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卷首语

随着中日两国政府代表陆续展开的相关谈判，中日东海划界问题日益受到国内外各界人士的重视。本期围绕着这个问题发表的文字不少。其中包括了知名中国国际法学者王可菊教授撰写的有关钓鱼岛和东海划界关联性的文章，以及几位年轻学者所撰写的有关大陆架的基本理论和应用问题的论文。此外，还有一篇颇富参考价值的有关里海（封闭海）划界问题的英文论文。该文是由国际知名海洋法学者 Erik Franckx 所撰写，希望获得读者的重视。

关于水下文化遗产的保护问题在当前国际社会上深受重视。对于中国这样的文明古国而言，丰富的水下文物，更使得我们不得不加紧对于联合国教科文组织在 2001 年底通过的《保护水下文化遗产公约》的研究。张湘兰教授和朱强先生所合著的对该公约的评析，为读者提供了深刻的解析。

对海洋环境的关切是本刊长期的努力方向。本期除了刊出有关台湾海峡船源污染的法律问题，以及年轻学者王小晖撰写的核材料海上秘密运输的国际法问题 2 篇文章以外，还有印度海洋法与海洋政策知名学者 Vijay Sakhuja 针对海洋老旧船舶和类似海上平台的淘汰回收利用问题所撰写的一篇英文论文，都很具有参考价值。

关于海上执法和海上安全的问题，近年来也越来越受到各国的关注。本期针对这个方向刊出的文章包括了周忠海教授有关海上紧追权的行使问题，并有深刻讨论我国应该加强有关海盗罪立法的专文。后者由王震和沙云飞两位青年学者合作执笔。另外，北京外交学院的龚迎春博士留学日本多年，对于日本的海洋政策自有其独到的见解。本期刊登她所撰写的有关海洋领域非传统安全因素对海洋法律秩序的影响一文，深入介绍了日本相关的研究和政策方向，值得读者细读。

当然，本期的内容特别丰富，有关取消航海过失免责中的管船过失免责的讨论，关于无居民海岛权属问题的研究，以及有关海底政治与国际法的述评等文字，篇篇精彩，内容精深、文笔流畅，读之令人敬佩。

至于《日本水产业协会法》的译文，对于急需健康发展远洋渔业的中国而

言，更是一部极具参考价值的法典。惟因篇幅过长，只得分段刊出。不便之处，恳请读者见谅。

编辑部　谨识

EDITOR'S NOTE

With the related negotiations between the representatives of the government of China and the government of Japan being initiated successively, the issue over delimitation of the East China Sea between China and Japan has drawn more and more attention from domestic and foreign personages of all circles. Professor WANG Keju, a famous scholar on international law in China, elaborates the issue of the relevance of the Diaoyu Islands to the delimitation of the East China Sea. Several younger scholars discuss the basic theory regarding the continental shelf and the application of such theory. Besides, an English article by an authoritative scholar on the law of the sea, Erik Franckx, relating to maritime delimitation of the Caspian Sea (enclosed sea) is of high reference value. We hope readers will peruse it.

The protection of underwater cultural heritage is being attached great importance in the international community at present. China, a State with an ancient civilization and abundant underwater cultural heritages, should do more research on the Convention on the Protection of the Underwater Cultural Heritage adopted by the United Nations Educational, Scientific and Cultural Organization in 2001. The commentary on this Convention, co-authored by Professor ZHANG Xianglan and Mr. ZHU Qiang, provides a deep analysis of the Convention.

Addressing the concern for marine environment is always the direction toward which the Journal makes its efforts. The current Issue covers two articles, one on the legal problems of vessel-source pollution in the Taiwan Strait and the other on the international legal issue over the secret transportation of nuclear materials by sea. The latter is written by a WANG Xiaohui, a scholar of younger generation. Moreover, Vijay Sakhuj, a famous Indian scholar on the law of the sea and maritime policy, publishes an English article on the recycling of old-aged sea-going vessels and similar platforms on this Issue. All the articles are of high reference value.

Issues in connection with maritime law enforcement and maritime security have received increasing attention from various States in the recent years. The

current Issue includes several articles in this regard. The article by Professor ZHOU Zhonghai discusses the exercise the right of hot pursuit and the article, co-authored by WANG Zhen and SHA Yunfei, two younger scholars, explores the enhancement of legislation on piracy in China. Besides, Doctor GONG Yingchun of China Foreign Affairs University, who has also studied in Japan for years, has her own view on the maritime policies of Japan. The current Issue contains her article relating to the impact of the non-traditional security factors on the maritime legal order, which recounts the research and policy direction of Japan.

Without doubt, the topics covered in the current Issue are diversified. The discussion on abolishment of the exemption of liability for fault in ship management in the nautical fault exemption system, the research on the ownership of uninhabited islands, and the review of the seabed politics and international law are all splendid and deep. Their wordings are fluent and admirable.

The translated version of the Japanese Fisheries Association Law is of significant value to China, as China urgently needs to develop its pelagic fishing industry soundly. However, we have to publish the translation in several issues due to its length. We sincerely ask for forgiveness from the readers for any inconvenience caused therefrom.

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Maritime Delimitation in the Caspian Sea: Legal Issues

Erik Francks *

The legal regime of the Caspian Sea has been the subject of a substantial interest in academic circles during the last decade. This has been mainly triggered by the underlying political and economical realities, to the extent that the question could be raised: What is there still to be added? This plethora of legal writings on the Caspian Sea, of which the added value can sometimes be doubted, has moreover triggered some rather critical remarks lately.[1]

In order not to be classified in this category of contributions without added

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* Erik Francks, Director of the Department of International and European Law and the Center for International Law, Faculty of Law, Vrije University, Brussels, Belgium. This article represents the author's contribution to the conference "The Caspian Sea: Legal Issues" organized by the International Institute for Fuel and Energy Complex of the MGIMO University of the Ministry of Foreign Affairs of the Russian Federation, the Moscow International Petroleum Club, the Russian Academy of Sciences and the Russian Association of International Law at the President Hotel in Moscow on February 26-27, 2002. It consequently reflects the *status iuris* at that time. The author would sincerely like to thank the organizers for providing him with the opportunity to participate in this prestigious conference, and especially Prof. Anatoly Kolodk in for his kind invitation in this respect.

1 Especially relating to the American scholarship on the subject, see the trenchant comment of E. Sievers, The Caspian, Regional Seas, and the Case for a Cultural Study of Law, *Georgetown International Environmental Law Review*, Vol. 13, 2001, p. 361. Who writes: "What is international law scholarship if it is not lawyers acting like and writing like political scientists and economists freed from the pressures of peer review? No better formula for a race to the bottom can be imagined than the system we now have. In this system, students judge scholarship, scholarly credentials are won quickly without attention to language or writing requirements, and, because conferences are incidental, writers are not even exposed to cursory critical feedback. As a discipline, what mechanisms has law developed to ensure that legal scholars publish their best work, acquire relevant skills, or even read foundational texts, not to mention ensure that standards of excellence exist? The answers to these questions place international law on a uniquely fragile foundation as an academic discipline. Most scholars of international law have never seen the things or people about which they write, never use materials in the languages of those people and places, and almost never do original or archival research. Getting the story right is, if quality of published works is any guide, a low priority of American scholars of international law, and getting the story right is simply not rewarded."

value, the present paper will mainly focus on a number of lessons to be learned from the delimitation experience in the Baltic Sea, where a certain special expertise is believed to be at hand. In order to do so, the first part of my intervention will relate to the *sui generis* nature of the Caspian Sea. Secondly, a few words will be devoted to the present day practice of the littoral States. This will then provide a basis for assuming that experience in maritime boundary delimitation gathered elsewhere, particularly in the Baltic Sea, may not be totally devoid of interest.

I. Sui Generis Nature of the Caspian Sea

The main topic of the present paper is "Maritime Delimitation in the Caspian Sea". According to the Latin saying "*in cauda venenum*", the much debated question here is whether the Caspian marine areas are indeed sea or lake. Unlike in some other areas of the world, it is not the penultimate word which causes difficulties here, like in the Persian Gulf, or should one rather say Arabian Gulf.[2] With respect to the Caspian Sea, however, it is the exact legal nature of this geographical feature which is the centre of debate.

Every argument that this water expanse is a sea is easily countered by another one pointing in the direction of a lake. Historically it is undoubtedly correct to call it a sea, but today this water area is cut off from, the other seas and oceans. Whether there is a natural outlet or not, is moreover a hotly debated issue.[3] From an oceanographic point of view, the salt water and the type of fauna and flora again point in the direction of a sea area,[4] whereas the fact that it is located 26.5 meters below the normal level of the other seas and oceans rather gives it affinities with

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2 On the contrary, both parties even agreed to qualify the Caspian Sea as "an Iranian and Soviet Sea". See the exchange of notes between M. Filimonov, the Soviet Ambassador at Teheran, and M. A'Lam, the Iranian Minister for Foreign Affairs, dated 25 March 1940. This exchange took place on the occasion of the signing of the Treaty of Commerce and Navigation between Iran and the Soviet on the same day [as reprinted in English translation in *British and Foreign State Papers*, Vol. 144, 1940-1942, p. 419].

3 The hybridization of Baltic, Black and Caspian marine species indicate a certain link, but the natural character of the latter has been questioned.

4 Or to use the words of an expert of the Intergovernmental Oceanographic Commission of UNESCO: "[F]rom an oceanographic point of view (composition of water, fauna, flora), the Caspian Sea should be considered as a sea." Quoted from S. Vinogradov and P. Wouters, The Caspian Sea: Current Legal Problems, *Zeitschrift für ausländisches öf fentliches Recht und Völkerrecht*, Vol. 55, 1995, p. 604, note 54; S. Vinogradov, Transboundary Water Resources in the Former Soviet: Between Conflict and Cooperation, *Natural Resources Journal*, Vol. 36, 1996, p. 393, note 8.

the lake concept.[5] Finally, if mere size would seem to categorize it as a sea,[6] it could easily be qualified as the largest lake on earth.[7]

Confronted with such a variety of contradictory signals, defying any clear categorization, lawyers often find relief in the *sui generis* concept. G. Gidel, writing in *tempore non suspecto*, made the following comments with respect to the Caspian Sea:

> *Pour que l'on se trouve en présence d'espaces régis par le droit international maritime, if faut que ces espaces communiquent librement et naturellement les uns avec les autres par route l'étendue du monde. Ainsi l'espace d'eau salée dénommé Mer Caspienne peut être l'objet de rapports internationaux, puisque ses rivages se répartissent entre plusieurs dominations politiques: elle n'est pas régie d'office par les règles du droit international maritime, car elle est privée de communication aver le reste des Océans.*[8]

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5 After about 150 years of steady lowering of the water level, this trend drastically turned around since 1977 (2.5 meter rise in 15 years, causing all kinds of serious problems in the area) to the extent that projects to divert certain northern rivers into the basin of the river Volga, which had been on the Soviet drawing board for some time, were finally shelved in1986. See for instance E. Franckx, The Soviet North-South River Diversion: New Options for the Future, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 111, where an English translation can be found of the Decree of the Central Committee of the Communist Party of the Soviet and the Council of Ministers of the U.S.S.R., 14 August 1986, On the Termination of the Works concerning the Reversal of Part of the Flow of Northern and Siberian Rivers, 29 Sobranie Postanovlenii Pravitel'stva S.S.S.R. (Collected Decrees of the U.S.S.R. Government) 158 (1986) (id., pp. 112~114). Point 1 of this Decree stated: "The termination of the projects and preliminary works concerning the reversal of part of the flow of the northern rivers in the river Volga shall be considered as appropriate. The Gosplan (State Planning Committee) of the U.S.S.R., the Gosagromprom (State Committee for Agricultural Production) of the U. S. S. R. and the Ministry of Amelioration and Hydrology of the U. S. S. R. shall exclude the tasks, set by the plans for the period 1986-90 for the execution of the said works. The Gosagroprom (State Committee for Agricultural Production) of the U.S.S.R., the Ministry of Amelioration and Hydrology of the U.S.S.R. and the Council of Ministers of the R.S.F.S.R. shall direct the means and material resources freed in accordance with the present decree to land improvement in the Non-Black soil zone of the R.S.F.S.R., to the increase of the works concerning the reconstruction of the irrigation systems in the basin of the river Volga" (id., p. 113).

6 The area covered, for instance, is larger than the Persian Gulf.

7 In the same way as for instance Greenland is considered the largest island.

8 G. Gidel, *Le droit international public de la mer*, 1st ed., Chateauroux: Etablissements Mellottee, 1932, p. 40.

before coming to the conclusion:

> *[S]i le droit international s'y applique, ce ne peut être que par une entente, tacite ou formelle, entre les riverains, qui seuls, en principe, peuvent naviguer sur ces eaux.*[9]

For present purposes, as will be seen *infra*, these unbiased words of G. Gidel form a perfect starting point. Therefore, instead of trying to advance further arguments to tilt the balance either way, which may well turn out not to be a very rewarding exercise,[10] the present paper rather starts from the *sui generis* character of the Caspian Sea, based as it is partly on treaty law, and for the areas not covered by the latter, on consensus amongst the States directly concerned.

II. Present-day Practice of the Littoral State

It is not the intention here to repeat in detail what has already been written on this subject early 2001, when the present author presented a paper, entitled "The Problem of Delimitation in the Caspian Sea", to a symposium on the "Problems of Regional Seas", held at Istanbul, Turkey.[11] Reference can be made to the publication of the proceedings of this conference for further details.[12]

What seems to be particularly important for present purposes, however, is that all parties are at present apparently moving in a similar direction. As stated by one author after an updated overview of State practice of the littoral States early in 2000:

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9 G. Gidel, *Le droit international public de la mer*, 1st ed., Chateauroux: Etablissements Mellottee, 1932, p. 48.

10 See for instance B. Oxman, Caspian Sea or Lake: What Difference Does It Make?, *Caspian Crossroads Magazine*, Winter 1996, p. 1, at http://ourworld.compuserve.com/homepages/usazerb/141.htm, 1 January 2002, where he writes: "Attempting to determine the rights and duties of the States concerned by a process of deductive reasoning based on the status of the Caspian Sea as a sea or a lake is largely, if not entirely, a pointless endeavor."

11 This conference was held on 12-14 May 2001.

12 E. Franckx and A. Razavi, The Problem of Delimitation in the Caspian Sea, in B. Oztiirk and N. Algan eds, *Problems of the Regional Seas (Proceedings of the International Symposium on the Problems of Regional Seas 12—14 May 2001, Istanbul, Turkey)*, Istanbul: Anadolu Ofset, 2001, pp. 27~35.

> *The contest over mining rights in the Caspian is largely over. All the littoral States now favor sectoral division of the seabed. The dispute has therefore shifted from whether the seabed should be divided to how that division might be accomplished.*[13]

Recent press reports seem to confirm this conclusion. Towards the end of January 2002, officials of the five States concerned met to discuss the issue. At that time the Russian chief negotiator felt that progress had been made and that "a final deal could be struck in April" in Ashkhabad.[14] Even though later press reports seemed to cast some doubts on these optimistic perspectives,[15] the fact remains that in substance all the parties concerned seem to be discussing delimitation of maritime areas, at least as far as the sea-bed and subsoil are concerned.

III. Certain Relevant Principles

Once we start from the premise that, no matter how one has to qualify the Caspian Sea, the littoral States have agreed to rely on the delimitation of maritime areas as far as the sea-bed and subsoil is concerned, the submission can be made that there exists a certain framework in international law which provides guidance to the parties in this endeavour. It is indeed submitted that even when States are totally free to delimit their maritime areas, unencumbered in principle by international law, their actions nevertheless have sometimes been influenced not only by relevant principles of international law, but have even influenced the latter's further development.

The division of powers between State and federal authorities over maritime

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13 K. Mehdiyoun, Ownership of Oil and Gas Resources in the Caspian Sea, *American Journal of International Law*, Vol. 94, 2000, p. 179.

14 He is reported to have added: "I think that our next meeting in Ashgabat (due in April) could become the final one before a meeting of the leaders of the five Caspian Sea States". See Reuters, Breaking News from Around the Globe, at http://www.renters.com/news_article,jhtml?type=search&storylD=540984, 24 January 2002.

15 The Turkmen president was quoted early February during a visit to Moscow, that he did not feel that the timing was yet ripe for the conclusion of an agreement. See World Oil Magazine, at http://www.Worldoil.com/news/newsstory.asp.../article-e.asp?energy24=24732, 12 February 2002. Also the postponement of the visit of President Aliyev to Iran, where the discussion of the Caspian Sea would be on the agenda, points in that direction. See INRA Europe, at http://www.irna.com/newshtm/eng/24231256.htm, 13 February 2002.

expanses in the United States serves as a good example in this respect. At a very early stage U.S. courts applied international norms to these internal boundary disputes.[16] These court decisions, in turn, have had a profound impact on the further development of the rules of international law governing the subject.[17]

Even more relevant for present purposes is the recent decision of a Canadian arbitral tribunal dividing the respective offshore areas of the Province of Newfoundland and Labrador, and the Province of Nova Scotia.[18] Offshore exploitation rights had been settled between the federal authorities and the above-mentioned provinces by agreements reached in 1985 with Newfoundland and Labrador[19] and in 1986 with Nova Scotia.[20] The principles contained therein were later enacted at the provincial[21] as well as on the federal level.[22] The latter contained two identical dispute settlement provisions, which stated:

> *Where the procedure for the settlement of a dispute pursuant to this section involves arbitration, the arbitrator shall apply the principles of international law governing maritime boundary delimitation, with such modifications as the circumstances require.*[23]

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16 See for instance G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201 note 74.

17 It will suffice here to look at the classic textbook by D. O'Connell, *The International Law of the Sea*, Oxford: Clarendon Press, 1982, pp. 389~416, to understand the importance of these U.S. court cases to a proper understanding of the international law governing bays.

18 Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and The Canada-Newfoundland Atlantic Accord Implementation Act, Award of the Tribunal in the Second Phase, Ottawa, at http://www.boundary-dispute.ca, 26 March 2002. Hereinafter cited as 2002 Arbitration.

19 The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing, 11 February 1985.

20 Canada-Nova Scotia Offshore Petroleum Resources Accord, 26 August 1986.

21 Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act (Statutes of Newfoundland, 1986, c. 37) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Statutes of Nova Scotia, 1987, c. 3).

22 Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c.3) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada, 1988, c. 28).

23 Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) section 6(4), and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada, 1988, c. 28), section 48(4).

As was the case in the United States, Canada thus considered the rules of international law to apply to exclusive intra-Canadian relations. When a dispute arose relating to the offshore line dividing the respective offshore areas of the Province of Nova Scotia and the Province of Newfoundland and Labrador, the compromissory clause just mentioned was activated and terms of reference drawn up by the disputing parties.[24] Of particular importance is the following passage of the second phase in response to certain arguments contesting the application of the rules of international law *in casu*. The Tribunal stated more particularly:

> *Just as in the first phase the Terms of Reference called for the application of international law by analogy to the conduct of provincial governments within Canada claiming the benefit of a resource, so in the second phase they clearly call for the application of the principles of international law governing maritime boundary delimitation by analogy, in order to determine the extent of the offshore areas of the two provinces. In both cases the application of international law is analogical. In both cases it is appropriate and required by the Accord Acts and the Terms of Reference.*[25]

The Tribunal thus found no reasons why the relevant principles of international law governing maritime delimitation should not be suitable, by analogy, to be applied to an area where they were not originally intended to be applicable.

Since no compelling reasons therefore seem to exist to exclude a priori the possible application of this international law legal framework, this part will first try to locate the sources of the law of maritime delimitation in general and then look at the practice of States in the Baltic Sea more particularly.

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24 By means of Art. 3(2) of these Terms of Reference, the disputing parties requested the Tribunal to proceed in two phases: "(i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement. (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined." At http://www.boundary-dispute.ca/terms.html, 13 February 2002.

25 2002 Arbitration, para. 2.35.

A. The Sources of the International Law of Maritime Delimitation

Guidance here may not be as strict as one might have wished it to be, but it nevertheless exists. The starting point is the United Nations Convention on the Law of the Sea,[26] which is slowly, but steadily, approaching the ultimate objective which its drafters had in mind when embarking on this ambitious project, namely to create an "international treaty of a universal character, generally agreed upon".[27] Indeed, with 137 States and the European Community party to this agreement, one could say that this objective is indeed in sight.[28] Nevertheless, in the context of the subject treated by the present paper, it must immediately be added that of all the littoral States bordering the Caspian Sea, only Russia is so far bound by this convention.[29]

This should not, however, unnecessarily worry one in the context of the present paper, for the substantive law governing maritime delimitation is not really conventional in nature any more.[30] As stated by T. Treves, the 1982 Convention

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26 United Nations Convention on the Law of the Sea, U. N. Doc. A/Conf. 162/122, 12 December 1982, multilateral, as reprinted in United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea and the Agreement for the Implementation of Part XI of the Convention with Index and Excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea*, New York: United Nations, 1997, p. 294. This convention entered into force on 16 November 1994. Hereinafter cited as 1982 Convention. Also to be found on the Internet, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS.pdf, 13 February 2002.

27 As already envisaged, and required, by GA Res. 2749 (XXV) of 19 December 1970, within the framework of the principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.

28 Situation as of 25 February 2002.

29 The other littoral States did not even sign the document. It might moreover be added that besides Russia only Iran is at present a party to the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (U.N. Doc. A/CONF. 164/37), 8 September 1995, multilateral, as reprinted in *International Legal Materials*, Vol. 34, 1995, p. 1542. This agreement entered into force on 11 December 2001. Also to be found on the Internet, at http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/A_CONF.164_37_English.pdf, 13 February 2002.

30 This part is based on E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 249.

represented add codification of this branch of the law of the sea.[31] If the 1958 conventional system still gave some guidance as to the method to be used beyond the territorial sea,[32] Arts. 74(1) and 83(1) of the 1982 Convention, by stressing the result to be achieved rather than the method to be employed to reach that

31 T. Treves, Codification du droit international et pratique des etats dans le droit de lamer, *Recueil des Cours*, Vol. 223, 1990, pp. 11, 104.

32 See Art. 6 of the Convention on the Continental Shelf, 29 April 1958, multilateral, 499 United Nations Treaty Series (hereinafter cited as UNTS) 311. This convention entered into force on 10 June 1964. This article States: "1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall he determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. 3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land." The territorial sea has to be excluded in this respect for it received a similar treatment in 1958 and 1982，namely an equidistance-special circumstances rule which very much resembles the delimitation method codified in 1958 with respect to the continental shelf. See Art. 12 of the Convention on the Territorial Sea and the Contiguous Zone (hereinafter cited as 1958 Territorial Sea Convention), 29 April 1958, multilateral, 516 UNTS 205 (this convention entered into force on 10 September 1964) and Art. 15 of the 1982 Convention. Even though the formulation is not exactly the same, the essential rule contained therein remained unchanged. Only the 1982 Convention will therefore be cited here: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith". Given the limited extent of this zone, especially when compared with the newly created exclusive economic zone and there defined continental shelf in the 1982 Convention, it is easily understood that the issue receives its full importance today in areas beyond the territorial sea.

objective,[33] are both characterized rather by the complete absence of any such practical method to be followed.[34]

Indeed, according to the first paragraph of Arts. 74 and 83, an agreement has to be arrived at on the basis of international law "in order to achieve an equitable solution."[35] Given the particular drafting history of these articles of the 1982 Convention,[36] it can be stated, as already mentioned by the present author elsewhere, that these provisions represent "an agreement between the participants (of the Third United Nations Conference on the Law of the Sea) to further disagree."[37] The fundamental difference in approach between those who supported the median line or equidistance principle, coupled with an exception for special circumstances, on the one hand, and those favouring a more outspoken reliance on equitable principles, on the other, remained. The relevant articles of the 1982 Convention were able to circumvent the crucial issue of fixing the exact method of delimitation to be applied by emphasizing the final objective to be achieved instead. As a consequence States appear to be free to choose any method they want according to Arts. 74(1) and 83(1), as long as it leads to an equitable solution.[38] This teleological approach of Arts. 74(1) and 83(1) has been emphasized on more

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33 See Anon, Art. 74: Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts, in S. Nandan and S. Rosene eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 796, 814, where it is stated: "The requirement that the delimitation is to achieve an equitable solution places emphasis on the objective of the delimitation instead of on the method of delimitation." A similar remark can be found with respect to Art. 83. See Anon, Art. 83: Delimitation of the Continental Shelf between States with Opposite or Adjacent Coasts, in S. Nandan and S. Rosene eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 948, 983.

34 As stressed by I. Lucchim and M. Voelckel, *Droit de la Mer*, Tome 2, Vol. 1, Paris: Pedone, 1996, p. 89.

35 1982 Convention, Arts. 74(1) and 83(1).

36 Anon, Art. 74: Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts, in S. Nandan and S. Rosene eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 796~816; Anon, Art. 83: Delimitation of the Continental Shelf between States with Opposite or Adjacent Coasts, in S. Nandan and S. Rosene eds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 948~985.

37 E. Franckx, Coastal State Jurisdiction with Respect to Marine Pollution-Some Recent Developments and Future Challenges, *International Journal of Marine and Coastal Law*, Vol. 10, 1995, p. 253.

38 E. Manner, Settlement of Sea Boundary Delimitation Disputes According to the Provisions of the 1982 Law of the Sea Convention, in J. Makarczyk ed., *Essays in International Law in Honour of Judge Manfred Lachs*, Dordrecht: Martinus Nijhoff, 1984, p. 641.

than one occasion by the International Court of Justice itself.[39]

If not of conventional nature, is this sub-branch of the law of the sea then governed by customary international law? Once again, the answer appears to be negative. In the field of maritime delimitation not much customary law can be discerned as to the applicable principles which would be of direct relevance.[40] Or to use the words of the International Court of Justice:

> *A body of detailed rules is not to be looked for in customary international law... It is therefore unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of States to areas which were until yesterday zones of the high seas, to look to general international law to provide a ready-made set of rules that can be used for solving any delimitation problems that arise.*[41]

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39 International Court of Justice, Continental Shelf Case (Libya/Tunisia), 24 February 1982, *I.C.J. Reports*, 1982, p. 49, para. 50, where the Court States that "any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved." See also International Court of Justice, Continental Shelf Case (Libya/Malta), 3 June 1985, *I.C.J. Reports*, 1985, p. 30, para. 28, where the Court referred back to the quote just mentioned while adding: "The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to the States themselves, or to the courts, to endow this standard with specific content."

40 Despite the fact that State practice in this field is readily available and has been very carefully analyzed, it is almost impossible to draw general conclusions. See J. Charney, "Introduction", in J. Charney and I. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. xxiii, xlii (hereinafter cited as International Maritime Boundaries) and stressed by the same author in " International Law making in the Context of the Law of the Sea and the Global Environment", in M. Young and Y. Iwasawa eds., *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy, Irvington: Transnational Publishers*, 1986, pp. 13, 18.

41 International Court of Justice, Gulf of Maine Case (Canada/United States), 12 October 1984, *I.C.J. Reports*, 1984, p. 299, para. 111. See also p. 300, para. 114, where this argument is repeated.

As a consequence, the international law of maritime delimitation is not really to be found in treaty law, or in customary law, but is rather to be looked for in judicial decisions.[42] The latter constitutes what J. Charney has called a kind of judge made common law in the classic sense, even though the rule of *stare decisis* is not applicable on the international level.[43] As of now, this implies foremost decisions of the International Court of Justice and awards of arbitral tribunals.[44] The future will tell whether the International Tribunal for the Law of the Sea will have to be added to this list.

The fundamental question has however to be raised at this point whether States negotiating a maritime boundary settlement out of court are bound by the same rules and principles as cases decided by third party settlement. Even though the courts might have suggested at one time that this is actually the case, P. Weil indicates that such a point of view is rather what he calls "an artificial equation."[45] Or as succinctly stated by this author more recently:

> *While there are legal norms binding on the courts, there are no legal norms restricting the contractual freedom of States in this area. Third party delimitations are decided according to legal rules; negotiated delimitations are not, or at least are not necessarily.*[46]

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42 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, pp. 143~156.

43 J. Charney, Progress in International Maritime Boundary Delimitation, *American Journal of International Law*, Vol. 88, 1994, p. 227.

44 See for instance G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201, note 74, also national court decisions can sometimes have an impact on the development of international law.

45 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, pp. 105~114. To this one might add the fact that with respect to the maritime delimitation around the Norwegian island of Jan Mayen, the International Court of Justice in a sense refused Denmark the preferential treatment which Iceland had received earlier in its negotiated boundary with Norway. See International Court of Justice, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway), 14 June 1993, *I.C.J. Reports*, 1993, p. 38, para. 86.

46 P. Weil, Geographic Considerations in Maritime Delimitation, in American Society of International Law ed., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 115, 121.

As already indicated by the last part of the sentence, even P. Weil himself accepts some interaction between the two manners of arriving at a final settlement.[47] Other authors have stressed the close factual link which nevertheless exists between both of them,[48] with State practice even limiting the range of options available.[49] J. Charney as a matter of fact labels the influence which international law exercises on negotiated maritime boundaries "highly relevant" because diplomats are very much aware that if third party dispute settlement is resorted to, certain criteria instead of others will be taken into account. In a sort of preventive action, therefore, negotiators act within certain limits when trying to settle the dispute on a voluntary basis.[50]

This makes the work, sponsored by the American Society of International Law, which tries to analyze all the maritime boundaries settled since the Second World War, so valuable.[51] This project, in which the present author was invited to participate as a regional expert for the Baltic Sea since its inception in 1988, still

47 "No one can deny that the principles and rules expressed in judicial decisions have an important effect on the negotiating positions adopted in maritime boundary delimitation negotiations. In particular, the judge-made concepts of 'particular', 'incidental,' and 'special' geographical features which are to be ignored or given only partial effect have certainly pervaded State practice." P. Weil, Geographic Considerations in Maritime Delimitation, in American Society of International Law ed., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 120~121.

48 J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xxxvii, where he writes: "The law applicable to third party settlements will influence the negotiators, just as trends in boundary settlements will influence the tribunals."

49 J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xliv.

50 J. Charney, Progress in International Maritime Boundary Delimitation, *American Journal of International Law*, Vol. 88, 1994, p. 228.

51 See also J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xlii, emphasizing the importance of these trends and practices.

continues today.[52] The experience so gathered forms the basis of the last and most substantial part of the present paper.

B. Lessons to Be Learned from State Practice in the Baltic Sea

The present part will not cover delimitation practice in the Baltic Sea as a whole. Only the so-called fourth period,[53] which can be distinguished in the overall delimitation effort in the Baltic Sea,[54] will be discussed for the obvious reason that it covers all agreements directly related to the dissolution of the former Soviet Union.

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52 A fourth volume, to which the present author contributed eight new reports relating to the so-called fourth period in the over-all delimitation effort of the Baltic Sea [see E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256; the same author, International Cooperation in Respect of the Baltic Sea, in R. Lefeber, M. Fitzmaurice and E. Vierdag eds., *The Changing Political Structure of Europe: Aspects of International Law*, Dordrecht: Martinus Nijhoff, 1991, pp. 245, 255~261, as later supplemented by the same author in Maritime Boundaries in the Baltic Sea: Past, Present and Future, *Maritime Briefing*, Vol. 2, 1996, p. 6 (International Boundaries Research Unit, University of Durham, United Kingdom), and Maritime Boundary Delimitation in the Baltic, in R. Platzoder and P. Verlaan eds., *The Baltic Sea: New Developments in National Policies and International Cooperation*, The Hague: Martinus Nijhoff, 1996, pp. 167, 169~173. See also the following French articles written by the same author Frontieres maritimes dans lamer Baltique: passe, present et futur, *Espaces et Ressources Maritimes*, Vol. 9, 1996, p. 92 and Les delimitations maritimes en mer Baltique, *Revue de l'Indemer*, Vol. 5, 1997, p. 37 (Institut dudroit economique de la mer, Monaco) and accompanying text], is at the publisher for the moment. See J. Charney and R. Smith eds., *International Maritime Boundaries*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

53 As distinguished in E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256. This period started during the early 1990s and still continues today.

54 The previous periods ran from 1945−1972, 1973−1985, and 1985−beginning of the 1990s respectively. See E. Franckx, International Cooperation in Respect of the Baltic Sea, in R. Lefeber, M. Fitzmaurice and E. Vierdag eds., *The Changing Political Structure of Europe: Aspects of International Law*, Dordrecht: Martinus Nijhoff, 1991, pp. 245, 255~261, as later supplemented by the same author in Maritime Boundaries in the Baltic Sea: Past, Present and Future, *Maritime Briefing*, Vol. 2, 1996, p. 6 (International Boundaries Research Unit, University of Durham, United Kingdom), and Maritime Boundary Delimitation in the Baltic, in R. Platzoder and P. Verlaan eds, *The Baltic Sea: New Developments in National Policies and International Cooperation*, The Hague: Martinus Nijhoff, 1996, pp. 167, 169~173. See also the following French articles written by the same author Frontieres maritimes dans la mer Baltique: passe, present et futur, *Espaceset Ressources Maritimes*, Vol. 9, 1996, p. 92 and Les delimitations maritimes en mer Baltique, *Revue de l'Indemer*, Vol. 5, 1997, p. 37 (Institut du droit economique de la met, Monaco).

For present purposes, the Baltic and the Caspian Sea show some interesting points of correspondence. As a continuing State of the Soviet Union,[55] Russia first of all lost a substantial part of its territory and maritime facade in the Baltic as well as in the Caspian Sea during the early 1990s. In both areas, the issue of State continuation/succession came to the fore and especially its impact on previously concluded maritime boundary agreements or unilaterally established lines became a topical issue.

No analogy is of course perfect, and at least as many good reasons could probably be forwarded to distinguish both areas from a maritime delimitation point of view. Nevertheless, in view of what has already been said above, the submission is made that certain experiences gathered in the Baltic during the 1990s may not be totally irrelevant for the Caspian Sea, especially since they mainly concern relationships between former Soviet republics inter se, and the attitude of some third States with respect to these changes.

The next part will therefore focus on a number of areas where resemblances appear to be present. Five such areas will be highlighted: First of all the treatment of the condominium issue; secondly the impact of exploration and exploitation activities in disputed areas on relations between parties; thirdly the value to be attached to unilateral action of coastal States bearing on the exact juridical nature or outer limits of maritime zones; fourthly the possible closing-off effect of a combination of convex and concave coasts in certain areas; and finally the likeliness of third party settlement of maritime delimitation disputes.

1. Condominium Issue

Much has been written on this topic as far as the Caspian Sea is concerned, based on several treaties concluded between Iran and Russia, or their respective

55 See Circular Note of 13 January 1992 of the Ministry of Foreign Affairs of the Russian Federation, as referred to and stressed by the President of the Russian Association of International Law. See A. Kolodkin, Russia and International Law: New Approaches, *Revue Belge de Droit International*, Vol. 26, 1992/3, p. 552.

predecessors.[56] In the Baltic Sea a similar issue also became relevant, namely the legal status of the Gulf of Riga, disputed between Estonia and Latvia.

International law does not provide a clear-cut definition of the notion of a historic bay. In fact, treaty law only refers to this notion in a negative way, i.e. indicating that the provision on bays does not apply to historic bays. Such a negative description was already included in the 1958 Territorial Sea Convention[57] and an identical provision can also be found in the 1982 Convention.[58] Whether Latvia and Estonia are actually bound by any of these treaty provisions is not really important because the International Court of Justice already confirmed that these articles "express general customary law."[59]

It lies beyond the purpose of the present article to analyze in detail the general legal requirements necessary under international law to validate such a claim. This has already been sufficiently treated in the legal literature.[60] What will rather be looked at is the possible application of this notion to the Gulf of Riga and the legal implications this could have on the present day situation.

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56 E. Franckx and A. Razavi, *The Problem of Delimitation in the Caspian Sea, in B. Ozturk and N. Algan eds, Problems of the Regional Seas (Proceedings of the International Symposium on the Problems of Regional Seas 12−14 May 2001, Istanbul, Turkey)*, Istanbul: Anadolu Ofset, 2001, pp. 28~29. It concerns the Treaty of Turkmenchai of 22February 1828, the Treaty of Friendship of Moscow of 26 February 1921, the Treaty of Establishment, Commerce and Navigation of 27 August 1935, and the Treaty of Commerce and Navigation of 25 March 1940. Together with the historic Treaty of Gulistan of 12 October 1813 (as reprinted in G. De Martens, *Nouveau recited de Traites d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange, et de plusieurs actesservant à la connaissance des relations étrangères des puissances et Etats de l'Europe*, Gotingen: Dietrich Library, 1808−1819, pp. 89~95, these treaties are hereinafter cited as historic treaties.

57 1958 Territorial Sea Convention, Art. 7(6).

58 1982 Convention, Art. 10(6). Because of the similar nature of these provisions of 1958 and 1982, reference will only be made to the latter.

59 International Court of Justice, Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening), 11 September 1992, *I.C.J. Reports*, 1992, p. 351, para. 383. Hereinafter cited as Gulf of Fonseca judgment.

60 See for instance the following manuals on the topic: G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, pp. 176~178; L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 149~302; M. Strobl, *The International Law of Bays*, The Hague: Martinus Nijhoff, 1963, pp. 251~331.

The Gulf of Riga does not qualify as a juridical bay as defined under treaty law for a number of reasons. First of all because the bay is presently surrounded by two littoral States. Indeed, Art. 10 of the 1982 Convention starts out by limiting its application to "bays the coasts of which belong to a single State."[61] Secondly, because the closing line of the Gulf of Riga measures more that 24 nautical miles (n.m.),[62] something which Art. 10(4) does not allow. The latter element must have especially urged the Soviet Union in 1947 to opt for the historical claim[63] in order to side-step this requirement of maximum width which international law at that time even seemed to locate below the present day 24 n.m. threshold.[64] By doing so, a third obstacle was created in order to qualify the Gulf of Riga as a juridical bay under present day treaty law as mentioned above.[65]

Western commentators, analysing Imperial Russian and Soviet literature on the subject, come to the conclusion that these countries did claim the Gulf of Riga

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61 1982 Convention, Art. 10(1).

62 Bouchez mentions that the distance between the headlands of the bay is about 28 n.m. See L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, p. 219. It is difficult to conceive how the author arrived at this particular figure as the distance between Kolkasrags on the Latvian side and Vainu Point on the Estonian side is more than twice that width.

63 Decree of 10 April 1947, On the Proclamation of Bays and Islands Located in the Northern Arctic Ocean and Baltic Sea as Territory of the U. S. S. R., as mentioned by A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 20, note 11. But see P. Solodovnikoff, *La navigation maritime dans ladoctrine et la pratique sovietiques*, Paris: Librairie Générale de Droit et de Jurisprudence, 1980, p. 299, where he writes: "Aucune disposition législative ne fut prise par l'Union Soviétique au sujet de la baie de Riga, celle-ci étant considérée, tant par les juristes tsaristes que par les juristes soviétiques, comme étant un exemple classique d'eaux historiques." See in this respect also F. Volkov ed., translated from Russian by K. Pilarski, *International Law*, Moscow: Rogress Publishers, 1990, p. 223 and accompanying text.

64 Figures like 6, 10 or 12 n.m. were to be encountered during the first half of the twentieth century. See G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, pp. 37~74.

65 Namely that the existing conventional framework does not cover historic bays. See 1958 Territorial Sea Convention, Art. 7(6), 1982 Convention, Art. 10(6) and accompanying text.

as a historic bay.[66] Soviet literature of the 1980s apparently no longer mentioned the Gulf of Riga explicitly when discussing the concept of historic bays.[67] This omission does not appear to indicate that the claim concerning the Gulf of Riga was no longer made, as can be inferred from a 1990 manual on international law where it is stated:

> *In 1957, Soviet legislation defined as historical waters the Bay of Peter the Great (up to the line connecting the mouth of the Tyumen-Ula River with Povorotny Cape), the Sea of Azov and the White Sea, the Bay of Riga, the Kola Bay, the Pechorskaya and Cheshskaya bays, and the Vilkitsky and Sannikov straits.*[68]

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66 See for instance E. Rauch, *Die Sowjetunion and die Entwicklung des Seevölkerrechts*, Berlin: Wissenschaftlicher Autoren-Verlag, 1982，p. 66 and P. Solodovnikoff, *La navigation maritime dans la doctrine et la pratique soviétiques*, Paris: Librairie Générale de Droit et de Jurisprudence, 1980, pp. 298~299. About the Soviet point of view, see also V. Sebek, *The Eastern European States and the Development of the Law of the Sea*, New York: Oceana Publications, Inc., 1979, p. 170 ["Most international lawyers quote the Bay of Riga as part of the internal waters of the U. S. S. R."]; W. Butler, *The Law of Soviet Territorial Waters*, New York: Praeger, 1967, pp. 13, 74; M. Strobl, *The International Law of Buys*, The Hague: Martinus Nijhoff, 1963, pp. 267, 274; F. de Hartingh, *Les conceptions soviétiques du droit de la mer*, Paris: Librairie Générale de Droit et de Jurisprudence, 1960, pp. 30~34; A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 32; W. Butler, The Legal Regime of Russian Territorial Waters, *American Journal of International Law*, Vol. 62, 1968, p. 51.

67 As far as law of the sea textbooks are concerned, see for instance I. Blishchenko ed., translated from Russian by D. Belyavsky, *The International Law of the Sea*, Moscow: Progress Publishers, 1988, p. 26, as based on I. Blishchenko ed., *The International Law of the Sea*, Izdatel'stvo: Universiteta Druzhby Narodov, 1988, p. 32 (in Russian) [Peter the Great Bay and Bay of Penzhinsk]; G. Gorshkov ed., *International Law of the Sea Manual*, Moscow: Voennoe Izdatel'stvo, 1985, p. 69 (in Russian) [Peter the Great Bay]; Iu. Barsegov ed., *International Law of the Sea Dictionary*, Moscow: Izdatel'stvo Mezhdunarodnye Otnosheniia, 1985, p. 75 (in Russian) [Peter the Great Bay]; I. Barinova ed., *Contemporary Law of the Sea and the Practice of Its Application*, Moscow: Izdatel'stvo Transport, 1985, p. 62 (in Russian) [Peter the Great Bay]; S. Molodtsov, *Legal Regime of the Waters of the Sea*, Moscow: Izdatel'stvo Mezhdunarodnye Otnosheniia, 1982, p. 51 (in Russian) [Peter the Great Bay and Bay of Cheshsk]. With respect to manuals on international law, see for instance N. Blatova ed., *International Law*, Moscow: Izdatel'stvo Iuridicheskaia Literatura, 1987, p. 374 (in Russian) [White Sea and Peter the Great Bay]; B. Klimenko ed., *Dictionary of International Law*, Moscow: lzdatel'stvo Mezhdunarodnye Otnosheniia, 1986, p. 107 (in Russian) [Peter the Great Bay, Bayof Cheshsk and Bay of Pechorska]. None of these enumerations, however, is exhaustive. Besides Soviet examples, these works normally also refer to the practice of other States in this respect. Inter alia, reference is often made in this respect to the Hudson Bay in Canada.

68 F. Volkov ed., translated from Russian by K. Pilarski, *International Law*, Moscow: Rogress Publishers, 1990 , p. 223.

It is moreover noteworthy in this respect that a 1999 Russian international law manual even lists the Gulf of Riga as a historic bay belonging to Latvia.[69]

The conclusion can therefore be reached that, even though some uncertainty remained as to the exact juridical basis,[70] the Soviet Union did claim the Gulf of Riga as a historic bay. In this respect, the Soviet Union simply continued the practice set by its predecessor, Imperial Russia.

Whether this unilateral claim of the Soviet Union formed part of international law is of course a totally different question. One western author, basing herself on the 1947 situation, comes to the conclusion that the Soviet claim to the Gulf of Riga as a historic bay cannot be substantiated, mainly because of a lack of immemorial usage and continuous sovereignty.[71] This may well have been the case in 1947, but the author does not adequately answer the question whether the situation remained essentially unchanged during the early1990s. Indeed, Bouchez in his authoritative work on the subject has stressed that, taking into account present-day communication means, the time element has to be understood against this new changed background.[72] He in fact lists the Gulf of Riga as an example of the practice of States with reference to historic bays.[73] It cannot be denied that since 1947, the Soviet Union has exercised complete sovereignty over these waters in an uninterrupted manner. Already in 1982, E. Rauch came to the following conclusion:

> *Schon der Ausdruck 'historische Bucht' besagt, daß eine Inanspruchnahme als Eigengewässer unter Ausschluß anderer Staaten seit unvordenklicher Zeit und eine zumindest stillschweigende Hinnahme anderer Staaten, insbesondere der potentiell am meisten betroffenen Nachbarstaaten, gegeben sein muß. Legt*

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69 K. Bekiashev ed., *Public International Law Textbook*, Moscow: lzdatel'skaia Gruppa Prospekt, 1999, p. 417. (in Russian)

70 This is most probably the reason why the Gulf of Riga does not appear in G. Francalanci, D. Romano and T. Scovazzi eds., *Atlas of the Straight Baselines*, Milano: Dott. A.Giuffre Editore, 1986, p. 137. See especially the foreword (p. v) where the grounds are indicated on the bases of which selections were made for inclusion.

71 See A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 32.

72 L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 256~257.

73 L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 215, 219~220.

man diesen Ma? stab an, können lediglich die Bucht von Riga, das Weiß e Meer, die Tscheskaja Bucht und das Asow'sche Meer als historische Buchten der UdSSR i. S. des Art. 9 Abs. 6 RSNT(II) anerkannt werden.[74]

As has been stated above, Soviet authors normally like to refer to the Hudson Bay in Canada as another example of a historic bay.[75] Even though foreign objections to this claim appear to have been much more pronounced than with respect to the Gulf of Riga, an authoritative American scholar came nevertheless to the conclusion during the early 1990s, after a careful examination of all the pro's and con's, that Hudson Bay today does form part of the internal waters of Canada.[76]

An essential element in the proper evaluation of this claim is certainly the es-

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74 E. Rauch, *Die Sowjetunion und die Entwicklung des Seevölkerrechts*, Berlin: Wissenschaftlicher Autoren-Verlag, 1982, p. 67. Art. 9 of the Revised Single Negotiating Text corresponds with Art. 10 of the 1982 Convention.

75 See I. Blishchenko ed., translated from Russian by D. Belyavsky, *The International Law of the Sea*, Moscow: Progress Publishers, 1988, p. 26, as based on I. Blishchenko ed., *The International Law of the Sea*, Izdatel'stvo: Universiteta Druzhby Narodov, 1988, p. 32 (in Russian) [Peter the Great Bay and Bay of Penzhinsk]; G. Gorshkov ed., International Law of the Sea Manual, Moscow: Voennoe Izdatel'stvo, 1985, p. 69 (in Russian) [Peter the Great Bay]; Iu. Barsegov ed., *International Law of the Sea Dictionary*, Moscow: Izdatel'stvo Mezhdunarodnye Otnosheniia, 1985, p. 75 (in Russian) [Peter the Great Bay]; I. Barinova ed., *Contemporary Law of the Sea and the Practice of Its Application*, Moscow: Izdatel'stvo Transport, 1985, p. 62 (in Russian) [Peter the Great Bay]; S. Molodtsov, *Legal Regime of the Waters of the Sea*, Moscow: lzdatel'stvo Mezhdunarodnye Otnosheniia, 1982, p. 51 (in Russian) [Peter the Great Bay and Bay of Cheshsk]. With respect to manuals on international law, see for instance N. Blatova ed., International Law, Moscow: Izdatel'stvo Iuridicheskaia Literatura, 1987, p. 374 (in Russian) [White Sea and Peter the Great Bay]; B. Klimenko ed., *Dictionary of International Law*, Moscow: lzdatel'stvo Mezhdunarodnye Otnosheniia, 1986, p. 107 (in Russian) [Peter the Great Bay, Bay of Cheshsk and Bay of Pechorska] in fine.

76 J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 343. This notwithstanding the fact that one of the parties directly involved, namely the United States, for a long time seems to have contested this claim.

tablishment of a list of geographic coordinates by the Soviet Council of Ministers in 1985 determining the position of the baseline from which the territorial waters, the economic zone and the continental shelf is measured in the Baltic Sea.[77] The possibility of establishing such a system of straight baselines had first been introduced in Soviet legislation in 1971[78] and later consolidated by a new Law on the State Boundary of the U. S. S. R.[79] Of special importance here is a final paragraph of the 1985 Decree which was added to this list of coordinates. The latter provided that the following water expanses were considered to be "internal waters of the U.S.S.R., historically belonging to the U. S. S. R.", namely the White Sea and the Gulf of Cheshsk in the Barents Sea, the Gulf of Baidaratsk in the Kara Sea, and the Bay of Penzhinsk in the Sea of Okhotsk. A special entry was moreover added to this list stating that a decree of the Council of Ministers of 1957 declared the Peter the Great Bay to be "internal waters of the U. S. S. R. as waters of a historic bay."[80] One possible interpretation of this limited list could be that the Soviet Union only claimed these five bays as historic bays.[81] Another one, however, is that only those bays were explicitly mentioned of which the single segment closing the bay, i.e. the closing line, was bordered by the normal baseline on both sides. Since the Gulf of Riga was totally enclosed by a system of straight base lines, running from Cape Ovishi in the south, over the islands of Saaremaa and Hiiumaa to Cape Pakri in the north, and, as a consequence, no segment closed the bay between its natural entrance points, this enactment might not really have been the appropriate place to raise the historical status of the Gulf of Riga.

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77 Decree of 15 January 1985, On the Confirmation of a List of Geographic Coordinates Determining the Position of the Baseline in the Arctic Ocean, the Baltic Sea and Black Sea from which the Width of the Territorial Waters, Economic Zone and Continental Shelf of the U. S. S. R. is Measured, (Annex), *Izveshcheniia Moreplavateliam*, Vol. 1, 1986, p. 22. Hereinafter cited as 1985 Decree.

78 Edict of 10 June 1971, On the Introduction of Modifications to the Statute on the Protection of the State Border of the U. S. S. R., *Vedomosti Verkhovnogo Soveta S. S. S. R. (Communications of the Supreme Soviet of the U. S. S. R.)*, Vol. 24, 1971, p. 254.

79 Law of 24 November 1982, On the State Boundary of the U. S. S. R., *Vedomosti Verkhovnogo Soveta S. S. S. R. (Communications of the Supreme Soviet of the U. S. S. R.)*, Vol. 48, 1982, p. 891 and *Svod Zakonov S. S. S. R. (Code of Laws of the U. S. S.R.)*, Vol. 9, 1986, p. 202. See Art. 5.

80 See 1985 Decree, p. 47.

81 T. Scovazzi, New Developments Concerning Soviet Straight Baselines, *International Journal of Estuarine and Coastal Law*, Vol. 3, 1988, p. 37.

As far as the applicable legal regime is concerned, not much difference is to be noted between waters enclosed by straight baselines on the one hand and waters located in historic bays on the other. Both are subjected to the regime of internal waters, i.e. complete sovereignty. The only difference is the possible application of Art. 8(2) of the 1982 Convention to waters enclosed by straight baselines.[82] But because of the continued exercise of complete sovereignty by the Soviet Union over the Gulf of Riga, certainly since 1947, it appears beyond any shadow of a doubt that the regime of internal waters applies.

Again the question has to be raised concerning the international validity of these baselines. No easy answer can be put forward. It can certainly not be denied that official protests were lodged against the 1985 Decree.[83] It must however be remembered that the Baltic Sea is only one of the maritime areas covered by the Decree. Indeed, it only accounts for 32 of the 726 base points established by the Decree. Moreover, it is not very clear from the information available, against which segments exactly of this system of straight baselines protests were lodged.[84] Taking into account the special interest of the United States in the Arctic, one can assume that the essence of the protests was aimed at certain baselines in the Soviet Arctic.[85] The straight baselines here under consideration, namely from Cape Ovishi in the south to Cape Pakri in the north, by and large comply with the standards and guidelines for the establishment of straight baselines as elaborated by the Office of Ocean Law and Policy of the U. S. Department of State "in the light of current

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82 This article reads: "Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

83 See for instance United States Responses to Excessive National Maritime Claims, 112 Limits in the Seas 22 (1992). Here a list is published of claims made to straight baselines. From this list it can be inferred that the United States made multiple protests against the 1985 Decree. See p. 24.

84 For a more detailed analysis of this issue, see E. Franckx, *Martzme Claims in the Arctic: Canadian and Russian Perspectives*, Dordrecht: Martinus Nijhoff, 1993, pp. 224~225, note 471 and accompanying text.

85 Especially those closing off the Arctic straits located between the northern islands groups and the Eurasian continent. For more details and general background, see E. Franckx, *Martzme Claims in the Arctic: Canadian and Russian Perspectives*, Dordrecht: Martinus Nijhoff, 1993, pp. 145~195 with respect to the Soviet, and pp. 75~107 with respect to Canada.

international law and practice".[86] The baselines here under consideration easily pass what the study itself even called "one of the more controversial guidelines articulated in this study",[87] namely the 48 n.m. in maximum baseline length. The recently established Estonian straight baselines,[88] which closely follow the former Soviet system as established in 1985, has moreover been labelled as " satisfying the requirements under international law for the establishment of straight baselines",[89] especially with respect to the segments here under consideration.[90]

It seems therefore reasonable to submit that the Gulf of Riga had all the necessary characteristics to be considered as a historic bay. When the Soviet Union disintegrated in 1991, as a logical consequence, title passed to the two new coastal States in the area. As stated by the International Court of Justice in the Gulf of Fonseca judgment:

> *A State succession is one of the ways in which territorial sovereignty passes from one State to another; and there seems no reason in principle why a secession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States*.[91]

If Latvia and Estonia, therefore, should have been willing to continue this practice, it is believed that a strong claim could have been made to uphold the existing histo-

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86 Developing Standard Guidelines for Evaluating Straight Baselines, 106 Limits in the Seas 37 (August 1987). See pp. 17~18 for the proposed criteria for fringing islands which have to be complied with.

87 Developing Standard Guidelines for Evaluating Straight Baselines, 106 Limits in the Seas 37 (August 1987). See p. 14.

88 Law on the Boundaries of the Maritime Tract, *Riigi Teatala*, Vol. 1, 1993, p. 14. As reprinted in *Law of the Sea Bulletin*, Vol. 25, June 1994, p. 55.

89 A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p. 235.

90 Some doubts were expressed with respect to the part close to the Russian coast. Also the incorporation of one particular base point inside the Gulf of Riga was highlighted in this respect. See A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p. 237.

91 Gulf of Fonseca judgment, para. 399. Even though the Baltic republics do not consider themselves to be successor States of the former Soviet, it is believed that the substance of the argument remains valid.

ric bay argument.[92] No boundaries, even administrative ones, existed in the Gulf of Riga during the Soviet period and maritime activities, such as navigation and fishing, took place indiscriminately by nationals of both sides. Since no single regime for historic waters exists under present day international law,[93] it would be left to the parties to work a specific regime acceptable to both.[94] Estonia, however, clearly indicated that it did not wish to pursue this kind of reasoning.[95]

Indeed, one of the essential requirements for such a system to function appears to be the consent of all the parties involved.[96] Nevertheless the Court in this case stated that, once established, the dissolution of a condominium requires the agree-

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92 Or a statement by a Latvian author: "It seems that the Gulf of Riga could be claimed by Latvia and Estonia as historic." See I. Bergkhol'tsas, *Public Law of the Sea*, Riga: Jumi, 1997, p. 64. (in Russian) Our translation.

93 International Court of Justice, Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya), 24 February 1982, *I. C. J. Reports*, 1982, p. 18, para. 100, where the Court explicitly stated: "It seems clear that the matter continues to be governed by general international law which does not provide for a single 'regime' for 'historic waters' or 'historic bays', but only for a particular regime for each of the concrete, recognized cases of 'historic waters' or 'historic bays".

94 Nothing even prevents parties from dividing such historic waters between them, as was done with respect to Palk Strait and Palk Bay between India and Sri Lanka. These historic waters form part of the internal waters of both countries. It is interesting to note that a disputed island located near the equidistant line was totally disregarded for delimitation purposes and that traditional fishing rights were secured in the waters of the other country. See India-Sri Lanka (Historic Waters): Report Number 6~10(1), in *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 1409~1417. Taking into account the similar interests and situations present in the Gulf of Riga, this precedent in State practice could well have served as a model.

95 E. Franckx, Two New Maritime Boundary Delimitation Agreements in the Eastern Baltic Sea, *International Journal of Marine and Coastal Law*, Vol. 12, 1997, p. 365, where an explanation is suggested for this Estonian refusal.

96 As stressed by the Court in the Gulf of Fonseca judgment, para. 394: "This unanimous finding that the Gulf of Fonseca is an historic bay with the character of a closed sea presents now no great problem. All three coastal States continue to claim this to be the position..." The same paragraph further cites the following statement of a United Nations Secretariat study: "If all the bordering States act jointly to claim historic title to a bay, it would seem that in principle what has been said above regarding a claim to historic title by a single State could apply to this group of States." See also J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 368, who writes: "Such a title [historic waters] should, however, be founded upon the agreement of all the littoral States."

ment of all States involved.[97] Whether this requirement also applies to the transformation of common internal waters to offshore maritime water expanses is not that clear. J. Charney, who explicitly tries to apply this hypothesis in case of State secession with respect to the Hudson Bay, i.e. a water expanse possessing a natural outlet to the world oceans, simply States that two possible lines of argumentation are conceivable: One indicating that the new State has the right either to ratify or terminate the historic status of the waters, the other asserting that new States must be bound by the preexisting situation.[98]

Quite a number of interesting lessons for the Caspian Sea can therefore be learned from State practice in the Baltic Sea. The most important one is the submission that the absence of consent, which existed in the case of the Gulf of Riga, and is manifestly also present in the Caspian Sea, would probably make it very difficult for Iran and Russia to extend the condominium idea to areas not covered by the historic treaties concluded between these two parties.[99]

2. "First Exploration/ Exploitation, Then Delimitation" Theory

In the Caspian Sea, Azerbaijan especially seems to be a staunch supporter of the thesis that exploration and exploitation are not to be hindered by the absence of a delimitation agreement.

A similar tendency was present in the southeastern part of the Baltic Sea, which is the most promising area of that sea from a mineral exploitation point of

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97 Gulf of Fonseca judgment, para. 409. In this respect, reference can also be made to the judgment of the Central American Court of Justice, Gulf of Fonseca (El Salvador/ Nicaragua), 9 March 1917, as translated and reprinted in *American Journal of International Law*, Vol. 11, 1917, p. 700, where consent of all the parties was required for changing the legal relationship of the parties inside the Gulf of Fonseca.

98 J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 368.

99 In the areas which are covered by the historic treaties, a plausible argument can indeed be made that, since the latter can be qualified as so-called territorial treaties, they apply today to the new littoral States surrounding the Caspian, namely Azerbaijan, Kazakhstan and Turkmenistan. See for instance D. Allonsius, *Le regime juridique de la mer Caspzenne: Problemes actuels de droit international public*, Paris: Universite Pantheon-Assas (Paris II), L. G. D. J. , E. J. A., 1997, pp. 30~37.

view. The relationship between Lithuania and Russia[100] was characterized by the fact that every time the Russian Federation declared its intention to explore or exploit the presumed off-shore oil fields, it triggered a strong Lithuanian reaction.[101] The so-called Kravtsovskoye (D-6) oil field, located rather close to the coast, proved to be a difficult obstacle to overcome throughout the negotiations. The period until early 1996 was characterized by the fact that negotiations were held in the shadow of Russian initiatives to establish a consortium with foreign partners in order to start the exploitation of the D-6 oilfield.[102] But when the head of Lukoil announced during the month of April 1996that his company planned to finance the exploitation of the D-6 oil field with its own funds, the situation changed since it meant that development would not be further delayed by the need to obtain foreign capital.[103] Press reports suggest that Lithuania finally relinquished its claims to "a promising oil deposit in an undelimitated section of the Baltic Sea shelf not far from the coastal resort of Nida."[104] The understanding that Lithuania had renounced claims it might have had to this particular area facilitated the conclusion of the negotiations.[105] Indeed, the Russian newspaper Izvestiia inferred from unofficial sources that the quid pro quo was to grant Lithuania a sea corridor of about 1.1

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100 This part is based on E. Franckx, Lithuania-Russia: Exclusive Economic Zone and Continental Shelf [Report Number 10~18(1)], and by the same author, Lithuania-Russia; Territorial Sea [Report Number 10~18(2)], both accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

101 See for instance Izvestiia, 1 March 1994, p. 3, cols 3~6 and Finansovye Izvestiia, 12 September 1995, p. 2, col. 1.

102 For details of this period, see E. Franckx, Maritieme afbakening in de oostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the EasternBaltic Sea: Internet and Scientific Research), in P. De Meyere, E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid en verscheidenheid* [Huldeboek aangeboden aan Frits Gorlé], Brussels: VUB Press, 1996, pp. 275, 283~285.

103 For details of this period, see E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, pp. 275, 286~287.

104 See Baltic News Service, 17 September 1997, at http://gopher://namejs.latnet.lv, 15 December 1997.

105 E. Franckx and A. Pauwels, Lithuanian-Russian Boundary Agreement of October 1997: To Be or not To Be?, in V. Gotz, P. Selmer, and R. Wolfrum eds., *Liber Amicorum Gunther Jaenicke-Zum 85 Geburtstag*, Berlin: Springer, 1998, pp. 63, 74~75.

n.m. to the middle of the Baltic Sea.[106] It avoided the threat of enclosure by the adjacent maritime zones of Latvia and Russia, by securing Lithuania a maritime boundary with the country located opposite, namely Sweden.

Non-living resources also formed the crux of the maritime boundary dispute between Latvia and Lithuania in this area.[107] When one views the course of the negotiations, it appears that the many cooling off periods in the relationship between the two countries, which occurred during the period 1993—1999,were often directly related to particular actions taken by the Latvian authorities relating to the granting of licences with respect to those resources.[108] Until 1994 the negotiations went rather smoothly. But when the Latvian government publicly announced later that year that an American (AMOCO) and Swedish firm (OPAB) had been chosen to develop the Latvian continental shelf resources, including areas claimed by both sides, a dispute arose. The problem flared up once again a year later when in October Latvia signed contracts with these companies. A letter of protest followed the first event. After the second, Lithuania recalled its ambassador for consultations. This cycle repeated itself after every later action taken by the Latvian authorities in this respect.[109] The foreign oil companies involved did not push their luck, however, and it can now be stated with certainty that no exploration or exploitation took place in the area before the maritime boundary agreement was concluded on 9 July 1999.

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106 Izvestiia, 24 October 1997, p. 3, col. 3. This information was neither confirmed nor denied by the Lithuanian Minister of Foreign Affairs according to that same source (Izvestiia, 24 October 1997, p. 3, col. 4).

107 This part is based on E. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

108 For a detailed description of the course of these negotiations, see E. Franckx, Maritieme afbakening in de oostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the Eastern Baltic Sea:Internet and Scientific Research), in P. DeMeyere, E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid en verscheidenheid* [Huldeboek aangeboden aan Frits Gonlé], Brussels: VUB Press, 1996, pp. 275, 280~281 and 285~296, and by the same author, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, pp. 275, 283~286. The rest of this paragraph is based on these sources.

109 For instance when the Latvian government's Economics and Finance Committee decided to pass the bill on oil concessions for government consideration, or when a bill was passed for parliamentary adoption to allow foreign companies to drill in the Latvian continental shelf.

In the Caspian Sea a similar action-reaction pattern is apparently to be discerned. Iran, for instance, has officially protested against what it considers to be a provocative attitude on the part of Azerbaijan. A letter addressed to the Secretary-General of the United Nations clearly stated that the Iranian government " reserves the right to take any action in the future to protect its inalienable rights to the sea. "[110] It did so in July 2001 by sending a gunboat to chase two Azerbaijani survey vessels operated by a British Petroleum ship in disputed waters.[111] The basic fall back position of Iran has been described in the literature as being guided by two foremost considerations: Primo, that any unilateral action must cease until a comprehensive regime has been set up and, sec undo, that all unilateral joint venture contracts concluded by littoral States with foreign companies are invalid under international law.[112]

Turkmenistan also has officially protested against the proposed exploitation of a field located in the border area by Azerbaijan,[113] resulting in the Russian president cancelling an agreement between Luk oil and Rosneft tode velop this field together with Azerbaijan.[114] Here too, the patrolling of the area by Turkmen fighter planes

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110 Letter dated 30 March 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations, addressed to the Secretary-General, UN. Doe. A/53/890. It is interesting to note that the National Iranian Oil Company had concluded a similar agreement the previous year with some foreign oil companies to conduct an exploratory survey in an area claimed by Azerbaijan, and which had been vigorously protested at that time by the latter. See F. Sanei, The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with its Geopolitical Realities, *Vanderbilt Journal of Transnational Law*, Vol. 34, 2001, p. 681.

111 *The Moscow Times*, 27 February 2002, p. 7, col. 1. This Iranian action has been labeled the most serious incident in the area since the break-up of the former Soviet. See N. Sohbetqizi, Caspian Basin Nations Prepare Again to Tackle Territorial Conundrum, at http://www.eurasianet.org/departments/business/articles/eav032202.shtml, 22 March 2002.

112 F. Sanei, The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with its Geopolitical Realities, *Vanderbilt Journal of Transnational Law*, Vol. 34, 2001, p. 764.

113 Letter dated 23 July 1997 from the Permanent Representative of Turkmenistan to the United Nations, addressed to the Secretary-General, UN. Doc. A/52/259.

114 As mentioned in K. Mehdiyoun, Ownership of Oil and Gas Resources in the Caspian Sea, *American Journal of International Law*, Vol. 94, 2000, p. 185, note 59.

proved sufficient to halt all exploratory activities.[115]

It is believed that States in the Caspian Sea, if they want to promote regional stability and good-neighborliness, should not try to fix their maritime boundaries by granting concession blocs to oil companies in disputed areas. For one reason or another, gas and oil fields often have a tendency to be located just here !

3. Arguments Based on National Legislation or Enactments

In both areas, legal arguments have sometimes been advanced, based on national legislation, in an attempt to prove the correctness of positions on the international level.

In the Baltic Sea, an example can first of all be found in the system of straight baselines established by Estonia in the Gulf of Riga in 1993,[116] which soon became a bone of contention in the maritime delimitation negotiations with Latvia.[117] Especially the segment in front of the Gulf of Riga, connecting the islands of Allirahu, Ruhnu and Kihnu, gave rise to serious disagreement between the parties. Latvia, which itself did not claim any baselines in the area, especially contested the fact that these particular baselines did not follow the general direction of the coast. A careful analysis of the boundary agreement finally concluded by both parties in 1996 clearly indicates that this particular segment of the baseline system was totally disregarded.

Between the same two parties, a second example can be found in unilateral actions to determine the outer limits of their maritime zones in the area. Estonia was the first country to do so in 1993 by means of the same municipall enactment which established straight baselines along the Estonian coast.[118] Latvia also issued a proclamation in the midst of the dispute in which it unilaterally determined the outer limit of its fishery zone in the Gulf of Riga.[119] The latter intruded up to 18

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115 R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law (Moscow)*, Vol. 14, 2001, p. 84.

116 Law on the Boundaries of the Maritime Tract, *Riigi Teataja*, Vol. 1, 1993, p. 14. As discussed in A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p. 235.

117 This part is based on E. Franckx, Estonia-Latvia (Report Number 10~15), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

118 Law on the Boundaries of the Maritime Tract, *Riigi Teataja*, Vol. 1, 1993, p. 14.

119 Regulations on the Provisional Fishery Arrangements in the Gulf of Riga, 2 April 1996, Unofficial English translation kindly received from R. Stafeckis, Latvian Ministry of Foreign Affairs,15 July 1996 (on file with the author).

n, m. into waters claimed by Estonia.[120] Once again, the move sharply increased the tension between the parties even though its content had no practical impact whatsoever on the final boundary line.

A similar example can be found in the maritime boundary dispute between Latvia and Lithuania.[121] Here the Lithuanian President took a rather peculiar initiative by issuing a decree in which he stated that, until a bilateral agreement is reached:

> *The following principles of negotiations with[the] Republic of Latvia are confirmed: The border of the territorial sea of the Republic of Lithuania in the Baltic sea is a straight line starting from the last point of the State border of Latvia and Lithuania at the coast of the Baltic sea, the coordinates of which are N 56.04.10; E 21.03.53 to the point in the Baltic sea 12 nautical miles from the coast, the coordinates of which are N 56.03.06; E 20.42.37.*[122]

The Presidential decree also addressed the EEZ and the continental shelf:

> *The northern border of the economic zone and continental zone of the Republic of Lithuania in the Baltic sea is[a] straight line from the point in the Baltic sea the coordinates of which are N 56.03.06; E 20.42.37 to the point where the geographical parallel N 56.07.35 meets a border of the continental shelf of the third State in the Baltic sea.*[123]

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120 E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 280.

121 This part is based on E. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

122 Decree of the President of the Republic of Lithuania, On the Northern Border of the Territorial Sea, Economic Zone and Continental Shelf o[f] the Republic of Lithuania, 13 November 1996, *State News*, No. 112~2537 (1996), Art. 1(1).

123 Decree of the President of the Republic of Lithuania, On the Northern Border of the Territorial Sea, Economic Zone and Continental Shelf o[f]the Republic of Lithuania, 13 November 1996, *State Nexus*, No. 112~2537 (1996), Art. 1(2).

Whether the purpose of this decree was to influence the Lithuanian negotiating team or the Latvian government was not immediately clear. Fact is that the delimitation line finally agreed upon does not follow this unilateral declaration.

In the same vein, one of the arguments sometimes encountered in the literature is that a constitutional provision or other high level enactment, by means of which part of the Caspian Sea located in front of a particular littoral State is included in the territory of that State, renders the issue of the sharing of the sea expanses moot.[124]

Such a unilateral manner of trying to settle maritime boundaries, however, raises serious problems from an international law point of view. As stated by P. Weil:

> *A delimitation cannot be effected unilaterally, without taking into account the position of other States, and it is opposable to other States only to the extent that they accept it.*[125]

The International Court of Justice could not have said it more clearly, when it stated in 1951:

> *The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation I necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon*

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124 See for instance Art. 11(2) of the 1995 Constitution of Azerbaijan, at http://www.constitutional-court-az.org/const-contents.htm, as provided by the Constitutional Court of Azerbaijan, which reads: "Internal waters of the Azerbaijan Republic, sector of the Caspian Sea (lake) belonging to the Azerbaijan Republic, air space over the Azerbaijan Republic are integral parts of the territory of the Azerbaijan Republic." A slightly different wording can be found in the version provided by website of the President (at http://www.president.az/azerbaijan/const.htm). See also the 1999 decree by Turkmenistan's President in which he qualified the Turkmen sector of the Caspian Sea as an "inseparable part of the State". As mentioned in S. Vinogradov, The "Tug of War" in the Caspian: Legal Positions of the Coastal States, in W. Ascher and N. Mirovitskaya eds., *The Caspian Sea: A Quest for Environmental Security*, The Hague: Kluwer Academic Publishers, 2000, pp. 189, 193.

125 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, p. 110. On this point see also p. 107.

international law.[126]

The conclusion seems therefore to be justified that, since the unilateral approaches in the Baltic Sea have not had any impact on the maritime boundary finally agreed upon, a similar fate will most probably be encountered by similar attempts in the Caspian Sea. Nothing can prevent States from making unilateral claims in theory,[127] but in the final analysis their validity with respect to other States will always need to be judged on the international plane.

4. Consideration to Be Given to the Possible Enclosing Effect of the Interplay between Convex and Concave Coasts

Present-day international law casebooks still rely on the 1969 Continental Shelf Cases before the International Court of Justice[128] to illustrate how equity forms part and parcel of the contemporary sources of international law.[129] The court clearly stated:

> *Equity does not necessarily imply equality... But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here is a case where, in a theoretical situation of equality within the same order, an inequity is created.*[130]

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126 International Court of Justice, Anglo-Norwegian Fisheries (United Kingdom/Norway), 18 December 1951, *I. C. J. Reports*, 1951, p. 116.

127 Even though the appropriateness of such actions has been questioned by some authors, especially with respect to the Caspian Sea. See for instance B. Dubner, The Caspian: Is it a Lake, a Sea or an Ocean and Does it Matter? The Danger of Utilizing Unilateral Approaches to Resolving Regional/ International Issues, *Dickinson Journal of International Law*, Vol. 18, 2000, p. 253, where he concludes: "There is simply no room for unilateral declarations in the area."

128 International Court of Justice, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969, *I. C. J. Reports*, 1969, p. 3.

129 See for instance M. Janis and J. Noyes, *International Law: Cases and Commentary*, St. Paul: West Group, 2001, pp. 155~172.

130 International Court of Justice, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969, *I. C. J. Reports*, 1969, p. 3, para. 91.

In the southeastern Baltic Sea such a situation presents itself with respect to the relationship between the convex coasts of Latvia and the Russian Federation (Kaliningrad) and the concave coast of Lithuania. When Lithuania and Russia negotiated their maritime boundary, as already mentioned above, part of the compromise was that Russia allowed Lithuania a 1. 1 n.m. wide sea corridor reaching the middle of the Baltic Sea.[131] Since also Latvia took a similar approach later on, this combined action results in a situation today where Lithuania's maritime zones touch those of Sweden.[132] Instead of having a third party oblige Latvia and Russia to take the above-mentioned notions of equity into consideration,[133] in casu these countries did so out of their own free will in their respective bilateral negotiations with Lithuania.

In the Caspian Sea, a somewhat similar situation appears to be present in the southern part. A quick glance at a map depicting the hypothetical equidistant line[134] suffices to note that Azerbaijan, Iran and Turkmenistan, even though possessing coastlines which are roughly comparable in length, would end up receiving rather unequal portions simply because of the particular configuration of the coastlines in the area.

Based on Baltic Sea practice, the submission is that some adjustment might be required to delimit the convex coasts of Azerbaijan and Turkmenistan in their relation with the concave coast of Iran in the southern Caspian Sea.

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131 See Izvestiia, 24 October 1997, p. 3, col. 3 and accompanying text. On this point, see E. Franckx and A. Pauwels, Lithuanian-Russian Boundary Agreement of October 1997: To Be or not To Be?, in V. Gotz, P. Selmer, and R. Wolfrum eds., Liber Amicorum Gunther Jaenicke-Zum 85 Geburtstag, Berlin: Springer, 1998, pp. 74~75, as well as E. Franckx, Lithuania-Russia: Exclusive Economic Zone and Continental Shelf [Report Number 10~18(1)], and by the same author, Lithuania-Russia: Territorial Sea [Report Number 10~18(2)], both accepted for publication in International Maritime Boundaries, Vol. 4, The Hague: Martinus Nijhoff, 2002. Forthcoming.

132 E. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

133 It will be remembered that in the North Sea the Netherlands and Denmark had already concluded a bilateral agreement which totally enclosed the German maritime zone so that the latter would have no common boundary with the maritime zones of the United Kingdom. See Agreement Concerning the Delimitation of the Continental Shelf Between the Two Countries (Denmark/The Netherlands), 31 March 1960, 604 UNTS 209. This agreement entered into force on 1 August 1967.

134 See for instance the map reproduced in S. Vinogradov, The Legal Status of the Caspian Sea and its Hydrocarbon Resources, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998 , pp. 137, 144.

5. Third Party Settlement

A final comment concerns an evaluation of the manner in which States are likely to settle their maritime boundary disputes in the Caspian Sea, based once again on the practice so far encountered in the Baltic Sea.

One of the typical features of the over-all delimitation effort until the early1990s in the Baltic Sea was that not one single maritime boundary was arrived at by means of third party dispute settlement.[135] During the so-called fourth period,[136] a certain development took place in this respect. Estonia, Latvia and Lithuania all expressed the view, at least at one point during the negotiations leading to the maritime boundary agreements between them, that they would be willing to submit the dispute to either arbitration or third party settlement if a solution would not be forthcoming.[137]

The fact remains, however, that despite these expressions of intention, all the agreements in question were finally arrived at by means of direct negotiations between the parties. The closest one comes to the involvement of a third party in the process, but then not to decide the issue but simply to help out, is the involvement of Sweden in the negotiations between Estonia and Latvia. Even though the Swedish Minister of Foreign Affairs was quoted in the press as having said at the time of signature that her country was proud to have served as a mediator, it is believed that the country rather rendered its good offices.[138] At the same time it should be added that similar proposals, made in other maritime

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135 E. Franckx, Region X: Baltic Sea Maritime Boundaries, in *International Maritime Boundaries, Vol. 1*, Dordrecht: Martinus Nijhoff, 1992, pp. 345, 364.

136 As distinguished in E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256 and accompanying text.

137 For an overview of these different instances, see E. Franckx, Maritieme afbakemng in deoostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the Eastern Baltic Sea: Internet and Scientific Research), in P. De Meyere and E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid enverscheidenheid [Huldeboek aangeboden aan Frits Gorlé]*, Brussels: VUB Press, 1996, pp. 287, 289, 291, 293, 295, 297, 298, 300, 311 (especially Latvia favoured this approach) and by the same author, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 282.

138 As discussed in E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 283.

delimitation disputes in the area at that time, were rejected by the parties.[139]

In view of this experience in the Baltic Sea, it appears unlikely that the maritime delimitation disputes in the Caspian Sea will be settled by means of third party settlement. If some signs of possible changes in this respect were visible in the southeastern part of the Baltic Sea between Estonia, Latvia and Lithuania inter se, this was certainly not the case in the bilateral relations between Lithuania and Russia on the one hand, or between Estonia and Russia on the other. In the Caspian Sea area, it is also in relationships between the newly independent States inter se that this possibility has been raised.[140] But neither Iran nor Russia seem to be directly inclined to appear before the International Court of Justice, or before any arbitration tribunal for that matter, with respect to this particular dispute. And neither country would seem to allow others to do so inter se because of their particular interests based on the above-mentioned historic treaties.

6. Conclusions

Starting from the premise that the littoral States of the Caspian Sea have apparently reached a stage, after about a decade of negotiations, where they all accept that the seabed underlying this water expanse may be divided in order to allow for an orderly development of the non-living resources of the area, this article tried to discern whether international law offers any guidelines to help the States involved in accomplishing this objective. Having found that the general framework provided by international law is neither to be found in treaty law nor in customary law, but rather in judicial decisions, the impact of the latter on State practice was highlighted.

These general principles, no matter how vague and circumstance-related they may be, subsequently find their reflection in certain trends and practices in State behaviour. States, in their endeavour to find an equitable solution, often prove will-

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139 Latvia and Lithuania rejected the offer made by Estonia, and the involvement of the OSCE was rejected in the framework of the Estonia and Russia land and maritime dispute. See E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 288.

140 Turkmenistan has suggested making use of this alternative in its dispute with Azerbaijan. See R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law (Moscow)*, Vol. 14, 2001, p. 111.

ing to restrict their initial claims by relying on these trends and practices.[141] Even the hypothesis that littoral States are not bound, as a matter of law, to take the general principles just mentioned into account when settling the division of the Caspian seabed,[142] should not necessarily imply the negation of the above-mentioned submission that the trends and practices to be discerned in State practice may well play an influential role. As demonstrated above, examples exist where States were nevertheless guided by such international norms which might not be, strictly speaking, legally binding.[143] Especially in view of the high risk of a possible escalation in tension in the Caspian region, this might not be such a bad idea after all, since these trends and practices would at least provide some kind of upper limit to the claims of the States involved.

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141 The present author was able to witness such a tendency in a number of bilateral maritime boundary negotiations held in the southeastern Baltic Sea.

142 I.e. the supposition that the Caspian Sea were to be qualified by all five littoral States as constituting an international border lake, quod non. In fact only Azerbaijan officially recognizes this water expanse as a lake in its constitution. As stressed by R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law (Moscow)*, Vol. 14, 2001, p. 126. Reference is made by this author to the above-mentioned the 1995 Constitution of Azerbaijan Art. 11(2), which however in English translation on the website of the President, as well as of the Constitutional Court, reads "Caspian Sea (Lake)".

143 See G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201 note 74; D. O'Connell, *The International Law of the Sea*, Oxford: Clarendon Press, 1982, pp. 389~416; 2002 Arbitration; The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing, 11 February 1985; Canada-Nova Scotia Offshore Petroleum Resources Accord, 26 August 1986; Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act (Statutes of Newfoundland, 1986, c. 37) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Statutes of Nova Scotia, 1987, c. 3); Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act（Statutes of Canada, 1988, c. 28); Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) section 6(4), and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada, 1988, c. 28), section 48(4); By means of Art. 3(2) of these Terms of Reference, the disputing parties requested the Tribunal to proceed in two phases: "(i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement. (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined." At http://www.boundary-dispute.ca/terms.html; 2002 Arbitration, para. 2.35 and accompanying text.

Based on these assumptions, the present article tried foremost to discern certain lessons from the practice of former Soviet Socialist Republics in an area, just like the Caspian Sea, where the Russian Federation lost a substantial part of the coastal facade it held in Soviet times, namely the southeastern Baltic Sea. Several issues which created serious difficulties between the parties there, before they were finally able to settle their maritime boundaries, at present still form bones of contention between certain littoral States of the Caspian Sea.

The comparison undertaken by the present article leads to a number of concrete suggestions: Primo, the condominium issue is not believed to possess a high potential in areas not covered by the historic agreements, because it essentially rests on the agreement of all the littoral States, quod non in the Caspian Sea. Secundo, exploration and exploitation without a prior delimitation agreement does not appear to be an appealing solution for the Caspian Sea. Besides the high risk potential involved in such course of action, practice in the Baltic Sea is instructive in the sense that oil companies never envisaged actual exploitation in disputed zones which the countries involved had not yet managed to delimit. Tertio, unilateral enactments, even of a constitutional nature, are not likely to influence delimitation agreements which always have an international aspect attached to them. Quarto, if the Baltic Sea littoral States were willing, out of their own free will, to heed the North Sea Continental Shelf judgment by preventing inequity in a theoretical situation where coastlines were of comparable length. In the southern Caspian Sea, States should therefore be advised to give this issue appropriate consideration. Quinto, it appears unlikely, in view of the Baltic Sea State practice, that the dispute in the Caspian Sea will ever be settled by means of third party settlement.

It is hoped that these comparative comments, no matter how rudimentary they may be, will nevertheless contribute to the further clarification of this topic by focusing on it from a totally different angle. As already indicated, however, it is clear that no analogy is perfect. Therefore, the peculiarities of the Caspian Sea will always have to be taken duly into account. In view of the topical nature of the Iranian letter to the Secretary-General of the United Nations, which was written on the very next day after the present conference closed its doors, namely on 28 February 2002, it might be appropriate to conclude the present article by indicating at least one potential distinguishing factor. Before being able to start the bilateral delimitation of the subsoil in the Caspian Sea, a unanimous agreement of all littoral

States may well be required.[144]

144 Letter dated 28 February 2002 from the Charge d'affaires a. i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations, addressed to the Secretary-General, UN. Doc. A/56/850. The operative part of this letter reads as follows: "The Islamic Republic of Iran, while reaffirming its position on the legal status of the Caspian Sea as contained in General Assembly document A/52/913, dated 21 May 1998, that the Agreement signed on 29 November 2001 by the Republic of Kazakhstan and the Republic of Azerbaijan regarding the division of the Caspian Sea is in contravention of the existing legal instruments governing the legal status of the Caspian Sea, and therefore does not recognize the said Agreement as valid. Clearly as long as the legal regime of the Caspian Sea is not complemented with the unanimous agreement of all coastal States, any decision taken in this regard is unacceptable and bears no legal basis."

钓鱼岛及其在东海划界中的地位

王可菊 *

内容摘要: 钓鱼岛及其附属岛屿(以下简称“钓鱼岛”)是中国的固有领土,自 19 世纪末,被日方侵占。钓鱼岛同时还位于中日间有待划界的东海。因而,对钓鱼岛及其在东海划界中的地位进行探讨,是十分必要的。钓鱼岛是中日关系中的敏感问题。中日两国人民世世代代友好符合中日两国人民的根本利益。希望在未来条件成熟时,妥善解决这一问题。

关键字: 钓鱼岛　领土　东海划界　地位

一、钓鱼岛是中国的固有领土

(一)钓鱼岛自古以来是中国的领土

钓鱼岛及其附属岛屿(日称“尖阁列岛”)由钓鱼岛(日称鱼钓岛)、黄尾屿(日称久场岛)、赤尾屿(日称大正岛)、北小岛、南小岛、大北小岛(日称冲北岩)和大南小岛(日称冲南岩)等 11 个岛礁组成,总面积为 5.24 平方公里,其中钓鱼岛为 3.8 平方公里。它们位于我国东海大陆架的东南边缘,水深 2000 米的冲绳海槽的西北侧。距我国台湾省基隆市东北 190 公里,距福建省的福州市和冲绳的那霸市皆为 420 公里。周围海域为优良渔场,我国渔民,尤其是台湾及福建渔民借风向海流之便自古以来在此捕鱼,并经常到岛上补充淡水、避风、捕捉海鸟、采集鸟蛋和中草药。钓鱼岛因此而得名。

钓鱼岛及其附属岛屿(以下简称“钓鱼岛”),自古以来便是中国的领土。它不仅是中国人民最早发现、最先命名、最早开发的,而且在现代领土主权概念产生前,中国政府就在无任何他国对其提出过权利要求的情况下始终在此行使主权。

1. 中国对钓鱼岛最先命名。在现存的不少明代史籍(如《顺风相送》(1403)等)中已见到钓鱼岛、赤尾屿、黄尾屿的当时名称,如钓鱼屿、赤屿、黄毛屿等。[1] 日本学者也持有钓鱼岛系中国最先命名的主张。日本学者指出,在日本根本没有称作

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1 郑海麟:《钓鱼台列屿之历史与法理研究》,香港:明报出版社 1998 年版,第 14~58 页。

“屿”的海岛。而在福建省、澎湖列岛、台湾省称为“屿”的海岛很多，达 29 个，在中国的古地图中则更多，在钓鱼岛中就有黄尾屿和赤尾屿。而且，在美国施政权下的琉球政府公文中，黄尾屿和赤尾屿的名称原封不动，原样使用。[2]

2. 中国明朝时钓鱼岛已是中国在海上行使自卫权的领域。在我国明朝的众多历史文献之中，例如明剿倭总督胡宗宪编的《筹海图编》、茅元仪辑的《武备志》、施永久编的《武备秘书》等，都载明钓鱼岛等岛屿在中国的海防范围之内。[3] 这表明，明朝时中国政府已在此行使有效的、排他的国家权力。

3. 钓鱼岛列人中国版图之内已久。明清时代，中国与自己的藩属琉球国往来甚多，除琉球每年派船纳贡外，每逢琉球新国王即位，中国皇帝都遣使前往册封（自 1372 年至 1879 年为 23 次）。而在许多册封史录中都一致记载了中国与琉球分界在赤尾屿和久米岛之间。[4] 换言之，钓鱼岛一向在中国的疆域之内。

4. 琉球国的地图中向来无钓鱼岛及其附属岛屿。清康熙 10 年（1701 年），琉球国使臣蔡铎进献的《中山世谱》地图及说明中，记载琉球的 36 岛，其中并无钓鱼岛等岛屿。日本出版的一系列有关琉球的地图中也都无钓鱼岛及其附属岛屿。[5] 显然，明清时代日本和琉球对中国对钓鱼岛等岛屿的领土主权从未有异议。

5. 清朝皇太后诏赏钓鱼岛予其大臣。清光绪 19 年（1893 年）10 月，慈禧皇太后下诏书“将该钓鱼岛、黄尾屿、赤尾屿三小岛赏给盛宣怀为产业，借采药之用”。因“书太常寺正卿盛宣怀其所进药丸甚有效验，据奏原料药材采自台湾海外钓鱼台小岛”，“知悉该卿家世设药局，施诊给药，救济贫病，殊甚嘉许”。此举是中国中央政府对钓鱼岛行使领土所有权的表现。此事在盛宣怀之子盛恩颐致其女盛毓真的信中提及：“皇上以此三岛赐与汝祖作为采药之用。诏书猶在家中是吾家物也。

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2 [日] 高桥庄五郎著，李杰译：《钓鱼岛等岛屿纪事》，北京：海洋地质调查局 1983 年版，第 35 页。

3 胡宗宪编的《筹海图编》（1562）的《福建沿海沙图》“福八”中，列有钓鱼屿、黄毛山、赤屿等。茅元仪辑的《武备志》（1621）“海防”一章中的《福建沿海省图》，列有钓鱼山、黄毛山、赤屿等。施永久编的《武备秘书》卷二《福建海防图》，列有钓鱼山、黄毛山、赤屿等。

4 如《顺风相送》(1403)、《琉球记》(1633)、《使琉球杂录》(1683)、《中山传信录》(1719)、《琉球国志略》(1756)、《续琉球国志略》(1866)。

5 例如，日本文献林子平编《三国通览图说》及其附图（1785）。林子平在其序中说明，此数国之图“非个人杜撰，而是有根据的画图。”1832 年德国东方学家海因里希克拉普罗特将该书及其附图译成法文出版，由此钓鱼岛等岛屿是中国领土也为世人知晓。见 [日] 井上清：《关于钓鱼岛等岛屿的历史和归属问题》（中译本），上海：三联书店 1973 年版，第 43~49 页。此外还有，阪宅甫辑的《中山聘使略》(1832) 所附的《琉球属岛全图》，大槻文彦的《琉球诸岛全图》(1873)，关口备正辑的《府县改正大日本全图》（1875）等。

家中并有图说……”[6]

（二）日本乘甲午战争胜利之机窃取钓鱼岛

1868 年，日本勤王派打倒了德川幕府，树立起天皇政权。1871 年废除各藩，建立了以天皇为唯一最高专制君主的高度中央集权的统一国家。此时，天皇政府已抱有吞并朝鲜、台湾和琉球的野心。1872 年封琉球王为藩王，规定嗣后其外交统由日本掌管。1874 年出兵台湾，1875 年严令琉球王断绝与中国的朝贡和册封关系，武力镇压其反抗。1875 年入侵朝鲜。1876 年与朝鲜订立其第一个强加于外国的不平等条约（规定朝开放港口，设日本侨民区，日享有治外法权，朝日间免除进出口关税，日本在朝使用日币购物，朝是自主的主权国家即朝与清无藩属关系）。1879 年在琉球废藩，改设冲绳县，完全吞并琉球。1876 年宣告小笠原群岛归日本管辖。1894 年 7 月对华不宣而战，偷袭在朝鲜的清军队，在海上突袭清海军。战后根据 1895 年 4 月的《马关条约》第 2 款，夺得台湾及附属各岛屿和澎湖列岛。[7]

当日本独占琉球全岛之后，琉球之外的钓鱼岛进入日本的视野。日本天皇政府伺机掠夺钓鱼岛长达 9 年之久。[8] 其过程如下：

1. 1885 年日本福冈县古贺辰四郎登上钓鱼岛，事后向冲绳县官府提出租借该处土地的申请，当时日本内务省和外务省担心公开将该岛划为日本领土必遭中国严重抗议，而未予批准。但内务省秘令冲绳县对该岛进行勘查。冲绳县令勘查后在报告中指出，这些岛屿为清国方面“所熟悉，且复各有命名”，“勘查之后立即树立国标，实恐未为妥善”。外务卿给内务卿的复文称“若贸然公开树立国标，必招致清国之疑虑”。

2. 1890 年冲绳县知事又向内务大臣请示需要划定管辖，内务省外务省未答复。1893 年冲绳知事再次请示，又未答复。

3. 1894 年末，日本在侵华的甲午战争中胜利已成定局，日本政府认为窃取钓鱼岛的绝好时机终于到来。12 月内务大臣行文与外务省磋商在钓鱼岛定管辖树标桩事。1895 年 1 月外务省答复无异议。1 月 14 日，内阁会议批准钓鱼岛归冲绳管辖并立标桩。1 月 21 日，内务大臣向冲绳县知事下达有关指示。此时《马关

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6 诏书和盛恩颐致其女的信存于该女盛毓真（又名徐逸）手中。诏书英文译文载于美国第 72 届国会第 1 会期记录，1971 年 11 月 9 日版，第 117 卷，第 169 期，第 17967 页。美国参议院外交委员会及美国国务院主要根据此诏书，认可徐逸女士对钓鱼台的所有权。见 1972 年 4 月 4 日、4 月 6 日的《参考消息》。

7 [日] 井上清：《关于钓鱼岛等岛屿的历史和归属问题》（中译本），上海：三联书店 1973 年版，第 71~84 页；王铁崖编：《中外旧约章汇编》第 1 卷，上海：三联书店 1957 年版，第 614 页。

8 [日] 井上清：《关于钓鱼岛等岛屿的历史和归属问题》（中译本），上海：三联书店 1973 年版，第 84~102 页。

条约》尚未签订。在谈判时，日方对内阁会议已作出占据钓鱼岛决议的事讳莫如深。

从 1885 年到 1895 年，日本将钓鱼岛并入国土的系列活动一直未公开，直至 1952 年 3 月《日本外交文书》第 23 卷出版，上述经过才首次公诸于世。而且，直到 1969 年 5 月 5 日冲绳县才实地设立标桩。1970 年冲绳政府在文件中说，根据明治 29 年第 13 号敕令，钓鱼岛成为日本领土，但事实上该敕令并无此内容。[9]

顺便指出，“尖阁列岛”这一称呼，是 1900 年（明治 33 年）冲绳师范学校教师黑岩恒氏所起的名字，“而不是日本政府正式公开命名的，也不是后来又正式追认的”。“尖阁列岛”的叫法，据认为是来自英文航路图的“pinnacles”（小尖塔、顶点之意）一词。“尖阁列岛”各岛的名称，是在 1969 年 5 月在美国的施政下，根据石垣市长的命令，在“尖阁列岛”上树标牌时，才将岛名写为鱼钓岛、久场岛、大正岛、南小岛、北小岛、冲的北岩、冲的南岩和久米赤岛。这些名称，不仅不是根据敕令正式命名的，而且即使在出现“尖阁列岛”主权问题时，日本政府也没有举出列岛的岛名，只是在 1972 年 5 月外务省情报文化局散发的小册子《尖阁诸岛》中，才举出其岛名。[10]

（三）日本至今仍非法占据我钓鱼岛

1. 日本在二战后未归还我钓鱼岛

1943 年 12 月 1 日中美英三国《开罗宣言》指出，“日本所窃取于中国之领土，例如满洲、台湾、澎湖群岛等，归还中国。”[11] 1945 年 7 月 26 日中美英三国促令日本投降之《波茨坦公告》第 8 条规定：“《开罗宣言》之条件必将实施而日本主权必将限于本州、北海道、九州、四国及吾人所决定的其他小岛之内。”[12]

日本投降后，只把台湾和澎湖列岛归还中国，而将钓鱼岛交由美国占领。1951 年 9 月 8 日在美国策划下签订《旧金山对日和约》。[13] 该和约第 3 条规定将北纬 29 度以南的南西诸岛置于托管之下，由美国为管理当局。美国遂宣布对钓鱼岛等岛屿拥有施政权。1971 年 6 月 17 日美日签署《归还冲绳协定》。1972 年 5 月 15 日该协定生效，美国将钓鱼岛也一并归还给日本。

对于《旧金山对日和约》和《归还冲绳协定》，我国政府都及时作出了反应，声明它们对我国没有拘束力。1951 年 8 月 15 日周恩来外长发表声明称，“对日

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9 [日] 井上清：《关于钓鱼岛等岛屿的历史和归属问题》（中译本），上海：三联书店 1973 年版，第 101 页。

10 [日] 高桥庄五郎：《钓鱼岛等岛屿纪事》，北京：海洋地质调查局 1983 年版，第 32~35 页；[日] 上地龙典：《钓鱼岛与竹岛》（中译本），北京：国家海洋局海洋战略研究所 1988 年版，第 9 页。

11 《国际条约集》(1934−1944)，北京：世界知识出版社 1961 年版，第 407 页。

12 《国际条约集》(1945−1947)，北京：世界知识出版社 1959 年版，第 77 页。

13 《对日和约问题史料》，北京：人民出版社 1951 年版，第 80 页。

和约的准备、拟订和签订，如果没有中华人民共和国参加，无论其内容和结果如何，中央人民政府一概认为是非法的，因而也是无效的。”[14] 1951 年 9 月 18 日周恩来外长又发表声明指出，美国政府在旧金山会议中强制签订的没有中华人民共和国参加的对日单独和约，中央人民政府认为是非法的，无效的，因而是绝对不能承认的。[15] 1971 年 12 月 30 日我国外交部声明中指出，“美日两国政府在《归还冲绳协定》中，把我国钓鱼岛等岛屿列人‘归还区域’，完全是非法的，这丝毫不能改变中华人民共和国对钓鱼岛等岛屿的领土主权。”[16]

值得指出的是，由于海内外华人轰轰烈烈的保钓运动的压力，美国在归还冲绳前后并没有支持日本对钓鱼岛的权利主张。签约前美国国务院发言人说：“随着归还冲绳，尖阁群岛的施政权将归还日本。但是关于主权归属问题，美国采取中立的立场。”1971 年 6 月 17 日，日美两国签订了《归还冲绳协定》。签约时，美国国务院公开声明，美国根据《旧金山和约》只接受了有关岛屿的施政权，“与冲绳一起归还的只是对尖阁列岛的施政权，主权与施政权是两回事，这次归还日本的只是施政权，关于主权问题，与美国毫无关系”。[17]

2. 日方不断强化实际控制的措施以造成是日本领土的“既成事实”

1968 年联合国远东经济委员会下属的亚洲近海流域矿产资源联合勘探委员会对东海和黄海进行了广泛调查，发现钓鱼岛周围海域是“世界上十大油田之一”，此后日本便加快对钓鱼岛的侵占活动。1969 年在钓鱼岛开始竖起有地名的标桩。1970 年在 5 个岛上竖起“未经核准不得登岛及进入岛周围领海”的警告牌。1970 年冲绳县议会通过“关于尖阁列岛领土防卫决议”。1972 年 5 月 15 日《归还冲绳协定》生效当日，日本海上保安厅在冲绳那霸设立了第 11 管区，并派船在钓鱼岛海域巡视。此后海空军除一般巡视外，还特别跟踪监视。对在附近作业的我方渔民和调查船进行驱赶，派人到岛上进行气象、资源、地质调查，在岛上加强设施建设，排除在该地区的中日联合开发，公然否认中日双方曾达成的搁置钓鱼岛问题的谅解。

目前日方强化实际控制的措施有变本加厉之势。日本防卫厅对钓鱼岛以及冲绳本岛以西的其他岛屿，制定了一套“西南岛屿有事”对策方针。2005 年 2 月，日本政府宣布接管 1988 年由右翼组织“日本青年社”在中国领土钓鱼岛兴建的一座灯塔，并作为日本的国家财产予以保护。为此我国外交部官员向日方提出严正交涉，指出钓鱼岛是中国的固有领土，中国对这些岛屿拥有无可争议的主权，日本

14 《新华月报》，北京：人民出版社 1951 年 9 月号，第 1027 页。
15 《新华月报》，北京：人民出版社 1951 年 10 月号，第 1233 页。
16 《新华月报》，北京：人民出版社 1971 年 12 月号，第 8 页。
17 [日] 上地龙典：《钓鱼岛与竹岛》（中译本），北京：国家海洋局海洋战略研究所 1988 年版，第 33 页；[日] 高桥庄五郎：《钓鱼岛等岛屿纪事》（中译本），北京：海洋地质调查局 1983 年版，第 24 页。

此举是对中国领土主权的严重挑衅和侵犯，中国政府和人民坚决不接受日方采取的任何单方面行动，此等行动都是非法无效的。2006 年 3 月 29 日，日本文部科学省公布了对新版高中教科书的审定结果，竟要求教科书将钓鱼岛明确写成日本领土。我国外交部发言人当即表示，钓鱼岛是中国的固有领土，中国对此有无可争辩的法律依据。

应当指出，日方在坚持“尖阁列岛是日本固有领土”的立场同时，不断加强对其实际控制，企图以此造成钓鱼岛为其领土的既成事实。然而，由于我国政府不断对日方此种行为表示异议，即我国并未对日方行为予以默认，因此，日方这种处心积虑的作法是徒劳的，对钓鱼岛等岛屿的侵占，不能取得其领土主权。

（四）强占不产生领土主权

国家领土是一国主权支配下的地球表面的特定部分。[18] 领土是国家行使主权的对象。[19] 国家对领土拥有的权力称为领土主权、领有权和领土权。[20] 领土主权是指国家对其领土本身及领土内的人和物体所具有的最高权力。非法占有不取得领土主权。

日本以占有“无主地”为其窃取钓鱼岛的口实。1972 年 5 月 14 日，日本外务省再次发表“尖阁列岛领有”问题的正式见解，主要是：1. 日本政府根据国际法上的先占权，从明治 18 年（1885 年）以后就再三对尖阁列岛进行实地调查，确认是无人岛，而且清国的统治并没有达到这里。于是明治 28 年（1895 年）1 月内阁会议决定在当地树标，正式划入日本领土。2. 这个列岛从不包括在 1895 年 5 月生效的《马关条约》第 2 条割让给日本的领土之内。3. 根据《旧金山条约》第 3 条，钓鱼岛施政权交给美国时，中国未提出异议。[21]

传统国际法认为，领土的取得方式有原始取得和转承取得。前者包括先占等，后者包括割让等。先占制度是把罗马法上无主物先占规则加以类推而得出的，在欧洲列强掠夺殖民地时起了重要作用。先占的概念在解决现实国际社会的领土争议中有一定的价值。因为争议中判断一国是否享有所涉领土的主权，首先应以其取得领土时的国际法为准（时际法原则），这为有关领土争议的国际案例所承认。

按照国际法，一国通过先占取得的领土只能是无主地。1975 年 10 月 16 日国际法院在关于西撒哈拉案的咨询意见中指出，“无主地”这个法律概念必须根据在当时有效的法律进行解释。在法律上，有效“先占”的一项基本条件是，该土地必

18 [英] 奥本海著，王铁崖等译：《奥本海国际法》，第 1 卷第 2 分册，北京：中国大百科全书出版社 1998 年版，第 1 页。
19 周鲠生著：《国际法》（上册），北京：商务印书馆 1981 年版，第 320 页。
20 [日]《国际法辞典》（中译本），北京：世界知识出版社 1985 年版，第 797 页。
21 前文已指出，中华人民共和国周恩来外长已对该条约做出有关声明。

须是无主地。[22]《奥本海国际法》指出，“占领的客体只限于不属于任何国家的土地，……任何国家的领土，都显然不是占领的可能客体。”[23] 英国的布朗利认为，“无主地”是指在法律上容许所有国家取得但目前仍未置于任何领土主权之下的部分。[24]

然而，日本政府将钓鱼岛窃为己有时，钓鱼岛及其附属岛屿根本不是什么无主地。日本政府将“无人岛”与“无主地”混为一谈，是偷换概念。

前面已指出，仅明清时代，中国对钓鱼岛已持续行使领土主权，长期和平展现其国家权力。与此同时，日本及琉球从未提出反对。显然，中国的中央政府与钓鱼岛之间的关系是正常的领土主权性质的法律关系。顺便指出，解决领土争端的有关国际案例说明，判断一国对一块土地是否行使主权的标准，视所涉土地的实际情况而定。例如，1931 年克利柏顿岛仲裁案裁决（法国—墨西哥），对于不适宜居住的土地的取得的评论。[25] 1928 年帕尔马斯岛仲裁案（美国—荷兰）裁决对荷兰对该岛所表现的国家权力的认可。[26] 1933 年国际常设法院在东格陵兰案（丹麦—挪威）的判决中对几乎尚未开发，更提不上占领并且长期与世隔绝的土地，法院压低了对其有效统治的正常要求，其理由是这些地方不容易进去。[27]

日本学者井上清在其《钓鱼岛等岛屿的历史和领有权》一文中指出，“即使根据西方各国的原始占有领土的‘法理’，在 16、17 世纪也承认‘发现’新土地的国家就是该土地的领有者。即使运用这一‘法理’，钓鱼岛等岛屿也只能是中国的领土而绝不会是什么别的东西，因为已经得到确实证明的事实是：这些岛屿是被中国人发现的。中国人给自己发现的土地定了中国名称，而且这些名称在中国的正式文献即册封的使录中有反复的记载。”作者还指出：“在这个小小的无人岛上设置行政机关等等，在明清时代是不可能的，也是没有必要的。”作者援引日本著名国际法学家横田喜三郎下述有关论述：“根据原始占有的土地的状况，（有效统治的）原则有时不能原封不动地适用，也有时没有必要。例如像无人岛那样的情况，设立行政机关，配置警察力量和兵力，实际上没有必要。在不能住人的情况下，也不能配置这些东西。”“何况明朝政府还作出了更多的贡献：它把钓鱼岛等岛屿划

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22 中国政法大学国际法教研室编：《国际公法案例评析》，北京：中国政法大学出版社 1995 年版，第 186 页。

23 [英] 奥本海著，王铁崖等译：《奥本海国际法》，第 1 卷第 2 分册，北京：中国大百科全书出版社 1998 年版，第 74 页。

24 [英] 伊恩•布朗利著，曾令良、余敏友等译：《国际公法原理》，北京：法律出版社 2003 年版，第 121 页。

25 R. Bernhardt ed., *Encyclopedia of Public International Law*, Vol. 2, Amsterdam: North-Holland Publishing Company, 1981, pp. 53~54.

26 R. Bernhardt ed., *Encyclopedia of Public International Law*, Vol. 2, Amsterdam: North-Holland Publishing Company, 1981, pp. 223~224.

27 R. Bernhardt ed., *Encyclopedia of Public International Law*, Vol. 2, Amsterdam: North-Holland Publishing Company, 1981, pp. 81~84.

入了自己的海上防御区域之内，在系统地阐述防御倭寇的措施的书籍《筹海图编》中说明了它的位置及管辖区隶属关系。”[28]

日方以先占无主地作为自己侵占钓鱼岛的法理根据，也确实给人以其处于别无选择的无奈境地的感觉。日本学者高桥庄五郎指出：“在国际法中，作为国家行为而取得领土的有割让、吞并、征服、先占、添附等。只要日本承认日清战争和《波茨坦宣言》，那么作为占有尖阁列岛的根据，只能坚持先占而无他路可走。日本取得尖阁列岛主权的原因丝毫也没有征服或吞并等选择的余地。所以奥原教授说：‘我从所有角度出发对此问题进行研究，结果仍不能发现日本将尖阁列岛编入领土之前，尖阁列岛会是中国领土这一事实，或者说无法进行立证。换句话说就得强调这个地区在国际法中是无主地。’（奥原敏雄论文：《尖阁列岛主权的根据》，《中央公论》，1978 年 7 月号）。”[29]

总之，无论从事实或法理视角，将 19 世纪末的钓鱼岛说成是“无主地”，纯系自欺欺人之谈。领土主权不能创始于对他国领土的侵占，强占不产生领土主权。日本对中国钓鱼岛的强占，不使日本对钓鱼岛拥有领土主权。

二、钓鱼岛在海洋划界中的地位

海洋划界涉及到领海、专属经济区和大陆架的划界。尽管大陆架和专属经济区是两个独立的制度，具有不完全相同的权利基础，即前者是自然延伸及距离，后者则依距离标准。然而，关于海岸相向或相邻国家间专属经济区和大陆架的划界，1982 年《联合国海洋法公约》（以下简称“《公约》”）对两者作出了内容相同的规定。该《公约》第 74 条第 1 款规定：“海岸相向或相邻国家间专属经济区的界限，应在《国际法院规约》第 38 条所指国际法的基础上以协议划定，以便得到公平解决。”该《公约》第 83 条第 1 款规定：“海岸相向或相邻国家间大陆架的界限，应在《国际法院规约》第 38 条所指国际法的基础上以协议划定，以便得到公平解决。”众所周知，《国际法院规约》第 38 条所指出的“国际法”是：1. 当事国明确承认的国际条约；2. 成为通例并被接受为法律的国际习惯；3. 各国承认的一般法律原则；4. 作为证明法律规则的辅助资料的司法判例及权威公法学家的学说。英国的布朗利指出，1982 年《公约》的规定，将划界问题留给一般国际法或国际习惯法处理。[30] 同时，按照《公约》的要求，有关国家应以彼此间的协议来划定界限，应以达到公平解决

28 [日] 井上清：《关于钓鱼岛等岛屿的历史和归属问题》（中译本），上海：三联书店 1973 年版，第 51~53 页。

29 [日] 高桥庄五郎：《钓鱼岛等岛屿纪事》（中译本），北京：海洋地质调查局 1983 年版，第 83 页。

30 [英] 伊恩•布朗利著，曾令良、余敏友等译：《国际公法原理》，北京：法律出版社 2003 年版，第 243 页。

来作为划界的目标。为取得公平的划界结果，公平原则（或称衡平原则）是有关划界实践中若干年来适用的一项原则。关于公平原则，其适用时在不同案件中要考虑到相应的一些有关情况。[31]

钓鱼岛在海洋划界中的地位，有两方面的问题：一是其本身可以划得何种海域，一是它在海洋划界中的作用。

（一）钓鱼岛所应拥有的海域

按照《公约》第 121 条岛屿制度的规定，岛屿（即四面环水并在高潮时高于水面的自然形成的陆地区域）的领海、毗连区、专属经济区和大陆架应按照《公约》适用于其他陆地领土的规定加以确定。但《公约》同时规定了此项规则的例外情况。换言之，与 1958 年的《大陆架公约》不同，《公约》制定了另一项新的规则。其第 121 条第 3 项规定："不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区或大陆架。"

第 121 条第 3 项对岩礁一语未下定义，但对不得拥有专属经济区或大陆架的岩礁有两个限定，即"不能维持人类居住"和不能维持"其本身的经济生活"。无论符合以上哪一种条件，都属于不得拥有专属经济区或大陆架的情形。"维持人类居住"，应理解为维持人类最基本的、正常的、长期的定居生活，维持"其本身的经济生活"，主要是指开发岩礁上或其内的资源是否能维持本身的经济生活。如果投资将岩礁改造成半人工岛屿，使其能维持人类居住或其本身的经济生活而拥有 200 海里专属经济区或大陆架，显然是有失公允的，也不是规则制定者的本意。[32]

就钓鱼岛的自然环境和资源状况而言，是难以维持人类居住或其本身经济生活的。钓鱼岛除有淡水外，其他条件不适宜长年居住。20 世纪初日本的古贺辰四郎父子在岛上断续经营期间，所雇工人是季节性的，食物需要从岛外携人。《钓鱼岛等岛屿记事》中说，1891 年，伊泽弥喜太同渔民一起从石垣岛来到鱼钓岛和久场岛……他在岛上的一个洞穴里还发现两具穿着中国服装的尸体。黑岩恒在

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31 傅崐成著：《国际海洋法—衡平划界论》，台北：三民书局 1992 年版，第 117~157 页。傅崐成：《国际海洋划界案件中的衡平考量》，载于傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 160~180 页。袁古洁著：《国际海洋划界的理论与实践》，北京：法律出版社 2001 年版，第 138~168 页。高建军著：《国际海洋划界论》，北京：北京大学出版社 2005 年版，第 52~133 页。

32 马英九著：《从新海洋法论钓鱼台列屿与东海划界问题》，台北：正中书局 1986 年版，第 126~132 页。马英九认为："该条第 3 项的主要目的，显然在于否定若干岩礁享有经济区及大陆礁层的权利，以作为第 121 条第 2 项的限制。因此，对于第 3 项的解释就必须从严，以免得这项限制失去意义。基于这样的认识，对第 3 项可作如下的解释：第一，岩礁必须在相当长期内维持人类居住。第二，岩礁维持本身经济生活所需资源应限于岩礁本身所产，而不包括其领海内及外地输入的资源。第三，开发岩礁本身资源必须合于经济原则，其标准应依争端发生时之当地情况认定之。"

1900 年《尖阁列岛探险记事》中说，同行的人中还有人说在山中看到人的白骨。[33]《钓鱼岛与竹岛》中说："昭和 53 年 5 月 12 日，一个称为'尖阁诸岛领有敢死队'的民族派的青年数人登上鱼钓岛，他们带着粮食，在那里过起了帐篷生活。他们下决心坚持到政府以某种方式实行有效控制为止，但包括第二小队在内在毅然实行了总共 20 天左右的有效控制后终于支撑不住了，据说撤离的原因是由于'营养失调'。"[34] 此外，岛上虽有过采集鸟粪、鸟羽，制作标本和采药等经济活动，但后来因有关资源如信天翁日渐稀少，经营活动无利可图，遂终止。自太平洋战争爆发后，数 10 年来钓鱼岛处于"无人岛状态"。[35]

根据以上情况可知，钓鱼岛不得拥有专属经济区或大陆架。

（二）钓鱼岛在海洋划界中的作用

根据众多的海洋划界实线，岛屿在划界中的作用有三种情况，即完全效力、部分效力或零效力。

钓鱼岛距福建省福州市和冲绳的那霸市皆为 420 公里，距最近的中国领土彭佳屿和日本领土先岛群岛各为 90 海里左右，恰在中日两国的中央。在中间线附近的岛屿在划界中的作用，国际实践中也是三种情况：1. 享有全效力的岛屿是面积较大、人口多的岛屿，如 1965 年英挪大陆架案中的设得兰群岛、1974 年日韩大陆架案中的对马岛。2. 享有部分效力的，如 1971 年意大利突尼斯大陆架划界协定中位于中间线附近或横跨中间线的意大利的 4 个岛屿，即兰佩杜萨（面积 3 平方英里）、利诺萨（面积 2 平方英里）、潘特莱里亚（面积 32 平方英里）和兰皮恩 (面积不足 1 平方英里）。前三者得到 13 海里，后者得到 12 海里。由于意大利当时主张的是 6 海里的领海，所得也包括大陆架。3. 属于无效力的有两种情况，一种只有领海，一种是连领海也没有。1968 年伊朗与沙特阿拉伯大陆架案中，位于中间线附近的伊朗的法尔西岛和沙特阿拉伯的阿拉比亚岛，只拥有 12 海里领海。1974 年《伊朗—阿联酋大陆架划界条约》中，由于波斯湾中的小岛阿布穆萨的主权在两国间存在争议，所以划界时该岛未被计及。[36] 1974 年，日韩大陆架划界时，

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33 [日] 高桥庄五郎：《钓鱼岛等岛屿纪事》（中译本），北京：海洋地质调查局 1983 年版，第 116 页。

34 [日] 上地龙典：《钓鱼岛与竹岛》（中译本），北京：国家海洋局海洋战略研究所 1988 年版，第 49 页。

35 [日] 上地龙典：《钓鱼岛与竹岛》（中译本），北京：国家海洋局海洋战略研究所 1988 年版，第 26 页

36 袁古洁著：《国际海洋划界的理论与实践》，法律出版社 2001 年版，第 35~40 页；马英九著：《从新海洋法论钓鱼台列屿与东海划界问题》，台北：正中书局 1986 年版，第 133~142 页。

所划界线终止于主权有争议的独岛（日称竹岛）之南，即该岛未参与划界。[37]

根据上述情况，钓鱼岛地处中间线附近，且面积很小，主权存在争议，在中日专属经济区大陆架划界中应赋予零效力为宜。

37 [韩]朴椿浩编著：《国际海洋边界——太平洋中部和东亚》，北京：法律出版社 1994 年版，第 158~162 页。

中日钓鱼岛争端的解决方式问题

宋玉祥 *

内容摘要: 在国际法上, 国际争端的程序问题与实体问题同样重要。从程序方面来讲, 武力解决方式与和平解决方式(包括政治方式与法律方式)是国际争端解决的 2 种基本方式。在中日钓鱼岛争端中, 由于武力解决方式的使用受到了很大限制, 和平解决方式便更趋重要。而对中国来说, 基于各方面因素的考量, 政治解决方式是"相对可行而不可取"的, 法律解决方式是"相对可取而不可行"的, 如果在目前状况下强行解决钓鱼岛争端, 其结果很可能是中日分割钓鱼岛列屿。本文拟从国际法角度对中日钓鱼岛争端的程序问题进行初步探析。

关键字: 钓鱼岛 争端解决方式

一、引 言

钓鱼岛列屿自古以来, 至少自明代以来即为中国先民最早发现并先占, 且根据"中国治世"之"普天之下, 莫非王土"的领土观, 当然为中国固有领土。但由于种种历史原因, 它们被日本窃取, 并通过《马关条约》被割占并强行占领至今, 成为中日之间严重的领土纠纷; 其中政治因素、经济因素、国防因素以及由于近代日本侵华所导致的民族感情因素密切交织在一起, 因而也成为目前世界上最为复杂、棘手的领土争端之一。

从国际法角度讲, 中日钓鱼岛争端主要涉及实体与程序两方面的问题。对于该列屿的归属问题, 中日双方, 包括各方的当局及学者, 都各执一词, 极力论证本国对于该列屿的主权。其中日方偏重于从国际法角度加以佐证, 而中方则多通过历史学者对历史事实与证据进行考证, 且大多倚重于实体性历史权利之论证, 对该争端之解决方式及其可行性进行深入研究者却甚为鲜见, 而对于争端之解决来说, 恰当的解决方式或程序与合理的依据同样重要——合理的主张并不必然具有可行性。

因此, 本文研究的落脚点既不在于对该争端历史的研究, 也不在于国际法上

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关于该争端的实体问题，而是在于探讨中日钓鱼岛争端的解决方式及其可行性问题，即程序问题。对于该问题，作者深入比较了国际争端的各种解决机制，包括武力解决方式和以外交方式与法律方式为代表的和平解决方式，并特别考量了中国台湾当局的参与，探寻了就中国而言最佳且可行的解决方式。

就研究方法而言，比较研究的方法与联系的方法是本文的主要研究方法，前者体现为对各种国际争端方式的比较研究，以及对就中国而言相对可取且可行的解决方式之探寻；后者集中体现于对中日钓鱼岛争端与东海大陆架争端的综合考量之中。本文的结论对于中国而言似乎是一种“悖论”，取决于中日政治、经济关系的大局，而不仅是钓鱼岛争端本身——孤立的研究方法所得出的结论很可能是一种“乌托邦”式的空想。

二、中日钓鱼岛争端解决方式的对比研究

（一）武力解决方式

国际争端的解决方式传统上可以划分为武力解决方式与和平解决方式。“传统国际法承认战争是国家推行政策的工具，是解决国际争端的合法手段。‘诉诸战争权’是主权国家的合法权利。”[1] 这种“诉诸战争权”是国家不证自明的天然权利，正如人权法上人之所以为人而所必须具备的基本人权。崇尚自然法的近代国际法之父胡果•格老秀斯甚至认为，“自然法原则中的任何内容都决不反对战争”，“如果发动战争的目的是为了保全我们的生命和身体完整，以及获得或拥有那些对生活来说是必要的和有用的东西的话，那么都是完全与那些自然法原则相一致的。”[2]

但第一次世界大战后，特别是“二战”后，国家的战争权逐渐受到了限制乃至禁止。1928 年《巴黎非战公约》[3] 首先对国家的战争权进行了限制，[4]《国际联盟盟约》进一步限制了国家的战争权。[5] 现行的国际武力控制制度规定于《联合国宪

1 王铁崖主编：《国际法》，北京：法律出版社 1995 年版，第 236 页。
2 格老秀斯著，坎贝尔英译、何勤华等译：《战争与和平法》，上海：上海人民出版社 2005 年版，第 50 页。
3 全称为《关于废弃战争作为国家政策工具的一般条约》，也称《白里安—凯洛格公约》。
4 《巴黎非战公约》第 1 条规定：“伟大的缔约各国以其各自人民之名义庄严宣布，斥责为国际争议之解决而诉诸战争，并在其相互关系上废弃战争作为实行国家政策的工具。”第 2 条规定：“伟大的缔约各国一致同意，他们之间可能发生的一切争端或冲突，不论其性质或起因如何，只能通过和平方式加以处理或解决。”
5 《国际联盟盟约》第 12 条规定：“非俟仲裁员裁决或法庭判决或行政院报告后 3 个月届满以前，不得从事战争。”

章》中，该宪章第 2 条明确规定，“各会员国在其国际关系上不得使用威胁或武力，或以与联合国宗旨不符之任何其他方法，侵害任何会员国或国家之领土完整或政治独立”，“各会员国应以和平方法解决国际争端，避免危及国际和平、安全及正义”。这不但禁止了战争权，而且禁止了其他一切形式的武力使用，唯遗留了“自卫”与“安理会授权或采取的行动”两项例外。[6]

由于晚近国际法已经严格限制了国家武力的使用，中国在钓鱼岛争端中也不例外。如要使用武力解决该争端，则必须符合《联合国宪章》规定的关于武力使用的上述 2 项例外之一。安理会难以为钓鱼岛争端之解决而授权中国使用武力或直接对日采取行动，因而中国是否有权使用武力解决钓鱼岛争端取决于是否符合“自卫”的条件。

笔者认为，中国在钓鱼岛列屿问题上仍然享有天然的自卫权。对于自卫权的行使，国际法院于 1986 年在“军事与准军事活动案（尼加拉瓜诉美国）”的判决中指出，“合法的自卫措施必须符合必要性和相称性的标准”，[7] 即“必要性”和“相称性”是自卫权行使的 2 个不可或缺的条件。前者是指自卫必须在遭受“武力攻击”时方可行使，它是自卫权启动的前提；后者是指在行使自卫权时的武力攻击应适度，不应过度攻击，以恢复遭受武力攻击前的原状为宜，这是在自卫性攻击过程中应遵守的规则。由于日本自 20 世纪 70 年代以来就对钓鱼岛列屿及其周围海域实施了军事控制，以海警力量驱赶甚至炮击在该海域作业的中国台湾渔民与民间保钓人士，并导致了人员伤亡，[8] 这种军事控制与封锁显然是一种武力攻击。虽然自卫的及时性是必要性的重要内容，但日本对中国领土钓鱼岛列屿的军事控制与封锁一直处于持续状态，即中国一直处于日本这种武力攻击状态。正如凯尔森所言，“只要该领土的地位还是军事占领，而这就意味着，被占领国和占领国之间还处在战争状态之中”，[9] 既然处于战争状态之中，进行自卫自然无可非议。因此，只要这种武力攻击状态存在，在其他方式不足以解决钓鱼岛争端的情况下，自卫便不违背及时性的要求，也即是必要的。王铁崖教授在评价海湾战争时说，“1990 年伊拉克占领科威特的全部领土，构成连续性的武装攻击，从而使自卫权的行使

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6 《联合国宪章》第 51 条规定：“联合国任何会员国受武力攻击时，在安全理事会采取必要办法，以维持国际和平及安全以前，本宪章不得认为禁止行使单独或集体自卫之自然权利。”第 42 条规定：“安全理事会如认为第 41 条所规定之办法（武力以外之办法）为不足或已经证明为不足时，得采取必要之空海陆军行动，以维持或恢复国际和平及安全。此项行动的包括联合国会员国之空海陆军示威、封锁及其他军事举动。”

7 王铁崖主编：《国际法》，北京：法律出版社 1995 年版，第 124~125 页。

8 《历年保钓事件记载》，下载于 http://www.diaoyuislands.org/fwl/1.html，2006 年 5 月 22 日。

9 汉斯凯尔森著，王铁崖译：《国际法原理》，北京：华夏出版社 1989 年版，第 243 页。

合法化”，[10] 这种“连续性的武装攻击”与日本对钓鱼岛列屿的持续军事控制与封锁如出一辙，中国当然仍然保有自卫权。

即使是对钓鱼岛列屿实施了非法侵占的日本，其学者也极力鼓吹武力解决方式，并强烈主张将钓鱼岛列屿列于《美日安保条约》之中，企图借美国的力量武力保护其对钓鱼岛列屿的实际控制，甚至对美国的相反立场以战争威胁相要挟：“对于能够面不改色地大声叫嚣著理论上的矛盾，任意片面变更态度的这种做法，不禁令人想起当年在凡尔赛和平会议上，美国威尔逊总统那前后矛盾的言行，引发了日本人对美国严重的不信任，进而惹起日本对美国开战之事。”[11] 这种赤裸裸的战争叫嚣行为，充分暴露了日本不遵守国际法的心态，反衬了中国行使自卫权的必要性。

（二）和平解决方式

1. 政治方式

“所谓国际争端的和平解决方法，是以武力以外的方法解决国际争端，即：用政治的方法（亦称为外交的方法）或法律的方法来解决国际争端”，[12] 而“政治方法，有时亦被称为外交方法，是指法律方法以外的争端双方解决方法和争端当事国以外的第三方解决方法，一般包括：谈判、协商、调查、斡旋、调停、和解”。[13] 不论其名称与形式如何，其实质在于争端之解决的主导权位于争端当事方手中，最终结果是否对当事方有拘束力完全取决于当事方的同意；即使有第三方的参与，该第三方的决定对当事方也无拘束力，除非得到当事方的同意。

在选择国际争端之解决的和平方式时，“国家行为体更相信和习惯于采用法庭外的外交方法和谈判智慧”，[14] 而大国更是如此。与司法以公正为最终价值目标不同，外交方式是建立在实力基础之上的，大国往往无需借助司法程序，凭依其实力通过外交方式解决争端，能获得较司法方式更多的国家利益。因此，大国更倾向于通过政治途径解决该争端，而往往明确反对提交国际仲裁或司法，限制乃至排斥第三方的介入。事实上，法律解决方式是力量弱小的国家所乐于采取的争端解决方式，法律在某种程度上就是对弱者的援助。“在国家实力无法与大国相抗衡的现实的条件下，借助国际组织和国际司法机制，是小国实现自身利益诉求和

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10 汉斯·凯尔森著，王铁崖译：《国际法原理》，北京：华夏出版社 1989 年版，第 125 页。

11 [日] 中村胜范：《美日安保条约与尖阁诸岛》，载于程家瑞主编：《钓鱼台列屿之法律地位》，台北：东吴大学法学院 1997 年版，第 79 页。“这种做法”系指美国在中日钓鱼岛争端中持中立立场，将钓鱼岛列屿排除于《日美安全条约》适用范围之外的做法。

12 王铁崖主编：《国际法》，北京：法律出版社 1995 年版，第 569 页。

13 王铁崖主编：《国际法》，北京：法律出版社 1995 年版，第 569 页。

14 苏晓宏：《大国为什么不喜欢国际司法》，载于《法学》2003 年第 11 期。

国际正义的一种机会”。[15] 中、日两国都是深具实力且实力相当的大国，而大国都对以外交谈判的方式解决争端充满自信，显然倾向于外交方式。

然而，对于争端解决的结局来说，一切外交方式，特别是建立在实力相当的国家之间的谈判，其结果往往为双方的互让与利益的折衷，而不会是全得全失的结局。因为在无法通过实力压制对方的情况下，全失的结局是争端当事方都无法接受的，假如未能达成利益的折衷，便意味着谈判的失败。因此，以外交方式解决钓鱼岛争端，其结果很可能是中日分割钓鱼岛列屿。即使是由中方或日方单独取得该列屿，也必须为对方从其他方面进行利益上的补偿。

通过谈判达成分割钓鱼岛列屿的结局，虽然对于中日双方来说都是不尽人意的，但相对于全失的结局而言，又可能都是勉强可以接受的。

2. 法律方式——国际仲裁与国际司法解决

所谓解决国际争端的法律方式是指用仲裁和司法判决来解决国家之间的争端，[16] 即法律方式主要包括仲裁与司法 2 种途径，其根本特征在于，虽然是否提交仲裁或司法解决取决于当事各国的共同同意，但一经当事国同意，争端解决的主导权便掌控于第三方实体之手，其作出的裁决或判决对于当事各方具有拘束力，而无需再次经过当事方的同意。

与外交方式相比，法律方式的解决依据在于法律规则，包括实体规则和程序规则，而不是实力与谈判技巧，所以一般会较为平等地对待当事各方，结果也较为公正；且国际间法院与仲裁庭也有着处理领土争端与大陆架划界案件的丰富经验，其作出的判决或裁决较为令人信服，一般也会得到有效执行。另外，法律方式的解决通常是确定的、终局性、永久性的，争端之解决较为彻底，一经解决完毕，其后便不再容易引发争议。从中日关系的大局来看，提交国际仲裁或司法以终局性、永久性地解决钓鱼岛争端，有利于减少两国之间的摩擦与冲突，促进两国关系的健康发展。

虽然如此，但就中日钓鱼岛争端的具体情势而言，法律方式的使用是不现实、不可行的。在“国际无政府状态”下，无论是仲裁还是司法的使用都需要经过当事国的同意。未经国家同意，即使是国际法院也没有管辖权。根据《国际法院规约》第 36 条的规定，国际法院对事管辖权有 3 类：(1) 争端当事国提交的一切案件，不限于法律性质的争端，即所谓的“自愿管辖”；(2)《联合国宪章》和现行条约中特别规定的事件或争端，即所谓的“协定管辖”；(3) 国家事先声明接受国际法院

15 苏晓宏：《大国为什么不喜欢国际司法》，载于《法学》2003 年第 11 期。

16 传统的国际法把解决国际争端的方法主要分为强制性和非强制性 2 大类。非强制方法又分为政治的解决方法和法律的解决方法 2 种，后者如仲裁和司法解决。参见王铁崖主编：《国际法》，北京：法律出版社 1995 年版，第 453 页。

管辖的一切法律争端，即所谓的“任择性强制管辖”。[17] 但作者认为，中日双方都难以同意将该争端提交仲裁或司法，其原因众多，主要有以下几点：

(1) 中日双方的共同原因

中日钓鱼岛争端的特殊性在于其与政治密切相关。事实上，与其说该争端之解决的困难在于其法律性，不如说是在于其政治性。

对于中日双方来讲，在近代史上，领土的变动都是因日本侵华造成的，领土问题因日本侵略问题而格外敏感。中国将日本对钓鱼岛列屿的领土主张看作是日本军国主义的死灰复燃，鉴于近代日本军国主义对中国人民造成的严重伤害，它往往涉及中华民族的民族感情。有学者明确指出，关于这些岛屿的民族感情是所有各方的一个问题，尤其是对于近代历史上受到日本侵略的中国（包括大陆和台湾地区）人民来说。[18] 而日本也将中国的领土主张看作民族主义的复兴，时恐因其近代对中国的侵略行为而引起中国的报复，所以双方对领土问题都格外警惕。

更为敏感的是，钓鱼岛争端与中日东海大陆架划界密切相关，直接关系到东海大陆架上之油气资源的归属。钓鱼岛海域之大陆架上储藏着丰富的油气资源，[19] 联合国亚洲暨远东经济委员会于 1968 年 10 月 12 日至同年 11 月 29 日期间，利用美国的调查船进行了东海海域之地球物理学的调查，并于翌年 5 月发表了此次调查的报告书。该报告书断定，中国台湾与日本之间的大陆架很可能是世界上油气储量最为丰富的海底油田之一，在台海盆地约 20 万平方公里的大陆架上，至少蕴藏着如整个波斯湾同样巨量的石油，最保守的估计为 800 亿桶，[20] 而钓鱼岛列屿恰恰处于该储油海盆的边缘地带。随着“二战”后国际海洋法上大陆架制度的确立，钓鱼岛列屿在东海大陆架划界中的重要地位便浮现出来，其主权的归属直接关乎东海油气资源的分配问题。这些丰富的油气资源对于国土狭小、资源极其贫乏的日本来说，其重要性不言而喻；对于中国而言，随着国民经济的快速发展，油气资源需求与日俱增，自 1993 年成为石油产品净进口国、1996 年成为原油净

17 王铁崖主编：《国际法》，北京：法律出版社 1995 年版，第 590 页。《国际法院规约》第 36 条规定：“(1) 法院之管辖包括各当事国提交之一切案件，及联合国宪章或现行条约及协约中所特定之一切事件。(2) 本规约各当事国可随时声明关于具有下列性质之一切法律争端，对于接受同样义务之任何其他国家，承认法院之管辖为当然而具有强制性，不须另订特别协定。”

18 Phil Deans, The Diaoyutai/Senkaku Dispute: The Unwanted Controversy, at http://www.kent.ac.uk/politics/ research/kentpapers/deans.html, 20 March 2006.

19 [日] 尾崎重义著：《尖阁诸岛的归属问题（上）》，载于程家瑞主编：《钓鱼台列屿之法律地位》，台北：东吴大学法学院 1997 年版，第 228 页。另参见吴天颖著：《甲午战前钓鱼列屿归属考——兼质日本奥原敏雄诸教授》，北京：社会科学文献出版社 1994 年版，第 7~8 页。

20 [日] 尾崎重义著：《尖阁诸岛的归属问题（上）》，载于程家瑞主编：《钓鱼台列屿之法律地位》，台北：东吴大学法学院 1997 年版，第 228 页。另参见吴天颖著：《甲午战前钓鱼列屿归属考——兼质日本奥原敏雄诸教授》，北京：社会科学文献出版社 1994 年版，第 7~8 页。

进口国以来，[21] 至 2004 年中国进口原油已达 1.2 亿吨，而至 2010 年，中国的石油总需求规模将达到 3.5~3.8 亿吨，石油进口依存度将达到 51.4％ ~52.6％，[22] 也面临着严重的油气资源紧缺。中日双方的这种资源储量及需求状况决定了钓鱼岛海域的油气资源直接影响到两国国民经济的发展，并超出了经济利益的范畴而跨入政治领域，其利益价值具有根本重要性。

传统上，这种涉及对国家具有根本重要性的经济、政治利益，如荣誉的争端，为“不可裁判的争端”。正如有学者所言，“按照一种流行的意见，现行国际法并不适用于国家之间可能发生的一切争端，因为有一些争端按照其本身的性质不是对争端适用现行国际法的国际法庭的判决所能决定的。在仲裁条约中，这种争端常被排除于这些条约所设立的国际法庭的管辖权之外；这种争端就是涉及争端方的重大利益、独立或荣誉的争端。”[23] 中日钓鱼岛争端基于民族感情因素、政治因素以及严重的经济因素，具有强烈的不可裁判色彩。况且，“现代东北亚纷争水域中的离岸岛屿主权的争执，不太可能由司法或采由第三国涉入的其他方式来解决”，[24] 中日两国也不例外。

就中日钓鱼岛争端而言，法律解决方式所导致的结果往往是“全得全失”。如果提交国际仲裁或司法解决，无论是中方还是日方胜诉，都会被判归钓鱼岛列屿的全部，即要么由中方获得整个列屿，要么由日本整体获得，而不是分割钓鱼岛列屿。因为中日双方的证据都是支持“全得全失”这一结果的：如果中国的证据有效且被法庭或仲裁庭采纳，那么钓鱼岛列屿在 1895 年 1 月 14 日之前即为“无主地”，中国将会获得整体钓鱼岛列屿的主权；反之，如果中国的证据被法庭或仲裁庭判定无效，而日方的证据有效，那么钓鱼岛列屿在该日期之时便已为日本先占取得，而不再是“无主地”，当然由日方整体获得。但是，无论是对于中方还是对于日方来说，“全失”的结局都是无法承受的，对其当政者而言无疑是一种政治灾难。因此，双方在将该争端提交司法或仲裁时显得格外谨慎，双方也都已明确声明拒绝以仲裁与司法方式解决该争端：日本政府曾于 1996 年 7 月 19 日在联合国发布一份新闻稿，表示日本政府不认为有将来将本案提交地区性法庭处理之理由，因为事实上领土争端并不存在。中华人民共和国亦于 1996 年 10 月间警告美国不得插手本争端案。其外交部发言人曾表示：“此为涉及中、日两国之问题，第三者不得插手”。[25]

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21 宣晓伟：《破解中国石油进口困局》，下载于 http://www.china.org.cn/chinese/OPc/727528.htm，2006 年 4 月 23 日。

22 发改委：《中国 2010 年石油进口依存度将突破 50％》，下载于 http://news.xinhuanet.com/fortune/2005-02/16/content_2583742.htm，2006 年 4 月 23 日。

23 汉斯•凯尔森著，王铁崖译：《国际法原理》，北京：华夏出版社 1989 年版，第 318 页。

24 [韩] 朴春浩：《东北亚解决领土争执之某些消极的因素》，载于程家瑞主编：《钓鱼台列屿之法律地位》，台北：东吴大学法学院 1997 年版，第 74 页。

25 Jr. William Schachte：《钓鱼台 / 尖阁群岛争端之我见》，载于台湾法学会、台湾国际法研究会合编：《钓鱼台国际法研讨会论文与讨论纪实汇编》（1997 年），第 62 页。

(2) 中日双方各自的原因

①日方拒绝司法或仲裁的特殊原因

日本目前控制着钓鱼岛列屿，在中日钓鱼岛争端之中占据有利地位。在国际法上，“实际控制”这一事实具有一定的法律效力，从某种程度上说，事实产生权利，“掌有即是一半的法律”。[26] 日本企图通过时间的流逝来造成并巩固其“实际控制”这一既成事实，通过这种长时间的“实际控制”来弥补其侵占之合法性的不足，当然倾向于不提交仲裁或司法。进言之，日方甚至拒绝以任何方式解决钓鱼岛争端，因为其认为关于钓鱼岛列屿之主权问题，中日双方不存在争端，利用其占有该列屿的优势颠倒是非地声称日本对钓鱼岛列屿享有合法主权。

②中国拒绝司法或仲裁的特殊原因

在钓鱼岛争端之解决中，中国对于司法或仲裁等法律方式之拒绝，主要基于历史经历、中西文化的异质以及中国目前两岸分治的现况。

首先，近代国际法曾对中国造成过深深的伤害，留下了难以弥合的历史伤疤。自中国于 19 世纪中期被迫融入近代国际法体系以来，国际法几乎从未为中国伸张正义；相反，却往往在西方列强侵略中国的过程中助纣为虐、落井下石。中国在长达几千年的时间内实行的习惯法体系是中国世界秩序，这种秩序也得到了有效的实施，运行良好。自 1840 年鸦片战争以来，西方列强的入侵逐渐破坏了这种习惯法秩序，近代国际法思想随之导入。但中国世界秩序被瓦解后，“并未被以主权国家体系为基础的近代国际秩序所代替，而代替的是一种不平等条约的秩序。中国对外关系所适用的不是国际法原则和规则，而是不平等条约。”[27] 西方列强拒绝将近代国际法秩序适用于中国，却以该秩序的基本原则之一“约定必须信守”强迫中国遵守不平等条约秩序，使近代中国的主权在政治、经济、国防、文化等诸领域都遭到了严重侵犯，特别是在东北、西北与西南方面丧失了大片领土。在“一战”后召开的巴黎和会上，中国作为战胜国参加和会，并引用了近代国际法上著名的“情势变迁”原则以收复山东与废除不平等条约，遭到的却只是英、法、美等大国的抵制。会议最终还是拒绝了中国代表废除不平等条约的合法要求，并将原德国在中国山东的权利转移给日本。

其次，中国具有与西方文化相异质的独特文化传统，这种文化传统具有独特的思维方式与语言表达方式，即采用形象思维与实质逻辑，而不是西方文化严密

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26 [韩] 朴春浩：《东北亚解决领土争执之某些消极的因素》，载于程家瑞主编：《钓鱼台列屿之法律地位》，台北：东吴大学法学院 1997 年版，第 73 页。

27 王铁崖著：《国际法引论》，北京：北京大学出版社 1998 年版，第 391 页。

的形式逻辑，并体现于其语言表达方式之中。“中西法律文化的分野，形成了在价值理念、政治组织方式、权力运行、政治逻辑思维等各方面都具有的不同表现和特点……以国际司法为核心制度的国际法治生成并根植于西方文明背景，其基本原则和运作方式都带有强烈的西方文化的色彩，与中国本土文化传统和固有思维方式格格不入。”[28]

这种思维方式与语言表达方式致使西方学者难以充分、合理理解中国证据资料的本意，使中国古代本来确定、充分的关于钓鱼岛列屿的证据变得不确定，乃至歪曲。中国明清遣琉册封史的述职报告对于“黑沟”或“郊”为“中外之界”的记载，除了被日本某些御用学者恣意歪曲外，依据根源于西方文化传统的近代国际法只能被解释为“‘无主地’与外之界”。[29]

近代国际法给中国造成的历史伤疤与中西文化传统的异质最终共同导致了中国对于近现代国际法的信任危机，中华人民共和国于 1972 年撤回了中华民国政府 1946 年关于接受国际法院强制管辖的声明便是最好的例证。西方国际法学者也对此作出了深刻地描述：“在影响国际法院的政治因素当中，最突出的因素是怀疑法院的公正性，害怕国际法缺乏明确性，和最后是公然表示无视法院意见的日益增长的趋势。……来自第三世界的法官代表着一种文化背景，它倾向于赞成在传统法规的实质上来一个极端的变化，使它适应不发达国家目前的需要。因此，较为坚持法规观念的国家对向国际法院提出争端感到犹疑……”[30] 迄今为止，中国尚未就任何政治、领土方面的中外争端提交国际仲裁或司法解决。这种信任危机严重妨碍了中国将钓鱼岛争端诉诸仲裁或司法。

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28 苏晓宏：《中国参与国际司法的困阻与对策分析》，载于《华东师范大学学报（哲学社会科学版）》2004 年第 3 期。

29 清康熙二十三年（1683 年）遣琉册封使王辑的述职报告《使琉球录》记载：“（二十四日）辰刻过彭佳山，酉刻遂过钓鱼屿……二十五日见山，应先黄尾，后赤屿，无何遂至赤屿，未见黄尾屿也。薄暮过郊（或作沟）……问郊之义何取？曰：中外之界也。界于何辨？曰：悬揣耳。然倾者恰当其处，非臆度也。”清康熙二年（1663 年）册封使张学礼的述职报告也作出了类似记载。然对于这种表述，日本御用学者，如奥原敏雄等却曲解为：“因为册封使录是中国人写的，如果赤屿是中国领土，是以久米岛为界的话，那么，任何人都理当无庸置疑地加以记述。譬如写作：‘赤屿乃中国与琉球为界之地方山也。’。但是杨氏（指台湾学者杨中揆）所述的逻辑，却一开始就忽视了在确定属中国抑或属琉球之前，也有可能出现不属于两国中任何一方的情况，问题就出在这里。”转引自吴天颖：《甲午战前钓鱼列屿归属考——兼质日本奥原敏雄诸教授》，北京：社会科学文献出版社 1994 年版，第 52 页。其意思也就是以近现的国际法为标准衡量中国古代的习惯法秩序，如果当时的中国政府未将赤尾屿标示为“中国赤屿”，该岛屿便成为近现代国际法上的“无主地”。殊不知，根据“普天之下，莫非王土”的领土观，在中国世界秩序内是没有无主地可言的。

30 马克斯•普朗克比较公法及国际法研究所主编，陈致中、李斐南译：《国际公法百科全书》，广州：中山大学出版社 1998 年版，第 110~111 页。

最后，中国目前两岸分治的现状决定了其不可能将钓鱼岛争端提交仲裁或司法解决。

由于历史原因，中国在台湾海峡两岸形成了两岸分治的状态，台湾地区事实上存在着高度的自治，大陆存在一个合法的全国性政府——中华人民共和国政府，且得到世界上绝大多数国家的承认。这种两岸分治的状态使中方解决钓鱼岛争端的力量发生了严重的内耗。

对于台湾当局来说，避开中国大陆单方面与日本通过司法或仲裁方式解决钓鱼岛争端可能导致国际社会对其“独立”状态的法律承认，因为无论是国际仲裁还是司法，领土争端的当事方都是国家或类似实体——在国际法院具有诉讼资格的实体只限于“国家”，[31] 而仲裁也给予“台独”以极高的法律支持。因此，中国台湾如果单方面决定采用仲裁或司法与日方解决该争端，则可以以迂回的方式通过该争端之解决走向“台独”，[32] 这必将遭到中国大陆的极力抵制。同时，日本在同中国大陆交涉该争端不成的极端情况下，如果对中国台湾的这种行为予以配合，则很可能干涉中国统一这一内政；在其他争端中如果中国大陆不能满足其利益要求，日本则亦可能利用中国台湾的这种“台独”企图将钓鱼岛争端变为向中国大陆要挟的筹码，进而在国际关系与国际战略中制肘中国。中国大陆当然不会以“台独”为代价换取钓鱼岛列屿的主权，况且利用法律方式解决该争端的结果是否必然导致中国对该列屿享有主权尚不确定。

对于中国大陆来说，其是日本目前承认的作为中国之代表的唯一合法政府，所以就双方而言具有仲裁或诉讼资格的中方当事者只有中国大陆。在这种情况下，一方面，如果提交国际仲裁或司法，那么在中国一方，只有中国大陆具有仲裁或诉讼资格；若中国台湾当局欲参与仲裁或诉讼，只能参与中国大陆一方，作为共同的诉讼当事一方——任何将台湾当局作为独立的当事一方或参与第三方的做法都是中国大陆所不能接受的。但如果采取将中国大陆与中国台湾作为共同一方的做法，则是目前的台湾当局所不能接受的，因为这种做法意味着台湾当局在某种程度上同意两岸统一，而目前台湾当局尚无接受两岸统一的强烈意向。如果强行将中国台湾排除在外，无疑会使两岸本来业已紧张的关系与分裂状态雪上加霜，增加台湾民众的反感，为“台独分子”增添台独的藉口，助增其“台独”倾向，虽然作为合法的全国性政府，中国大陆在法律上有权采取这种做法。

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31 《国际法院规约》第 34 条第 1 款规定：“在法院得为诉讼当事国者，限于国家。”

32 在台湾法学会与台湾国际法研究会于 1997 年在台湾宜兰召开的“钓鱼台国际法研讨会”上，诸多学者都为台湾当局避开中国大陆而单方面诉诸国际法院献计献策，时任宜兰县长的游锡堃也极力鼓吹通过钓鱼岛争端的解决“维护台湾的主权”、提升“未来台湾的国际地位”。详见台湾法学会、台湾国际法研究会合编：《钓鱼台国际法研讨会论文与讨论纪实汇编》（1997 年）。

另一方面，由于中国大陆一直主张中国对钓鱼岛列屿拥有主权的重要依据在于该列屿为台湾岛群不可或缺的组成部分。如果在裁决或判决中中国胜诉，那么从法理上讲，虽然中央政府有权自主决定行政区划，但将钓鱼岛列屿划归台湾地方政府管辖似乎更为合理，也更能为台湾民众所接受，但这在两岸尚未统一且“台独”倾向越来越严重的情况下，是中国大陆所不能接受的。

综上所述，在“国际无政府状态”的国际社会中，由于不存在国内法那样的强制管辖权，提交仲裁或司法是建立在冲突双方有一定互信度以及对国际法院与作为裁判依据的国际法之信任的基础之上，但中日双方因历史积怨而忌心甚重，且中国对国际仲裁和司法以及国际法一贯持不信任态度，从未有将争端提交国际仲裁或司法的实践与先例，加之钓鱼岛争端严重关乎国家领土与政治、经济利益，更何况中国传统上的华裔秩序和语言逻辑、思维方式与近现代国际法相去甚远，采用法律方式对中国亦有不利。另外，中国目前分裂、分治的政局使中方解决钓鱼岛争端的实力产生了严重的内耗，在两岸尚未统一的状态下解决该争端必然影响到两岸的政治状态。因此，中国提交国际仲裁或司法的可能性不大，采用法律方式对于中国来说虽是相对可取的，却是不可行的。

（三）中日钓鱼岛争端之解决的可能性结局

关于中日钓鱼岛争端的解决，在相关证据与不同解决方式的共同作用下，可能有以下几种结局：

第一，“全得全失”的结局，即钓鱼岛列屿为中方或日方整体获得。

这种结局是法律方式所导致的，无论是仲裁还是司法，因为中日双方的证据都是支持“全得全失”的。如上文所述，如果中国的证据有效且被法庭或仲裁庭采纳，那么钓鱼岛列屿在 1895 年 1 月 14 日之前显系“无主地”，钓鱼岛列屿便由中国整体获得；反之，如果中国的证据被法庭或仲裁庭判定无效，而日方的证据有效，那么钓鱼岛列屿在该关键日期之时便已为日本先占取得，当然不再是“无主地”，于是便由日方整体获得。

外交方式显然不会导致这种结局，因为在以外交方式解决该争端时，“全失”的结局是当事双方都无法接受的。在未产生这种结局之前，谈判便已告破裂。

第二，“有得有失”的结局，即中日双方分割钓鱼岛列屿。

这种结局往往是由外交方式产生的。外交解决方式的结果往往是当事各方利益的折衷。如果以该方式解决钓鱼岛争端，考虑到谈判的特征与双方的谈判实力，其结局很可能是中日双方分割钓鱼岛列屿。而基于钓鱼岛列屿的地理分布与面积大小，中国很可能仅获得钓鱼岛一岛，黄尾屿与其附近小岛和赤尾屿则很可能划归日本。即使由一方整体获得，另一方也必须从其他方面作出利益补偿。

第三，中日双方“搁置争议，共同开发”钓鱼岛列屿及其海域的资源。

这是晚近中国处理海洋边界及离岸岛屿问题的一贯政策，如在南海诸岛问题上中国便一直坚持这种立场，它便于减缓中国国家宏观战略之实施的国际阻力。然而，这种“搁置争议，共同开发”的建议并未得到相关他国的认同与实施，似乎仅是中国的一厢情愿。在实施过程中，这种建议往往仅是中国单方面的呼吁、单方面搁置争议，其结果却是鼓励相关他国对我国权益的一步步蚕食。

第四，中日双方相互永久性放弃钓鱼岛列屿，但不对第三方放弃，共同排除第三方取得。

这种结局有 3 个特征，一是放弃是相互的；二是放弃是永久性的；三是并不对第三方放弃，即对于第三方而言，该列屿并非已被抛弃的领土，因而不能通过先占方式加以取得。

这种结局相对而言便于中日双方接受，且有利于减轻中日东海大陆架划界的阻力，促进资源开发，但国际社会尚未存在过类似的国家实践。虽然回避了钓鱼岛列屿的主权问题，但在使用问题上仍会产生争议，该结局出现的机会亦甚微。

第五，消灭争端标的，即以核力量炸除钓鱼岛列屿。

这种解决方式及其结局仅为民间人士一种极端的立场。[33] 由于争端标的归于消灭，中日双方及其国民都得不到利用，这是对自然赋予人类之财产的恶意破坏，是不道德的。因此，这种结局也仅是一种理论上的假设，只有在极端情况下才会变为现实。

三、中日钓鱼岛争端与东海大陆架划界之解决的关系

（一）捆绑式解决

在东海海域，中日之间同时存在 2 项严重的争端，即钓鱼岛争端与东海大陆架和专属经济区划界争端。[34] 前者是关于岛屿主权问题，后者是关于海床、水体及其资源的归属问题，二者在国际法上密切相关。

关于这 2 项争端之解决的关系，可采取捆绑式一体解决与独立分体解决 2 种方式。中国在这 2 项争端中应采用何种方式？作者认为，捆绑式一体解决对中国严重不利，采用分体解决的方式更能实现有利于中国的结局。

陆地领土是大陆架主张的根本依据，[35] 如果采用 2 项争端一体解决，那么钓

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33 《中国应断然回击日本的军事挑衅》，下载于 http://www.ren-jian.com/index.asp?act=ViewEachArticle & ArticleID= 69，2006 年 4 月 22 日。

34 鉴于东海大陆架划界问题更为复杂，更具代表性，本文仅论述钓鱼岛争端与东海大陆架划界争端的关系。

35 《海洋法公约》第 76 条第 1 款规定：“沿海国的大陆架包括其领海以外依其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土。”

鱼岛主权问题必然成为东海大陆架划界的先决条件。由于日本在目前的中日钓鱼岛争端中占有优势地位，一旦钓鱼岛列屿划归日方，日方很可能以钓鱼岛列屿为跳板蚕食中国东海大陆架。

虽然 1982 年《联合国海洋法公约》规定“不能维持人类居住或其本身的经济生活的岩礁，不应有专属经济区或大陆架”，[36] 但该公约并未对“人类居住”、“本身的经济生活”与“岩礁”这些术语作出明确的定义，极易引发歧义：(1)“人类居住”是暂时性还使永久性居住？开发自身及其周围的资源以从他处换取人类居住之所需，是否应理解为能够“维持人类居住”？如此，任何岛屿只要具有一定的面积，经过开发便可能维持人类居住。(2)“本身的经济生活”如何理解？是否应理解为存在“人类生活”？钓鱼岛上有植被、有较大数量的鸟类、有淡水，这些生物的存在是否能理解为能维持“本身的经济生活”？ (3) 钓鱼岛列屿是否为“岩礁”？钓鱼岛上有大量植被，说明具有较厚的土壤，能否仍然被界定为“岩礁”？显然，从通常意义观之，将钓鱼岛列屿，特别是钓鱼岛本岛界定为“不能维持人类居住或本身的经济生活的岩礁”是不尽人意的。

虽然也有中国台湾学者主张“就国际法（主要为新海洋法）而言，在东海海床划界中，面积微小，无人居住，距岸甚远，且主权有争执的钓鱼台列屿，不应具有任何划界效力。”[37] 但这种结论是否能为仲裁庭或国际法院采纳尚不确定，只是一种理论上的分析。在国际仲裁或司法实践中，“远离大陆并靠近在划界国家间假定之中间线的岛屿，（在划界中）常被赋予部分效力。”[38] 在中日东海大陆架划界谈判中，日方的方案明显将钓鱼岛列屿作为其大陆架主张的依据，[39] 一旦钓鱼岛列屿被判归日本，这种依据很可能为国际仲裁庭或法庭所考量。

因此，捆绑式的解决方式对于中国来说是不可取的。

（二）分别解决

所谓“分别解决”，指中日钓鱼岛争端与东海大陆架争端隔离独立解决。作者认为，这种解决方式对于中国来说更为可取。究其原因，在于以下几点：

其一，钓鱼岛争端仅仅涉及中国与日本两个当事方，但东海大陆架争端还涉及韩国等第三方问题。如果采用捆绑式的一体解决方式，由于添加了新的当事方，徒增争端的复杂性，而且对韩国也甚为不便。

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36 《联合国海洋法公约》第 121 条第 3 款。

37 马英九著：《从新海洋法论钓鱼台列屿与东海划界问题》，台北：正中书局 1986 年版，第 156 页。

38 Kuen-chen FU, *Equitable Ocean Boundary Delimitation*, Taipei: 123 Information Co., 1989, p. 252.

39 《争油气资源露领土野心，东海谈判日漫天要价》，下载于 http://military.china.com/zh_cn/head/83/20051008/12718181.html，2006 年 4 月 24 日。

其二，中国对于东海大陆架之主张的依据主要在于“自然延伸”原则与衡平原则，即使不考量中国领土——钓鱼岛列屿在大陆架划界中的效力，中国仍然可以基于大陆的自然延伸而主张东海大陆架并及于冲绳海槽。而此时由于钓鱼岛争端尚未解决，钓鱼岛列屿的归属问题尚存争议，该列屿在国际仲裁或司法实践中并不能作为日本主张大陆架的依据，难以得到仲裁庭或法庭的考量——既然领土主权问题尚存争议，那么由该领土衍生的权利必然也存在争议。在未被授权裁定领土归属的情况下，仲裁庭或法庭是难以裁定这些衍生权利的。

另外，采用分体解决也存在不同的争端解决顺序，即应首先解决钓鱼岛争端还是东海大陆架划界争端？对于中国来说，首先解决东海大陆架争端，而后解决钓鱼岛争端，似乎更为有利。理由如上文所述，中国对东海大陆架之主张的依据在于“自然延伸”原则，而无需凭借钓鱼岛列屿的考量因素；而如果首先解决钓鱼岛争端，一旦该列屿为日本获得，则容易变为日本主张东海大陆架的依据，损及中国在东海大陆架争端中的优势地位。

四、结　论

关于钓鱼岛争端的解决程序或方式问题，对于中国来说，基于中国的文化传统、近代历史经历、目前的政局状况以及中国的国力现实，外交方式是“相对可行而不可取”的，而仲裁与司法等法律方式则是“相对可取而不可行”的。如果在目前状况下强行解决钓鱼岛争端，必然是通过外交方式，其结果很可能是中日分割钓鱼岛列屿。至于中国政府是否决定解决该争端以及选择何种解决程序，将取决于中国政府对该争端之结局的接受程度，即中国政府是仅能接受“全得”的结局，还是能够接受分割钓鱼岛，甚至“全失”的结局？

需要指出的是，钓鱼岛争端虽然是中日之间严重的领土争端，但并非中日关系的全部，甚至不是其主要方面。鉴于其他情势的考量，可以预见，在不远的将来，中国可能不会因该争端而影响中日政治、经济关系的大局。一旦影响到中日关系的整体，钓鱼岛争端就可能被双方搁置——事实上，“搁置争议、共同开发”乃中国处理领土与海洋划界问题的重要政策，虽然这种政策对中国来说并不是十分有利，钓鱼岛争端也不宜久拖不决。

在钓鱼岛争端问题上，中国一方由于两岸的分裂、分治状态使中方的力量发生了严重的内耗，并为日本所乘。两岸当局应有民族大义意识，而不应计较于一己之私，始能使该争端之解决产生有利于中国的结局，这也是中华民族复兴所必需。

中国东海二百海里外大陆架法律问题初探

贾 宇 *

东海是一个半封闭海，位于中国大陆和琉球群岛之间，北接朝鲜半岛，南至台湾海峡，面积约 77 万平方千米，最宽处不足 400 海里。[1] 东海是一个宽大陆架海区，大陆架和大陆坡面积约为 55 万平方千米，约占全海区面积的 80%。

东海大陆坡北宽南窄，最宽处 70 千米，最窄处不足 30 千米。冲绳海槽是东海的一个重要地理单元，南北长 1200 千米，东西宽 90~125 千米，北部水深 600~800 米，南部水深超过 2000 米，[2] 最大深度可达 2719 米。[3]

一、中日在东海的海洋划界问题

1982 年《联合国海洋法公约》（以下简称《公约》）将自然科学意义上作为一个整体的海洋划分为具有不同法律地位的区域，包括领海、专属经济区和大陆架等。当沿海国对专属经济区和大陆架的权利主张发生重叠时，需要进行海洋划界。中日在东海的海洋划界问题，既包括专属经济区划界，也包括大陆架划界。

根据《公约》，沿海国对其领海以外邻接领海的一定范围的海域享有专属经济区和大陆架的权利。根据《公约》第 55 条和第 57 条，专属经济区是沿海国领海以外并邻接领海的一个区域，其宽度从领海基线量起不应超过 200 海里的距离。根据《公约》第 76 条，沿海国的大陆架包括其领海以外依其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土，如果从测算领海宽度的基线量起到大陆边的外缘的距离不到 200 海里，则扩展到 200 海里的距离。

沿海国均有权主张领海以外的专属经济区，以及依陆地领土的全部自然延伸的大陆架，或最大扩展到 200 海里的大陆架。中日双方均已通过国内立法提出了各自的专属经济区和大陆架权利主张。1998 年《中华人民共和国专属经济区和大

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1 International Hydrographic Organization, *Limits of Oceans and Sea* (Special Publication No. 23), 3rd ed., p. 1953.
2 海洋发展战略研究所：《专属经济区和大陆架》，北京：海洋出版社 2002 年版，第 10 页。
3 管秉贤：《中国大百科全书：大气科学、海洋科学、水文科学》，北京：中国大百科全书出版社 1987 年，第 169 页。

陆架法》第 2 条规定："中华人民共和国的专属经济区，为中华人民共和国领海以外并邻接领海的区域，从测算领海宽度的基线量起延至 200 海里。中华人民共和国的大陆架，为中华人民共和国领海以外依本国陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土；如果从测算领海宽度的基线量起至大陆边外缘的距离不足二百海里，则扩展至二百海里。"[4]

日本于 1996 年 6 月 14 日颁布了《专属经济区及大陆架法》。该法规定，日本的专属经济区是指从日本领海基线起 200 海里的海域。超过中间线的部分以中间线为其专属经济区的外部界限，如日本与有关国家之间有可代替中间线的协议线，则以此线为准。该法第 2 条确认日本根据《公约》对其大陆架实施主权权利和其他权利。第 2 条第 1 款规定，日本的大陆架包括从日本的领海基线向外延伸到其每一点同领海基线的最近点的距离等于 200 海里的线以内的海域的海床和底土。如果大陆架的外部界限的任何部分超过了中间线，中间线（或者日本与其他国家协商同意的其他线）将替代那一部分线；该条第 2 款还规定，日本的大陆架还包括根据《公约》第 76 条由日本内阁另行规定的、200 海里范围以外的海域的海床和底土。[5]

东海的宽度不足 400 海里，中日双方在东海的专属经济区和大陆架权利主张有重叠。中日在东海的海洋划界问题，既有专属经济区划界，也有大陆架划界，双方对划界的主张各不相同。中方坚持大陆架自然延伸至冲绳海槽，日本单方面提出了一条"中间线"，既是有意混淆专属经济区和大陆架的区别，也是以一条所谓的"中间线"作为两个不同海洋区域的划界主张。

专属经济区和大陆架是两个具有不同法律性质的管辖海域，分别适用两个既有联系又有区别的法律制度。这两种制度分别规定在《公约》的第五部分"专属经济区"（第 55 至 75 条）和第六部分"大陆架"（第 76 至 85 条）中。

根据《公约》第 55 条和第 57 条，专属经济区是沿海国领海以外并邻接领海的一个区域，其宽度从领海基线量起不应超过 200 海里的距离。

沿海国对专属经济区的权利并非与生俱来，中日两国均已通过颁布国内法等形式，提出了对专属经济区的权利主张。专属经济区的划界应该通过谈判的方式进行，达成双方同意的界限。日本已经提出了中间线的划界主张，并单方面提出了一条所谓的"中间线"。中方在东海专属经济区划界问题上迄未提出正式的划界主张。

根据《公约》第 76 条关于大陆架的定义，沿海国的大陆架是其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土。同时，《公约》又以

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4 国家海洋局政策法规办公室编：《中华人民共和国海洋法规选编》，北京：海洋出版社 2001 年版，第 11 页。

5 海洋发展战略研究所：《专属经济区和大陆架》，北京：海洋出版社 2002 年版，第 424~425 页。

200 海里的距离标准，“补偿”了窄大陆架国家的利益，使先天没有自然延伸大陆架的沿海国也可以主张最大可达 200 海里的法律上的大陆架。正是这种“左右逢源”的规定，使中日双方在东海大陆架界限问题上各执一词，相持不下。

二、大陆架和外大陆架

依照自然科学的观点，陆地自然延伸没入海洋的部分，分为大陆架、大陆坡和大陆基，总称为大陆边。大陆架是大陆向海洋底的自然延伸，其范围是从低潮线起以极其平缓的坡度延伸到坡度突然变大的陆架坡折或陆架外缘。大陆坡是分开大陆和大洋的全球性巨大坡折，其上限是大陆架外缘（陆架坡折），下限水深变化较大。大陆基是自大陆坡坡麓缓缓倾向海底的扇形地，位于水深 2000~5000 米处，跨越陆坡坡麓和大洋底，是由沉积物堆积而成的沉积体。[6] 在自然科学的意义上，没有大陆架和外大陆架之分。

大陆架作为一个法律概念，经历了 1958 年《大陆架公约》到 1982 年《公约》的发展，其法律界限和范围更加明确。法律意义的大陆架与地质意义的大陆架在范围上是不同的。《公约》第 76 条关于大陆架制度作了系统的规定：

> 1．沿海国的大陆架包括其领海以外依其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土，如果从测算领海宽度的基线量起到大陆边的外缘的距离不到 200 海里，则扩展到 200 海里的距离。
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> 2．沿海国的大陆架不应扩展到第 4 至第 6 款所规定的界限以外。
>
> 3．大陆边包括沿海国陆块没入水中的延伸部分，由陆架、陆坡和陆基的海床和底土构成，它不包括深洋洋底及其洋脊，也不包括其底土。
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> 4（a）为本公约的目的，在大陆边从测算领海宽度的基线量起超过 200 海里的任何情形下，沿海国应以下列两种方式之一，划定大陆边的外缘：
>
> （1）按照第 7 款，以最外各定点为准划定界线，每一定点上沉积岩厚度至少为从该点至大陆坡脚最短距离的百分之一；或
>
> （2）按照第 7 款，以离大陆坡脚的距离不超过 60 海里的各定点为准划定界线。
>
> （b）在没有相反证明的情形下，大陆坡脚应定为大陆坡坡底坡度变动最大之点。
>
> 5．组成按照第 4 款（a）项（1）和（2）目划定的大陆架在海床上的外部界线的各定点，不应超过从测算领海宽度的基线量起 350 海里，或不应超过

6 冯士笮、李凤歧、李少箐主编：《海洋科学导论》，北京：高等教育出版社 1999 年版。

连接2500公尺深度各点的2500公尺等深线100海里。

6．虽有第5款的规定，在海底洋脊上的大陆架外部界限不应超过从测量领海宽度的基线量起350海里。本款规定不适用于作为大陆边自然构成部分的海台、海隆、海峰、暗滩和坡尖等海底高地。

7．沿海国的大陆架如从测算领海宽度的基线量起超过200海里，应连接以经纬度坐标标出的各定点划出长度各不超过60海里的若干直线，划定其大陆架的外部界限。

8．从测算领海宽度的基线量起200海里以外大陆架界限的情报应由沿海国提交根据附件二在公平地区代表制基础上成立的大陆架界限委员会。委员会应就划定大陆架外部界限的事项向沿海国提出建议，沿海国在这些建议的基础上划定的大陆架界限应有确定性和拘束力。

9．沿海国应将永久标明其大陆架外部界限的海图和有关情报，包括大地基准点，交存于联合国秘书长。秘书长应将这些情报妥为公布。

10．本条的规定不妨害海岸相向或相邻国家间大陆架界限划定问题。”

可见，法律意义上的大陆架范围比自然科学意义上的大陆架要广，实际上包括了自然科学意义上的整个大陆边。

《公约》第76条关于大陆架制度的规定是一个整体，大陆架原本并无内外之分。但在大陆架外部界限的确定以及沿海国对大陆架权利的内涵等方面，200海里以内和以外的大陆架有一些差别。

沿海国大陆架外部界限的确定有两种情况：在200海里范围以内，海岸相邻或相向国家大陆架主张重叠的，需要划界后确定；关于200海里以外大陆架的外部界限，《公约》以一系列公式线和制约线，限制了宽大陆架国家对其大陆架的无限扩展，并要求其将最终认定的大陆架外部界限提交“联合国大陆架界限委员会”（以下简称“委员会”）审查。沿海国在委员会建议的基础上划定的大陆架外部界限方具有确定性和拘束力。

沿海国对200海里以外大陆架的权利与200海里之内的部分也有区别：沿海国对200海里范围内大陆架自然资源的主权权利是完整的，而对200海里范围以外大陆架资源的开发，则应按照一定比例和时限向国际海底管理局缴付费用或实物，与国际社会共享。[7]

通常情况下，鉴于《公约》第76条关于沿海国可以将大陆架扩展到200海里的“距离标准”，对海岸相向国家而言，如果其间海域宽度不足400海里，“距离标准”使双方的大陆架权利主张相重叠，可能使任何一方都不能获得200海里外的大陆架。有关国家大陆架具体界限的确定，应该通过谈判协商解决或提交国际

7　参见《公约》第82条。

司法程序。

考查《公约》第 76 条条文产生的历史可以发现，该条款关于 200 海里外大陆架外部界限的规定，对面向大洋的宽大陆架国家无限扩展其大陆架外部界限提出了一些限制条件。[8] 但也不能否认，陆地向海洋自然延伸的情况并非仅仅存在于面向大洋的国家，以自然延伸原则主张的大陆架有超过 200 海里的情况也可能发生在海岸相向国家之间。“任何国家，只要自然延伸的证据对其有利，在确定 200 海里以外的海床界限时，仍可要求考虑自然延伸。”[9]

此种情况下，尤其是当该海岸相向国家间尚未就大陆架划界达成协议时，一方基于自然延伸而提出的大陆架主张，超过 200 海里的部分是否属于外大陆架是一个值得思考的问题。

显然，《公约》关于大陆架外部界限规定是一个普遍性的要求，不论是否面向大洋的沿海国均需要受此限制。海岸相向的国家如果有超过 200 海里的大陆架主张，也涉及外大陆架问题。

三、中国在东海的外大陆架问题

中国根据自然延伸原则主张中国在东海的大陆架的外部界线在冲绳海槽中心线，超出了 200 海里。超出的部分即为“外大陆架”，也是中国在东海的大陆架的组成部分。台湾学者傅崐成教授认为，即使赋予琉球群岛划界的全效力，它也仅仅是对位于冲绳海槽东部的琉球群岛大陆架而言。日本只能提出从琉球群岛开始的东海大陆架的要求，这将使琉球群岛的海岸面对的大陆架宽度很窄。因而，日本在东海的大陆架划界中的所得非常有限，并只能集中在东海的东部。[10]

参考中日双方在东海的各种权利主张，中国主张的东海大陆架，在法律上由如下部分构成（见下图）：

1. 中国领海基线至 200 海里专属经济区权利主张外部界限之间的海域（AB），包括：

（1）中国领海基线至日本 200 海里权利主张外部界限之间的海域（AE），属于中国的大陆架，与中国的专属经济区权利主张重合。

（2）中日双方专属经济区和大陆架权利主张重叠区（EB）。其中，日本 200 海里权利主张线以东至其单方主张的所谓“中间线”之间的海域（EF），属于双方

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8 参见第三次联合国海洋法会议正式记录，卷十，中文本。

9 Victor Prescott, Resources of the Continental Margin and International Law, in Peter J. Cook and Chris M. Carleton eds., *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford: Oxford University Press, 2000.

10 Myron H. Nordquist, John Norton Moore and Tomas H. Heidar eds., *Legal and Scientific Aspects of Continental Shelf Limits*, Leiden/Boston: Martinus Nijhoff Publishers, 2004.

权利主张的重叠区；日本单方主张的所谓“中间线”至中国 200 海里专属经济区权利主张外部界限之间的海域（FB），属于双方权利主张的重叠区，也是日本划界主张与中国权利主张的重叠区。

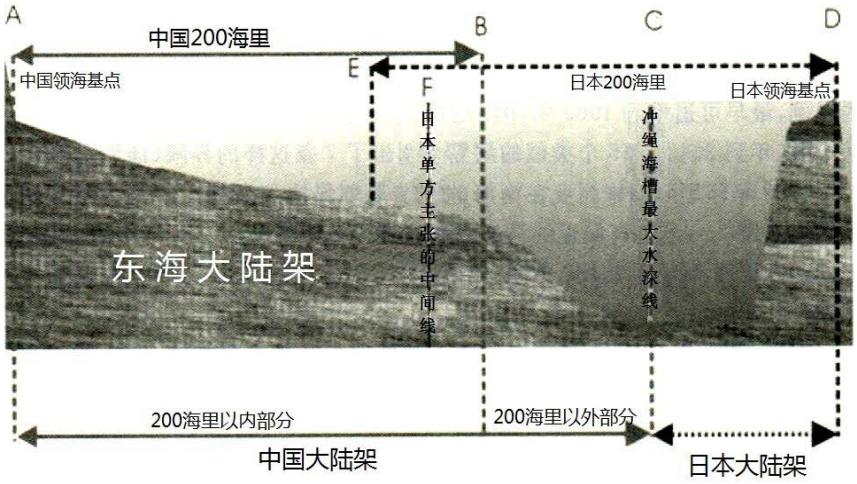

图　中日专属经济区和大陆架主张示意图

2．中国 200 海里专属经济区权利主张的外部界限至冲绳海槽最大水深线之间的海域（BC），属于中国的 200 海里以外的大陆架，与日本的权利主张、划界主张都有重叠。

中日之间尚未进行海域划界，双方的权利要求还停留在权利“主张”的层面。中国对东海大陆架的主张，有必要从法理的角度予以分析和完善。

（1）中国根据自然延伸原则主张的大陆架超过了 200 海里。200 海里以外大陆架外部界限的详情及有关科学和技术资料，应按照《公约》的要求提交委员会审查。

（2）中国最晚应在 2009 年 5 月之前向委员会提交此种审查的申请。[11]

中国应就东海大陆架超过 200 海里的部分直接向委员会提出申请，籍此完整表达中国在东海自然延伸的大陆架范围，尽管可能会因日本提出反对而不能获得委员会的确认。同时，根据《公约》附件二第 4 条及《联合国大陆架界限委员会议事规则》附件一等的有关规定，国家可就一部分 200 海里外大陆架外部界限提出申请。因而，在程序上中国完全可以就东海 200 海里外大陆架外部界限的确定向委员会提出申请。

11　Report of the Eleventh Meeting of States Parties of the UN Convention on the Law of the Sea, New York, pp. 14~18, May 2001, SPLOS/73/Corr.1.

四、相关案例的启示

亚太地区相邻或相向国家间关于大陆架的划界协定所划界限超过 200 海里的案例，最早可追溯到 1969 年印度尼西亚和马来西亚的大陆架划界协议。[12] 从 1982 年到 2003 年，5 个类似的划界案划出了 7 条这样的界限。

1969 年印尼和马来西亚在南海的大陆架划界协议所划印—马大陆架边界线的终点第 25 点，距离最近的马来西亚领土达 228 海里，大于 200 海里；距离最近的印度尼西亚领土约 132 海里，[13] 小于 200 海里。此处海域与印—马两国海岸相邻。

根据 1997 年 5 月 14 日印尼和澳大利亚的大陆架划界协定，印澳双方的大陆架界限距离最近的属于澳大利亚的斯科特礁超过 200 海里，但离印尼群岛基线不到 200 海里。[14]

上述 5 个划界协定的缔约国，无一就其中超过 200 海里的部分向委员会提出申请，也从无任何国家或组织，包括委员会、国际海底管理局在内对此提出疑义。究其原因，一是上述部分协定在签定和生效时，《公约》尚未产生、生效以及有关国际组织尚未成立；二是有些划界案的划界区域总体上属于沿海国主张的大陆架范围，无论其间如何划分，并不侵犯属于全人类的国际海底；或者说，一方获得了原本属于另一方但被该另一方放弃给对方的一部分大陆架权利，因而不必取得委员会的认可。

但中日在东海的情况与此相比有本质的不同：其一，中方根据自然延伸原则提出的大陆架权利主张，有超出 200 海里的部分，在理论上应属 200 海里外大陆架。其二，尽管中日双方的大陆架主张有重叠，但中日之间尚未划界，最终的大陆架界限还不确定。

在鄂霍茨克海，俄罗斯划出其专属经济区和大陆架后还有一块属于公海和国际海底的“面包圈”。[15] 该海域的特点之一是只被单一国家的管辖海域所包围，只有俄罗斯有可能对其提出 200 海里外大陆架的权利主张。这与东海被中、韩、日三国所包围的情况也有不同。

美国和俄罗斯在白令海的大陆架界限也超出了 200 海里，但双方 200 海里的

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12 国家海洋局政策研究室：《国际海域划界条约集》，北京：海洋出版社 1989 年版。
13 数据来源：李明杰根据 CARIS LOTS 软件计算。
14 参见联合国政府间海洋学委员会和国际水道测量组织编，国家海洋局国际合作司译：《大陆架外部界限——科学与法律的交汇》。
15 参见联合国政府间海洋学委员会和国际水道测量组织编，国家海洋局国际合作司译：《大陆架外部界限——科学与法律的交汇》。

权利主张都已得到了满足。[16] 这同中日东海的情况也无相同之处。美俄双方大陆架超出 200 海里的部分，应提请委员会的审查。

2004 年 11 月 15 日，澳大利亚通过联合国秘书长向委员会提交了其 200 海里外大陆架外部界限申请案，其中包括根据其对南极的领土主张而在南极地区划出的面积为 686821 平方公里的大陆架区域。澳大利亚在给联合国秘书长的照会中称，考虑到《南极条约》规定的南纬六十度以南区域特殊的法律和政治地位，请求委员会对关于该区域的申请暂时不要采取任何行动。[17] 实际上，澳大利亚通过这种方式，实现一石多鸟的目的：既重申了对南极的领土要求，又主张了籍此而派生的海洋权益，同时还不致引起国际社会的反对，值得深入研究。

五、结论和问题

中日之间尚未进行海域划界，双方的权利要求还停留在权利“主张”的层面。中国对东海大陆架的主张，有必要从法理的角度予以分析和完善。

1．中国主张大陆架直抵冲绳海槽中心线，超过了 200 海里。

2．这条“理想”的大陆架界限所划入的中国大陆架由三部分组成，各组成部分法律性质不同：

（1）中国领海基线向东至日本 200 海里权利主张外部界限以西（AE），属于中国的专属经济区和大陆架权利主张范围，无争议。

（2）中国领海基线向东至 200 海里专属经济区外部界限（AB），属于中国的专属经济区和大陆架权利主张范围。其中包括中日双方权利主张重叠区（EB），属于中国主张的大陆架（和专属经济区）范围。

（3）中国 200 海里专属经济区外部界限至冲绳海槽最大水深线之间（BC），属于中国主张的大陆架的 200 海里以外的部分。

3．实现权利的程序性——中国应就 200 海里以外的部分（BC）按照相应的法律程序，将相关证据资料提交委员会审查。

4．法律程序的时效性——中国应该在 2009 年 5 月 13 日之前完成相关证据资料的提交，[18] 明确表达中国在东海的大陆架权利主张，使之在法律上更加完善。

尽管日本已经通过国内立法等形式提出了其在东海的专属经济区和大陆架权利主张和划界主张，从而使两国的大陆架主张发生重叠，进而使中国获得全部自

16 参见联合国政府间海洋学委员会和国际水道测量组织编，国家海洋局国际合作司译：《大陆架外部界限——科学与法律的交汇》。

17 下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm，2006 年 8 月 19 日。

18 下载于 http://www.un.org/Depts/Ios/clcs-new/continental-shelf-description.htm#definition，2006 年 8 月 20 日。

然延伸的东海大陆架在现实上困难重重，但在法理上厘清自然延伸原则下中国在东海的大陆架问题，依然是必要的。“如果自然延伸的要素对一个国家十分有利，就值得去为使用这些要素准备论据。”[19] 中国在东海的大陆架自然延伸到冲绳海槽的主张，应该是一个完整的概念，需要有法律的和科学的依据来支持和完善。

多年来，中国坚持东海大陆架到冲绳海槽最大水深线，但仅仅停留在主张的层面是不够的，需要有法律的和科学的依据来支持和完善，因此，超过 200 海里的大陆架的外部界限应提交委员会审查；同时，中国应该也可以通过向大陆架界限委员会提交申请案的方式，再次昭示和重申在东海的大陆架权利和主张。

19 Victor Prescott, Resources of the Continental Margin and International Law, in Peter J. Cook and Chris M. Carleton eds., *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford: Oxford University Press, 2000.

《联合国海洋法公约》大陆架的法理和应用条件

方银霞* 周建平**

内容摘要:《联合国海洋法公约》(以下简称“《公约》”)在确认沿海国拥有200海里专属经济区主权权利以外,《公约》第76条关于大陆架的定义中还规定沿海国可根据各自的地形和地质条件将其大陆架扩展到200海里以外,所扩展的距离根据《公约》第76条的有关规定执行。由于《公约》第76条所定义的大陆架是法律意义的大陆架,是一个科学与法律政治的结合体,也是不同政治利益集团之间妥协的产物,因此在具体操作中存在一定的复杂性,尤其是“洋脊”问题。《公约》第76条中规定的“洋脊”可以分为深洋洋脊、海底洋脊和海底高地三种情况,而不同类型的洋脊有着不同的划界距离标准。目前许多沿海国,尤其是各岛国都期望利用有关“洋脊”条款中的规定来扩展他们的外大陆架。因此我们必须加强对《公约》第76条的法理和应用条件研究,真正掌握并正确援用有关法律的依据、原则和条件,为维护我国合法权益、为我国200海里以外大陆架的申请提供参考,同时弄清各沿海国的外大陆架划界主张,以便确定我们的应对原则和政策。

关键字:《联合国海洋法公约》第76条 大陆架 洋脊

根据《联合国海洋法公约》(以下简称“《公约》”)第76条,“沿海国的大陆架包括其领海以外陆地领土的全部自然延伸,扩展到大陆边外缘的海底区域的海床和底土,如果从测算领海宽度的基线量起到大陆边的外缘的距离不到200海里,即扩展到200海里。”“沿海国大陆架不应扩展到第4至第6款所规定的界限以外”(即界定200海里以外大陆架外部界限的2条公式线和2条制约线)。“大陆边包括沿海国陆块没入水中的延伸部分,由陆架、陆坡和陆基的海床构成,它不包括深洋洋底及其洋脊,也不包括其底土。”[1] 根据上述规定,沿海国可以根据各自的不同地形、地质条件,将其大陆架的外部界限最远划到距领海基线以外350海里,

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1 《联合国海洋法公约》,北京:海洋出版社1992年版,第39~41页。

甚至更远。

《公约》第 77 条和 82 条还规定："沿海国为勘探大陆架和开发其自然资源的目的，对大陆架行使主权权力"，上述权力"是专属性的"。[2] 而在外大陆架深水区域蕴含着丰富的矿产资源，如富钴结壳、多金属结核、天然气水合物、海底热液硫化物矿床以及与热液硫化物矿床伴生的深海生物基因资源等。因此各沿海国对外大陆架的划界申请都非常重视，俄罗斯政府于 2002 年第一个向联合国秘书长和大陆架界限委员会提交了俄罗斯 200 海里以外大陆架划界案，到目前为止，巴西、澳大利亚、爱尔兰政府都已经正式提交了各自的 200 海里以外大陆架划界案。[3] 根据《公约》附件二第 4 条有关划界案提交时间的规定，在未来几年里将有一批发达和发展中国家会提交他们的外大陆架划界案，如巴基斯坦、斯里兰卡、新西兰、印度、尼日利亚、汤加、英国、缅甸、圭亚那等国家都已经正式表示将于 2009 年底前提交他们的 200 海里以外大陆架划界案。

由于《公约》第 76 条所定义的大陆架是法律意义的大陆架，是一个科学与法律政治的结合体，也是不同政治利益集团之间妥协的产物，因此在具体操作中存在一定的复杂性。《公约》第 76 条关于"洋脊"的定义和有关规定则是其中最复杂的部分，也是可操作性最难、争论最多的部分。[4]《公约》第 76 条中规定的"洋脊"可以分为深洋洋脊、海底洋脊和海底高地三种情况，而不同属性的洋脊有着不同的划界距离标准。俄罗斯划界案的北冰洋部分就是期望利用有关"洋脊"规则将俄罗斯的外大陆架一直划到北极极点，如果该划界案成立，将导致整个北冰洋被瓜分。《朝日新闻》2003 年 6 月 6 日报道：日本希望利用《公约》第 76 条的"洋脊"规则得到太平洋上的冲之鸟岛、北大东岛、南大东岛、冲大东岛、小笠原群岛、南鸟岛、八丈岛等几个海区共 65 万平方公里海域、相当日本国土面积 1.7 倍的外大陆架。

另外澳大利亚、冰岛、新西兰等岛国也正在积极利用有关"洋脊"条款中的规定来扩展他们的外大陆架。因此必须加强对《公约》第 76 条的法理和应用条件研究，才能真正掌握和正确援用有关法律的依据、原则和条件，充分利用《公约》第 76 条和《大陆架界限委员会科学与技术准则》中有关处理"洋脊"问题的原则和方法。

一、大陆架定义

2 《联合国海洋法公约》，北京：海洋出版社 1992 年版，第 39~41 页。

3 俄罗斯、巴西、澳大利亚、爱尔兰政府的 200 海里以外大陆架划界案，下载于 http://www.un.org/depts/los/clcs_new/clcs_home.htm，2005 年 7 月 15 日。

4 《联合国大陆架界限委员会技术文件汇编（汉英）》（内部资料），2000 年版，第 51~53 页。

《联合国海洋法公约》第 76 条对大陆架的定义如下：

第 1 款：“沿海国的大陆架包括其领海以外陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土，如果从测算领海宽度的基线量起到大陆边的外缘的距离不到 200 海里，即扩展到 200 海里。”

第 2 款：“沿海国大陆架不应扩展到第 4 至第 6 款所规定的界限以外”，即第 4 款中界定 200 海里以外大陆架外部界限的 2 条公式线和 2 条制约线。

第 3 款（大陆边的构成）：“大陆边包括沿海国陆块没入水中的延伸部分。由陆架、陆坡和陆基的海床构成。它不包括深洋洋底及其洋脊，也不包括其底土。”

必须明白的是：《公约》第 76 条定义的“大陆架”是一个法律概念的大陆架，而不是纯科学意义上的大陆架，它等同于科学概念上的大陆边（缘），由科学概念的大陆架、陆坡和陆基三部分组成（图 1）。

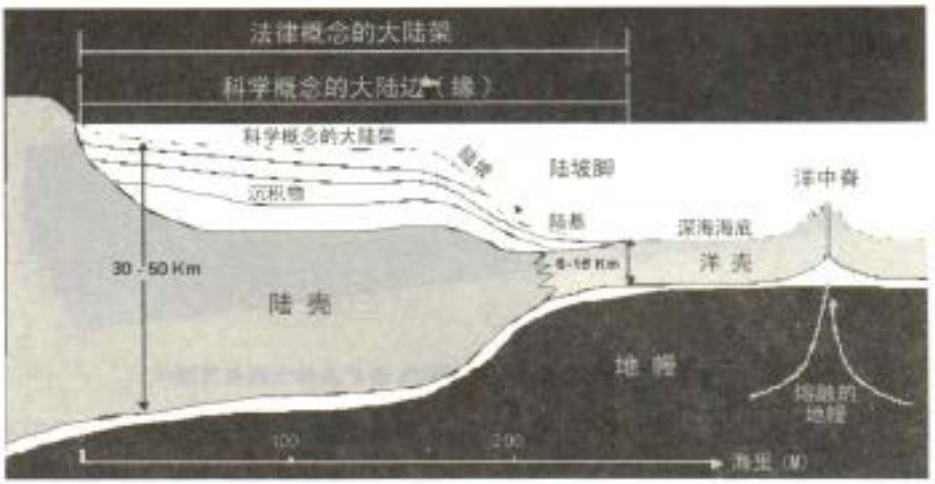


图 1　科学概念的大陆架与法律概念的大陆架示意图
（哈拉尔德·布莱克，大陆架界限委员会委员）

第 4 款（公式线）

(a) 在大陆边超过 200 海里的情况下，沿海国应以下列方式划定大陆边外缘（图 2）：(1) 按照第 7 款，以最外各定点为准划定界限，每一定点上沉积岩厚度至少为该点至大陆坡脚最短距离的 1%（Gardiner 线）；或（2) 按照第 7 款，以离大陆坡脚的距离不超过 60 海里划定界限 (Hedberg 线）。

(b)（大陆坡脚定义）：“在没有相反证明的情况下，大陆坡脚应定为大陆坡坡底坡度变化最大之点”，该定义提出了确定大陆坡脚的二个标准（地形和构造），根据地形标准规定要求：(1) 确定大陆坡脚位于大陆坡底区域；(2) 大陆坡脚界定为大陆坡底坡度变化最大之点。

第 5 款（限定线）：组成按照第 4 款第（a）项第（1）和（2）目划定的大陆架在

海床上的外部界限的各定点，不应超过：(1) 参照各定点从测算领海宽度的基线量起距离为 350 海里之处划的线；或（2）参照各定点从 2500 米等深线量起距离为 100 海里之处划的线。

第 6 款（洋脊问题）：虽有第 5 款的规定，在海底洋脊上的大陆架外部界限不应超过从测算领海宽度的基线量起距离为 350 海里。本款规定不适用于作为大陆边自然构成部分的海台、海隆、海峰、暗滩和坡尖等海底高地。

第 7 款（外部界限规则）：沿海国的大陆架如从测算领海宽度的基线量起超过 200 海里，应连接以经纬度坐标标出的各定点划出长度各不超过 60 海里的若干直线，划定其大陆架的外部界限（图 2）。

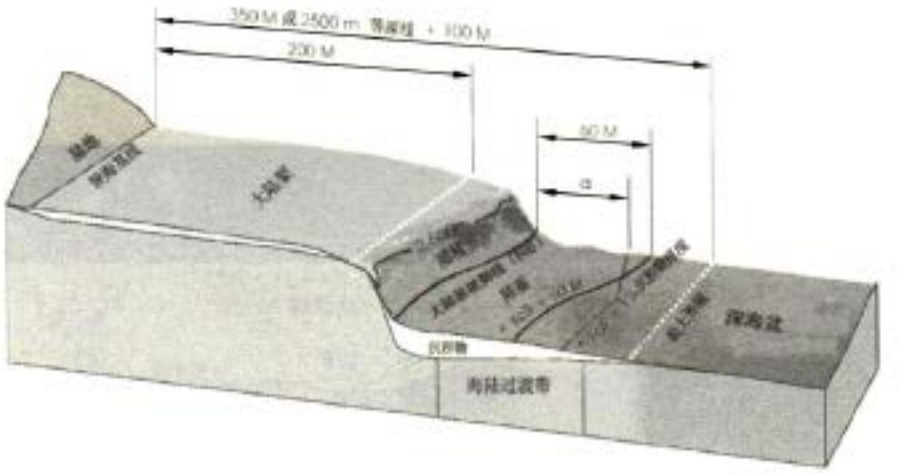


图 2 根据《联合国海洋法公约》第 76 条扩展的大陆架范围 [5]

第 8 款（外部界限的申报规则）：从测算领海宽度的基线量起 200 海里以外的情报应由沿海国提交大陆架界限委员会。委员会应就有关划定大陆架外部界限的事项向沿海国提出建议，沿海国在这些建议的基础上划定的大陆架界限应有确定性和拘束力。

二、“洋脊”规则在 200 海里以外大陆架划界中的作用

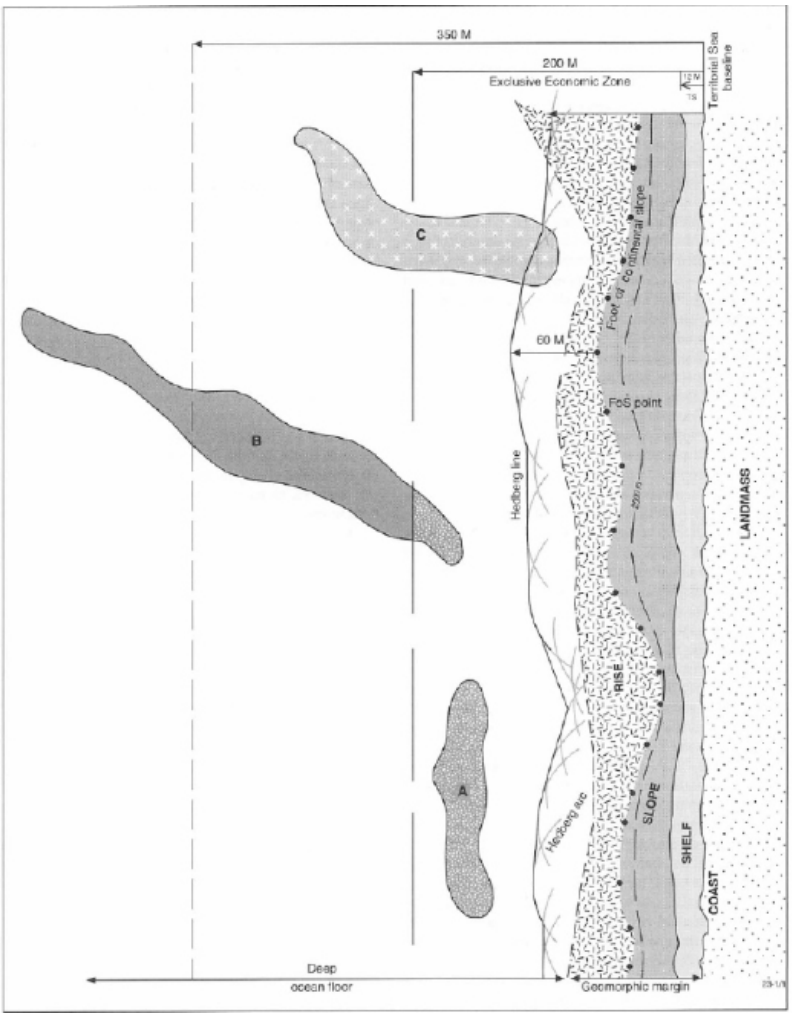
（一）《公约》第 76 条对洋脊问题的有关规定

5 新西兰大陆架计划科学顾问组：《新西兰大陆架和〈联合国海洋法公约〉第 76 条》，2003 年版，第 7 页。

第 3 款：大陆边包括沿海国陆块没入水中的延伸部分，由陆架、陆坡和陆基的海床构成。它不包括深洋洋底及其洋脊，也不包括其底土。

第 6 款：虽有第 5 款的规定，在海底洋脊上的大陆架外部界限不应超过从测算领海宽度的基线量起距离为 350 海里。

根据《公约》第76条“洋脊”可以分为深洋洋脊、海底洋脊和海底高地三种情况。深洋洋脊是“深洋底具有不规则或平缓地貌且陡峭两翼的长高地”；海底洋脊是“海底具有不规则或平缓地貌且陡峭两翼的长高地”；[6] 海底高地则是位于周边或相邻海底平面之上的任何海底地貌，但不包括作为大陆边自然组成构成部分的海台、海隆、海峰、暗滩和坡尖等海底高地。



6 International Hydrographic Organization, A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea−1982,athttp://www.iho.int/iho_pubs/CB/C-51_Ed4-EN.pdf, 15 July 2005.

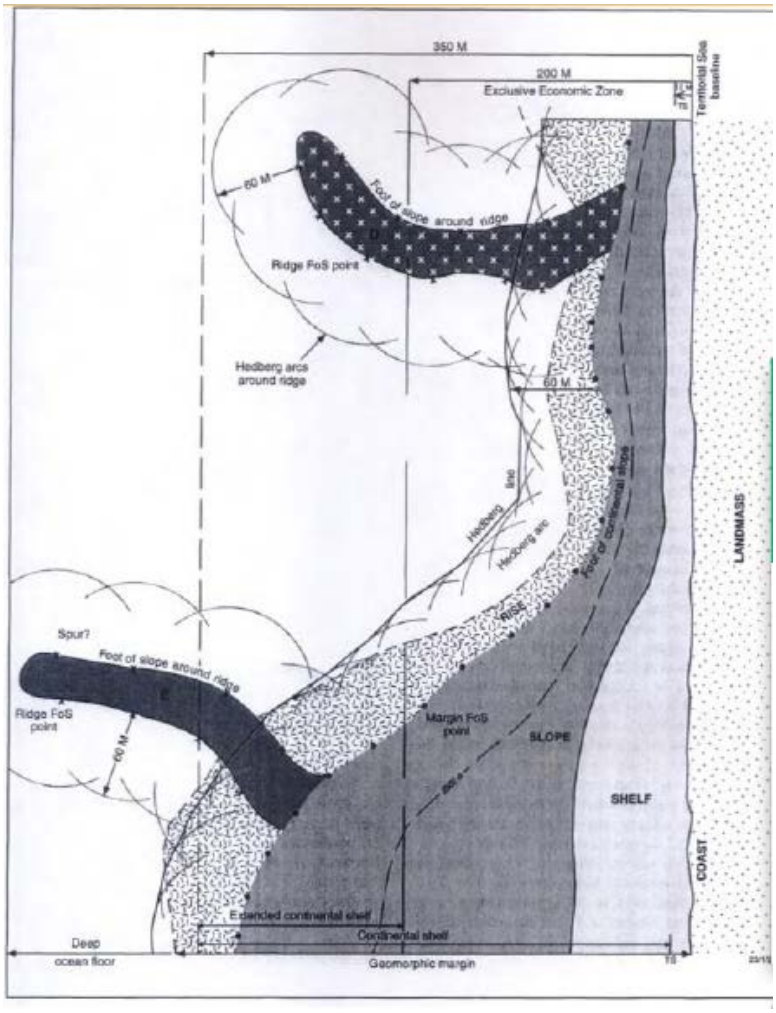


图 3　76 条对各类洋脊和海底高地的解释及其与法律和地貌大陆边缘对应的概念曲线[7]

《公约》第 76 条第 3 款规定大陆边不包括深海洋底及其洋脊，并对不同类型的“洋脊”，即深洋洋脊、海底洋脊和海底高地的应用范围和可划定的大陆架外部界限的最大距离作了规定：

(1) 深洋洋脊（第 76 条第（3）款），最远可划至 200 海里；

(2) 海底洋脊（第 76 条第（6）款），最远可划至 350 海里；

(3) 海底高地（第 76 条第（6）款），最远可划至 2500 米等深线＋ 100 海里。

7　P. J. Cook 与 Chris Carleton 编，国家海洋局国际合作司编译：《大陆架外部界限—科学与法律的交汇》（内部资料），2003 年版，第 317 页。

沿海国在 200 海里内对海床和底土的主权权力（第 76 条第 1 款和第 77 条）可以包括深洋底和任何大洋洋脊，或位于 200 海里区域内的洋脊部分。图 3 中大洋洋脊 A 和 B 证实了这样的情况。在该例子中，按照第 76 条第 4 款第（a) 项第（2）目，两个洋脊分别位于陆隆边缘和大陆边缘的外缘之外，并延伸到了深洋洋底。然而洋脊 A 和洋脊 B 的一部分都位于 200 海里带之内。因此，洋脊 A 和 B 在 200 海里区域之内的部分成了相邻沿海国大陆架的一部分。

第 76 条第 3 款通过术语将沿着具有大洋特征并不能成为地貌大陆边缘的组成部分的深洋底洋脊界限限定在 200 海里。许多海洋科学家认为洋中脊（例如大西洋洋中脊），通常位于靠近大洋盆地中央的位置，是该类洋脊很好的实例。它们一般容易与具有大陆边缘特征的陆架、陆坡和陆隆区分。

正如联合国海洋事务与海洋法司所指出的，[8] 将“洋脊”条款引入第 76 条部分限制了大陆架沿着洋脊延伸至大洋中部的主张。例如，如果大洋洋脊不是自然延伸部分，限制同样可以阻止沿海国从边缘“青蛙跳”至可扩展到 200 海里以外的洋脊之上。但是，使用沉积物厚度公式线或称之为 Gardiner 公式线的第 76 条第 4 款第 (a) 项，甚至当洋脊位于自然延伸的外缘之外时，也可能引起洋脊部分是否包括在“法律”大陆边缘之内的争论。图 3 中的洋脊 C 证明了这种情况，该洋脊位于陆隆之外，但在用 Hedberg 线圈定的边缘外缘之内。那么支持者可就洋脊成为法律边缘部分与第 76 条第 5 款中允许的沿着洋脊扩展至 200 海里以外“限制线”的主张进行争议。然而第 76 条第 3 款似乎反对这样的扩展，它用深洋底不能成为大陆边缘的组成部分将洋脊从自然延伸中分离出去，因此 200 海里以外不能成为大陆架管辖部分。

在第 76 条中可能引起争议的是大洋洋脊是深洋底特有的地貌，而海底洋脊是大陆边缘的组成部分。从地貌上考虑该问题可能很容易澄清，但是在地质大陆边缘是否与“法律”大陆边缘无关的问题上仍会引起争议。图 3 中海底高地 D 构成的地貌边缘的突出部分在理论上可引起是否可作为大陆边缘自然组成部分的争议。将只与大洋有亲缘关系的特征，例如洋中脊，并入自然延伸中成为大陆边缘或陆块自然延伸的一部分，这样的考虑没有地质基础，然而对洋脊的一部分是否为地貌大陆边缘的组成部分上仍存在争议。有些专家建议位于洋中脊之上的岛屿陆块在二者具有相似的岩石组成并在相同的地质作用下形成的情况下，该洋脊可以被认为是岛屿地质上的自然延伸，换句话说，他们的主张是按照第 76 条第 6 款将洋中脊当作海底洋脊，且可使用 350 海里的界限。其他专家则强烈坚持洋中脊不能与大陆架一样。有的主张是在已有的大陆架合理增加扩展区域（图 3E 地貌），

8 Division of Ocean Affairs and Law of the Sea,The Law of the Sea, Definition of the Continental Shelf, An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, United Nations Publication Sales No. E. 93.V. 16, United Nations, New York, 1993, pp. 280~284.

或将额外的延伸扩展至 200 海里以外（图 3D 地貌）。目前，大洋洋脊的基本地质解释是它由洋壳组成。麦凯尔维认为第 76 条所指的洋脊是陆壳，而不是由洋壳组成。[9] 联合国海洋事务与海洋法司在提及洋脊的讨论时补充支持这样的观点，即“地质学家认为，虽然在《公约》中没有特别指出，大陆边缘由陆壳及其上覆沉积物组成，主要为陆源，不包括洋壳”。[10]

《联合国大陆架界限委员会科学技术准则》将在各种地质过程中形成的洋脊类型总结为：(1) 海底扩张和与火山一岩浆活动有关形成的洋脊（洋中脊）；(2) 沿转换断层和作为海底扩张内在过程的一部分形成的洋脊；(3）后期构造活动造成洋壳上隆形成的洋脊；(4) 与地壳在热点上移动有关的火山活动形成的洋脊；(5) 大洋地壳板块相互作用形成的洋脊 ;（6）与羽状异常地幔柱有关的区域岩浆活动形成的洋脊；(7) 与活动板块边界和岛弧系形成有关的洋脊；(8) 与大陆地壳断裂作用（拉张和减薄）形成的海底洋脊。一般认为前 5 种洋脊属于深洋洋脊，后 3 种为海底洋脊。[11]

（二）洋脊条款的形成历史

第三次联合国海洋法会议的重要任务是寻求建立法律“大陆架”的定义，以协调沿海国的各种利益。该定义的建立要考虑包括洋脊在内的各种海底高地，以及与陆架区域的关系。由于种种原因，海底洋脊和大洋洋脊问题引起了极大的争论。引起争论的问题有：

1．是否应排除位于洋脊之上的国家具有 200 海里以外大陆架权利的方式来解释第 76 条；

2．在考虑 200 海里以外的大陆架权利方面，包括沿洋脊延伸的问题时等深线（反映地貌）是否应给予更多或更少的权重，或与地质同样的权重；

3．第 76 条中引用的大陆架作为陆地领土的自然延伸“到大陆边缘的外缘”的含义是否可能应用于位于大洋洋脊顶部的岛屿；

4．第 76 条是否可以解释为允许沿海国从大陆边缘“跨越”至相邻洋中脊的主张；

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9 Vincent E. McKelvey, Interpretation of UNCLOS III Definition of the Continental Shelf, In D. M. Johnston and N. G. Letalik eds., *The Law of the Sea and Ocean Industry, New Opportunities and Restraints*, *Proceedings of the 16th Convention of the Law of the Sea Institute*, Honolulu, 1982, pp. 465~472.

10 Division of Ocean Affairs and Law of the Sea, The Law of the Sea, Definition of the Continental Shelf, An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, United Nations Publication Sales No. E. 93.V. 16, United Nations, New York, 1993, pp. 465~472.

11 《联合国大陆架界限委员会技术文件汇编（汉英）》（内部资料），2000 年版，第 51~53 页。

5．第 76 条是否限制使用洋脊，这样沿海国就不能毫无理由地延伸其大陆架范围。

因此在第三次联合国海洋法会议第八次会议上，“海底洋脊”成了一个重要议题，并专门成立了第 6 磋商组对其进行仔细审议。前苏联反对大陆边缘不包括“水下洋脊和底土在内”，并提出了当“海底洋脊”被认为是沿海国自然延伸部分时，大陆架管辖权在“海底洋脊”上可扩展多远的问题，并建议“包含水下洋脊的陆架区的扩展界限不得超过 350 海里距离”。[12] 其他的提案则试图将“海底洋脊”定义为“由洋壳形成的狭长的海底高地”。日本建议大陆边缘“不包括深洋底或由洋壳形成的洋脊”；宽大陆架国家集团则建议大陆边缘应该包括海底高地，但不包括深洋底洋脊；澳大利亚建议“海台、海隆、暗滩和坡尖”是海底高地的实例，应包括在大陆边缘之中。苏联甚至提出了更加特殊的建议，认为大陆边缘不应包括“深洋底、及其洋脊、海山、海底平顶山和任何其他不在大陆边缘上的海底高地”。丹麦认为“海底高地是大陆边缘自然组成部分”，具有“与陆地领土基本相同的地质构造”特征，补充了自然延伸的概念。冰岛则认为 350 海里界限“应用于与沿海国陆块延伸有关的洋脊”。美国支持建立在“位于阿拉斯加北部的楚克奇海台及其组成高地不能作为洋脊”认识上的综合提案，其内容被涵盖成为第 76 条第 6 款的最后一句：“本规定不适用于作为大陆边自然组成构成部分的海台、海隆、海峰、暗滩和坡尖等海底高地”。[13] 关于海底洋脊的问题，第 6 磋商组小组主席在完全综合了各方的意见下最终形成了第 76 条第 3 款和第 6 款。

从第 76 条中“洋脊”概念逐步形成背景的历史回顾可以得到这样的信息：(1) 第 76 条给出了“深洋洋脊”、“海底洋脊”和“海底高地”之间的差异。第 76 条第 3 款中应用的“深洋洋脊”是由洋壳组成的深洋洋脊，这样的洋脊不是“法律”大陆边缘的组成部分，不适用于扩展 200 海里以外的大陆架；(2) 在第 76 条中既没有引用洋壳，也没有引用陆壳。

从上述“洋脊”条款的形成历史过程中可以看出，“洋脊”条款的形成是有切身利益的部分沿海国的科学和法律专家力图最大限度扩展他们的大陆架范围而精心策划和政治妥协的结果。如果说人们在最初对这些复杂的“洋脊”条款的真实意图还不清楚的话，今天，俄罗斯、巴西和澳大利亚政府向联合国和大陆架界限委员会提交的划界案让人们大开眼界，领略了“洋脊”条款在扩展 200 海里以外大陆架的巨大作用。

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12 Satya N. Nandan and ShabtaiRosenne eds., *United Nations Convention on the Law of the Sea Commentary*, Vol. 2., Dordrecht/ Boston/London: MartinusNijhoff Publishers, 1995, pp. 852~864.

13 Satya N. Nandan and ShabtaiRosenne eds., *United Nations Convention on the Law of the Sea Commentary*, Vol. 2., Dordrecht/ Boston/London: MartinusNijhoff Publishers, 1995, pp. 852~864.

（三）利用“洋脊”规则扩展外大陆架的复杂性

“洋脊”问题不仅涉及到《公约》第 76 条，同时还要考虑与海岛有关的第 121 条。《公约》对海岛国家和岛屿与大陆地块赋予的法律地位是否存在差异？在划定 200 海里以外大陆架外部界限时，是否具有与陆地领土相同的权利？上述问题涉及的是确定海岛国家和岛屿是否具有扩展大陆架权利的法律基础问题。《公约》第 121 条“岛屿制度”是专门定义岛屿的法律地位的条款：

第 1 款：岛屿是四面环水并在高潮时高于水面的自然形成的陆地区域；

第 2 款：除第 3 款另有规定以外，岛屿的领海、毗邻区、专属经济区和大陆架应按照本公约适用于陆地领土的规定加以确认；

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

上述规定表明：除人类无法生存的岩礁之外，岛屿与陆地领土具有相同的权利和限制。因此，岛屿国家和岛屿在满足《公约》第 76 条有关规定的条件下，也具有将其大陆架扩展到 200 海里以外的同等权利。但由于岛屿的特殊地形、地貌条件，其大陆架扩展到 200 海里以外权利不应是无限的，应受到更多的限制。因为，对海底资源具有主权权利的沿海国将外大陆架扩展的范围越大，意味着具有“人类共同继承遗产”意义的“国际海底”就变得越小。

深海盆地区的岛屿和岛屿国家大多是位于深海底的洋脊露出于海平面以上部分，在水下的洋脊延伸到很远，冰岛就是这样的特例。冰岛是位于大西洋中脊的岛屿国家，大西洋中脊朝北延伸至北冰洋，向南可一直追索到南极。如果不对像冰岛这样的岛屿和岛屿国家扩展大陆架的权利进行限制，其结果将难以设想。因此，《公约》在涉及“洋脊”的条款部分作了非常复杂的规定和门槛。尽管有了如此繁杂的若干规定，在实际操作中仍十分困难，图 4 展现的是位于西南非洲纳米比亚海上的鲸鱼海岭，它是被人们讨论得最多而尚无定论的一个实例。

鲸鱼海岭形成于 80~100 百万年前（中到晚白垩纪）南大西洋张开早期的热点岩浆作用活动期，在海底扩张的后期南大西洋完全张开时与巴西大陆边缘破碎分离。鲸鱼海岭自相邻的非洲大陆的大陆溢流玄武岩区延伸至大洋盆中，由碱性玄武岩组成的热点洋脊型大洋火山岛链。[14] 由于地质历史的演化和构造运动，原本位于大洋中间的深洋洋脊被推覆到大陆边缘或俯冲到大陆地壳之下，使洋脊的性质和如何确定它的扩展权限问题变得更为复杂和困难。该洋脊地貌上已成为纳米比亚的自然延伸，直至 200 海里专属经济区外约 780 海里处。鲸鱼海岭轮廓线由数个 2500 米等深线闭合组成。按照第 76 条如果将鲸鱼海岭当作海底洋脊，大陆

14 James P. Kennett, *Marine Geology*,Englewood Cliffs, New Jersey: PrenticeHall, Inc., 1982, pp. 157~159, 168~170, 192~193, 669~674.

架要求将被 350 海里限制线限制；如果被当作坡尖和边缘的自然组成部分，[15] 主张将可沿着地貌延伸到专属经济区外的等深线限制线（2500 米等深线加 100 海里）；若被当作深洋底的大洋洋脊就不是大陆架，延伸则不能超过 200 海里。

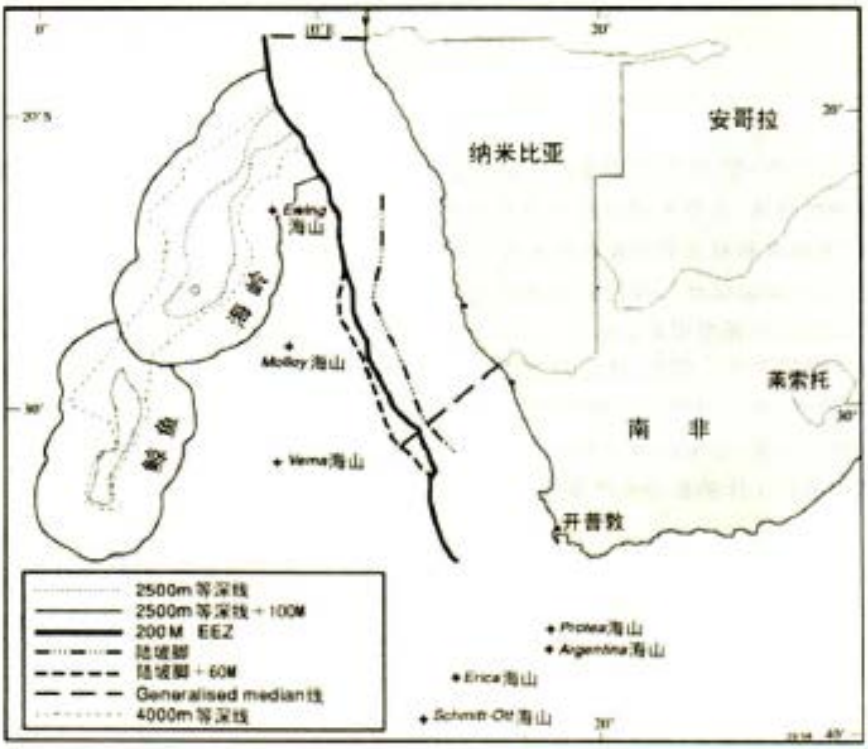

图 4　西南非洲鲸鱼海岭的等深线和海底界限位置

与“洋脊”有关的 200 海里以外大陆架问题是《公约》第 76 条中最复杂和最具争议的问题，俄罗斯划界案的北冰洋部分就是企图利用“洋脊”规则，将其大陆架一直扩展到北极极点的典型案例。他们利用当把洋脊看作是属于大陆边自然组成部分的海底高地时，可利用 2500 米等深线＋ 100 海里限制线原则，最大限度地扩大其大陆架范围。为此，俄罗斯划界案力图从科学上论证北冰洋中的 2 条主要洋脊（罗莫洛索夫和门捷列也夫海岭）的地壳属性为大陆性地壳，从而可认为它们是大陆边的自然组成部分，而将其外大陆架外部界限一直划到北极极点。此外，日本、美国、澳大利亚、新西兰、冰岛和其他岛国也正在谋求利用“洋脊”规则来划定他们各自的 200 海里以外大陆架界限。

15　Victor Prescott, National Rights to Hydrocarbon Resources of the Continental Margin beyond 200 Nautical Miles, In Gerald H. Blake, Martin A. Pratt, and Clive H. Schofieldeds., *Boundaries and Energy: Problems and Prospects*,The Hague: Kluwer Law International, 1998, pp. 51~82.

三、结　论

《公约》第 76 条所定义的大陆架是法律意义的大陆架，是一个科学与法律政治的结合体，也是不同政治利益集团妥协的产物，因此《公约》第 76 条关于“洋脊”的定义和有关规定在具体操作上所引起的争议也是必然的，面对新一轮的国际“蓝色圈地运动”，我们必须加强对《公约》第 76 条的法理和应用条件研究，真正掌握并准确援用有关法律的依据、原则和条件，为我国 200 海里以外大陆架划界案提供参考。同时，还必须密切关注各岛屿国家和地区的外大陆架划界主张，弄清他们所运用的技术原则和最大主张范围的划界依据，以便确定我们的应对原则和政策，避免因情况不明造成的主权争议等政治问题，导致我国主权和相关利益维护工作的被动和严重损失。

论大陆架共有

董玉鹏 *

内容摘要: 本文从分析上个世纪以来国家间大陆架划界争端中存在的问题入手，在分析公法和私法关系以及国际法和国内法关系的趋同性的基础上，参照国内民法领域的共同所有制度，提出了不同于以往的“搁置主权，联合开发”的大陆架争端解决方法。对于大陆架资源开发所引发的争端，笔者主张在充分进行国家间以及国际利益衡量的前提下，先以共有的形式解决大陆架所涉的主权权利问题，然后再以强制的合资模式进行资源合作开发。当然，这种新型的解决方式会受到历史性、国家政策、国际关系等因素的影响。所以，针对不同的争议区域应该采取灵活的处理方式。

关键词: 大陆架划界　国家主权　共有制度　联合开发

一、引　言

大陆架不属于沿海国的领土，也不属于公海区域或国际海底区域，它是沿海国行使自然资源主权权利的一个特殊海域。[1] 大陆架相关制度的特色就在于其对海床与上覆水域予以区分，沿岸国仅对其大陆架水域的海床和底土行使资源管辖权。[2] 自上个世纪中叶以来，随着人们对浅海资源的逐步勘探和开发，大陆架的归属等相关问题就一直受到了各沿海国的关注。他们以国家主权延伸理论为基础，主张自己对沿海大陆架享有所有权，由此引发的争端此起彼伏，类型各异，有的争端还被诉诸国际法院等国际性的司法机构进行裁决。时至今日，大陆架的所有权归属和划界等问题仍然困扰着许多国家。虽然有的国家通过签订条约等方式暂时解决了大陆架的争端，但仍然遗留了不少后续问题，远没有达到理想的效果；有的国家之所以能够搁置主权争议进行大陆架资源的共同勘探与开发，很大程度上是因为其单个国家的技术水平尚未达到足以自由支配海底资源的能力。随着各国经

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1 曾令良、饶戈平主编：《国际法》，北京：法律出版社 2005 年版，第 351 页。
2 邓永军：《大陆架与专属经济区法律地位和法律制度的比较研究》，载于《中山大学学报论丛》，2004 年第 5 期。

济发展对于海底资源依赖程度的逐步加大，上述临时性措施都将面临各种新情形的挑战，有关大陆架的划界、资源的合理分配等矛盾也将会更加尖锐。

二、大陆架划界国际争端解决方式与存在的问题

（一）“大陆架”作为一个国际法概念的提出

“大陆架”作为一个正式的法律概念，首次出现在美国的 1945 年《杜鲁门公告》中。[3] 1958 年联合国海洋法会议上制定的《大陆架公约》第 1 条规定：“大陆架一词是指：1. 邻接海岸但在领海范围以外，深度达 200 米或超过此限度而上述水域的深度容许开发其自然资源的海底区域的海床和底土；2. 邻近岛屿海岸的类似的海底区域的海床和底土。”

在 1973 年召开的第三次联合国海洋法会议上，大陆架是一项重点审查内容。本次会议上所确定的关于大陆架的法律概念成为 1982 年《联合国海洋法公约》[4] 第 76 条的主要内容，即：“沿海国的大陆架包括其领海以外依其陆地领土的全部自然延伸，扩展到大陆边外缘的海底区域的海床和底土。如果从测算领海宽度的基线量起到大陆边的外缘距离不到 200 海里，则扩展到 200 海里的距离。”

可见，关于大陆架的法律制度，1982 年《联合国海洋法公约》与 1958 年《大陆架公约》没有实质性的区别。但是与后者相比，《联合国海洋法公约》确定的大陆架的概念对大陆架的外部界限采用了新规定，明确指出了两种情况：一种情况是，如果全部自然延伸不到 200 海里，则扩展到 200 海里；另一种情况是，如果全部自然延伸超过 200 海里，则不应超过从测算领海宽度的基线量起 350 海里，或不应超过 2500 米深度各点的 2500 米等深线外 100 海里。后一情况是为了适当照顾大陆架国家的利益，同时也考虑和尊重了其他国家的利益和要求，并规定，沿海国在超过 200 海里部分开发石油和其他自然资源的收入应与国际社会分享，即进行资源开发时应向国际海底管理局缴付费用或实物。[5]

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3 1945 年的 9 月 28 日由杜鲁门总统发表的《关于大陆架的声明》宣布：“处于公海下毗连美国海岸的大陆架的底土和海床的自然资源属于美国，受美国的管辖和控制。”这是第一个对大陆架主张沿海国管辖权的法律文件，尽管它并没有给大陆架精确的法律定义，但提出了“大陆架”这一新颖的法律概念。

4 《联合国海洋法公约》于 1982 年 4 月 30 日在第三次联合国海洋法会议第 11 期会议上获得通过，并于 1994 年 11 月 16 日生效。

5 根据 1982 年《联合国海洋法公约》第 82 条，沿海国对于超过 200 海里的大陆架，开采到的石油和实物要提成按比例分配给海洋法公约的成员国，分配时要特别考虑到发展中国家的利益。矿物开采 5 年以后从第 6 年开始应缴付产值或产量的 1%，以后每年增加 1%，到第 12 年增加到 7% ,12 年以后一直维持 7%。

（二）当前大陆架划界国际争端解决的基本原则

沿海国对于大陆架划界以及归属的争端是一个关系到国家的主权和经济利益的重大问题。1973 年第三次海洋法会议关于大陆架划界问题的讨论，从一开始就在运用什么原则上出现了严重分歧：一些国家主张，大陆架界限应按照公平原则通过协议划定，适当时可采用中间线或等距离线，但要顾及各种特殊情况；另一些国家则主张中间线或等距离线应是唯一合理的划界原则。[6] 然而，需要指出的是，任何单方面的划界决定，或者在有关国家缺席的情况下作出某种国际安排，都无助于问题的解决，而且是不合法、无效的。

参照以往关于大陆架划界争端的案例，关于大陆架的划界，逐渐形成了一定的原则：

1.“协定和等距离一特殊情况”原则。1958 年《大陆架公约》第 6 条对这一原则作了规定：相邻或相向国家大陆架的疆界应由两国间协定予以决定；在无协定的情形下，除根据特殊情况另定界线外，疆界应适用等距离线（中间线）予以确定。这就是所谓的“协定和等距离一特殊情况”原则。实践中，有要相当一部分大陆架划界并非简单地、完全地适应等距离线，而是考虑了与划界有关的情况，对等距离线进行了调整。[7]

2. 公平原则。一般讲，公平原则指把公平合理作为调整大陆架划界的方法，并表明在大陆架划界中，不管用何种划界方法，都须提供公平的解决办法，或产生公平的划界结果，达到公平的目的。[8] 此原则在大陆架划界实践中具有重要意义。适用公平原则，并不否定等距离线作为大陆架划界的一种方法。划界时仍可采取等距离法，以求得公平解决。

《联合国海洋法公约》有关大陆架定义和大陆架划界的规定，为各国之间的大陆架划界提供了一定的法律依据，[9]《公约》第 84 条规定：“1. 海岸相向或相邻国家间大陆架界限，应在《国际法院规约》第 38 条所指国际法的基础上以协议划

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6 张耀光等：《大陆架在国家可管辖海域划界问题研究》，载于《地理与地理信息科学》2004 年第 3 期。

7 参见周忠海著：《国际海洋法》，北京：中国政法大学出版社 1987 年版，第 108 页。

8 大陆架划界争端中公平理念的引入最早见于 1969 年“北海大陆架案”的判决。国际法院的判决否定了荷兰和丹麦关于《大陆架公约》第 6 条是国际习惯法的主张，指出划界应依公平原则，并考虑一切有关情况，使每一方尽可能多地得到作为其陆地领土自然延伸的一部分。在 1969 年以后的大陆架划界实践中，公平原则得到了广泛适用，如 1984 年美一加拿大关于“缅因湾海洋边界划定案”，1986 年几内亚一几内亚“比绍海洋划界划定争端案”等。

9 1958 年《大陆架公约》通过之后，各国陆续签订了不少专项大陆架划界协议，如 1974 年日本和韩国的大陆架划界协议、1971 年泰国和马来西亚、印度尼西亚大陆架划界协议、1971 年伊朗和卡塔尔大陆架划界协议等。

定，以便得到公平解决。2. 有关国家如在合理期间内未能达成任何协议，应诉诸第 15 部分所规定的程序。”也就是说，大陆架划界应根据国际法由有关国家协议解决，最根本的原则是公平解决，如解决不了，可采用海洋法解决争端程序解决。

（三）传统大陆架争端解决方式存在的问题

目前，大陆架资源争端解决的可能方案主要包括：

1. 通过协议划定边界。通过协议划定边界是海岸相向或相邻国家间解决权利重叠区域的通常途径，它能提供稳定、清楚的海上管辖权界限和创造安全的资源开发投资环境，是一种最直接且最彻底的解决方法。但是，划界谈判往往需要耗费相当长的时日，不可能在短期内达到目的。尽管划界是理想的办法，却无助于现实争端的及时、有效解决。

2. 临时性措施和安排。在成功划界之前，临时性安排可以考虑以下形式：第一，冻结资源调查、勘探或开发活动。争端双方在协定期内都不得在重叠区域内进行与海底资源有关的任何活动。这种方法可以暂时保持重叠区域的和平局面，却无益于大陆架资源的开发。第二，暂定措施区域进行合作直至共同着手开发。这是许多划界协定和资源管理协定采用的一种临时安排，即有关国家暂时搁置主权或主权权利争议，在相互间协定的基础上，将一定范围的海域规定为“暂缓区”，并建立在该区域的某种合作机制，勘探和开发重叠海域的自然资源。[10] 这一共同开发活动不构成支持或否定任何一方对有关区域及其资源的权利或权利主张的基础，也不创设任何新的权利或扩大现有权利。[11] 由于是临时安排，这些方案并不能完全有效地解决问题。当事国在达成临时协议之后，其态度很有可能会随着进一步合作的展开而发生改变。在这种情况下，双方合作的基础是双方的协议，并不能得到相关国际法的有效约束。如果发生违约或其他不能继续合作的情况，即使诉诸国际性的裁决机构，其法律依据至多也只是相关国际法律文件的原则性规定。在此，法律的预见性和可执行性得不到保障。

3. 国际诉讼。通过国际诉讼的方式进行大陆架争端的解决目前被很多国家广泛采用。国际法院的相关判决，大部分都得到了当事国的尊重，并依照判决或裁定签订了相关的划界协议。但是，由于国际法院并不是超越于主权国家之上的机构，其判决并不具有直接强制力。而且，其法律依据也是可质疑的，因为在很多没

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10 这种制度性安排与《联合国海洋法公约》第 74 条和第 83 条的要求一致。一般地说，争端海域的共同开发是划界前的一种过渡安排，它不妨碍最后协议的达成和最后界限的划定，不意味着任何一方放弃其权利或权利主张，也不得视为承认对方的权利主张。

11 “北海大陆架案”判决指出，在重叠海域，可通过共同开发的协议来解决。“突尼斯一利比亚大陆架案”同样也肯定了共同开发的方法。专案法官埃文森在其不同意见中称：“共同开发是解决海洋边界争端的一个公平的替代方法。”

有法律规定或规定不明确的情况下，国际法院都是按照前一个问题中所提及的原则作为裁判标准，同样缺乏预见性和稳定性。具体到中国来说，中国更不愿意进行国际仲裁和诉讼。除了国家主权绝对性的考虑外，中国沿海邻国的情况各不相同。某一区域大陆架纠纷的有利判决标准适用于我国和其他国家的大陆架纠纷很可能会变得对我国不利，而我国作为当事人的某一案件的判决对于其他类似争议必定有连动效应，并不符合我国的整体利益与长远发展。

传统大陆架争端解决方式存在的上述问题，使得目前关于大陆架的划界以及归属等国际纠纷一直处于僵持阶段。各国总是从对自己有利的事实出发为自己争辩并相互进行单方面划界、资源勘探等一系列试探性行为，结果导致争议区域的自然资源迟迟得不到有效利用。那么是否可以改变传统的思维模式，转换视角，从国内法的相关制度中寻找更为合理的解决方案呢？笔者认为，国际法与国内法、公法与私法的分类方法，是人为的设定。在人类社会早期，法律要么是公法优位（如中国封建社会的公法文化传统），要么是私法发达（如古罗马的民法文化传统），尽管这种不平衡长期存在，但不同的社会类型在相当长的时间内还是经历了较为健康完整的发展历程。那么公法与私法之间是否也有可以相互借鉴的内容和制度呢？尤其是大陆架这一相对较新的法律制度领域，是否可以借鉴国内私法制度体系中规定的共同所有制度的框架，加以改造，形成大陆架本身独特的共有制度？笔者认为有必要对此进行进一步的分析。

三、民法共有制度在大陆架争端解决方面适用的可行性

（一）私法概念是否可以延伸至公法领域？

公私法的划分，与人类社会自身的发展有着深刻的联系。古罗马法学家注意到，有关私人之间的关系和以国家为一方而形成的社会关系具有很大的不同，因而规范二者的法律也具有质的区别。在此基础上，他们将法分为公法和私法。按照乌尔比安的解释，“公法是与国家组织有关的法律”，“私法是有关个人利益的法律”。凡是保护国家利益的规范都属于“公法”，保护私人利益的规范都属于“私法”。[12] 公法体现了社会生活要求集中、管理的方面，重心在于规定公民与国家的关系，规定政府及官员的权力和责任。公法的价值侧重于社会秩序与社会公平的维护，其调整方式是自上而下的，主要关系到社会资源的再分配，以实现分配正义。私法则体现了社会生活本身不受国家权力任意干涉的需要，在私法领域，社会关

12　潘萍、徐强胜：《公私法关系论纲》，载于《河北法学》2003 年第 4 期。

系的参加者根据预先设计好的典型化的法律规范，独立、自主地从自身利益出发作出在各种生活状况下的决定。私法的价值侧重于自由和效率，实现的是校正正义，它的调整方式自下而上，主要关系到社会资源的初次分配。公私法的关系问题实质上是国家对社会主体的社会、经济、文化等生活干预的范围和方式问题，反映着政治国家和市民社会的关系。[13]

在 20 世纪以前，由于社会经济关系相对简单，公法和私法的划分是比较清晰的。但是，进入 20 世纪以后，社会在各个方面的深刻变化对法的理念和立法产生了重大影响，公法私法化和私法公法化是社会发展对私法和公法如何更好地规范和保护社会而提出的更高要求。它是权利与权力互动的表现，其出发点是通过对各自的反动达到私益和公益的良性运作。其目的并不是通过私法公法化来否定私益，也不是通过公法私法化使公益侵占私益。恰恰相反，通过私法公法化使私益获得实际的实现和扩张，通过公法私法化使公益直接地与私益结合，使私益在一单纯私法制度中不能或很难实现的目标通过公法私法化来达到。公益和私益性质虽异，但并非截然对立。

1998 年 6 月 26 日通过的《中华人民共和国专属经济区和大陆架法》第 4 条规定："中华人民共和国为勘查大陆架和开发大陆架的自然资源，对大陆架行使主权权利。中华人民共和国对大陆架的人工岛屿、设施和结构的建造、使用和海洋科学研究、海洋环境的保护和保全，行使管辖权。中华人民共和国拥有授权和管理为一切目的在大陆架上进行钻探的专属权利。"值得注意的是，这里使用了"主权权利"一词，而非"主权"。"权利"一词是民法上的基本概念，暗含着平等主体间的利益分配的意思，可以看作是公法和私法领域基本概念的融合与渗透。

（二）国内法制度是否可以延及国际法领域？

国际法与国内法之间的区别是十分明显的，它们各有其特定的调整对象、主体、形成方式和实施方式，从而在整体上形成相对独立的法律体系，互不从属。但是，国际法和国内法这两个法律体系不是孤立存在的，而是相互密切关联的。

第一，国家是国际法和国内法相互联系的纽带。国家是国内法的制定者，同时也参与国际法的生成。国家的对内政策和对外政策的一致性和连贯性决定了国际法与国内法具有必然的联系。一般来说，国家的对外政策必然影响它对国际法的态度和立场，而国家的对外政策又总是受国内法的影响。

第二，国际社会和国内社会是国际法和国内法相互联系的基础。国际法主要是依存和适用于国际社会，国内法主要是依存和适用于国内社会。但两个社会不

13 孙国华、杨思斌：《公私法的划分与法的内在结构》，载于《法制与社会发展》2004 年第 4 期。

是隔绝的，国际法和国内法所分别调整的国际事项和国内事项互相影响，互相依存。[14]

第三，国际法和国内法相互联系是各自实现自身职能的需要。从国际法看，在其原则和规则形成和发展的过程中，不断吸收和借鉴国内法的原则和制度，如关于国家责任中的“过错原则”就来自“无过失者，本质上不应受任何拘束”这一罗马法原则。[15]

国际法的发展，如个人作为国际法主体的不断增加，条约中划一的国内法规定以及像欧洲共同体那样的法律秩序的出现，都倾向于使国际法和国内法之间的区别不像以前那么清楚而且是更复杂。[16] 有很多以前纯粹属于国内法的制度已经在国际法领域适用了，民法的共有制度也有可供国际法借鉴的可能性。

（三）共有制度是否受制于国内民法传统？

共有制度是一项相当复杂的制度。在原始社会，共有的范围包括几乎所有的生产资料和消费资料。后来，个人使用的生产工具和消费资料逐渐地转变为归家庭或个人所有；随着社会的发展，在一些社会，[17] 土地等生产资料也完成家庭化或个人化过程。但是在私有化的过程中，并不是所有财产都能够私有化，即使在实行财产私有化、由权利人自主利用所有物的世界里也需要合作，以取得规模效益和合作优势。而合作即需要合并财产于一处，形成共有财产。之所以结成共有关系，要么是为了共同的目的自愿地合并财产，要么是因为维系其他法律关系的必要。在人类历史上，并不是所有的立法均建立在个人本位的基础之上，在个人所有尚未发育的社会，共同所有就不是以清晰的个人所有为基础的，其共有内容往往包含了公有物、共有财产等权念。

历史上 2 种最典型的共有制度便是罗马法上的共有和日尔曼法上的共有。罗马法的共有体现了罗马法的个人主义特色，也可以说正因为罗马法是以个人为本位的，所以它才建立起以个人意志为基础的可转化的共有制度。日耳曼社会则创制了独特的总有制度，[18] 它是基于其独特的社会组织——马尔克而存在的，建立

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14 以人权的保护为例，在过去相当长的时间内，一国对本国国民的人权待遇以及人权保护属于国内法问题。但时至今日，人权的国际保护已成为公认的国际法的前沿领域。

15 曾令良、饶戈平主编：《国际法》，北京：法律出版社 2005 年版，第 99 页。

16 参见 [英] 詹宁斯瓦茨修订，王铁崖、陈公绰、汤宗舜、周仁译：《奥本海国际法》，北京：中国大百科全书出版社 1995 年版，第 32 页。

17 如古罗马的不动产家庭所有制度。虽然家长享有绝对的支配权，但是却不是家长的个人单独所有。

18 在总有制度下，所有权名义上归全体成员享有，实际上所有权主体已经被抽象为独立于成员的团体（只是没有人格）。其成员也许拥有份额，但这种份额永远不能转化为个人所有权，只表现为用益权，而不能请求将其分割并转化为个人所有权。总有制度实质上是马尔克公社体制中耕地团体所有、分散利用（用益权在社员）状况的概括。

在固定的社会关系基础之上，与罗马法个人财产集合成共有或可分割为个人所有权的共有完全是两种性质的制度安排。形成以上两种迥异的共有形式的根本原因就在于，罗马法律制度较早地确立了私有物和公有物、交易物与非交易物的划分，这使得罗马社会不需要用一种权利界限模糊的集体或团体所有来包容私人财产和公共财产。而在日耳曼法中，除了动产为个人所有外，不动产均采取社区性的共同所有形式，归成员共同利用的财产和归个人利用的财产，都统一地纳入“共同所有”的名下。也就是说，这里的共同所有包括了罗马法的公共所有和个人所有，它是人的共同体而不是财产共同体。所以说，共有这一法律概念的雏形存在不同的历史背景。

《法国民法典》所确立的共同财产或共有是一种属于个人所有范畴的财产存在状态，或是个人财产之间的某种结合状态。《法国民法典》并没有将共同所有作为一个独立的所有权类型，而是将之归类为两个以上的人共同拥有和行使一个所有权。[19] 1907 年《瑞士民法典》也明确规定了共同共有，主要是指数人依法律规定或契约结成一种以财产为基础的共同体，要分割财产必须解散共同体，是一种以共同体解除为条件的共有关系。这种共存财产具有独立于每一个共有意志的特性，其财产服务于特定共同体的需要，体现出一定的团体或社会本位思想。在共有规定方面，《瑞士民法典》实现了个人本位向社会本位的转变。[20]

总之，法律上对于共有制度的规定是受制于国内民法制度的。在涉及大陆架的共有问题上，很有可能会出现不同国家国内民法传统相冲突的情况。但是，目前世界范围内法律文化的融合以及立法方法的相互借鉴和趋同使得在国际法这一相对较新的领域内的制度创新成为可能，各国民法传统的不同并不构成国家间相邻大陆架共有制度构建的根本性障碍。

（四）大陆架的共有与国家主权理论

从上面的分析我们可以看出，公法和私法、国际法和国内法的关系是相当密切的，它们之间的制度和原则可以相互渗透、相互借鉴。民法中的共有制度当然不能直接移植到大陆架所有权的争端解决中来，但是笔者认为，基本原理的借鉴是完全可行的。20 世纪 40 年代末，美国之所以提起有关大陆架的概念及权利要求，认为沿海国对大陆架海床和底土的自然资源行使管辖权是合理的，主要是由于“大陆架可以被认为是沿海国陆地的自然延伸，因而自然属于它”；大陆架的资源又“往往是蕴藏在领土内的油田和矿床的向海延伸”，这就给予地理上的“邻接原则”以

19 高富平著：《物权法原论：中国物权立法基本问题研究》，北京：中国法制出版社 2001 年版，第 232 页。

20 高富平著：《物权法原论：中国物权立法基本问题研究》，北京：中国法制出版社 2001 年版，第 237 页。

合法性，为沿海国对大陆架的海床和底土提出要求提供了理论根据。[21] 1955 年国际法委员会在拟定大陆架条款草案的过程中，将沿海国在大陆架的主权权利解释为“沿海因为开发和利用大陆架资源所必要的一切权利，包括管辖权及防止和惩罚违法行为的权利”。因此，这种主权权利意味着沿海国对大陆架自然资源的占有、使用和处置的权利及相关的管辖权。此项权利与沿海国在内海和领海所享有的权利不同，它仅为勘探和开发自然资源而拥有。[22] 1958 年日内瓦《大陆架公约》已经确定，沿海国勘探和开发的权利既是专属的，又是根据事实本身当然存在的，不需要象征性地占领，也不需要公告。这个法律原则在“北海大陆架案”的判决中已经充分得到确认。该判决认为：“有关大陆架的一切法律规则中最根本的一条，即沿海国对构成其陆地领土自然延伸至海洋并在海洋下的大陆架区域的权利，是根据事实本身自始就存在的，这是由于它对其陆地享有主权，而且作为该陆地的延伸，为了勘探海床和开发其自然资源而行使其主权权利的。总之，这里有一种固有的权利。”

前面提到了公法与私法基本概念的相互渗透。而一国对于其沿海大陆架之所以是享有“主权权利”而不是“主权”，其理由在于，虽然这些权利是领土主权所固有的，具有主权性质，然而只限于以勘探和开发大陆架的资源为目的，所以并不合计在全部的领土主权以内。[23] 无论是《联合国海洋法公约》还是一般国际法，都承认“陆地支配海洋”的原则，允许沿海国适用正常基线或直线基线划定内水，拥有从领海基线量起不超过 12 海里的领海，不超过 200 海里的专属经济区和（原则上）最远不超过 350 海里的大陆架。这就是说，沿海国拥有领土主权或主权权利的海域，可以向从前的公海海域扩展。但这种主权的扩展同时也削弱了主权的绝对性。1982 年《联合国海洋法公约》所包含的妥协方案之一便是，该沿海国家对从领海基线量起 200 海里以外的大陆架上的非生物资源的开发，就必须通过按照公约设立的管理局缴付费用或实物，以根据“公平分享的标准”进行分配。[24] 这和一个国家享有的单方面的主权有着明显的区别，需要国家权力的让步和权利的让渡。另外，为了共同利用跨界的自然资源，有关国家达成了许多的国际安排，[25] 各国还就平等地分享跨界自然资源缔结了许多双边或区域性的条约。绝对主权的概

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21 周忠海著：《国际海洋法》，北京：中国政法大学出版社 1987 年版，第 95 页。

22 鹿守本主编：《海洋法律制度》，北京：光明日报出版社 1992 年版，第 123 页。

23 参见 [英] 詹宁斯•瓦茨修订，王铁崖、陈公绰、汤宗舜、周仁译：《奥本海国际法》，北京：中国大百科全书出版社 1995 年版，第 195 页。

24 参见 [英] 詹宁斯•瓦茨修订，王铁崖、陈公绰、汤宗舜、周仁译：《奥本海国际法》，北京：中国大百科全书出版社 1995 年版，第 197 页；另见前注中所列举的缴纳比例。

25 例如，《各国经济权利和义务宪章》规定：“对于二国或二国以上所共有的自然资源的开发，各国应合作采用一种报道和事前协商的制度，以谋对此种资源作最适当的利用，而不损及其他国家的合法利益。”

念正逐渐被“平等地利用”的概念所取代。[26]

所以，如果当前借鉴国内民法理论中的共有制度来解决大陆架的划界争端，并不存在像领土划界那样绝对主权性的障碍。早在 17 世纪，荷兰法学家格老秀斯就在他的多部著作中阐述了海洋自由的思想，其理论在现代公海法律领域得到了贯彻。他的海洋自由思想的理论依据，很大程度上可以说是把连接各国的海洋看作了人类的共有物（公有物），在这一公有物之上是没有主权的。然而，如果我们转换视角，又可以把他的观点理解为每一个国家对于公海都享有不可剥夺的主权，这种自由航行、自由贸易的利益应该公平地为每一个主权国家所共享。这样，所有对于公海的主权就成为了与民法领域私权一样性质的主权权利。主权的不可侵犯性没有变，但是却新添加了平等性和妥协性。诚然，大陆架不同于公海，格老秀斯所处的历史时代和技术背景也不可能使其对于大陆架的利益分配问题进行详细的阐述。由于地理条件等因素的限制，[27] 大陆架在利益的归属上，其性质恰恰介于公海和陆地领土之间，既非全人类所共同享有，也非绝对的排他支配。除了“搁置主权，共同开发”这一模糊的非法律概念之外，特定国家的共有也是不受绝对主权原则限制的折衷方案之一。[28]

四、传统大陆架划界纠纷解决方法与共有制度适用的协调

（一）大陆架划界的传统影响因素

从现有的判决和裁决来看，大陆架划界应考虑的相关情况包括：地理因素、地质和地貌因素、当事国的行为、第三国的利益、保护资源的统一性和对自然资源的平等利用，其中以地理因素的首要性尤其明显。在国际司法和仲裁实践中，通常

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26 例如，1957 年“拉努湖仲裁案”指出，法国准备在拉努湖的法国管辖部分进行分道工程，由于有条约规定，不能看成单纯是法国境内的事情，法国有义务通知西班牙政府并征求西班牙政府的意见，如果不那样，法国应承担违反条约的责任。见杨泽伟：《论国际法上的自然资源永久主权及其发展趋势》，载于《法商研究》2003 年第 4 期。

27 本文将在第三部分对以往影响大陆架划界以及利益归属的各种因素进行进一步分析。大陆架的自身特征决定了划界纠纷的复杂性和灵活性，也为新的纠纷解决方法的灵活性发挥预留了充分的空间。

28 在此需要注意的是，我国在南海问题上的立场与东海问题不同。南海存在众多的岛屿，周围包括了领海，因而是主权问题，也有大陆架问题；而在东海问题上，没有领海之争，问题的焦点集中在大陆架的划界与海底资源的分配。

考虑了以下相关情况：1. 地理因素。如海岸形状[29]和比例性，[30]其中比例性是重要的地理因素之一。它是指当事国邻接划界海域的相关海岸线长度与当事国通过划界方法得到的相关海域之间的关系。[31] 2. 地质和地貌因素。从国际司法和仲裁实践的发展来看，虽然地质和地貌因素在海洋划界中的作用逐渐减弱，但是在从当事国的海岸量起 200 海里范围以外的大陆架划界，地质和地貌因素是一个应该加以考虑的相关因素。[32] 3. 当事国的先前行为。[33] 4. 对自然资源的平等利用。[34]

当代的问题除了传统因素以外，还要考虑国际关系因素与历史因素。当采用的划界线太靠近一国海岸时，从理论上讲，安全因素应被作为潜在的相关因素。但从目前的国际司法和仲裁实践来看，还没有肯定地把安全因素列为划界的相关因素。[35] 关于历史性因素，同样不存在确定性。在 1982 年的突尼斯一利比亚案中，法院认为，“突尼斯的历史性权利的问题在许多方面可能与本案的决定有关”。但经过审查后，法院又认为“没有必要继续谈论历史性权利作为基线的正当理由的问题。只有在本法院认为妥当的划界方法可能侵犯历史性权利区域的时候，本法

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29 1969 年“北海大陆架案”认定“海岸的一般构造以及任何特殊或异常特征的存在”是划界时应考虑的因素。1971 年在北海地区签订的五个大陆架划界协定，也是按照 1969 年“北海大陆架案”的判决结果完成的。在 1982 年突尼斯一利比亚大陆架划界案中，国际法院认为：“海岸方向的改变是一个必须考虑的事实。”在 1985 年的几内亚—几内亚“比绍海洋划界案”中，仲裁法庭考虑了“海岸线的一般走向”和“海岸的一般形状”。

30 1969 年“北海大陆架案”中，法院确认：“最后应考虑的因素是，按照公平原则所完成的划界在归属于有关国家的大陆架的范围和各自海岸线长度间所应产生的合理比例的要素”。在 1985 年利比亚一马耳他大陆架划界案中，国际法院把比例性作为调整海岸相向国家之间的中间线应考虑的一个因素。在 1993 年的格陵兰一扬马延海域划界案中，法院认为，在本案的情况下适用等距离方法，在相关海岸线长度和由它们产生的海洋面积之间将会导致不合比例，以至于在划界时必须考虑当事国相关海岸线长度之间的差别。

31 袁古洁：《对大陆架划界问题的思考》，载于《中外法学》1998 年第 5 期。

32 在 1969 年的北海大陆架案中，法院指出：“划界应通过协议，按照公平原则，并考虑到所有有关情况，以使每一个国家得到构成其陆地领土向海中和海底的自然延伸的全部大陆架部分，并且不侵犯另一国陆地领土的自然延伸。”在 1977 年的英法大陆架仲裁案中，仲裁法庭赞同国际法院在北海大陆架案中的上述结论。在 1985 年的利比一马耳他大陆架划界案中，法院则认为：“由于法律的发展使一个国家，不管相应的海底和底土的地质特征如何，都可以主张属于它的大陆架从海岸扩展到 200 海里，在确定有关国家的法律权利或着手在其主张的地区之间划界时，就没有理由对在该距离以内的地理地质因素给予任何作用。”

33 在 1982 年的突尼斯一利比亚大陆架划界案中，国际法院认为，它必须考虑两当事国可能认为是公平的、或当作公平而按其行动的各种已经划定的界线——只要这些界线曾作为暂时的、影响到哪怕是部分划界区域的解决方法。

34 在 1993 年的格陵兰一扬马延案中，第一次将自然资源的平等利用列为划界考虑的相关因素。法院认为，双方当事国都强调该地区的海洋资源对它们各自利益的重要性。

35 在 1977 年的英法大陆架仲裁案中，法庭认为，这些因素对本案的划界不起决定性的作用，它们可以支持并加强、但不能反对已经由法院验证的本地区地理、政治及法律条件所表明的结论。在 1993 年的格陵兰一扬马延海域划界案中，国际法院坚持安全因素并非与海洋区域的概念无关，但是在本案中所导致的界限，并没有足以靠近一方当事国的海岸以使安全问题成为一个需要特别考虑的因素。

院才不得不根据大陆架划界的情况来决定这些权利的有效性和范围以及利比亚对这些权利的可反对性”。然而在 1998 年厄立特里亚一也门仲裁案中，两个当事国在仲裁协议中特别要求仲裁庭根据历史性所有权裁决领土主权问题，历史性所有权在案件裁判中则受到了高度重视。[36] 对于我国的大陆架划界问题来说，国内很多学者从维护我国国家利益的角度，尤其强调了历史因素在解决大陆架争端过程中的论据作用。[37] 但是，在他们所虚拟的辩护中，单方面强调对我国有利的因素、对于不同地区问题使用不同的说辞，甚至把历史性的因素作为主要的权益归属理由，毕竟只是一厢情愿的做法。

以上因素，和大陆架的共有并没有实质性的冲突，当事国可以通过“共有化”这一实有权益界定模糊但是法律定义明确的概念，将“非此即彼”型的划界争议转化为双方互相承认的既得权共享。如果当事国确实是出于资源开发的经济利益考虑，那么共有制度完全可以克服以上因素的影响，实现两国经济利益的最大化。

（二）大陆架共有与大陆架附随权利和义务的冲突与协调

根据《联合国海洋法公约》第 77 条至第 81 条，沿海国在其大陆架的权利包括：1. 开发自然资源，包括大陆架海床和底土的矿物和其他非生物资源，以及属于定居种的生物；2. 授权和管理为一切目的在大陆架上进行钻探的专属权利；3. 有权建造并授权建造、操作和使用及管理人工岛屿、设施和结构，并对这些人工岛屿、设施和结构享有专属管辖权。[38] 需说明的是，沿海国在对其所属大陆架行使其主权权利时，不得影响大陆架上覆水域和水域上空的法律地位及其他国家在大陆架上的合法权利，[39] 因为《联合国海洋法公约》第 78 条和第 79 条也规定了不特定国家在一国大陆架的权利，即：1. 大陆架的上覆水域和水域上空对一切国家开放，任何国家的船舶和飞机得自由航行和飞越；2. 所有国家有权在大架铺设海底电缆或管道，沿海国除为了勘探大陆架和防止、减少及控制由于管道造成的污染外，不得加以阻止。

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36 在厄立特里亚—也门仲裁案中，仲裁庭认为：“毫无疑问，历史性所有权的概念对于在当今世界上可能存在的情势具有特殊的影响。”

37 例如，有人认为：“历史性所有权是《联合国海洋法公约》和一般国际法明确承认和保护的既得权利。”参见赵建文：《联合国海洋法公约与中国在南海的既得权利》，载于《法学研究》2003 年第 2 期。

38 沿海国的上述权利，是在 200 海里以内大陆架上的权利，沿海国对 200 海里以外大陆架上的非生物资源的开发，如上所述应缴付费用或实物。参见《联合国海洋法公约》第 82 条的规定。

39 对大陆架上覆水域和上空的法律地位，《海洋法公约》第 78(1）条规定，“沿海国对大陆架的权利不影响上覆水域或水域上空的法律地位。”在 200 海里范围以内，大陆架的上覆水域及水域上空应适用《联合国海洋法公约》关于专属经济区的规定，而在 200 海里以外的大陆架上覆水域和水域上空，则适用公海制度。

就像私法领域所有权的两面性一样，一国在大陆架上的权利并不是绝对、无条件的，除了开发资源、获取收益的权利外，还有一系列的附随性权利以及对其他国家的义务。[40] 大陆架共有之后，就存在了两个国家之间相互的权利义务以及共有国与第三国之间的附随性权利义务。[41] 不论大陆架归属一国还是为多国共有，所有国对于其他第三国的权利义务都是一样的。而在共有国内部，他们之间的权利义务可以参照传统民法共有制度的相关规定，主要表现在共有大陆架的管理上。

在民事法律制度领域，对共有财产管理的原则是：有契约约定的按照原来的约定处理，没有约定的应当共同管理。无论何种共有关系，对于共有财产的保存行为，都是以防止共有财产的灭失、毁损或其权利丧失、限制等为目的来维持其现状的行为。共有人可以在不问其他共有人的意思如何的情况下，单独为之。对共有财产的改良行为，即不变更共有财产的性质，而增加其效用或价值的行为，由于其紧急性不如保存行为，且费用多数过大，价值或者效用又不必然增加，因此需要共同决定。[42] 对于大陆架来说，共有所带来的附随性权利和义务会更加复杂，并且往往会搀杂国家间的外交以及国际大环境的影响，以目前的情况来看，可以说几乎是一片空白。在共同管理的具体细节上，共有国之间很可能会有持续不断的再谈判、再协商等情况。

（三）涉及多个国家的大陆架划界与共有制度的适用标准：以中国东海大陆架为例

1998 年 4 月 26 日，我国第九届全国人民代表大会常务委员会第三次会议通过了《中华人民共和国专属经济区和大陆架法》，确立了专属经济区和大陆架基本制度。根据该法，我国可以主张从测算领海宽度的基线量起不超过 200 海里的专属经济区和属于我国陆地领土向海洋的全部自然延伸的大陆架。初步估计，我国可主张的管辖海域面积约 300 万平方公里。但是，我国大陆架东部面临四个海，其中黄海、东海和南海都涉及大陆架海域划界的问题。目前我国除与越南在北部

40 这里所谓的“附随性”权利，并不是说这些权利不重要，而是相对于大陆架资源开发这一主要目的来说是附随性的。

41 在 1969 年北海大陆架案中，国际法院对第三国的利益给予了重视。判决认为，在大陆架划界中的一个相关因素是，“要考虑到同一地区各相邻国家间任何其他大陆架划界所产生的现实或可能发生的影响”。在 1982 年突尼斯一利比亚大陆架案中，国际法院强调“第三国的权利保留”。袁古洁：《对大陆架划界问题的思考》，载于《中外法学》1998 年第 5 期。

42 杨立新著：《共有权研究》，北京：高等教育出版社 2003 年版，第 58 页。

湾海域有划界协定外，[43] 尚未与周边国家划定过管辖海域界线。从我国所处的特殊地理位置来看，我国在大陆架划界问题上比世界上其他任何国家和地区所经历的大陆架划界问题都要复杂。

中日东海大陆架的资源争端源于日本自 2004 年 5 月起对中国开发紧贴中日中间线中国一侧的东海海域“春晓”油气田逐步升级的反应。2004 年，我国外长呼吁双方搁置分歧，共同开发东海资源，并希望日方对此提议进行研究，但日方对此持消极态度。《联合国海洋法公约》规定，每个沿海国都对其近海区域拥有权利。中日两国在东海大陆架的权利范围有相当一部分是重叠的。[44] 中国和日本的海洋立法各自主张自然延伸和 200 海里的大陆架区域都于法有据，无可厚非。但是，当两国的这种单方面主张在东海导致权利冲突时，中国的自然延伸毋庸置疑地优越于日本的 200 海里距离，东海大陆架在地形、地貌、沉积特征和地质上都与我国大陆有着连续性，是我国大陆领土在水下的自然延伸，[45] 我国对直至冲绳海槽的东海大陆架享有不可剥夺的主权权利，东海大陆架涉及其他国家的部分，理应由中国和有关国家通过协商加以划分，任何单方面改变现状的做法都是缺乏法理依据的。[46]

我国关于解决这些争议的一贯立场是，应对依照《联合国海洋法公约》和国际习惯法，由争议各方考虑到各种因素和情况，通过平等协商，和平、公平地予以解

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43 2000 年 12 月 25 日在北京签署的《中华人民共和国和越南社会主义共和国关于两国在北部湾领海、专属经济区和大陆架的划界协定》第 6 条规定：“缔约双方应相互尊重按照本协定所确定的两国各自在北部湾的领海、专属经济区和大陆架的主权、主权权利和管辖权。”第 7 条规定：“如果任何石油、天然气单一地质构造或其他矿藏跨越本协定第 2 条所规定的分界线，缔约双方应通过友好协商就该构造或矿藏的最有效开发以及公平分享开发收益达成协议。”

44 日本 1996 年《专属经济区和大陆架法》第 1 条和第 2 条规定，日本的专属经济区和大陆架是从其领海基线量起向外延伸到其每一点同领海基线的最近点的距离等于 200 海里的线以内的区域。如果专属经济区和大陆架的外部界限的任何部分超过了中间线，中间线（或日本与其他国家议定的其他线）将代替那一部分线。参见余民才：《中日东海油气争端的国际法分析—兼论解决争端的可能方案》，载于《法商研究》2005 年第 1 期。1998 年颁布的《中华人民共和国专属经济区和大陆架法》第 2 条规定，我国的专属经济区是从领海基线量起延至 200 海里的区域，大陆架是我国陆地领土的全部自然延伸扩展到大陆边外缘的海底区域，或在某种条件下扩展到 200 海里的海底区域。

45 冲绳海槽构成东海大陆架与日本琉球群岛岛架间的天然界限。因为该海槽东西两侧的地质构造性质截然不同。海槽以西是稳定性大陆地壳，海槽以东为琉球岛弧，地壳运动十分活跃，地震频繁。海槽东西两侧的沉积物分别属于琉球岛架与东海大陆架两个物源区。东海大陆架边缘和海槽西坡的沉积物性质与长江的物质类同，海槽东坡沉积物性质则与琉球群岛有着紧密的联系。而海槽本身属于陆壳向洋壳的过渡带，其地貌既不同于堆积沉积型的平坦陆架，也不同于洋壳型的洋脊海盆，是一种独特的地貌单元。东海大陆架止于冲绳海槽西坡坡脚，琉球群岛岛架止于冲绳海槽东坡坡脚。参见余民才：《中日东海油气争端的国际法分析—兼论解决争端的可能方案》，载于《法商研究》2005 年第 1 期。

46 李广义：《东海大陆架划界争端国际法依据辨证》，载于《当代法学》2005 年第 3 期。

决。中日外交上存在的隔阂以及历史遗留的矛盾决定了大陆架共有制度在中日两国之间很难适用。可见，共有制度的采用除了国家主权理论的障碍以外，国际关系因素也发挥着重要作用。和我国相邻的沿海国很多，适用同统一的标准是一种欠缺灵活性的做法。因此，笔者认为，对于不同的国家，我们要采用不同的标准来探讨大陆架的共有问题。

五、基于大陆架共有的联合开发:国家间的意思自治与法律冲突

（一）为什么基于共有制度的联合开发是理想的大陆架资源开发方式？

共同开发有狭义和广义 2 种含义。狭义的共同开发是指国家之间通过协议，达成在某个具体区域，对其内资源，主要是油气资源进行联合开。广义的共同开发，除油气资源外，还包括渔业资源共同开发协议。[47] 共同开发包括两种类型，即在海洋边界线明确下的跨界共同开发 [48] 和海洋边界线未明确而处于争议区的共同开发 [49]。依据海洋边界线是否已存在的情况来对共同开发分类是被多数学者所接受的。这种分类，还蕴含着共同开发功能性的考虑，即在跨界情况下，进行共同开发更多地带有经济利益的驱动，而争议区的共同开发，除经济利益外，还有政治上的考虑，如缓和争端、改善关系等。[50]

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47 陈德恭：《共同开发的国际法原则和国际实践》，载于《清华法律评论》2002 年第 4 卷。

48 属于跨界共同开发的案例有 8 个：(1)1958 年巴林和沙特阿拉伯共同开发波斯湾大陆架案；(2)1969 年卡塔尔和阿布扎比共同开发案；(3)1974 年法国与西班牙划界与共同开发协定；(4)1974 年苏丹与沙特阿拉伯协议；(5)1976 年英国与挪威共同开发弗里格油田的协议；(6)1981 年冰岛与挪威（扬马延岛）的共同开发协议；(7)1988 年利比亚与突尼斯大陆架共同开发协议；(8)1993 年塞内加尔与几内亚比绍管理与合作协定。

49 属于争议区共同开发的有 13 个案例：(1)1962 年荷兰和联邦德国关于埃姆斯河口资源共同开发案；(2)1965 年科威特与沙特阿拉伯共同开发协议；(3)1967 年伊朗与伊拉克共同开发协定；(4)1971 年伊朗与沙迦共同开发协议；(5)1974 年日本和韩国共同开发东海大陆架协定；(6)1979 年泰国与马来西亚共同开发的谅解备忘录；(7)1988 年南、北也门之间的共同开发协议；(8)1989 年澳大利亚与印度尼西亚帝汶海的共同开发；(9)1992 年马来西亚与越南的共同开发协定；(10)1993 年哥伦比亚与牙买加有关海洋划界和共同开发的协议；(11)1995 年英国与阿根廷在西南大西洋近海的共同开发制度；(12)2001 年 2 月尼日利亚和圣多美普林西比签署了关于在几内亚湾共同开发两国专属经济区石油和其他资源的协定；(13)2001 年 7 月澳大利亚与东帝汶临时政权签订的关于东帝汶海合作安排的备忘录。

50 国际法院在爱琴海大陆架案中指出，在单方面开发将对有关权利造成不可挽回的损害或对有关海床或底土造成实际损害的危险的情况下，国际法支持禁止单方面开发的义务。

但是，上述所提到的传统意义上的共同开发不可避免地具有临时性。在跨界共同开发情况下，一般而言，共同开发随跨界商业性石油的生产期的结束而终止；在争议海域，共同开发不是对边界问题的永久性安排，它一般随着海洋边界线的最终划定或设立的共同开发区不再成为必要而终结。《联合国海洋法公约》第 74 条和第 83 条是为划分专属经济区和大陆架作出的，其中规定：在达成划界协议前，有关各国应基于谅解和合作的精神，尽一切努力做出实际性的临时安排，并在此过渡期间内，不危害或阻碍最后协议的达成。然而，《公约》规定的“最后协议”究竟是何意指？究竟是大陆架的划界协议还是进一步的正式资源合作开发协议，表述非常模糊。基于临时考虑的大陆架资源合作开发极有可能带有强烈的国内利益色彩并伴随着不利于可持续发展的短期行为，而且这种国家与国家之间的临时合作也是不稳定的。笔者认为，对大陆架资源的合作开发只有以大陆架的共有为基础才能够在资源开发过程中更好地实现收益的分配。另外，由于双方解决了所有权的争议，各自的权利义务更加明确，对于该大陆架区域的海洋环境保护也是有利的，不会出现只为争取经济权益而进行共同开发、不承担风险和责任的掠夺式开发等短期行为。

（二）开发联合体的构成与运作在冲突法领域的问题

有人认为，从广义上来说，共同开发的主体，可以是主权国家，也可以是跨国的或非跨国的企业或企业集团。而狭义的共同开发主体，则是指两个或两个以上国家，在国际法指导下，经过谈判签署协议，在有争议的海洋区域进行自然资源的勘探和开发活动。从以往的案例来看，联合开发的主体模式主要有三种：[51] 1. 代理制的管理模式，即由一当事国代表双方管理共同开发区，在共同开发区适用代理国的法律。[52] 2 . 强制合资模式，即两国协定将大陆架的共同开发区分为若干部分，建立承租人经营制，在每一分区内，有关勘探或开发活动适用经营者授权国的法律。[53] 3. 超国家管理模式，即国家授予联合管理局以全权负责的能力，在开发

51 肖建国：《论国际法上共同开发的概念及特征》，载于《外交学院学报》2003 年第 2 期。

52 在 1958 年协定中，巴林和沙特阿拉伯在划定了波斯湾界线后，进一步规定沙特对已划归其境内的油田拥有管理和开采权，但净收入的一半交巴林。

53 1974 年的《日本和韩国共同开发东海大陆架的协定》中这种联合开发的主体模式首次得到实践。该协定设立了一个面积为 8.4 万平方公里的共同开发区，位于东海日本主张的大陆架“中间线”与韩国主张的自然延伸线之间，协定的意旨是搁置双方划界争议 50 年，共同开发大陆架资源。但从国际法和国家主权角度来看，日韩协定是对我国东海大陆架主权权利的严重侵犯。

区内，只有一份工作计划、一种税收制度、一项预算和一套法律制度。[54]

笔者认为，代理制模式只涉及一国管理机制的运用，不涉及两国有关法律体制的相互协调，因而较易于建立和管理。但这种模式并不可行，因为一方代理另一方行使对资源的主权权利，可能致使另一方顾虑到两方没有平等地位，甚至认为自己对这一资源的主权权利受到损害或丧失。超国家管理模式的安排可以极大地减少行政开支，提高工作效率，但这种开发模式也有不足之处，比如两国同意建立超国家机构，就必须就其职责、人员组成、工作程序、开发制度、法律适用等关键问题协调一致，而这种协调在两个法制相异的国家之间是比较难于完成，更需要两国相互作出不同程度的让步。所以，基于大陆架共有基础之上的共同开发的联合体应该是广义的，不仅仅限于国家。在大陆架的所有权问题上达成合意后，所涉争议的大陆架就已经根据国家间的共同意思表示具有了合法的地位，国家完全可以从接下来的资源开发等商业化运作中退出，仅仅负责大陆架的一般管理问题。强制合资的法人主体模式避免了两国法律相互协调的问题，体现出商业上的高效原则以及平等和简易的特点。

六、结　论

本文从分析上世纪以来有关国家大陆架划界的国际争端中存在的问题入手，参照国内民法领域的共同所有制度，通过对公法和私法关系以及国际法和国内法关系趋同性的分析，所提出的不同于以往“搁置主权，联合开发”的大陆架争端解决方法只能说是一种设想。以共有的形式解决大陆架所涉的主权权利问题，势必会遇到现实中复杂的国家间利益分配上的障碍，历史因素、国家政策、国际关系等因素也会或多或少地对这种移植于私法领域的制度进行改造，最后甚至可能会使得原初的共有制度体系面目全非。即使共有的理念在大陆架领域得以接受，在大陆架共有基础上，以国家为背景的法人联合体的强制合资型的资源共同开发这一理想状态还要受到国家内部以及国际上各种经济法领域特殊制度的羁绊，在法律适用上也存在着诸多困境与空白。但是笔者认为，从目前的情况来看，对于大陆

54　1989年澳大利亚与印度尼西亚《东帝汶缺口条约》中规定的管理模式便是这样的典型。该条约将双方在东帝汶海的争议区划定为合作区，合作区按照距离两国海岸线的远近进一步分为三块区域，每块区域适用不同的勘探开发制度。位于两国大陆架中间的区域由两国设立的联合管理局全权负责一切勘探开发活动，具有法人资格以及两国法律所要求的为行使其职能所必备的法律行为能力，如发放许可证、签订合同、获得处置动产与不动产等能力。

架共有的种种设想，可以在相邻大陆架国家间，在外交关系良好、利益冲突相对较小的前提下逐步试点。

《保护水下文化遗产公约》评析

张湘兰 * 朱 强 **

内容摘要: 联合国教科文组织 2001 年《保护水下文化遗产公约》是国际社会保护水下文化遗产的第一个公约。由于水下文化遗产国际保护牵涉到众多棘手问题，如沿海国和船旗国管辖权之争、考古学界和打捞业的利益矛盾、国家主权豁免等，公约的起草过程争议重重。尽管最后文本受到了美英等海洋大国的非难，但公约毕竟实现了各方利益的协调，原则上与《联合国海洋法公约》保持了一致。最为重要的是，它为国际水下文化遗产保护提供了基本法律框架。

关键词: 水下文化遗产 沿海国管辖权 海难救助法 《保护水下文化遗产公约》

联合国教科文组织一直被喻为国际文化遗产保护的“兵工厂”，主持制定了保护文化遗产的三项公约：1954 年《关于在武装冲突的情况下保护文化财产的公约》、1970 年《关于采取措施禁止并防止文化财产非法进出口和所有权非法转让公约》和 1972 年《保护世界文化和自然遗产公约》。2001 年 11 月 2 日，这座“兵工厂”又推出了一件“新式武器”——《保护水下文化遗产公约》，构建了国际水下文化遗产保护的基本法律框架。本文拟围绕公约制订过程中的焦点对公约内容进行综合评析。[1]

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1 近年来许多探宝者开始觊觎我国沿海沉船，有效保护水下文化遗产已成为不容忽视的问题。2005 年两会期间，许多委员不约而同提出了有关提案，如单霁翔委员关于加强水下文化遗产保护工作的提案，陈玉益委员关于加大我国南海水下文化遗产开发保护力度的建议。委员们均指出我国应尽早加入《保护水下文化遗产公约》，这不仅有利于促进我国水下文化遗产的保护工作，还将使我国在国际上维护国家利益与海洋权益，通过国际社会合作制止盗掘中国古代沉船与文物的海盗行为上获得更大的主动权。（载于《中国文化报》2005 年 3 月 12 日版）目前国内学者对该公约鲜有研究，傅崐成教授在《海洋法专题研究》（厦门：厦门大学出版社 2004 年第 1 版）中设“水下文化遗产”专题，对公约、海峡两岸现行制度等做了介绍；郭玉军教授在《国际水下文化遗产若干法律问题研究》（载于《中国法学》2004 年第 3 期）一文中，从法律定性、法律归属、保护与管理及典型案例等方面，对水下文化遗产的法律问题进行了探讨。公约中文文，下载于 http://www.unesco.org/culture/legalprotection/water/images/chinconv.doc。

一、背景介绍

与人类挑战海洋的大无畏壮举相伴随的总是无情的海难，无数船舶、生命和财物遗存海底。它们提供了人们从陆地遗址得不到或不能得到的历史知识（如关于古代造船业、航海生活及贸易航线的情况）；更重要的是，深海化学和生物环境有效保存了沉船遗址的完整原状，使其作为“时代的缩影”具有独特的考古价值。[2] 另一方面，海底沉船又蕴藏着巨大经济财富。1986 年，克里斯蒂拍卖行拍卖了“Geldermalsem 号”上的中国瓷器和金锭，价值达 1600 万美元。[3] 由于自持水下呼吸器在二战后的广泛使用，对海底沉船的大肆抢掠接踵而至。无视正当考古发掘方法的商业打捞，严重破坏了沉船遗址，而打捞物品则散落在私人收藏者手中，不能用于科学研究和公众展览。[4] 加之海洋石油开采、管道铺设、海洋污染等其他因素的威胁，水下文化遗产保护已被认为是“海洋法迫切需要解决的最新的全球性事项。”[5] 这一问题的产生不仅仅源于科技发展为贪婪的人们提供了便利，更重要的是，缺失保护水下文化遗产的有效法律机制。在传统法律框架下，适用于历史沉船打捞纠纷的是海难救助法和遗失物法。由于这些传统法律制度的立法精神与水下文化遗产保护不一致，其适用反而助长了商业打捞行为的猖獗。[6]

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2 例如，17 世纪木制的瑞典战船 “Wasa 号 ” 由于沉没在冷的咸水中免于遭受船蛆的侵蚀，从而使现代人可以了解 17 世纪海军生活的原貌；从沉船“HMS Pandora 号”上打捞的 18 世纪的塔希提岛物品增加了人们对波利尼西亚历史的了解，see Robyn Frost, Underwater Cultural Heritage Protection, *Australia Yearbook of International Law*, Vol. 23, 2004, p. 26. 关于水下文化遗产的重要价值，可参见联合国教科文组织：《关于应否制订一份保护水下文化遗产的国际文件的初步研究》第 7~9 段，下载于 http://unesdoc.unesco.org/images/0010/001026/102628cb.pdf。

3 相关的事例不胜枚举，see Craig Forrest, A New International Regime for the Protection of Underwater Culture Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, footnote 10.

4 1986 年 12 月 2-5 日，在澳大利亚布里斯班举办的保护可移动的文化财产的联合国教科文组织地区研讨会发表了一个关于保护水下文化遗产的声明，该声明断定“如果不再立即采取积极措施，可以预见，探宝者最近在国际范围特别是东南亚地区的进展必将使重要遗产的精华蒙受可悲的损失。”参见 UNESCO：《关于应否制订一份保护水下文化遗产的国际文件的初步研究》，第 6 段，下载于 http://unesdoc.unesco.org/images/0010/001026/102628cb.pdf。

5 A. Couper, Editorial: The Principal Issues in Underwater Cultural Heritage, *Marine Policy*, Vol. 20, 1996, p. 285.

6 关于对传统法律制度的讨论，见下文。

对此，很多国家出台了适用于水下文化遗产的特别立法。但大部分国内遗产保护立法只适用于一国领水。[7] 国际社会对水下文化遗产保护的关注则始于 1978 年。欧洲理事会发布了第 848 号建议，[8] 敦促成员国必要时修改其国内立法以符合其附件中确定的最低法律要求，并建议部长委员会起草一项保护水下文化遗产的欧洲公约。该建议所确定的最低法律要求是：水下超过百年的所有物品都应得到保护；海难救助法不应适用于这类物品，代之以设立固定的发现者经济报酬制度；国家对水下文化遗产的管辖权应延伸到 200 海里，即所谓的“文化遗产区”。《联合国海洋法公约》磋商期间也曾提出这个问题，由于时值尾声，花在它身上的时间很少，仅有 2 条涉及，即第 149 条和第 303 条。[9] 尽管该规定含混模糊，过于简短；[10] 但其为制定水下文化遗产保护的专门公约留下了空间，[11] 且确实包含了适用于水下文化遗产的仅有的国际法规范，将沿海国对水下文化遗产的管辖权限于毗连区的外延，[12] 并确立了一般原则：各国有义务在沿海国管辖权外的各个海域保护水下文化遗产，这一义务的承担应为全人类的利益，[13] 各国在承担义务时应共同合作。

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7 See Robyn Frost, Underwater Cultural Heritage Protection, *Australia Yearbook of International Law*, Vol. 23, 2004, pp. 27~28. 例如美国出台了 1987 年抛弃沉船法对水下文化遗产作专门规制，但其领海基线外发现的水下文化遗产仍适用传统海事法。

8 Doc 4200，斯特拉斯堡。需要提及的是，欧洲理事会 2000 年发布了关于海洋和河流文化遗产的第 1486 号建议，其中反映了《保护水下文化遗产公约》的发展。

9 第 149 条“有考古和历史价值的物品”：在本地区发现的所有具有考古和历史价值的物品，均应从全人类的利益出发，予以保护或处理，要特别尊重原有国、或文化起源国，或历史与考古起源国的特权。第 303 条“在海上发现的有考古和历史价值的物品”：(1) 国家有责任保护在海上发现的有考古和历史价值的物品，并应就此予以合作。(2) 为了控制这些物品的贩卖，沿海国可以根据第 33 条（关于毗连区的规定），认为未经其批准从这一条款中所提及的区域的海底取走这些物品，将构成该条款中所提及的在其领土或领海内对其法律与规章制度的侵犯。（3）本条款丝毫不影响确实的所有者的权利，海难救助法，或其他海事规则，或有关文化交流的法规与惯例。（4）本条款不影响有关保护有考古及历史价值的物品的其他国际协议和国际法的条例。

10 《联合国海洋法公约》的两个条款饱受批评，如 L. Caflisch, Submarine Antiquities and International Law of the Sea, *Netherlands Yearbook of International Law*, Vol. 13, 1982, p. 3; A. Arend, Archaeological and Historical Objects: The International Legal Implications of LOSC Ⅲ, *Virginia Journal of International Law*, Vol. 22, 1982, p. 777; A. Strati, Deep Seabed Cultural Property and the Common Heritage of Mankind, *International and Comparative Law Quarterly*, Vol. 40, 1991, p. 859; P. O'Keefe and J. Nafziger, Report: The Draft Convention on the Protection of the Underwater Cultural Heritage, *Ocean Development and International Law*, Vol. 25, 1994, p. 391.

11 第 303 条第 4 款。

12 第 303 条第 2 款。

13 Arend 认为第 149 条将人类共同遗产的概念适用于水下文化遗产，see A. Arend, Archaeological and Historical Objects: Implications of UNCLOS III, *Virginia Journal of International Law*, Vol. 22, 1982, p. 800；而 Caflisch，则认为第 149 条并没有指定一个职权机构控制具有考古和历史价值的物品的恢复，从而舍弃了人类共同遗产原则，see L. Caflisch, Sub-marine Antiquities and the International Law of the Sea, *Netherlands Yearbook of International Law*, Vol. 13, 1982, p. 31.

基于欧洲理事会第 848 号建议，欧洲水下文化遗产保护公约草案于 1985 年出台，该草案认识到《联合国海洋法公约》对水下文化遗产保护的漠视，提出：水下文化遗产的界定应与陆地遗产保护立法保持一致以保障保护制度的内在整合，包括所有超过 100 年的物品；国家对水下文化遗产的管辖权应延伸到 200 海里；现行的海难救助法不应适用于水下文化遗产。该草案反映了地中海国家救助法和文化遗产法的分立，引入了水下文化遗产的非商业利用原则。该草案最终因希腊和土耳其之间的领土纷争被迫流产。[14]

1988 年，国际法协会设立了文化遗产法委员会，其首要任务就是起草一项保护水下文化遗产的国际公约。国际法协会最终于 1994 年通过了草案，并提交联合国教科文组织考虑。[15] 该草案实质上反映了欧洲理事会公约草案的精神：其一，所保护的水下文化遗产仅指所有人已经放弃所有权的，以避免因私财产权产生的问题；其二，保护制度以沿海国管辖权为基础，通过文化遗产区的自由设立将国家管辖权扩展到了领海基线起 200 海里；其三，排除了传统海难救助法对国际水域水下文化遗产的适用。公约草案还附录了国际古迹遗址理事会[16] 制定的《水下文化遗产保护管理规章》，该规章确立了水下考古学的基准。

1993 年，教科文组织开始对水下文化遗产保护公约的起草进行可行性研究。[17] 研究表明，虽然 1982 年《联合国海洋法公约》对国际水域的水下文化遗产有所规定，但有必要建立一个更为具体的法律保护框架，其间需要解决很多复杂的争议，例如沿海国的管辖权、海难救助法和所有权的地位、军舰和主权豁免、考古和商

14 对欧洲理事会公约草案的详细介绍，see J. Blake, The Protection of the Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 45, 1996, pp. 819~843.

15 国际法委员会在 1990-1991 年间与联合国海洋法委员会进行了磋商，未得到答复；与国际海事组织也进行了磋商，得到的答复是，它主要关心的是打捞对航行造成威胁的沉船，所以对这项建议不感兴趣；委员会还与国际海事委员会进行了磋商，反应是它对此类问题没有直接的兴趣。国际法协会第 64 届全会通过了该委员会的公约草案，并建议国际法协会秘书处将其转交教科文组织，由其作下一步处理，因为它认为教科文组织是在这一问题上采取行动的适当机构。关于该草案的具体介绍，see P. O'Keefe and J. Nafziger, Report: The Draft Convention on the Protection of the Underwater Cultural Heritage, *Ocean Development and International Law*, Vol. 25, 1994, p. 393.

16 一个非政府组织，成立于 1964 年，在联合国教科文组织具有特别观察员地位，主要职能是向政府间组织提供保护世界纪念碑和遗址的建议。

17 在其 1993 年的第 141 次会议上，联合国教科文组织执行局通过了一项决议（Doc. 141EX/18 Paris, 23 Mar 1993, Resolution 5. 5. 1, para. 20）要求总干事承担可行性研究。该研究报告于 1995 年 3 月 23 日提交执行局第 146 次大会（Doc. 146 EX/27)。

业利益的平衡等问题。1996 年 5 月举行的专家会议[18]一致肯定了公约制定的必要性。1998 年，教科文组织以国际法协会草案为基础拟订了预备草案文本。[19]该草案经 1998 年 6–7 月、1999 年 4 月两次政府专家会议讨论。第二次专家会议虽然没有对预备草案做正式修改，但形成了一个修改稿，以此奠定了 2000 年 7 月第三次专家会议的工作基础。第四次会议于 2001 年 3–4 月间举行，总干事明确表明这是最终草案形成前的最后一次会议。[20]在这种压力下，会议于 6 月又续期举行。第四次会议的关注焦点是由 Carsten Lund 主席草拟的一份单一谈判稿。最终，在对谈判稿进行修改的基础上，《保护水下文化遗产公约》在 2001 年 11 月 6 日的教科文组织第 31 届大会上通过，87 票赞成，4 票反对，15 票弃权。[21]公约共有正文 35 条，附件规章 36 条。

二、《保护水下文化遗产公约》的目的和一般原则

序言[22]和第 2 条确立了公约的目的和一般原则，形成了保护制度的基础。其出发点是《联合国海洋法公约》第 149 条和第 303 条的原则性规定，即各国有义务为了全人类的利益保护水下文化遗产，并为此相互合作。鉴于《联合国海洋法公约》相关规定的不充分，公约第 2 条第 1 款开宗明义地指出，公约的目的是“确保和加强对水下文化遗产的保护”。为了实现这一立法目的，公约确立了以下一般原则：为全人类利益保存水下文化遗产原则、就地保存原则、不得对水下文化遗产进行商业开发原则以及国际合作原则。

公约第 2 条第 3 款规定：“成员国应根据本公约的规定为全人类之利益保存

18 CLT-96/CONF. 605/6 Paris, 22—24 May 1996.

19 Doc. CLT-96/Conf. 202/5, April 1998，关于该草案的具体讨论，see S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1999, p. 171.

20 P. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, London: Institute of Art and Law, 2002, p. 30.

21 教科文组织的公约通过程序中没有签字程序，而是通过协商一致或投票由全体大会通过。弃权国家包括英国、巴西、捷克、哥伦比亚、法国、德国、希腊、爱尔兰、以色列、几内亚比绍共和国、荷兰、巴拉圭、瑞典、瑞士和乌拉圭。反对国家包括俄罗斯、挪威、土耳其和委内瑞拉。关于反对和弃权的理由，see T. Scovazzi, Convention on the Protection of Underwater Cultural Heritage, *Environmental Policy and Law*, Vol. 32, 2002, pp. 152~157.

22 该序言在国际法协会草案的基础上稍作修改，很大程度上仿效了 1998 年欧洲理事会草案。尽管序言并不构成公约的实体规则，但与其他国际公约一样，其提供了公约解释的“上下文”（1969 年维也纳条约法公约第 31(2) 条）。

水下文化遗产”。[23] 公约序言认识到“水下文化遗产的重要性，它是人类文化遗产的组成部分，也是各国人民和各民族的历史及其在共同遗产方面的关系史上极为重要的一个内容”。由于水下文化遗产面临的威胁是全球性的，其保护也应是为了“全人类之利益”。但是，公约并没有为所谓“全人类之利益”提供任何法律基础，只是停留于美好的愿望，较《联合国海洋法公约》第 149 条并无什么改观。“全人类”将如何得益于水下文化遗产的保护，公约规定过于原则笼统。尽管公约规定了扣押水下文化遗产应“为公众利益”、促进公众认识、设立并加强“主管机构”等，但仅仅是重申了一项考古原则：在不危害保护的前提下，公众应得以访问文化遗产。公约没有对公共基金、博物馆建设以及博物馆收藏渠道等作出具体规定。而且，公约未解决全人类利益与财产所有权、特殊国家利益等其他权益之间的关系。[24]

公约在确定水下文化遗产的“保护”措施时，使用了“保存”一词。结合公约序言，我们可对“保存”进行更为精确的界定。序言强调了使用不科学的发掘方法以及商业开发对水下文化遗产造成的威胁，因此公约通过“保存”一词确立了维持和保护水下文化遗产物理完整性及其考古价值的一般理念。水下文化遗产面临的最大危险是缺乏专业知识的人随意将其迁移到一个完全陌生的环境，打破其与原生环境之间的均势，这样不仅破坏了文化遗产间的物理关系，降低其考古价值，而且容易对打捞物造成损坏。[25] 公约的目的就在于引入就地保存原则。[26] 这反映了

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23 《联合国海洋法公约》第 149 条规定：“在‘区域’内发现的一切考古和历史文物，应为全人类的利益予以保存或处置，但应特别顾及来源国，或文化上的发源国，或历史和考古上的来源国的优先权利。”教科文组织公约有三点区别于第 149 条：其一，使用“保存”而不是“保存或处置”，处置已不被视为保存的替代方法。(CLT- 99/WS/8, Paris, Apr. 1999,24）其二，没有提到相关国家的优先权利。第 149 条的用语在解释中遇到了很多困难，为此，本公约去除了这一规定，成员国的历史或文化利益在其他规定，如合作、通知、信息分享等条款中得以体现。其三，本公约适用于公约处理的所有海域。

24 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 68.

25 1974 年土耳其当局的一项研究表明其沿海发现的古船都受到了侵犯。在其他国家，潜水人员曾用炸药将船骸炸开，轻而易举地取走金锭。此外，有人不作任何必要的勘察和规划，便用“螺旋桨洗流”法在沉船周围打洞，从而破坏了科学的发掘方法本可获得的资料，也毁坏了许多东西，如船用的木料等，而这些东西都有十分重要的考古价值。一国政府将其管辖权扩展到领海之外在许多情况下就是想要控制这种严重的破坏。UNESCO《关于应否制订一份保护水下文化遗产的国际文件的初步研究》第 4 段，下载于 http://unesdoc.unesco. org/images/0010/001026/102628cb.pdf。

26 公约第 2（5）条规定“ 在允许或进行任何开发水下文化遗产的活动之前，就地保存应作为首选。”附件规章第 1 条重申了这一点，“ 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。”序言认可了就地保存原则，表明“ 决心提高国际、地区和各国为就地保护水下文化遗产，或因科研及保护的需要，小心打捞水下文化遗产而采取的措施的有效性。”关于就地保护原则在文化遗产法中的确立，see Luigi Migliorino, In Situ Protection of the Underwater Cultural Heritage under International Treaties and National Legislation, *International Journal of Maritime and Coastal Law*, Vol. 10, 1995, p. 483.

考古学的基本原则，发掘工作只能在 2 种情况下进行：遗址面临威胁或用于合法的研究目的。公约亦预期了在特定情形下的发掘打捞。附件规章第 1 条规定："可以许可进行一些有助于保护、认识或改善水下文化遗产的活动。"第 4 条则提到了"为了科学研究或最终保护有关水下文化遗产而需要进行的发掘或打捞。"而这些活动必须遵守公约附件规章所确定的考古学基本准则。有学者质疑就地保存原则没有考虑水下文化遗产其他利用者的利益。[27] 但事实上，一般大众欣赏研究水下文化遗产并不以发掘为必要，人们可以通过书籍、电影电视、互联网等媒体获取知识。[28]

探宝者无视正当考古方法的商业打捞活动，一直是考古学界的心头大患。序言表达了这一忧虑，承认"先进技术为发现和进入水下文化遗产提供了便利"，"对水下文化遗产日益频繁的商业开发，尤其是对某些以买卖、占有或交换水下文化遗产为目的的活动深感忧虑"。这些都反映了考古学的声音—水下文化遗产的商业打捞不符合资源的保存。虽然序言未明示，但公约第 2 条第 7 款宣布"不得对水下文化遗产进行商业开发。"附件规章第 2 条明确规定："以交易或投机为目的而对水下文化遗产进行的商业性开发或造成的无法挽救的失散与保护和妥善管理这一遗产的精神是根本不相容的。水下文化遗产不得作为商品进行交易、买卖和以物换物。"公约第 4 条还原则上排除了海难救助法和遗失物法对水下文化遗产的适用。因此，公约并不是简单地关注水下文化遗产考古价值或物理完整性的保存，而是要消除对水下文化遗产经济价值的承认。这就引发了众多复杂的问题，诸如水下文化遗产的不同价值该以何种方式实现，其经济价值和考古价值能否在某些形式上共存，或者如公约实体条款和序言所表明的，这些价值相互对立。公约能否实现这一目标，值得怀疑。[29]

公约还秉承了《联合国海洋法公约》第 303 条所确立的合作原则。任何国际保护制度只有基于国家间的充分合作才会有效。序言认识到"保护和保存水下文化遗产的重要性，所有国家都应负起这一责任。"公约第 2 条第 2 款明确规定"成

27 David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-proposal, *Journal of Maritime Law and Commerce*, Vol. 30, No. 2, 1999, pp. 341~342.

28 See Ole Varmer, The Case against the "Salvage" of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1998, p. 292.

29 具体讨论见本文第四部分。

员国应开展合作，保护水下文化遗产。”同时，第 4 款规定：“成员国应根据本公约和国际法，按具体情况单独或联合采取一切必要的措施来保护水下文化遗产，并根据各自的能力，运用各自能用的最佳的可行手段。”因此，公约向成员国施加了积极的合作义务。

公约是《联合国海洋法公约》和 1985 年欧洲公约草案等区域性行动发展的产物。因此，它不仅重申了既存的原则，还引入了新原则，谋求建立一个新的国际保存机制。公约序言不仅认识到编纂现行规则的必要性，而且表明要逐步发展这些规则。这些发展必须遵循国际法和国际惯例，包括适用于国际水域水下文化遗产的制度和《联合国海洋法公约》。保存机制将建立在各国管辖权的基础之上，要求每个国家为了全人类之利益保存在其管辖范围内的水下文化遗产。此外，每个国家还有义务设立教育和国家服务，建立义务违反的惩罚机制，确保基本准则得以遵守，禁止促进水下文化遗产商业动机的法律适用。

三、《保护水下文化遗产公约》的适用范围

公约适用范围包括公约的适用客体（即何为公约意义上的“水下文化遗产”）、公约规制的活动和公约的地理范围。与国际法协会草案相比，公约适用范围发生了巨大变化：一方面，抛弃标准的省略和国家船舶的涵盖使之有所扩大，另一方面，开发水下文化遗产活动的限定又使之有所缩小。

（一）“水下文化遗产”的定义[30]

公约第 1 条对“水下文化遗产”作了界定：“(a) ‘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、其他运输工具或上述三类的任何部分，所载货物或其他物品，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。(b) 海底铺设的管道和电缆不应视为水下文化遗产。(c) 海底铺设的管道和电缆以外的，且仍在使用的装置，不应视为水下文化遗产。”

与教科文组织的其他公约相比，该定义以实际物体来描绘，而不限于抽象的说明；且较很多陆地文化遗产公约更为广泛，着眼于文化遗产的原生环境，而不是

30 关于“文化财产”和“水下文化遗产”定义的有关问题，see Lauren W. Blatt, SOS (Save Our Ship)! Can the UNESCO 1999 Draft Convention on the Treatment of Underwater Cultural Heritage Do Any Better?, *Emory International Law Review*, Vol. 14, 2000, pp. 1587~1591.

文化遗产的构成。[31]“所有人类生存的痕迹”包括所有作为人类历史证据的物品，公约所列举的物品仅仅是最有可能在水下发现的水下文化遗产类型。[32]

100 年的时限点为国内立法和国际公约普遍使用，其设置主要是基于管理的实用，而不是考古、文化或历史意义，不免有些武断。[33] 如此一来，泰坦尼克号沉船以及两次世界大战时期的遗址适用公约还需时日。值得注意的是，1998 年草案虽然也以 100 年作为时限点，但同时允许成员国单方决定将晚于 100 年的遗址纳入公约调整范围。[34] 该条的灵活性有助于保护晚近水下文化遗产，但其赋予成员国的自主性过大，有可能严重减损 100 年的一般规则。因此，公约未作相同规定。[35] 此外，公约没有明确规定时限的起算点。从公约促进就地保存的目的出发，应以开发水下文化遗产的任何活动计划时起算，而不是发现时。[36]

公约定义中包含了一个“价值”标准，它只调整具有“文化、历史或考古特征的”人类生存遗迹。[37] 公约是否应该包含价值标准引发了激烈讨论。各国的立场因其国内法而异。一般而言，普通法国家只对被认为具有特别价值的特定水下文化遗产遗址提供保护，而大陆法国家则倾向于对超过一定历史的或被识别为“古迹”或“文化遗产”的所有遗址“一揽子”保护。价值标准的规定表明普通法国家在谈判中占了上风。但是，该标准的措辞实际上并没有对公约的适用范围有所限制，很多国家认为超过百年的所有物品都具有“文化、历史或考古特征”。事实上，具

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31 See CLT- 99/WS/8, Paris, Apr. 1999, 15．这一定义沿袭 T 国际法协会草案，源于 1985 年欧洲公约草案。

32 早期一个未被采纳的提案包括了非人类资源，如古生物以及对与海洋有精神联系的土著有着重要文化意义的自然特征，CLT - 2000/CONF. 201/3, Paris, Apr. 2000, 3。美国考古学研究所还主张将定义扩大到非人类考古学物品，如古印第安遗址，Anon., Comments of the Archaeological Institute of America on the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Cultural Property*, Vol. 7, No. 2, 1998, pp. 538~544.

33 很多国家都以时间作为保护的一项标准，包括荷兰（50 年，1988 年纪念碑和历史建筑物法）、丹麦（100 年，1992 年自然保护法）、挪威（100 年，1979 年文化遗产法）、瑞典（100 年，1988 年涉及古纪念碑和发现物的法案）和希腊（1453 年前的都属于水下文化遗产，1453 年到 1830 年期间的由考古学理事会定夺）。很多国际公约和建议中都使用了 100 年的时限，包括 1970 年教科文组织公约和 1985 年欧洲文化财产犯罪公约。

34 1998 年草案第 1(b）条，关于该条款的讨论，see S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1999, p. 174.

35 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *IJMCL*, Vol. 18, 2003, p. 63.

36 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 524.

37 草案未包含这一标准，很多学者提出了批评，认为定义过宽，以时间标准代替了历史价值标准，see e.g. David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-proposal, *Journal of Maritime Law and Commerce*, Vol. 30, No. 2, 1999, pp. 332~334.

备这一特征也并一定意味着具有任何文化或考古价值。因此，该规定只是敷衍之计，并不能满足公约范围限制论者的要求。[38] 英国就对此表达了强烈的保留。

（二）所有权和抛弃的私法问题

关于水下文化遗产的争端大都聚焦于所有权和抛弃问题。[39] 各国有权决定在其领土内发现的水下文化遗产的归属和处置，由其法院根据法律适用规则确定水下文化遗产的所有权。比较法表明，国内法在这一问题上相差甚大，少有一致。[40] 而且，“所有权纠纷很少仅限于两个对立国家的法律。文化财产在其尘封前通常就已移转了很多国家。”[41] 对于国际水域发现的水下文化遗产，其所有权通常受到海难救助法和遗失物法的调整。一般而言，任何人都可自由地打捞公海的沉没财产并向所有人请求救助报酬。[42] 打捞者在得到报酬前可以对打捞物行使海事优先权。如果所有人不明，或所有人抛弃了权利，发现者即可依据遗失物法取得所有权。如果所有人可以确定，且其未抛弃权利，其所有权并不因岁月长久而消灭。因此，如何确定“抛弃”就成了关键。[43]

公约起草者面临的难题之一就是如何处理这些私有权利的关系。起草者认识到公约一旦处理不当，剥夺了原所有人的权利，将可能违反成员国宪法。因此，国

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38 Bederman 曾建议仿效美国的国家登记制度，每一成员国应制订“重要”船舶的目录，以此限制公约的适用范围。还有学者认为，在这一问题上其实没有折衷，为确定某一遗址的文化价值通常需要进行深入的考古工作，这就使得建立在这些特征之上的价值标准违反了公约的根本原则 — 对水下文化遗产应尽可能不挠乱并就地保护，see S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 64.

39 See, eg, Columbus-America Discovery Group v. Atlantic Mutual Insurance,742 Fsupp.1327 (EDVa. 1990)；974 F. 2d 450 (4th Cir., 1992); Treasure Salvors, Inc v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F. 2d 330, 340 (5th Cir., 1978); Pierce v. Beamis (The Lusitania) [1986] 1 QB 384, [1986] Lloyd's Rep. 132.

40 CLT- 99/WS/8, Paris, Apr. 1999,17．关于对各国国内法的考察，see S. Dromgoole ed., *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague: Kluwer Law International, 1999; ILA Sixty-Fourth Conference, Report of the International Committee on Cultural Heritage Law, Queensland, Australia, 1990, pp. 3~6.

41 Evangelos I. Gegas, Note & Comment, International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property, 13 Ohio St. J. on Disp. Resol. 155 (1997), quoted from George Koumantos, Introductory Report, The International Protection of Cultural Property from the Standpoint of Private International Law, *International Colloquy on European Law*, 1983.

42 S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1999, p. 184.

43 关于海难救助法和遗失物的适用条件，美国学者基于其丰富的案例资源做了充分讨论，see e. g., Charles A. Cerise, Treasure Salvage: The Admiralty Court “Finds” Old Law, *Loyola Law Review*, Vol. 28, 1992, p. 1126.

际法协会和教科文组织早期的草案都认为公约仅适用于已经被抛弃的水下文化遗产。然而，其所设定的“抛弃”标准引发了高度争议，不为很多国家接受。[44] 因此，公约舍弃了“抛弃”标准，其适用不考虑水下文化遗产是否被抛弃，[45] 没有涉及任何所有权问题。表面上，这是一个最简单的解决方法，所有权和抛弃问题未决似乎不会对沉船的保存产生影响，但毕竟不是长久之计，所有权和公约的各项基本原则之间终究会产生矛盾。例如，当就地保存被认为是最佳选择时是否能禁止所有人打捞其财产？所有人在打捞作业时是否应遵循公约附件中的规章？如果答案是肯定的，所有人的权利就被妨害了。事实上，公约很多条款都对所有权产生了潜在地影响。[46]

（三）军舰和其他国家船舶

由于涉及军舰的国际法复杂不清，且具有高度政治敏感性，公约的起草者原先并不打算将公约适用于军舰和其他国家船舶。[47] 如果这样，相当一部分的水下

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44 草案规定“水下文化遗产在下列情况下视为被抛弃：(a) 水下文化遗产的所有人在勘察打捞技术发明后 25 年内未找寻该遗产；(b）虽然没有技术合理允许勘察或打捞作业，但自水下文化遗产的所有人最后一次权益主张已过至少 50 年。”关于该条款的讨 论，see S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1998, pp. 179~183; David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-proposal, *Journal of Maritime Law and Commerce*, Vol. 30, No. 2, 1999, pp. 332~334（该作者认为草案规定违背了很多海事国家遵循的一般海事法，实际上是对私人财产的“间接征收”）。如果规定“抛弃”标准，最棘手的是国有船舶的适用问题，其在国内法层面本身就有很多争议，典型的如美国 Sea Hunt, Inc v. Unidentified, Shipwrecked and Abandoned Vessels or Vessels, 47 F. Supp. 2d 678；有关讨论 see 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, 1999-2000, p. 311.

45 教科文组织指出其他涉及文化遗产保存的国际或区域条约都没有解决文化遗产的所有权问题。例如，1907 年国际和平大会关于武装冲突事件中文化财产保护的规定不限于公共财产，还包括私人财产；同样，1954 年公约调整的文化遗产保护也“不考虑来源或所有权。” See G. Reichelt, International Protection of Cultural Property, *Uniform Law Review*, Vol. 1, 1985, pp. 79~147; S. A. Williams, Recent Developments in Restitution and Return of Cultural Property, *International Journal of Museum Management and Curators*, Vol. 3, 1984, pp. 117~129.

46 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 70.

47 如谈判稿第 2 条第 2 款规定“公约不应适用于军舰、军舰辅助设施以及其他国家所有或运营且在沉没时仅用于政府非商业用途的船舶或航空器的残骸和内含物品。”(CLT-96/CONF. 202/5 Rev. 2, Paris, July 1999)

文化遗产将不受公约的保护制度调整。这一做法引起了非议。[48] 需要指出的是，起草者之所以排除国家船舶，很大程度上是因为抛弃问题的困扰。如果将公约草案设定的“抛弃”标准适用于国家船舶，很多国家都难以接受。它们认为国家不会抛弃其财产，除非有明示宣告。[49] 公约舍弃了“抛弃”标准，为涵盖国家船舶扫除了障碍。因此，公约最终包含了国家船舶，这被认为是其主要成就之一。[50]

事物总是利弊同存，随着公约对国家船舶的调整，一个问题相应而生—沉没的军舰适用国家主权豁免吗？《联合国海洋法公约》第 95 条和第 96 条赋予了国家船舶完全的豁免。[51] 这种豁免还扩展到了此类船舶的救助。[52] 对于沉没的船舶，很多学者认为其已经不再是船舶，亦不再由船旗国专属管辖。[53] 依照这一观点，《联合国海洋法公约》第 95 条和第 96 条将不再适用，国家船舶将与其他沉船适用相同的管辖权制度。[54] 大部分海洋国家表示反对，它们认为沉没的国家船舶仍然受船旗国专属管辖，只有在该国的明示允许下才受他国干涉。公约试图在船旗国和沿海国之间实现折衷，其第 2 条第 8 款规定：“本公约须与各国的惯例和包括《联合国海洋法公约》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。”然后，公约根据国家船舶所在的海域对其做了专门规定。如果位于另一国领水内，显然就会产生管辖权冲突。事实上，这种冲突过去已经产生过并

48 See, e.g., S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1999, pp. 186~187，该文指出 1973 年至 1995 年间在英国领水发现的具有历史或考古意义的沉船大部分就是军舰。

49 D. J. Bederman, Rethinking the Legal Status of Sunken Warships, *Ocean Development and International Law*, Vol. 31, 2000, pp. 97~125.

50 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 73.

51 第 95 条规定：“军舰在公海上有不受船旗国以外其他国家管辖的完全豁免权。”第 96 条规定“由一国所有或经营并专用于政府非商业性服务的船舶，在公海上应有不受船旗国以外任何其他国家管辖的完全豁免权。”

52 1910 年和 1989 年海难救助公约都不适用于国有船舶。

53 Dromgoole and Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Maritime and Coastal Law*, Vol. 14, No. 2, 1999, p. 233; Caflisch, Submarine Antiquities and the International Law of the Sea, *Netherlands Law Book of International Law*, Vol. 13, 1982, p. 25; W. Riphagen, Some Reflections on “Functional Sovereignty”, *Netherlands Yearbook of International Law*, Vol. 6, 1975, p. 128.

54 马耳他在 2000 年会议上已表示“联合国海洋法公约赋予军舰和其他用于非商业目的的政府船舶的豁免仅适用于其运营状态。一旦失事，它们就不再享有这一豁免。”

最终通过国家间的协议得以解决。[55] 依据公约第 7 条第 3 款，在这种情况下，沿海国应通知船旗国，就沉船保护的最佳方法进行合作。但是依据第 8 条第 2 款，船旗国的任何既得国际法权利并未因此改变。如果水下文化遗产位于大陆架或专属经济区，虽然第 10 条第 7 款规定未经船旗国的同意不得对国家船舶和飞行器采取任何行动，但有 2 个例外。其一，第 10 条第 4 款规定沿海国在没有船旗国同意的情况下可以授权采取紧急措施以“以防止人类活动或包括抢劫在内的其他原因对水下文化遗产构成的紧急危险。”其二，第 10 条第 2 款规定沿海国依据国际法“为保护其主权权利和管辖权不受干涉而禁止或授权开发本国专属经济区内或大陆架上的文化遗产。”如果水下文化遗产位于“区域”[56] 内，公约第 12 条第 7 款宣布“任何成员国未经船旗国的许可，不得对‘区域’内的国家船只或飞行器采取任何行动。”[57]

可以说，公约在主权豁免问题上并没有提供满意有效的折衷，以致于构成了很多国家采纳公约的主要障碍之一。[58] 从公约目的出发，水下文化遗产意义上的国家船舶不应被排除在公约之外；事实上，古代船舶适用国家豁免原则在实践中也存在很多困难。[59]

（四）公约规制的活动

前期草案使用“影响（水下文化遗产）活动”的措辞来界定公约规制的活动的范围。这一界定将很多活动包含在内，如对自然资源的勘测、人造岛屿、设施和结构的建造、电缆管道的铺设，以及越来越多的打捞水下文化遗产的商业计划。结合水下文化遗产的宽泛定义，这必将导致公约范围过大。加拿大代表指出“公约的主要努力应该是针对财宝打捞者或潜水探险，而不是渔业捕捞或电缆铺设，这

55 例如，法国和美国间为解决“CSS Alabama 号”争端签署了一个正式的协议，英国和南非间为解决“HMS Birkenhead 号”通过互发外交照会达成了协议。

56 公约第 1 条第 4 款将“区域”定义为“国家管辖范围以外的海床和洋底及其底土。”

57 有学者指出这里所指的是成员国的行为，而没有要求成员国禁止其国民或船舶从事这些活动，see P. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, London: Institute of Art and Law, 2002, p. 100.

58 See S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 74. 英国弃权的理由之一便是公约规定打破了海洋法公约建立的沿海国和船旗国之间的平衡。

59 See C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, pp. 527~528，该作者认为这不仅是因为海洋法公约第 29 条对“军舰”的定义对于早几个世纪的军舰并不恰当，而且是因为难以确认某一历史沉船是否实际上属于国家船舶（如武装民船或海盗船）。

些活动只是间接影响水下文化遗产。”因此建议用“开发”一词替代“影响”，只有那些与水下文化遗产具有目的关系的活动才受公约的强制规范调整。因此，1999 年会议对公约的范围进行了重要的修改。公约最后文本第 1 条第 6 款将“开发活动”界定为“以水下文化遗产为其主要对象，并可能直接或间接对其造成损伤或破坏的活动。”[60]

虽然渔业捕捞和电缆铺设等活动可能对水下文化遗产产生消极影响，但这些影响一般并非故意。这些产业并不愿意承认他们的活动给水下文化遗产带来的危险，以这些产业为重要经济部门的国家同样也予以否认。公约将“尽管不以水下文化遗产为主要对象或对象之一，但可能对其造成损伤或破坏的活动”定性为“无意中影响水下文化遗产的活动”。因此，要求“每个成员国应采用它能用的最佳的可行手段防止或减轻其管辖范围内无意中影响水下文化遗产的活动可能造成的任何不良后果。”[61] 该条款较加拿大代表原先提出的方案有所弱化，将“能用的最佳的可行手段”之确定交给了各个成员国。[62]

（五）公约的地理范围

公约适用于六个区域：内水、领海、毗连区、专属经济区、大陆架和“区域”。值得一提的是，公约所指的“内水”是海洋法意义上的“内水”，即“领海基线向陆地的水域”，[63] 排除了不具海洋性质的水域；而地理学意义上的“内水”，包括河流、湖泊和水坝，不是公约意义上的内水。公约谈判过程中，很多代表认为适用于公约范围内水下文化遗产的准则亦应适用于地理内水中的水下文化遗产。[64] 既然一国在其领土内具有完全的管辖权，所有国家都可以自愿将公约适用于其内水的水下文化遗产，代表们认为公约可以承认国际法上的这一权力。[65] 因此，第 28 条规

60 曾有一替代方案，不仅包括以水下文化遗产作为主要目标的活动，还包括那些以其作为目标或目标之一的活动（WG.1/WP.12, Paris, 4 July 2000), 提出者认为这一方案更可取，因为它涵盖了以水下文化遗产上的海洋生物为目标的海洋科学研究活动。

61 公约第 5 条。

62 加拿大代表的提案为：偶然影响水下文化遗产的活动：1．各成员国应采取合理的措施防止这些活动对其内水、群岛水域、领海、专属经济区或大陆架内知名的水下文化遗产产生不利影响。2．如果一成员国指明对其内水、群岛水域、领海、专属经济区或大陆架内的水下文化遗产特别保护，它应采取必要的措施确保这些活动不对此水下文化遗产产生不利影响。3．如果教科文组织指明对此区域的水下文化遗产特别保护，各成员国应采取必要的措施确保悬挂其国旗的船舶的活动不对此水下文化遗产产生不利影响。CLT-96/CONF.202/5 Rev. 2, Paris, July 1999.

63 《联合国海洋法公约》第 8 条。

64 下列国家建议将公约适用于海事区域和内水：匈牙利、突尼斯、比利时、法国、澳大利亚、阿根廷、加拿大、墨西哥、印度和委内瑞拉。此外，叙利亚、奥地利、荷兰、波兰和西班牙表示倾向于这一观点。

65 WG.1/WP 29, Paris, 6 July 2000.

定："任何国家或地区，在批准、接受、赞同或加入本公约之时或其后的任何时候，都可以声明本公约之《规章》适用于其不具海洋性质的内陆水域。"

四、《保护水下文化遗产公约》与海难救助法

除了考古价值外，水下文化遗产还具备其他多种用途，如供潜水者娱乐或鱼类产卵。利用者包括研究者、教育者、体育潜水者、渔民、船员、博物馆、商业打捞者及其投资人、沉船所有人和保险人、新闻记者、旅游公司、殉难者的家人等。[66] 每个人都希望染指水下文化遗产的权益，实现各自认识的水下文化遗产的附属价值。考古学家视沉船为研究历史文化的工具，体育潜水者视沉船为他们极限挑战和休闲娱乐的地点，而探宝者则视之为经济收益。这些不同的附属利益是矛盾的，甚至有时相互排斥。[67] 其中，最难处理的就是考古价值和经济价值的冲突。公约确立了就地保存原则和不得对水下文化遗产进行商业开发原则，并谋求通过否认水下文化遗产经济价值来保护其考古价值。海难救助法作为实现水下文化遗产经济价值的法律机制，其地位在公约谈判中成为焦点。

（一）争议一：水下文化遗产能否适用海难救助法？

海难救助法的宗旨是鼓励个人自愿救助海上的生命和财产并将救助财产交还其所有人以重返商业流通。适用海难救助法必须满足 4 个条件：[68] 第一，财产在可航水域面临海上危险；第二，自愿营救财产；第三，部分或全部成功；第四，为了所有人的利益善意行为。这些标准是否适用于水下文化遗产，尤其是水下文化遗产是否面临海上危险，存有疑问。

各国司法实践在这一问题上出现了较大的分歧。[69] 大部分法院认为自然环境

66 Ole Varmer, The Case against the "Salvage" of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1998, p. 291.

67 E. Herscher, Hearings Held on Historic Shipwreck Legislation, *Journal of Field Archaeology*, Vol. 11, 1984, p. 79.

68 The Blackwall, 77 U. S. 1（10 Wall.1 19L. Ed. 870 (1869)); The Sabine 101 US 384(1880).

69 有关讨论，see Anastasia Strati, *The Protection of Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, London: Kluwer Law International, 1995, pp. 48~49.

中的化学作用可使水下文化遗产永远消失，因此水下文化遗产需要救助服务。[70] 但亦有法院明确否定。[71] 学者们也是各持己见：有人认为“即使化学元素或自然腐化没有威胁财产，掠夺、偷窃或破坏性的打捞也不可避免地会造成危险。”[72] 而更多的学者从考古学的观点出发，认为长期遗存海底的水下文化遗产已经与周边环境形成了均势，物质分解减少，很少出现腐化现象，不再处于危险中。[73] 教科文组织的可行性报告认可了后一种观点，它指出“将遗失物品从海底捞出非但不是挽救，反而肯定会使其遭受损失，除非这些海底物品立即得到文物保护专门人员精心的技术处理。”[74]

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70 美国：Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 695 F. 2d 893, 901 n. 9 (5th Cir., 1983); Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 614 F. 2d 1051, 1055 (5th Cir., 1980); Treasure Salvors, 569 F. 2d at 337（“海上危险不限于风暴、火灾或海盗的威胁。”); Bemis v. RMS Lusitania, 884 F. Supp. 1042 , 1050 (E. D. Va.1995)（“法院通常认定水下船骸处于海上危险，因为沉船极其货物面临永远消失的危险。”）, aff’d, 99 F. 3d 1129 (4th Cir., 1996), cert. denied, 523 U.S. 1093 (1998); Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F.Supp. 953, 962 (M.D. Fla. 1993); Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 556 F.Supp. 1319, 1340 (S.D. Fla. 1983); Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F.Supp. 540, 557 (S.D. Fla. 1982); see also Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F. 2d 1511, 1516 (11th Cir., 1985) (Kravitch, C. J., specially concurring and dissenting in part) (arguing that the Eleventh Circuit should adopt the reasoning of the Fifth Circuit). 澳大利亚：在 Robinson v. Western Australia Museum, 16 A. L. R. 623 (1977)（Mason 法官论到：“救助并不限于营救实际遭受危难的船舶上的财产，它还扩大到对长期沉睡海底的船舶上的财产的营救。”Stephen 法官进一步指出即使在海上危险不存在的情况下也可成立有效的救助求偿，他认为救助并不限于船舶遭受毁坏危险或物理损坏，单纯的船舶静止化和所有人丧失使用就可成立有效的救助。）

71 美国：Klein, 758 F. 2d at 1515; Lathrop, 817 F.Supp. at 962; Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F.Supp. 597, 611 (D. Md. 1983), aff’d, 765 F. 2d 139 (4th Cir., 1985)；新加坡：Simon v. Taylor, [1975] 2 Lloyd’s Rep. 338 (Sing.)；加拿大：Ontario v. Mar-Dive Corp. ,[1996]141 D. L. R. 4ti577 (Steven R. Yormak, Canadian Treasure Law and Lore, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 229)（“救助作业会破坏水下历史遗址长期以来形成的环境平衡，将这些物品放于一个新环境会加快腐化。”）。

72 Bruce E. Alexander, Treasure Salvage beyond the Territorial Sea: An Assessment and Recommendations, *Journal of Maritime Law and Commerce*, Vol. 20, 1989, p. 16. See also David R. Owen, Some Legal Troubles with Treasure: Jurisdiction and Salvage, *Journal of Maritime Law and Commence*, Vol. 16, 1985, pp. 172~176.

73 See Terence P. McQuown, An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks, *William Mitchell Law Review-James*, Vol. 26, 2000, p. 316, 该作者引用了 M. Parrent 的论述“沉在海底的物品最初会开始腐化，但同时又被腐蚀物和海洋生物组成的凝聚物覆盖。最终这些凝聚物形成了一个保护层，有效减少了进一步的腐化过程。在这些物品适应其水下环境后，它们将不受涌流、潮汐和风暴的影响。任何沉睡海底几百年之九的木制船舶都与其环境形成了均势，即使不能保存数千年，也可以保存数百年。”

74 联合国教科文组织《关于应否制订一份保护水下文化遗产的国际文件的初步研究》，第 31 段，下载于 http://unesdoc.unesco.org/images/0010/001026/102628cb.pdf。

这些争议的产生，不仅因为海难救助法发展的地区差异，以及 1989 年《国际救助公约》并未明确界定“海上危险”，也未明确规定是否适用于历史沉船打捞；[75] 更重要的是，这些针锋相对的论点蕴涵了一个价值判断：水下文化遗产是否应适用海难救助法？

（二）争议二：水下文化遗产是否应适用海难救助法？

如上所述，在考古学家眼中，历史沉船打捞业是“掠夺者”和“历史的破坏者”。[76] 他们认为救助为商业利益驱动，目的在于将商品重返商业流通，与文化遗产保护的宗旨不符。打捞者的商业动机使其不可避免地会追逐价值昂贵的物品而忽视遗产的保护和保存，违反水下文化遗产保护的主要原则，如就地保存。而且，由于救助报酬通常是从被救助财产的收益中获得，文物贸易得以滋生。这些观点延伸到法律层面上则表现为对海难救助法的非难：海难救助法的目的是鼓励商业打捞，非但不能阻止，相反助长了非法开发行为，因此不能解决水下文化遗产保护问题。[77] 国际法协会草案第 4 条明确宣布“水下文化遗产不应适用海难救助法。”这代表了以完全的政府管制代替传统海商法的一种极端做法。[78] 一个较为温和的观点认为，可以允许私人按照历史保存的科学目的开发水下文化遗产，但鉴于海难救助法和海事法院不适宜管理水下文化遗址，这一折衷应该在环境法和历史保存法的框架下完成。[79]

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75 该公约第 30 条第 1 款 d 项允许一国批准公约时作出保留，当“有关财产位于海床上的具有史前的，考古的或历史价值的海上文化遗产”，可不适用公约的规定。这一条款表明成员国未作出保留，救助公约适用于历史沉船打捞。值得注意的是，在教科文组织讨论公约的时候，也有国际海事组织的专家在场指出“由于《国际救助公约》的私法、非强制的法律性质，即使有些缔约国没有提出保留，也可能存在排除适用该救助法公约的权利。”有关讨论，see David J. Bederman, Historic Salvage and the Law of the Sea, *University of Miami Inter-American Law Review*, Vol. 30, 1998, pp. 110~111.

76 在考古学纯化论者看来，水下文化遗产的经济价值与考古价值格格不入，商业打捞是水下文化遗产的主要威胁，商业打捞者不应作为水下文化遗产的正当利用者。E Clement, Current Developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, No. 4, 1996, p. 309; R. J. Elia, US Protection of Underwater Cultural Heritage beyond the Territorial Sea: Problems and Prospects, *International Journal of Nautical Archaeology*, Vol. 29, No. 1, 2000, pp. 43~56.（Elia 断言这些利益集团“根本违背核心价值、目标、方法和权益”，“商业打捞作业根本上有悖于保存”。）

77 Ole Varmer, The Case Against the “Salvage” of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 279.

78 这种极端论认为为了确保文化遗产的保存，只有像历史学家和以历史文化为目标的政府机构这样的非商业组织才能适当管理历史打捞，see D. K. Abbass, A Marine Archaeologist Looks at Treasure Salvage, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, pp. 266~267.

79 Ole Varmer, The Case Against the “Salvage” of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, pp. 301~302.

打捞业则指出，由于众多因素影响，水下文化遗址数量有限，商业打捞对水下文化遗产的损害比其他利用者小；[80] 而且随着技术的发展，他们的打捞活动亦遵循了考古学准则。例如，对所有物品整体出售，[81] 收益越来越多地通过媒体权利产生，如电影、记录文献、[82] 书籍 [83] 以及打捞物的展览和复制品的出售，[84] 最近，打捞者还通过允许旅游者观摩他们的探险活动来获得资金。[85] 此外，一些考古学观点也值得商榷。例如，不一定所有从遗址打捞的物品都构成整体的一部分；[86] 收集多余的物品 [87] 和资料“既不科学又是对资源和资金的浪费。”[88]

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80 一个商业财宝打捞公司预计最多只有 10 到 20 条沉船的挖掘在经济上可行。See G. Stemm, Protection of Our Underwater Cultural Heritage: Thoughts on the Future of Historic Shipwrecks，paper presented at the Thirty-First Annual Conference of the Law of the Sea Institute, University of Miami, 30-31 March 1998, p. 7. 另外一个估计数字是 100~200，打捞价值超过 $ 10 million. CLT- 96/CONF. 605/6, Paris, 22-24 May 1996, 12.

81 泰坦尼克号的打捞者 RMST Inc 公司就规定不准将打捞物单独出售，只允许作为一个整体出售。

82 例如，BBC 在 2005 年 3-4 月，播放了系列文献片，内容涉及在美国领水内的 Queens Anne’s Revenge、澳大利亚领水内的 HMS Pandora 以及英国领水内的 M2 潜艇和 Swan 号船。

83 近期，大量关于沉船发现和打捞的书籍问世，包括很多关于泰坦尼克的，如 RD. Ballard, *The Discovery of the Titanic*, London: Guild Publishing, 1987; T. McCluskie, M. Sharpe and L. Marriott, *Titanic and Her Sisters Olympic and Britannic*, London: Parkgate Books, 1999; and S. Wels, *Titanic: Legacy of the Worlds Greatest Ocean Liner*, Delmar, California: Tehabi Books and Time Life Books, 1997. 其他的如 C. Cussler, *The Sea Hunters*, London; Simon & Schuster, 1996; CM. Robinson, *Shark of the Confederacy: The Story of the CSS Alabama*, London: Leo Cooper, 1995; N. Pickford, *The Atlas of Shipwrecks and Treasure*, London: Dorling Kindersley, 1994; K. Jessop, *Goldfinder London: Simon & Schuster*, 1998; J. Beasant, *Stalin’s Silver*, London: Bloomsbury, 1995; and G. Kinder, *Ship of Gold in the Deep Blue Sea*, New York: The Atlantic Monthly Press, 1998.

84 在英国格林威治等地举办的泰坦尼克打捞品展览获得了巨大的成功，表明打捞作业不依赖出售打捞品也能成功。

85 St. Petersberg Times, “Hunt for treasure, but it’ll cost a pretty doubloon”, 1 Sept. 2000.

86 例如，泰坦尼克上的煤就不被认为是该文化藏品的一部分。

87 在挖掘都铎王朝战舰 “Mary Rose 号 ” 时，发现了很多稀有的弓箭。其中数千箭头，数量 “ 太多以致于产生了保存的难题 ”, see A. McKee, *How We Found the Mary Rose*, London: Souvenir Press, 1982, p. 121.

88 J. A. Roach, Shipwrecks: Reconciling Salvage and Underwater Archaeology, paper presented at the Proceedings of the Thirty-First Annual Law of the Sea Institute, University of Miami, 30-31 March 1998, p. 8.

值得注意的是，海难救助法本身业已发生了积极的变革，至少在美国如此。美国法院将历史保存价值注入了传统海难救助法，要求救助者必须具备考古技能，尊重考古准则，否则得不到报酬。[89] 因此，很多学者认为以水下文化遗产保护的理念融入海难救助法来促进有效保护制度的建立更为可行。商业打捞可以促使被人遗忘或所有人无力打捞的沉船早日浮出海面，而打捞者妥善保管遗产的商业动机和其职业技能有助于遗产保护，其报酬请求将最终和博物馆、考古学家的目标一并实现。[90]

完全排斥海难救助法的做法过于偏激，其目的在于阻却水下文化遗产流入市场的可能性，但可能适得其反，产生地下黑市。[91] 事实上，如果水下文化遗产面临被破坏的危险而国家又没有必要资金进行紧急发掘，由国家博物馆和商业打捞公司签约打捞该水下文化遗产，又何尝不可呢？[92] 因此，现实的选择是在水下文化遗产的历史价值和经济价值之间，在现代文化遗产保护法和传统海难救助法之间达成平衡，但这并非易事。

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89 在 MDM 案中，法院便拒绝了两组商业打捞者的打捞请求，指出“考古保存、现场摄影和遗址标记特别重要 …… 因为财宝船提供了独特的历史记载，开启了岁月的窗户，此时公众利益至上。这些是请求排他救助权利时必须考虑的重要因素。”631 F. Supp. 308, 310~311 (S. D. Fla. 1986); see also Cobb Coin Co v. Unidentified Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186,218 (S. D. Fla. 1981) (“如果历史沉船打捞没有适当考虑考古保存，其历史和市场价值都会大大受损。”）关于美国海难救助法的发展，see Justin S. Stern, Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks, *Ford ham Law Review*, Vol. 68, 1999-2000, p. 2489.

90 See David J. Bederman, Historic Salvage and the Law of the Sea, *University of Miami Inter-American Law Review*, Vol. 30, 1998, pp. 128~129; Lauren W. Blatt, SOS (Save Our Ship)! Can the UNESCO 1999 Draft Convention on the Treatment of Underwater Cultural Heritage Do Any Better?, *Emory International Law Review*, Vol. 14, 2000, pp. 1635~1638. 这并非学者的假想，已经有了实例。2002 年 9 月 27 日，英国政府与美国一家公司签订了合作协议打捞“HMS Sussex 号”，开辟了以合作方式进行深海考古的新模式，沉船打捞将遵循公认的考古方法，并有专业观察员参与。据说该船装载了 10 吨金币，而合作者将分享收益。

91 JAR Nafziger, International Penal Aspects of Protecting Cultural Property, *International Lawyer*, Vol. 16, 1985, p. 835; id, Comments on the Relevance of Law and Culture to Cultural Property Law, *Syracuse Journal of International Law*, Vol. 10, 1983, p. 325.

92 Sherri J. Braunstein, Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act of Is Still Causing Confusion and Conflict Rather than Preserving Historic Shipwrecks, *Widener Law Symposium Journal*, 2000, pp. 321~322.

（三）公约的规定

1994 年国际法协会草案第 4 条完全排除了海难救助法，1998 年教科文组织草案删除了这一条，并以第 12 条第 2 款代之，“不得适用任何为水下文化遗产的发掘和迁移提供商业动机的国内法和规章。”海难救助法自然属于该条所指。公约最后文本以第 4 条对海难救助法和遗失物法的问题作了专门规定，“海难救助法和遗失物法不适用于开发本公约所指的水下文化遗产的活动，除非它：(a) 得到主管当局的批准，同时（b) 完全符合本公约的规定，同时又（c）确保任何打捞出来的水下文化遗产都能得到最大程度的保护。”

这种“原则＋例外”的立法方式体现了起草者谋求在考古学界和商业打捞业之间实现平衡的良苦用心。其结果在考古学界看来，显然较国际法协会草案是一种倒退：如果例外成立，无论是适用海难救助法还是遗失物法，私人都可以取得所有权或占有，何以防止这些遗产的买卖？又何以使这些沦为私人收藏品的遗产为“全人类之利益”服务呢？[93] 而且，例外不仅损害了原则的明确性，更动摇了原则的本质，使得成员国可以通过解释公约附件中的规章来放任改良后的海难救助法继续适用于水下文化遗产。[94] 但对于打捞业而言，公约无疑是一种安慰。海难救助法和遗失物法仍将发挥其重要性，吸收调整水下文化遗产的国际法原则和规则并未给谨慎的打捞作业或海难救助法的正常实践带来什么严重影响。[95]

与第 4 条相关的条款是公约附件规章第 2 条，“以交易或投机为目的而对水下文化遗产进行的商业性开发或造成的无法挽救的失散与保护和妥善管理这一遗产的精神是根本不相容的。水下文化遗产不得作为商品进行交易、买卖和以物换物。”该条旨在保证水下文化遗产物品不能被视作商品，这实质上限制了打捞业从第 4 条获得的利益；加上公约关于“水下文化遗产”定义中的“价值”标准并不有效，打捞业难以通过出卖文化价值不大但具有商业价值的物品来获益。因此，利益的天平又倒向了考古学界。起草者错失良机，其本可以发展一项新制度，允许合理的商业运作存在以促进水下文化遗产考古价值和经济价值的最大化。[96]

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93 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Maritime Law and Commerce*, Vol. 18, 2003, p. 71.

94 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 541.

95 James A. R. Nafziger, The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck, *Harvard International Law Review*, Vol. 44, 2003, p. 269.

96 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Maritime Law and Commerce*, Vol. 18, 2003, p. 67.

值得注意的是，规章第 2 条后半段规定“本条不得解释为禁止下述活动：(a) 开展性质和目的完全符合本《公约》之规定，并经主管当局批准的专业考古工作或必要的辅助工作；(b) 存放在开展与本《公约》精神相符的研究项目时打捞的水下文化遗产，条件是这种存放不会损害打捞物的科学或文化价值，无损于其完整性或不会造成其无可挽回的失散，而且要符合第 33 和第 34 条的规定并经主管当局的批准。”(a) 款旨在“明确本规则所指的不包括遵守公约的职业考古服务。”[97] 职业考古学家有偿进行科学调查，其性质就是商业的。(b) 款则有点蹊跷，它没有界定什么是“存放”以及“存放”的地点。有学者认为，在禁止水下文化遗产商业化的背景下，该款可以说是一个例外；据此，按照公约附件发掘并取得国家许可的水下文化遗产可以出售给一个私人或公共博物馆来获利。[98]

公约并没有平息海难救助法适用之争。无论如何，公约所确立的非商业化原则实质上是以牺牲水下文化遗产的经济价值来保存其考古价值。这一政策不仅在政治上不为很多国家接受，而且由于海洋管理和限制非法发掘的难度也是难以实现。[99] 因此，美英等大国对公约提出异议也就不足为奇了。

五、《保护水下文化遗产公约》的管辖权制度

要建立水下文化遗产保存制度，国际合作是必需的。这就要求明确国家间，以及教科文组织等国际组织的责任，重新审视海洋法中的管辖权事项。[100] 这一极具政治敏感性的事项曾在《联合国海洋法公约》大会上掀起轩然大波，曾使欧洲公约停滞不前，而今又使《保护水下文化遗产公约》的制订困难重重。谈判更多地纠缠于国际水域中国家管辖权问题，而不是水下文化遗产保存制度的构建。[101] 各国

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97 CLT-2000/CONF.201/10, Paris, 7 July 2000, 2.

98 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 540.

99 管制水下遗址非常困难，国际水域尤其如此。从国内法保护的水下文化遗址偷盗物品屡见不鲜。例如，有人就从受 1973 年沉船保护法保护下的 15 世纪的历史沉船中偷了一个炮。K. McDonald, Breech of the Law, *Diver*, December 1999, p. 75. See also Wreck plunderers find way through law on war graves: Battleship Royal Oak, *The Times*, 4 April 1994 and Divers Looting Sunken D-Day War Graves, *Independent*, 31 October 2000.

100 BH Oxman, Marine Archaeology and the International Law of the Sea, *Columbia VLA Journal of Law and the Arts*, Vol. 12, No. 3, 1988, p. 355.

101 ILA Sixty-Fourth Conference, Report of the International Committee on Cultural Heritage Law, Queensland, Australia (1990), 1~17; CLT-99/CONF. 204, Paris, Aug. 1999, 5~8。其实，谈判初，挪威就提出教科文组织并不适合讨论海洋法事项，而以色列、伊拉克、希腊和土耳其建议保护水下文化遗产的协议形式不应是教科文组织主持下的独立的公约，而是实施联合国海洋法公约条款的协议；基于这些争论，大部分国家的谈判代表是海洋法方面的专家。

对于管辖权的立场呈现两极分化，关于《联合国海洋法公约》的解释无法协调，直接阻碍了公约谈判。[102] 其中，扩大沿海国管辖权是否符合海洋法公约成为焦点。

（一）《联合国海洋法公约》和沿海国的单边声明

尽管《联合国海洋法公约》有两个条款涉及水下文化遗产，但并没有对其管辖权作出特别规定。可以从一般管辖权条款中得出以下理解。[103] 对于一国领海内的水下文化遗产，沿海国拥有广泛的管辖权，这一点无庸置疑。在毗连区内，沿海国有权管制违反其海关、财政、移民或卫生法法律的行为，这一项权力似乎与水下文化遗产无关。但该公约第 303 条第 2 款规定：为了控制水下文化遗产的贩运，“沿海国可以在适用第 33 条（关于毗连区的规定）时推定，未经沿海国许可将这些物品移出该条所指海域的海床，将造成在其领土或领海内该条所指法律和规章的违犯。”据此，沿海国有权管制从海床迁移沉船或其货物的行为。至于在大陆架上沿海国是否被赋予了相关的权力，令人怀疑，因为水下文化遗产并非大陆架制度所指的“自然资源”。同样，沿海国在专属经济区内的权力是否适用于水下文化遗产也可疑，该区域内的权力与“经济开发”有关。公海自由原则虽然没有明确适用于水下文化遗产，但亦无相反的理由。

尽管《联合国海洋法公约》将沿海国对历史沉船的主权限于毗连区内，仍有少数国家背道而行。[104] 始作俑者是澳大利亚 1976 年历史沉船法第 28 条。此后，中国、塞浦路斯、爱尔兰、葡萄牙、西班牙和塞舌尔也都对位于各自大陆架上的历史沉船主张行使主权。挪威和泰国要求经许可勘探开发大陆架上石油的人在偶然发现考古财产时应遵守沿海国的国内立法。摩洛哥和牙买加对专属经济区内的考古研究活动，丹麦对其 200 海里渔区内发现的文物主张行使主权。此外，13 个国家的立法将其管辖权扩大到专属经济区内的研究活动，或是主张其主权包括专属经济区内的所有资源、结构或其他设施；而这些都可以通过法律解释扩大到考古研究。还有 11 国家主张 200 海里的领海，因此该海域发现的文化财产自然受这些国家管辖。有学者据此认为，一个国际习惯法规则已经形成：国家可以将对水下文化遗产的管

102 更具体的讨论，See P. Fletcher- Tomenius and C. Forrest, The Protection of the Underwater Cultural Heritage and the Challenge to UNCLOS, *Art, Antiquity and Law*, Vol. 5, No. 5, 2000, pp. 125~158.

103 有关讨论 see P. J. O’Keefe and J Nafziger, The Draft Convention on the Protection of the Underwater Cultural Heritage, *Ocean Development and International Law*, Vol. 25, 1994, p. 177.

104 有关讨论 Robyn Frost, Underwater Cultural Heritage Protection, *Australia Yearbook of International Law*, Vol. 23, 2004, pp. 36~40.

辖权扩大到大陆架或专属经济区。[105] 另有学者意见相左。[106] 美英等海洋大国则坚决反对上述国家的做法。因此，领海外海域的文化财产的法律地位尚无定论。[107]

（二）《保护水下文化遗产公约》谈判过程中的争议

尽管《联合国海洋法公约》第 303 条第 4 款预料到了特别调整水下文化遗产的国际公约的出现，但新公约是否能够将沿海国的相关管辖权扩大到《联合国海洋法公约》设定的界限以外呢？显然，不同的国家会有不同的答案。为此，公约首先确立了一个调和办法，也即公约最后文本第 3 条所规定的，“本公约中的任何条款均不得妨碍国际法，包括《联合国海洋法公约》，所赋予各国的权利、管辖权和义务。本公约应结合国际法，包括《联合国海洋法公约》，加以解释和执行，不得与之相悖。”这一条款具有一定的弹性，[108] 既可理解为允许《保护水下文化遗产公约》随着国际法的发展变化加强水下文化遗产的保护，亦可认为其必须遵守《联合国海洋法公约》的管辖权规定。[109] 这就为争议埋下了伏笔。

1994 年国际法协会草案效仿欧洲理事会草案，建议在国际法既定的管辖权区域外设定一个新的区域，即“文化遗产区”，以使沿海国管辖权延伸至大陆架的外延。在该区域内，沿海国对影响水下文化遗产的活动行使管辖权。对此，海洋大国表示强烈反对，认为它威胁到了《联合国海洋法公约》通过限制沿海国的权利和义务实现的平衡以及公海自由原则，实为“管辖权蚕食”。[110] 而同意论者则认为完全符合海洋法，并没有减损任何的现有权利和义务。[111] 由于争议甚大，1998 年教科文组织草案未采纳“文化遗产区”的概念，而是以大陆架和专属经济区为基础界定沿海国管辖权。其第 5 条第 2 款规定：“成员国可以按照本公约和其他国际法规则，管理和许可影响其专属经济区内和大陆架上的水下文化遗产的所有活动。”事实上，该草案仍沿袭了国际法协会草案的内容，通过另外一种方式扩大了沿海

105 See, e.g., Janet Blake, The Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 45, 1996, p. 819.

106 Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, London: Kluwer Law International, 1995, p. 269.

107 P. J. O’Keefe and James A. R. Nafziger, Report: The Draft Convention on the Underwater Cultural Heritage, *Ocean Dev. & Int’l L.*, Vol. 25, 1994, p. 394.

108 P. J. O’Keefe, 2001 UNESCO Convention on the Protection of the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 75.

109 因此，美国反对该条款。

110 具体讨论，see Jean Allain, Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides with the Lex Lata of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 38, 1997-1998, pp. 767~769.

111 CLT-2000/CONF.201/3, Paris, Apr. 2000, 9.

国管辖权。因此，同样备受指责。[112]

1999 年第 2 次专家会议结束后，管辖权谈判陷入僵局。2000 年第 3 次会议上，有人建议集中讨论合作、通报和协调区域，以此建立共有管辖权机制。《联合国海洋法公约》第 303 条要求各国合作保护水下文化遗产，《保护水下文化遗产公约》亦将其确定为一项基本原则；从这一原则出发构建管辖权更有利于实现各国之间的平衡。

（三）共有管辖权制度

公约最终确立的管辖权制度基于国籍和船旗国管辖原则，而不是一味追求沿海国管辖权向毗连区外的延伸。[113] 该制度可分为两部分：其一关于专属经济区内和大陆架上的报告和通报，[114] 其二关于这些区域内水下文化遗产保护制度的实施。[115]

就通报和报告而言，公约规定了一套复杂的制度来保证所有具有利害关系的国家得到水下文化遗产开发活动或行动计划的通知。沿海国必须保证其国民或船舶向其报告水下文化遗产的发现或其他有意活动。[116] 公约还要求其他成员国就其国民或船舶对另一国大陆架或专属经济区内的水下文化遗产的发现或有意活动向沿海国报告。或者，该其他成员国要求其国民或船舶向自己报告，再由其转告沿海国。[117] 此后，成员国还应将向其报告的情况通报总干事，由总干事将向其通报的所有信息通知全体成员国。[118] 而与相关水下文化遗产确有联系，特别是文化、考古或历史联系的成员国可以声明其参与就如何有效保护水下文化遗产而进行协商的意愿。[119]

在按照公约保护大陆架或专属经济区的水下文化遗产时，沿海国没有专属管辖权，而只有“协调国”的身份。[120] 因此，它负责与所有其他利益国家协商保护制度，并执行约定的保护措施，包括从事初期研究和所有后来的开发许可。[121] 公约还允

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112 具体讨论 see D. J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, *Journal of Maritime and Commerce*, Vol. 30, 1999, pp. 338~341.

113 成员国对毗连区内水下文化遗产的权利和义务沿袭海洋法公约第 303 条的规定。公约第 8 条规定：“在不违背第 9、10 两条的情况下，并在此两条之外，根据《联合国海洋法公约》第 303 条第 2 段的规定，成员国可管理和批准在毗连区内开发水下文化遗产的活动。此时，成员国应要求遵守《规章》的各项规定。”

114 第 9 条。

115 第 10 条。

116 第 9 条第 1 款 a 项.

117 第 9 条第 1 款 b 项。

118 第 9 条第 3、4 款。

119 第 9 条第 5 款。

120 第 10 条第 3 款。

121 第 10 条第 5 款。

许沿海国在协商前采取所有可行措施防止水下文化遗产面临的紧急危险，例如抢劫。[122] 但这些可行措施限于符合沿海国在国际法上的权力，因此只适用于其国民或船舶以及与其有协议的国家的国民或船舶。沿海国还有权依据包括《联合国海洋法公约》在内的国际法，为保护其主权权利和管辖权不受干涉而禁止或授权开发本国专属经济区内或大陆架上的文化遗产。[123] 至于在“国家管辖范围以外的海床和洋底及其底土”（公约称为“区域”）发现的水下文化遗产，其报告、通报和保存制度的实施基本上与前者相同，差异在于协商国不限于沿海国，而是由所有表明有利益关系的成员国选任。[124]

虽然公约所确立的共有管辖权制度实现了国家利益间的协调，但其程序过于“行政化”，欠缺效率。由于航海的国际性，也许有很多国家与特定水下文化遗产具有利害关系，如果要求所有国家就保护达成协议，必然阻碍及时和有效的保护；何况，确定一国是否与水下文化遗产具有联系的标准并不明确。[125] 此外，对公约与《联合国海洋法公约》等既有管辖权机制间的关系，仍有很多学者津津乐道。[126]

六、《保护水下文化遗产公约》的遗产保存制度

1990 年，国际法委员会指出“设立一个全球的管理机构目前看来并不现实。最好的替代方法是在遵守明确国际标准的前提下把水下文化遗产的控制权分配给成员国。”[127]《保护水下文化遗产公约》正是基于这一理念，以成员国义务设定为主体内容，建立了双层保护机制。第一层旨在消除开发水下文化遗产的商业动机，并确立考古技术标准以实现其历史价值；第二层则以调整非法文化遗产交易的国际文化遗产法为核心，当第一层机制被违反时，成员国可以没收进口到其领土内的非法发掘的水下文化遗产，并实施惩罚。

（一）考古标准：附件中的规章

只有确保水下文化遗产开发活动遵循适当的技术标准，保存水下文化遗产的目标才能实现。如上所述，国际法委员会一开始便意识到了这一点。应其请求，

122 第 10 条第 4 款。
123 第 10 条第 2 款。
124 第 12、13 条规定了此区域的保护。
125 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 544.
126 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, pp. 77~87.
127 ILA Sixty-Fourth Conference, Report of the International Committee on Cultural Heritage Law (Queensland, Australia, 1990), 13.

国际古迹遗址理事会拟订了《水下文化遗产保护管理规章》，作为草案的附件。公约谈判过程中，代表们对该规章的地位和内容展开了讨论。就其地位而言，该规章是应该作为公约不可或缺的一部分，还是应该仅为公约提及而不为其包含呢？两者独立的好处在于便于修改规章，作为考古实践的行为基准，规章应与时俱进。但由于谈判难以达成一个为成员国接受的修改程序，公约最终将规章确定为其一部分。公约第 33 条规定："作为本公约之附件的《规章》是本公约的一个组成部分，除非另有明确说明，否则凡提及本公约时，均包括该《规章》。"就其内容而言，公约在国际古迹遗址理事会规章的基础上，对措辞进行了修改，使其既适合并入公约又在政治上可被接受。[128] 该规章设置了水下考古发掘以及相关事务的基本标准，如项目设计、初步调查标准、项目方法和技术、项目时间表、人员能力和资格、物资保存、遗址管理、项目文件、项目存档和项目报告分发。这些良好考古实践的技术标准，被大部分成员国接受，不允许例外。

（二）许可、制裁和扣押

公约旨在确保以就地保存为首选，如打捞被视为适当，亦应遵循规章标准。奇怪的是，公约并未明确规定开发活动必须经许可。基于公约的目标和基本原则，许可要求是无庸置疑的；否则，就地保存原则名存实亡。[129] 何况，公约所确定的国家管辖权中都包含了"许可"这一职能，规章亦要求任何开发水下文化遗产的活动事先都需要建立项目设计。事实上，很多国家使用许可（发掘许可或进口许可）来管理陆地或水下文化遗产的恢复，[130] 并为协议国际法所承认。[131] 使用许可将有助于确保开发水下遗产的活动符合规章，对于保存制度大有裨益。[132]

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128 如关于禁止商业开发的措辞。

129 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, pp. 76~77.

130 See generally Prott and O'Keefe, *Law and the Cultural Heritage: Volume 1, Discovery and Excavation*, Abingdon: Professional Book Ltd., 1984, p. 98; B. Burnham, *The Protection of Cultural Property: A Handbook of National Legislation*, Paris: The International Council of Museums, 1974; Anon, *The Protection of Movable Cultural Properties II Compendium of Legislative texts, Vols. I and II*, Paris: UNESCO Publishing, 1984.

131 For example, in the 1970 UNESCO Convention.

132 关于许可程序的介绍，see McLaughlin, Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987, *Columbia-VLA Journal of Law and the Arts*, Vol. 19, 1995, pp. 149~198, and A. Croome, The United States Abandoned Shipwreck Act Goes into Action: A Report, *International Journal of Nautical Archaeology*, Vol. 21, No. 1, 1992, pp. 39~53.

公约规定开发水下文化遗产的许可必须遵循附件规章。[133] 在沿海国管辖权外的区域，这种许可由协调国授予，对于大陆架上的水下文化遗产，通常由沿海国授予许可。这一许可允许开发水下文化遗产的活动实际发生。同时，为了防止发掘者规避其所属国或发掘地国的法律，公约第 14 条要求成员国采取措施阻止非法打捞的水下文化遗产进入其领土，因此需要一个二次许可，专门处理水下文化遗产进入一国领土的情形。[134] 例如，一水下文化遗产经协调国联合其他利害关系国家许可打捞后在第三国上岸，如果该第三国也是公约成员国，须经其许可才能进入其领土。可以预计，大部分国家将用此许可。[135]

作为抑制非法行为的重要环节，制裁是必不可少的。国际文化遗产法的执行大都依赖于非刑事的制裁，如返还、恢复原状和偷盗物的没收。[136] 公约谈判过程中，代表们详细讨论了制裁的性质问题。[137] 最终认为制裁的性质应由各国决定，但是“对违反行为所作的制裁的力度应足以惩诫任何地方的违法行为，确保遵守本公约，并剥夺违反者从非法行为中获取的利益。”[138] 值得注意的是，公约第 18 条明确要求成员国采取措施在其领土内扣押以违反本公约的方式打捞的水下文化遗产。[139] 实践证明，如果合理操作，扣押是行之有效的。

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133 规章第 1 条。

134 国际法协会公约草案第 9 条规定“本公约的成员国可以规定发布许可，允许公约生效日后发掘或恢复的水下文化遗产，只要发掘或恢复活动已经遵守或将遵守宪章，即可进入该国领土。”教科文组织谈判稿规定“成员国可以遵循附件中的规章，发布许可，允许水下文化遗产进入其领土。”CLT- 96/CONF. 202/5 Rev. 2 1999, 2.

135 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 546.

136 Nafziger, International Penal Aspects of Protecting Cultural Property, *International Lawyer*, Vol. 16, 1985, pp. 835~852; C. Bassiouni, Reflections on Criminal Jurisdiction in International Protection of Cultural Property, *Syracuse Journal of International Law and Commerce*, Vol. 10, 1983, pp. 281~322. 在 1970 年教科文组织公约起草过程中，有人建议对非法进口施加更严格的刑事惩罚，该建议最后被拒绝，代之以进口国承诺在文化遗产的恢复和返还方面给予合作。

137 CLT-2000/CONF. 201/8, Paris, 5 July 2000．原来草案规定“每个成员国应对第 9 条规定的可予扣押的水下文化遗产的进口施加刑事、行政（或民事）制裁。” CLT-96/CONF.202/5 Rev. 2, Paris, July 1999.

138 公约第 17 条第 2 款。

139 公约第 18 条第 1 款。

行使扣押权利时，成员国有义务对水下文化遗产“记录、保护并采用所有合理措施使之保持原有状态。”[140] 原草案使用了“保藏”一词，而不是“保持原有状态”。保藏海洋物品是一个耗时耗钱的活动，要求所有成员国提供这样的设施可能是沉重的负担；而“保持原有状态”与前者相比负担较轻，是一种防止腐化的短期方法，而不是长期保存。该条并没有施加强制义务，而是要求沿海国采取所有“合理的”措施。什么是“合理的措施”取决于沿海国的基础设施、技术专长、设备等。发展中国家可以要求教科文组织和其他利害关系国家的技术支持。因此，第 18 条第 3 款要求扣押国通知所有可能与被扣押遗产有利害关系的成员国。[141]

扣押国还必须决定这些物品的最终处理。公约第 18 条第 4 款规定：“扣押了水下文化遗产的成员国应确保对该文化遗产的处理方式符合公众的利益，要考虑对该遗产的保护和研究，散落文物之复原，向公众开放，展览和进行教育等问题，以及与该文化遗产确有联系，尤其是文化、历史或考古方面的联系的成员国的利益。”该条所规定的处理方式丝毫没有考虑所有人或善意第三人的利益，这就产生了私有权利剥夺和补偿的相关问题。另外，该遗产是归属于扣押国、有利害关系的国家、全人类还是无主呢？公约不涉及到任何财产权利问题，因此没有提供任何答案。[142]

鉴于水下文化遗产的保存要为全人类之利益，第 18 条第 4 款旨在将这一原则贯彻到一国扣押水下文化遗产时。但遗憾的是，该条中使用的是“公众的利益”，而不是第 2 条第 3 款中的术语“全人类之利益”，似乎表明仅指扣押国的“一国之私”。而且，该条只是建议了考虑的因素，并没有施加任何义务。[143]

公约第 17 条第 3 款还规定成员国应相互合作以确保制裁措施得到实施。起初，合作义务以强制条款的形式规定，并列举了国家应予以合作的领域，例如文件的制作或引渡。[144] 但是，由于很多义务所涉及的问题的复杂性，特别是引渡，公约最终没有限定或列举成员国合作的方式。

（三）主管机关、公共认识和培训

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140 公约第 18 条第 2 款。

141 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 548.

142 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 88.

143 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 548.

144 秘书处草案第 10(2) 条规定：“成员国同意在执行这些制裁时相互合作。这一合作应包括但并不限于文件的制作和传送、证据取得、程序服务和引渡。” CLT-96/CONF. 202/5Paris, Apr. 1998.

世界文化遗产的保存需要各国积极参与集体保护机制。公约第 22 条要求“为确保本公约的有效实施，成员国应设立主管机构，已设立的要予以加强，负责水下文化遗产目录的编制、保存和更新工作，对水下文化遗产进行有效的保护、保存、展出和管理，并开展有关的科研和教育活动。”

公共事业的设立需要专业技术和政府融资，很多发展中国家难以承担，尽管教科文组织可以提供一些技术支持，但它并不能提供必要的资金援助。“主管机关”的措辞表明该机关并不需要从事“国家公共事业”承担的事务，而只是一个为实施公约提供必要机制（可能包括公共事业）的管理机构。这一规定有利于发展中国家，它们建立公共事业的程度不必和美国等发达国家相等。[145] 各国公共事业的发展水平参差不齐。因此，公约第 21 条要求各国“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。”

公约谈判中第 20 条虽然少有人问津，但其包含了水下文化遗产保存的最重要的工具。[146] 该条要求“成员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意义的认识、以及依照本公约保护水下文化遗产之重要性的认识。”谈判中，该条发生了些许变化，以“公众认识”取代了“教育”。[147] “公众认识”被认为是成员国承担的一项不很严格的义务，仅要求使公众认识而不是实际教育公众（包括正式的培训）。[148]

公约第 21 条要求各国“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。”由于培训设施不仅非常昂贵而且有很高的技术要求，发展中国家几乎难以承载。[149] 它们需要发达国家，特别是水下考古学和水下文化遗产保存先进的国家的帮助。因此，第 21 条包括了在技术转移方面给予合作的义务。但是，各国一般不可能允许与其

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145 1972 年世界遗产公约注意到了这一问题，“由于遗产保护所需资源的大小以及被保护财产所在国的经济、科学和技术资源的不充分，遗产在国内层面上的保护经常不完全。”

146 教育和大众认知是很多国际公约用来保护世界文化和自然遗产的重要工具。See, e.g., Art. 10 of the 1970 UNESCO Convention, Art. 7 of the 1954 Hague Convention and Art. 12 of the 1956 UNESCO Recommendations. See also J Gifford, M Redknapp and N Fleming, UNESCO International Survey of Underwater Cultural Heritage, *World Archaeology*, Vol. 16, 1985, p. 374.

147 谈判草案第 15 条规定“每一成员国都应通过教育手段努力创造并发展公众对水下文化遗产的价值以及违反公约和附件规章对水下文化遗产的威胁的认识。” CLT-96/CONF.202/5 Rev. 2, Paris, July 1999, 11.

148 海洋考古协会主持了一个非常成功的教育和培训项目，在美国、南非、澳大利亚等多国实施。下载于 http://www.nasportsmouth.org.uk.

149 77 国集团指出“只有适当保护水下文化遗产的人员和技术资源得以充分保障，该公约才有效；因此该公约应该提供一个能力建设、技术转移和培训制度”。 CLT-2000/CONF.201/3add, Paris, June 2000, 10.

保护产业有联系的特定技术的转移，技术转移的条件需为转移国所接受。

（四）保护水下文化遗产的国际合作

水下文化遗产，无论发现于国际海域还是沿海水域，通常具有国际性，或因船舶的来源、组成、船员、货物，或因贸易路线。因此，有可能对很多国家具有考古、历史或文化价值，从而产生了一国对水下文化遗产的潜在的权益以及反映人类共同遗产的国际权益。对于任何进行水下文化遗产开发活动的国家，努力同其他利害关系国家相互合作是其职责所在。该义务不仅在序言、一般原则和管辖权制度中得到体现，还在公约的另两条中得以具体化，即开发水下文化遗产的特定活动的协作和地区协议的发展。

公约第 19 条要求“缔约国应依据本公约在水下文化遗产的保护和管理方面相互合作，互相帮助，有可能的话，也应在对这种遗产的调查、挖掘、记录、保存、研究和展出等方面开展协作。”并“在不违反本公约宗旨的前提下，各缔约国要与其他缔约国分享有关水下文化遗产的信息，包括水下文化遗产的发现、所处位置、违反本公约或国际法或违反与这种遗产有关的其他国际法、有关的科学方法和技术以及有关法律挖掘或打捞的文化遗产。”公约还注意到发现水下文化遗产的信息如果让公众知晓可能会有危险，因此，公约要求当这一风险存在时成员国应在其国内法允许的范围内对这些信息保守机密。[150]

很多双边协议或区域性协议已经对水下文化遗产保存作了调整。[151] 欧洲和拉美、加勒比海国家指出公约在特定区域并不能充分保护水下文化遗产，它们表示要在区域层面上引入更严格的保护措施。[152] 区域协定的发展确实可以促进公约特定目标的实现，如在创造公共认识和培训方面的援助。为此，公约第 6 条第 1 款“鼓励成员国为保护水下文化遗产，签订双边、区域或其他多边协定，或对现有的协定加以补充。”必须注意的是，大量区域和双边协议的产生，虽然提供了更为严格的

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150 公约第 19 条第 3 款。

151 双边协议如美国和墨西哥 1970 年 7 月 17 日签署的《合作恢复和返还被偷盗的考古、历史和文化财产的条约》、美国和秘鲁 1981 年 9 月 15 日签署的《恢复和返还被偷盗的考古、历史和文化财产的协议》、美国和加拿大之间的《关于对特定种类的考古和民族物品施加进口限制的协议》。双边条约和区域协定对于保护可识别所有权的历史沉船尤其重要。例如，美国已经准备签署一项多边协定来保护泰坦尼克号沉船。尽管在此领域没有区域协定，但斯堪得纳维亚国家达成的关于保护爱沙尼亚沉船的条约可以说具备了这种特征。See C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 522, note 188.

152 由多米尼加共和国代表领导的拉美集团抱怨谈判进程缓慢，表示如果不加速进程，它们将考虑在圣多明各宣言的基础上建立一个区域协定。该宣言于 1998 年 12 月 4-5 日在拉丁美洲和加勒比海文化部长和负责文化政策的官员组成的 X 论坛上签署，意在执行教科文组织草案的很多规定。

保护制度，但又会造成水下文化遗产保护法律的“巴尔干化”，一个支离破碎的法律体系显然有悖公约的目的。这似乎是国际法发展进程中的一个两难问题。无论如何，公约在很多方面只是确立了水下文化遗产保护的“观念”，将这些先进观念延伸为有效的保护制度，正是区域协议和双边协议的合理性所在。因此，公约要求“所有这些协定应完全符合本公约的规定，不得削弱本公约的普遍性。各国在这些协定中可提出能比本公约提出的规章更好地保护水下文化遗产的规章。”[153]

七、结　语

和所有国际公约一样，《保护水下文化遗产公约》的制订承受了很大的政治压力，以美、英为首的海洋大国[154]对其施加了相当的影响。因此，公约最终文本较1998年草案发生了重大变化：所有权和抛弃问题被省略，公约和海难救助法的关系得以澄清，军舰和国家船舶进入了公约调整，公约所规制的活动范围缩小，而延伸沿海国管辖权的努力告以失败。如今，其生效前景尚难卜料。美、[155]英代表放言对公约不予支持，而加拿大则已经着手讨论批准和执行程序。同时，公约很多条款亦受到了学者的质疑，如所有权制度的缺失，牺牲水下文化遗产经济价值以保全其考古价值的理念等。[156]

尽管如此，公约仍取得了很多独到的成就。首先，它是国际社会第一个保护水下文化遗产的普遍性文件；第二，它在很多重要事项上达成了折衷方案；第三，它原则上保持了与《联合国海洋法公约》的一致和平衡；第四，它所采用的最后条款（如排除保留）有效促进了整体适用。[157]“因此，尽管新公约未跟随传统海事法上的理论路线，如前文所述，新公约仍然合理地建立了一套法律规范，反制了将水下文化遗产商业化的传统路线。我们可以说，1982年的《联合国海洋法公约》为海洋法上的疆界区划建立了一套坚实的制度；而2001年联合国教科文组织的新公约则更进一步地，为世界上位处于不同水域疆界内的水下文化遗产的保护工作，

153 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 553.

154 尤其是法国、德国、日本、荷兰、挪威和俄罗斯。这些国家，除了日本和美国外，都投了反对票或弃权。

155 美国对特定条款，如第9条和第10条，坚决反对，认为其变更了海洋法公约，see Sean D. Murphy, U.S. Concerns Regarding UNESCO Convention on Underwater Heritage, *American Journal of International Law*, Vol. 96, 2002, pp. 469~470.

156 Lauren W. Blatt, SOS (Save Our Ship)! Can the UNESCO 1999 Draft Convention on the Treatment of Underwater Cultural Heritage Do Any Better?, *Emory International Law Review*, Vol. 14, 2000, p. 1581.

157 Guido Carducci, New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage, *American Journal of International Law*, Vol. 96, 2002, pp. 433~434.

建立了新的规则。而且这一规则是非商业化的、公法上的规则。”[158]

中国一向关注水下文化遗产的保护，1989 年 10 月 20 日就颁布了《中华人民共和国水下文物保护管理条例》，对水下文物的保护提供了相当详细的管理机制，被西方学者认为是“在详细分析了其他国家所采行动之后所制定出来的机制，因此使得中国在这方面处于领先的地位。”该条例采取了依照文物起源国来区分管辖权的立场，[159] 而《保护水下文化遗产公约》并未按照这一思路制定规范，因此将来对于保护、打捞世界各地起源自中国的水下文化遗产，会发生争执。[160] 但另一方面，公约确立的协调国和协调会议制度又为中国积极参与相关水下文化遗产的保护提供权利保障。此外，公约关于水下文化遗产经济价值和考古价值关系的讨论亦为我国水下文化遗产保护和开发开拓了新思维。

158 傅崐成：《联合国教科文组织 2001 年〈保护水下文化遗产公约〉评析》，载于《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 17~18 页。

159 根据该条例第 2 条、第 3 条，对遗存于中国内水、领海内的一切起源于中国的、起源国不明的和起源国不明的文物以及遗存于中国领海以外按照中国法律由中国管辖的其他海域内的起源于中国的和起源国不明的文物，中国拥有所有权并行使管辖权；对遗存于外国领海以外的其他管辖海域以及公海区域内的起源于中国的文物，国家享有辨认器物物主的权利。

160 参见傅崐成：《联合国教科文组织 2001 年〈保护水下文化遗产公约〉评析》，载于《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 14~15 页。

Recycling of Maritime Vessels: Issues of Governance and Policy

Vijay Sakhuja*

The recycling of obsolete maritime vessels namely civilian and military vessels has emerged as an important issue in ocean governance. The rate and momentum of shipbuilding have increased by leaps and bounds with the colossal growth in world economic development and the corresponding increase in global maritime trade. The number and variety of ships in the form of freighters, containers, bulk carriers, crude and natural gas carriers have increased at a phenomenal pace.

Shipbuilding as an industry has seen a huge growth in the South Korea, Japan and China with the numbers and varieties of shipping platforms on the increase. While civilian shipping fleets have increased in number, there has been a corresponding increase in the global naval fleets of newer surface and submerged platforms of various sizes, capabilities, propulsions being built.

The issues in shipbuilding have been conditioned by the following factors:

1. The demand of global trade and the varieties of platforms needed for the same.

2. Newer technologies that have dramatically rendered several existing platforms obsolescent and unviable, in fact, several of the platforms of the yesteryears have become "white elephants at sea".

3. The increasing rate of depreciation and the exorbitant costs of maintaining the ageing platforms.

4. The erosion value of the platforms at sea and the attendant pollution and the contamination risks of the ageing platforms.

It is a fact that cycles of naval technology have been growing in complexity of technology and sophistication of hardware. The nature of technologies and the composites of materials that have been built into the maritime platforms have been

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built with the objective of technological optimality and operational efficiency. However, there has been an utter disregard in the choice of the composites of materials used in the building of the newer maritime platforms. Issues in shipbuilding and the manual breaking of ships have a host of operational and environmental issues.

Ship recycling or ship breaking could be defined as the process of dismantling an obsolete vessel's structure for scrapping or disposal. Conducted at a pier, dry dock, beach, water front or dismantling slip, it includes a wide range of activities, from removing all gear and equipment to cutting down of metal frames and resultant recycling the ship's materials. Ship breaking is a challenging process, due to the structural complexity of the ships and the many environmental, safety, and health issues involved.

It is a general belief that for safety reasons a ship must be scrapped after 20 to 25 years. On an average, some 600 ships and craft, small and big, various types and classes are decommissioned and sold as scrap. There are no fixed annual trends and the scrap market varies substantially. 1998 was a bumper year and 673 ships or 27,254,525 dwt were scrapped.[1]

Till 1970s, ship breaking was done in the docks of Europe. As the people in the developed world became mindful of the health and environmental costs of ship breaking and also due to intense pressure from environmentalists, the ship owners were left with no other option but to send their vessels to the poorer countries of Asia. Asia became a popular destination for dumping scrap of all kinds of materials primarily due to cheap labor, lax environmental law and weak enforcement agencies.

Since the early 1980s, ship breaking has been increasingly moved to poor Asian nations. Bangladesh, China, India, and Pakistan are preferred destination. By 1993, half of all oceangoing ships were scrapped in China. Today, India holds the top rank in ship breaking followed by Pakistan, Bangladesh and China. The annual turnover of the industry in India is about 10,000 crore rupees.

Alang in India recycles about 50% of the decommissioned ships in the world. The yards are located on the Gulf of Khambat and ship breaking began there in

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1 The Social and Labor Impact of Globalization in the Manufacture of Transport Equipment, Report for discussion at the Tripartite Meeting on the Social and Labor Impact of Globalization in the Manufacture of Transport Equipment, Geneva, 8−12 May 2000, at http://www.ilo.org/public/english/dialogue/sector/techmeet/tmte2000/tmter6.htm, 20 January 2006.

1983. There are 173 plots and 10 of these are exclusively for VLCCs.[2] Till January 2005, 4035 vessels amounting to 30.05 million metric tones had been beached. The yards at Alang have generated controversy about working conditions, workers' living conditions, and the impact on the environment. Besides, the daily wages of workers vary between Rs 60 and 100. In contrast, the labor cost in the ship breaking business in the United States could be something between $ 40 and 45 per hour.

In Bangladesh, ship breaking is undertaken for domestic steel requirements. The ship breaking industry is not subject to any environmental laws or health and safety regulations for workers. Chittagong ship breaking yard is highly polluted and has experienced several accidents and casualties and is believed to be most unsafe in the region.[3]

In China, ship breaking is not undertaken on the beaches. Instead, vessels are broken up in docks with cranes and machinery.[4] However, working conditions are similar in ship breaking yards all over Asia.

The process of recycling of ageing maritime platforms is for two purposes：

1. Reclaiming of the recoverable metal from the ships, which would be again recycled in the newer platforms after considerable treatment.

2. The commercial resale value of the recoverable materials that offers the ship breaking agencies lucrative contracts in the recovery and sale of scrap and the recoverable materials.

Recycling of maritime platform materials is a commercially lucrative business but with environmentally ultra-hazardous consequences. The following issues of concern are pertinent in the recycling of maritime platforms and ship breaking:

1. Human labor engagement in the occupationally hazardous operations that involves the direct contact or handling of decaying material composites. Quite often the manual labor engaged in the ship breaking operations have thinly clad clothing with virtually no protective gear as they engage in the tasks of demolition.

2. Ship breaking operations are considered to be environmentally polluting, devastating for the manual laborers who are exposed to the deadly toxic composites and the contamination of the radioactive materials that are unpacked from the disintegrating platforms.

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2 For more details, see ship breaking at http://www.greenpeaceweb.org/shipbreak/whatis.asp, 20 January 2006.

3 See http://www.greenpeaceweb.org/shipbreak/whatis.asp, 20 January 2006.

4 See http://www.greenpeaceweb.org/shipbreak/whatis.asp, 20 January 2006.

3. The health standards and the medical care for the manual laborers are absolutely nonexistent. Examined as an issue of health safety and from the view of human rights of the workers, the ship breaking yards are the "killing fields of the maritime industry" that has the utter disregard of human life and suffering.

4. The industrialized world are the worst culprits in this process since shipbuilding is their premium industry while ship breaking that has utterly disastrous consequences are removed from their territories since it is detrimental to their work force and damaging to their environment.

5. The lack of transparency in regard to the nature and amount of toxic substances aboard the ageing platforms that are being contracted for breaking is yet another serious issue of concern. Quite often as in the case of the French aircraft carrier *FNS Clemenceau*, the State authorities do not adopt transparent standards to reveal the real potential of the toxic levels of the composite materials on board the ship that is to be dismantled.

6. The lack of transparency has serious detrimental issues of safety on the human work force engaged in the demolition assignment and the environment pollution that is the consequence of the demolition process that unleashes a slew of the toxic brew the ships hold.

The level of hazardous activity has a pertinent impact on the human workforce and could result from the nature and level of toxic chemicals that are removed during the ship breaking process:

1. Asbestos, a deadly toxic chemical that are used as insulation composite is in hanger liners, mastic under insulation, cloth over insulation, cable, lagging and insulation on pipes and hull, adhesive, gaskets on piping connections, and valve packing.

2. Polychlorinated biphenyls (PCBs) that are in substantial quantities in rubber products such as hoses, plastic foam insulation cables.

3. Silver paint, habitability paint, felt under septum plates, plates on top of the hull bottom and primary paint on hull steel.

4. Lead − from lead and chromate paint, lead ballast, batteries, generators, and motor components.

5. Hazardous material and chemicals-including heavy metals in ship transducers, ballast, and paint coatings; mercury in fluorescent light tubes, thermometers, electrical switches, light fittings, fire detectors, and tank level indicators.

6. Chlorofluorocarbons (CFCs) in self-contained refrigeration devices such as

water coolers and small freezer units.

7. Excess noise associated with grinding, hammering, metal cutting, and other activities.

8. Fire from ignited insulation, matting, lagging, and residual fuel; and from lubricants and other flammable liquids.

While shipbuilding is the most commercially lucrative industry of the First World, ship breaking is the disastrous human activity with debilitating environmental repercussions for the Third World. The industry is reflective of the deeply flawed perspective of the First World in matters concerning safety and security of the Third World. Motivated by lucrative profits, unmindful of the humanitarian disaster and the environmental corrosion, the Third World States like Bangladesh, Pakistan and India are sacrificing on the altar of expediency the human costs and environmental costs of their respective countries for ill gains in commercial value.

Basel Convention

The industrialized nations have long been looking for cheaper ways to get rid of their industrial wastes. These toxic traders were shipping hazardous waste to developing countries and after this activity was discovered, an international anger led to the drafting and adoption of the Basel Convention.[5] During its first decade (1989—1999), the Convention aimed to set up a framework for controlling the "trans boundary" movements of hazardous wastes. In January 2002, the Basel Parties for the first time debated on the legal issues of old ships. They agreed in general that the Basel Convention should also be applicable to ships scrapped since they contain hazardous materials like asbestos and PCBs. The Basel Parties also adopted guiding principles for environmentally sound management of dismantling of ships. The guidelines are advisory in nature and are meant to improve the environmental performance of facilities involved in the breaking of ships.

In April 2004, a Turkish judge declared that the import of ships for scrap containing asbestos or other dangerous materials onboard was illegal.[6] Judges in India, Belgium and the Netherlands followed suite and ruled in similar ways. But

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5 For more details on Basel Convention, at http://www.basel.int/about.html, 5 January 2006.

6 Basel Convention and Shipbreaking, at http://www.greenpeaceweb.org/shipbrea/basel_convention_shipb.asp, 20 January 2006.

October 2004 was historic and the Basel Convention decided that ships could be considered toxic waste under international law and at the end of their life they cannot leave a country without permission of the importing State. The Convention also placed conditions on the 163 signatories to the treaty that they must assure that ship breaking is performed in an environmentally sound manner and minimizes the trans boundary movement of hazardous wastes onboard the ships.

The Case of *FNS Clemenceau*

The 50 year old decommissioned French aircraft carrier *FNS Clemenceau*, named after Georges Clemenceau (1841−1929), carrying 27,000 tones steels crap, some 500 tones hazardous and toxic materials including asbestos had long been in search of a scrap yard where its steel could be recycled. It was denied entry by several European countries and was rejected by Turkey and Greece, who cited a series of chemical hazards such as PCBs (polychlorinated biphenyls), TBT (tributyltin), asbestos, and the possibility of radioactive waste on board.

The French authorities had planned to decontaminate the ship in Spain, but for mysterious reasons the ship never reached Spain. The French also tried to sell the ship to China, which also refused its entry. Finally, *Clemenceau* stayed left high and dry in the Mediterranean, as no country was willing to take it for scrapping.

It then found customer in India and the ship was to be scrapped by the Indian company AG Enterprises Ltd. – Shree Ram Vessels Scrap Ltd., in Alang, Gujarat. The ship left France on December 31, 2005, while Greenpeace and local NGOs attempted to stop the vessel through protests.

The Supreme Court of India on January 16, 2006 denied entry to *FNS Clemenceau* in India's territorial waters until February 13, 2006 pending a decision whether the ship is to be allowed in the country for breaking.[7] Meanwhile, the owners of the French warship gave an undertaking before the Supreme Court that they will not bring the vessel in the exclusive economic zone of India.

The Supreme Court-appointed Committee on hazardous waste management had earlier submitted its report recommending that *Clemenceau*, which is carrying asbestos, should not be allowed to enter India. G. Thyagrajan, Chairperson, Supreme Court Monitoring Committee on Hazardous Wastes Management noted:

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7 French Toxic Ship Not to Enter India Till Feb. 13, *Hindustan Times*, 16 January 2006.

We cannot allow the last rites of dead ships here but we have an open mind and have asked the French Government to provide us more details and documents.[8]

Also the Supreme Court of India in its October 14, 2003 order refers to the issue of Ship Breaking saying,

We accept the following recommendations of HPC (Report of the High Powered Committee on Management of Hazardous Wastes): "Before a ship arrives at port, it should have proper consent from the concerned authority or the State Maritime Board, stating that it does not contain any hazardous waste or radioactive substances… The ship should be properly decontaminated by the ship owner prior to the breaking."[9]

Interestingly, on December 20, 2004, three civil society organizations of France (Ban Asbestos France (Bannir 1'Amiante) and Syndicat CGT de la DCN de Toulon) began raising public opinion against the sale of the vessel for final scrapping in India.[10] In an open letter to the French government, the three organizations highlighted (a) the irregular conditions of a partial asbestos removal done on the former aircraft carrier, *Clemenceau* and (b) the export to India of the ship with 22 tons of asbestos waste on board without any consideration for the health.

Also, officials from Technopure, the company contracted by the French Government to decontaminating the ship before it was dispatched to India, became public to confirm that the *Clemenceau* contains as much as 500 tonnes of asbestos much more than the French Government has admitted to.[11] Reportedly, the company disclosed the information on "moral grounds, despite the confidentiality clause they were bound to".

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8 Vaiju Naravane, Greenpeace Activists Meet French Officials, *The Hindu*, 21 January 2006.

9 Supreme Court Monitoring Committee on Hazardous Wastes Final Report on *Clemenceau*, at http://www.scmc.info/special_issues/final_report_to_clemenceau_3.html, 20 January 2006.

10 Asbesto Laden Ship Steering for Indian Shore, *The Indus Telegraph*, 17 January 2006.

11 France Dumps Clemenceau on India in Deliberate Violation of International Law: Greenpeace, at http://www.greenpeace.org/india/press/release/france-dumps-clemenceau-on-ind, 10 January 2006.

On February l6, 2006, French President Jacques Chirac, prior to visiting Delhi on a State visit, recalled the ship back to France. Jacques Chirac announcement came after France's highest administrative court ordered the ship's transfer to be called off in response to legal action by Greenpeace and three anti-asbestos groups.[12]

Concluding Remarks

The damages and the ill consequences of the ship breaking industry are devastating not only by the level and slew of toxic environmental exposure and the hazardous work activities but more so by the poor state of working conditions and the utter disregard by the entrepreneurs of the working conditions of the workers. It would be pertinent to point that the industry of ship breaking is relegated to be a Third World industry as it carries all the actual and devastating consequences of injury, disability and chronic sickness for the human force engaged in the task. It poses the most disastrous and permanent corrosion on the regional environment.

Regulations aimed at solving toxic dumping problems are easily circumvented and developed States continue to violate international laws with impunity. In this connection, the *Clemenceau* is symbolic of the global issue of developed countries dumping toxic waste in developing countries. Developed countries must not be allowed to think that their responsibilities end when these hazardous wastes leave their shores.

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12 India Hails Recall of Toxic Ship, at http://englsh.aljazeera.net/NR/exeres/12FF9E01-416F-4654-8CA1-F0A0D78CA4AA.htm, 20 February 2006.

台湾海峡船源污染法律问题刍议

傅崐成 * 刘先鸣 **

内容摘要: 如何通过法律途径有效规制台湾海峡内由船舶所造成的污染，是当前迫切需要海峡两岸共同解决的重大问题之一。本文首先在国际法和海峡两岸现行立法的框架下，探讨了船舶在台湾海峡内所享有的通行权利的性质；其次，以《联合国海洋法公约》和国际海事组织相关规则为基础，讨论两岸当局对船源污染的管辖权空间；再次，分析目前台湾海峡内船源污染控制的实际效果。以上述论证为基础，本文认为，海峡两岸政府之间的合作是有效控制船源污染的必要途径，并为两岸合作可能面临的困难提出了可供参考的合作方式和法律途径。

关键词: 台湾海峡　船源污染　联合国海洋法公约

台湾海峡是指位于台湾岛与对岸福建省、广东省海岸之间的一段水域。该海峡的南端在北纬 22 度左右，开口大，从台湾南端到对岸的广东惠来一带，大约有 350 海里。海峡的北端在北纬 25.5 度左右，开口较小，从台湾的淡水河口到对岸的福建平潭一带，大约有 135 海里。[1]

一、台湾海峡水域的法律性质

要讨论台湾海峡的船源污染的法律控制问题，必须要明确船舶在台湾海峡所享有的通行权利的性质。依据国际法，船舶所享有的通行权利是由海峡水域的法律性质所决定的。因此，我们必须首先讨论台湾海峡的法律性质。

（一）何谓“用于国际航行的海峡”？

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1 傅崐成：《台湾海峡水域法律地位研究》，载于傅崐成著：《海洋管理的法律问题》，台北：文笙书局 2003 年版，第 371 页。

《联合国海洋法公约》第三部分关于海峡的规定明确指出，过境通行权适用于“用于国际航行的海峡”[2]。但对于什么是“用于国际航行的海峡”，公约并没有给出明确的定义。目前对于这一概念最权威的定义来自于国际法院的裁决。

在 1949 年科孚海峡案中，阿尔巴尼亚政府曾抗辩道科孚海峡并非存有通过权的国际通道，理由是该水道只是次要水道，甚至不是连接公海两部分之必要途径;此外，该水道构成科孚港的一部分，几乎完全用于科孚与沙兰达之间的当地交通。面对这一抗辩，国际法院裁决道：“有人或许会询问，标准到底是通过该海峡船只之多寡，还是该海峡用于国际航行之重要性？本院认为，真正决定要件是该海峡连接公海两个部分的地理状态，以及用于国际航行的事实。该海峡是否是连接公海两个部分之必要航道，或仅是爱琴海与亚德里亚海之间的备用航道并非决定因素。总之，该海峡的确是国际海上交通的有用航道。”[3]

从国际法院的裁决来看，所谓“国际海峡”仅需是地理上连接公海两部分的水道，而且功能上可用于国际航行。至于该海峡是否为沿海国之领海无关紧要，且该海峡船舶流量多寡亦非所计。从另一角度观察，重要的是该海峡的地理特征，以及该海峡是否实际用于国际航行，至于是否存有其他可替代航道则非所问。[4]

有学者指出，国际法院之所以不将是否有备用航道或争议之海峡是否为必要航道列为考量因素，进而放弃“必要性标准”，乃因全世界连接公海之海峡中，不存在有其他并行航道者寥寥可数，若将必要性标准列入考量则对国际海峡之讨论无太大意义，因为仅有几个海峡能符合此要件。[5]

国际法院在科孚海峡案中确立的国际海峡之标准逐渐为国际社会所接受。1958 年《领海与毗连区公约》和 1982 年《联合国海洋法公约》都未对这一标准做出实质性修改。在 1982 年《联合国海洋法公约》中，由于专属经济区制度的建立，原来属于公海的部分海域被划归为专属经济区，因而“用于国际航行的海峡”的地理定义随之被确定为“在公海或专属经济区的一个部分和公海或专属经济区的另一部分之间的一段区域”。[6]

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2 《联合国海洋法公约》第 37 条。

3 Corfu Channel Case (Albania v. United Kingdom), Judgment of 1948, *I. C. J. Reports*, 1948—49, p. 4, para. 28. Quoted from S. N. Nandan and D. H. Anderson, Strait Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982, *British Year Book of International Law*, Vol. 60, 1989, p. 167.

4 Office for Ocean Affairs and the Law of the Sea (United Nations), Strait Used for International Navigation, 1992, p. 2, para. 7; U. N. Sales No. E. 91. V. 14. 转引自姜皇池：《由国际海峡制度论台湾海峡与澎湖水道法律定位问题——基线划定之可能与影响，兼论〈领海法〉相关条文》，载于《台大法学论从》第 28 卷第 3 期。

5 姜皇池：《由国际海峡制度论台湾海峡与澎湖水道法律定位问题—基线划定之可能与影响，兼论〈领海法〉相关条文》，载于《台大法学论从》第 28 卷第 3 期。

6 《联合国海洋法公约》第 37 条.

（二）台湾海峡是否属于“用于国际航行的海峡”？

依据国际法院在科孚海峡案中采用的功能性标准视之，台湾海峡一方面连接公海或专属经济区的两个部分，另一方面当然的用于国际航行，因此，从文意解释的角度看，台湾海峡满足“用于国际航行的海峡”这一概念的要件。

但是，关于台湾海峡的另一特性需被提及，即该海峡的宽度远远宽于24海里。依据现行海洋法中12海里为最大领海宽度的规定，在台湾海峡之内必然会留有公海或者专属经济区水道，这种海峡被称为“宽海峡”。而宽度小于24海里的，全部水域皆为沿海国领海的海峡，则被称为“领海峡”。

针对“宽海峡”的特殊性质，对“用于国际航行的海峡”这一概念的理解，不应该局限于文义，而应该考虑到创立此法律概念的最初目的。“用于国际航行的海峡”以及适用其中的“过境通行制”的创立，都离不开“12海里领海”这一概念的提出。联合国第三届海洋法会议上，英国代表Mr. Dudgeon曾这样评论道：“国际社会对12海里领海制度的接受，意味着在许多原本是国际航行、航空之重要通道的海峡之中，不会再存在公海海道（而将成为沿海国地领海）。因此需要确保国际社会在这些对世界交通网络至关重要的海峡之中能够继续通畅的航行。”[7] 正是基于这种考虑，国际社会才创设出“用于国际航行的海峡”和“过境通行制”这一对概念。相比于适用于领海的“无害通过制”，在“过境通行制”之下，航行国享有更多的权利，航空器、军舰都可以行使过境通行权，潜水艇可以在水面之下航行，而沿海国则受到了更多的限制。因此，“用于国际航行的海峡”和“过境通行制”这一对概念的创设，实际上体现了沿海国与航行国之间博弈的结果，既满足了沿海国扩大领海范围的要求，又保证了航行国所极为重视的在国际海峡内的航行权利。

基于上述分析，“用于国际航行的海峡”这一概念，实际上是为“领海峡”而创设的。而作为拥有公海或专属经济区水道的“宽海峡”，由于航行国在其中可以行使公海或专属经济区内的航行自由权，因此没有必要适用“过境通行制”。

《联合国海洋法公约》对此也做出了明确的回答。依据公约第36条，在该海峡内有“在航行和水文特征方面同样方便的一条穿越公海或穿越专属经济区的航道”，则公约第III部分关于“用于国际航行的海峡”的规定不适用于该海峡。在这种航道中，应依据航道水域本身的法律性质（公海或专属经济区）而适用公约相关部分中关于航行或飞越自由的规定。

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7 Mr. Dudgeon (UK), UNICLOS III Official Records, Vol. 2, p. 125 (para. 17). Quoted from S. N. Nandan and D. H. Anderson, Strait Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982, *British Year Book of International Law*, Vol. 60, 1989, p. 179.

综上所述，台湾海峡属于“用于国际航行的海峡”，但在台湾海峡内并不适用“过境通行制”，而是依据领海、专属经济区、公海等不同水域的法律性质，适用无害通过制、航行或飞越自由等制度。

（三）海峡两岸对于台湾海峡的具体规定

在目前国际社会普遍承认一个中国的背景下，台湾海峡两岸都是中国领土，受单一而不可分的中国主权的管辖。但是，海峡两岸事实上也存在着两个管辖实体。因此，分析海峡两岸各自对台湾海峡水域法律地位的规定，有利于我们正面认识这一问题。

首先，从测量领海及各个海域外部界限的所必须的基线来看，海峡两岸没有冲突。中国大陆于 1996 年颁布了部分领海基点、基线，中国台湾于 1999 年也颁布了部分相关的领海基点、基线。[8] 值得注意的是，在金门、马祖等毗邻大陆、在台湾控制下的岛屿，台湾并没有公布他们的相关基线。很明显，这是出于海峡两岸关系的考虑。[9] 事实上，这其中隐含的主要考虑就在于，金门、马祖区域已经包含在大陆颁布的领海直线基线之中了，在“一个中国”的概念下，没有必要为这些岛屿再次颁布不同的基线，以免形成重复且矛盾的中国领海基点基线，给予外国船、机选法舞弊的机会，制造执法上障碍。[10] 何况颁布基线是对外性质的主权行为，而非大陆和台湾之间的内部事务。大陆与台湾在颁布领海基线问题上的一致和避免矛盾，为在台湾海峡内实现法律秩序的统一奠定了基础。这一饶富意义的安排，本文第一作者当时以台湾“行政院”顾问身份，穿梭两岸主管机关进行游说，确曾做出积极的贡献。[11]

其次，从海峡内水域的法律性质来看，海峡两岸也没有冲突。台湾当局于 1998 年制定的《领海与邻接区法》中对台湾海峡水域法律性质的相关规定如下：

> 第三条　“中华民国”领海为自基线起至其外侧 12 海里之海域。
>
> 第十三条　在用于国际航行的台湾海峡非领海海域部分，“中华民国”政府可就下列各项或任何一项，制定关于管理外国船舶和航空器过境通行之法令：
>
> 1．维护航行安全和管理海上交通；

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8 关于海峡两岸的具体基点基线，请参见傅崐成：《台湾海峡水域法律地位研究》，载于傅崐成著：《海洋管理的法律问题》，台北：文笙书局 2003 年版，第 387~395 页。

9 Zou Keyuan, Redefining the Legal Status of the Taiwan Strait, *International Journal of Marine and Coastal Law*, Vol. 15, No. 2, 2000, p. 256.

10 例如，在海峡一方认定为领海、另一方却不认定为领海的水域上空行使飞越自由。

11 参见傅崐成：《中国人民海洋权利之主张——谈两岸领海基线之划定公布》，载于傅崐成著：《海洋管理的法律问题》，台北：文笙书局 2003 年版，第 318 页。

2．防止、减少和控制环境可能受到之污染；

3．禁止捕鱼；

4．防止及处罚违犯“中华民国”海关、财政、移民或卫生法令，上下任何商品、货币或人员之行为。

前项关于海峡过境通行之法令，由“行政院”公告之。

由此两条款观之，台湾当局亦认为台湾海峡内由领海和非领海（专属经济区）水域构成，则在不同水域内依据不同水域的法律性质适用不同的通行制度，为其应有之意。具体而言，即为在领海水域内，对外国船舶实行无害通过制；在专属经济区内，对外国船舶和航空器适用海洋法公约第 58 条规定的航行和飞越自由。但第 13 条曾引起台湾学者许多争议，主要意见在于该条款中“用于国际航行的”字样是否意味着台湾海峡是《联合国海洋法公约》意义上的“用于国际航行的海峡”，“过境通行之法令”是否意味着在台湾海峡内实行“过境通行制”？[12] 笔者认为，如前文所述，依据《联合国海洋法公约》，在台湾海峡之内，领海范围之外，有一条专属经济区水道。则过境船舶的通行权应依据这些海域的法律性质而确定，没有适用“过境通行制”的空间。而中国台湾《领海与邻接区法》第 13 条中将“过境通行之法令”限定于列明的四个方面，与《联合国海洋法公约》中“过境通行制”的内容大相径庭，而与沿海国在专属经济区和毗连区内的权利相一致。因此，可以推断台湾《领海与毗连区法》并没有（也无法）在台湾海峡内创设供国际航行海峡的“过境通行制”。并且，尽管鉴于中国台湾在国际社会中的特殊地位，其并非《联合国海洋法公约》的缔约国，但它宣布，它将遵循公约中的新规则来管辖海洋事务。这些新规则以其在 1998 年中国台湾《领海与邻接区法》中证明已接受者为限。[13] 从中我们可以看到台湾当局对《联合国海洋法公约》的尊重。事实上，在全球共享一个海洋、船舶常作国际航行的背景下，如果中国台湾脱离了国际社会的普遍实践，则其立法亦难以得到实施。

大陆方面，1992 年颁布的《领海和毗连区法》以及 1998 年颁布的《专属经济区和大陆架法》都没有明确提到对台湾海峡水域性质的规定。但在《领海和毗连区法》第 3 条规定，中华人民共和国领海的宽度从领海基线量起为 12 海里。依据此条款，从大陆领海基线量起 12 海里之外的海域即为专属经济区。而大陆《专属经济区和大陆架法》与台湾《专属经济海域和大陆礁层法》都规定了 200 海里专

12 参见王人杰：《“中华民国专属经济区海域及大陆礁层法”暨“中华民国领海及邻接区法”评述》，台北：《法令月刊》第 49 卷第 3 期。转引自周怡：《从国际法论台湾海峡的法律地位》，载于《中正大学法学集刊》第 8 期。另参见姜皇池：《由国际海峡制度论台湾海峡与澎湖水道法律定位问题—基线划定之可能与影响，兼论〈领海法〉相关条文》，载于《台大法学论从》第 28 卷第 3 期。

13 Zou Keyuan, Redefining the Legal Status of the Taiwan Strait, *International Journal of Marine and Coastal Law*, Vol. 15, No. 2, 2000, p. 247.

属经济区。[14] 至此，大陆与台湾在台湾海峡水域的法律地位这一问题上，在《联合国海洋法公约》所建立的框架基础上实现了一致。

由于台湾海峡最大宽度不超过 350 海里，则海峡两侧沿岸 12 海里内为中国领海，12 海里之外为中国的专属经济区。在中国领海内，外国船舶享有无害通过权；在中国专属经济区内，外国船舶和航空器享有海洋法公约第 58 条所规定的航行和飞越自由。台海两岸在海洋法立场上的一致，对于确立外国船舶在台湾海峡的航行制度有着决定性的意义。

二、中国在台湾海峡内的管辖权空间

（一）《联合国海洋法公约》的规定

台湾海峡处于中国一国的主权管辖之下。依据《联合国海洋法公约》，依据不同水域的不同法律地位，沿海国享有不同的管辖权。

在领海之内，外国船舶享有无害通过权。[15]《联合国海洋法公约》第 21 条规定，为了“保全沿海国的环境，并防止、减少和控制该环境受污染”，沿海国可以依据公约规定和其他国际法规则，制定关于无害通过领海的法律和规章。但是，“这种法律和规章除使一般接受的国际规则或标准有效外，不应适用于外国船舶的设计、构造、人员配备或装备”。

在专属经济区之内，外国船舶享有类似于公海的航行自由，但要考虑到沿海国对海洋环境保护的需要。[16]《联合国海洋法公约》第 211 条第 5 款规定，沿海国可以对其专属经济区制定法律和规章，以防止、减少和控制来自船只的污染。但“这种法律和规章应符合通过国际主管组织或一般外交会议制定的一般接受的国际规则和标准”。

就沿海国在领海和专属经济区内不同的管辖权限而言，根据公约第 21 条和第 211 条第 5 款的规定，其区别在于：领海之内，沿海国享有主权权利，可以对船源污染问题制定各项相关的法律法规，但如果涉及“外国船舶的设计、构造、人员配备或装备”，则须以“一般接受的国际规则和标准”为限；而在专属经济区中，沿海国仅对其自然资源享有主权性权利，因此沿海国为规制船源污染而制定的国内法，必须皆以“一般接受的国际规则和标准”为限。由此，在专属经济区之内，沿海国对船源污染问题的管辖权远远小于领海。在领海内沿海国可以制定自行的排

14 《中华人民共和国专属经济区和大陆架法》第 2 条，《“中华民国”专属经济海域及大陆礁层法》第 2 条。
15 “无害通过权”的具体内容请参见本文附表。
16 《联合国海洋法公约》第 58 条。

污标准，但在专属经济区内确定排污标准的权利却留给了国际社会。

（二）一般接受的国际规则和标准

从上述《联合国海洋法公约》对领海和专属经济区的规定来看，沿海国在这两部分海域中享有的管辖权都受到了“一般接受的国际规则和标准”的限制。

“一般接受的国际规则和标准”是《联合国海洋法公约》中新创设的一个法律概念。其内涵主要是指技术性的规范和法令。创设这一法律概念的目的在于：“使那些未加入技术性公约但已经加入海洋法公约的国家，都必须将这些国际上已经广受尊重的技术性规范，纳入其国内立法中。毕竟，这些一般接受的国际规则与标准并非‘习惯国际法’。如果不用这样的方法，对于未加入这类技术性公约的国家而言，将没有适用的义务。”[17]

《联合国海洋法公约》之所以作这样的规定，原因在于，沿海国制定的国内法可以适用于在其管辖范围内的一切外国船舶，如果沿海国各自制定防污规范而无任何国际法层面的限制，则必然会出现在不同国家海域内防污标准千差万别的情形，从而会使得原本平坦光滑的国际航路变得“崎岖不平”。而若沿海国的防污标准涉及到“外国船舶的设计、构造、人员配备或装备”，则会使得外国船舶因达不到这样的标准而被拒绝在某些特定海域航行，因而在实质上剥夺了海洋法公约赋予各国的航行权利。因此，鉴于每一沿海国在其领海或专属经济区内对外国船舶的管辖都对整个国际航运发生影响，《联合国海洋法公约》对其管辖权做出了限制。

“一般接受的国际规则和标准”这一制度设计，使得未加入条约者仍然得受条约拘束。这似乎打破了“非缔约国不受约束原则”，背离了 1969 年《维也纳条约法公约》的规定。然而，由于各个缔约国加入了 1982 年《联合国海洋法公约》，经由正式立法程序加入公约后，各个缔约国也就接受了公约中的各种制度设计。既然接受《联合国海洋法公约》是各缔约国自由意志的产物，那么接受随之来的“一般接受的国际规则和标准”的约束，也就并没有违背各缔约国的意志。[18]

何为“一般接受的国际规则或标准”？国际法学会于 1993 年成立的“沿海国家关于海洋污染管辖问题的委员会”在 2000 年所作的“最终报告书”指出：

> 到底什么样的接受程度才能被认为是“一般接受”，这个标准目前实在还不清楚。立法者可能故意要让它含混不清以便保持微妙的平衡。我们必须考量的重点是：国际社会对于某一规则或标准的接受程度，而非对于包含该规则

17 傅崐成著：《从海洋法公约看沿海国对海洋污染的规范与执法管辖权》，载于《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 65 页。

18 傅崐成著：《从海洋法公约看沿海国对海洋污染的规范与执法管辖权》，载于《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 71 页。

或标准的法律文件的接受程度。但如果此一国际文件广为各国所接受，当然就扩大了其中的规则或标准受到‘一般接受’的机会。MARPOL 73/78 显然就是这样的文件。[19]

国际法学会对《经 1978 年议定书修订的 1973 年国际防止船舶造成污染公约》的认定是建立在实证而非理论分析的基础上的，MARPOL 目前已经有 131 个国家为其缔约国，涵括了全球商船总数吨数的 97.09%，[20] 这种普遍接受的情形对于确立其为“一般接受的规则与标准”起了决定性的作用。

三、中国在台湾海峡内的实际管辖效果（以在海峡水域内驱逐单壳油轮为例）

（一）驱逐单壳油轮的法令——一般接受的国际规则和标准的新发展

2002 年“威望号”溢油事故之后，法国和西班牙政府于 2002 年 12 月宣布它们将根据《联合国海洋法公约》采取单边措施，要求载运重油的单壳油轮 [21] 在它们专属经济区之外航行，进而欧盟决定将所有单壳油轮驱逐出欧盟海域。在这种压力下，国际海事组织在其海上环境保护委员会 2003 年 12 月 4 日通过的对 MARPOL 附则 I 的修正案中再次将单壳油轮的淘汰期提前。[22] 该修正案已经于 2005 年 4 月 5 日生效。依其规定，自 2005 年 4 月 5 日起，MARPOL 73/78 通过前建造的油轮（单壳油轮）不得再继续运营。中国作为 MARPOL 的缔约国，交通部已发表公告表示该修正案对中国具有约束力，中国将遵照执行。

淘汰单壳油轮，实际上是“一般可适用的规则和标准”的提高，亦即沿海国管

19 傅崐成著：《从海洋法公约看沿海国对海洋污染的规范与执法管辖权》，载于《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 65 页。

20 下载于 http://www.imo.org/Conventions/mainframe.asp? topic_id＝247，2005 年 1 月 4 日。

21 单壳油轮是指船体只有单舷侧保护的油轮。由于质量和设计上的缺陷，单壳油轮的失事率要比双壳油轮高 5 倍，且失事后极易发生原油泄漏。中国海运网，下载于 http://www.cnshipping.com/youlun/newdetail.asp?id=477,2005 年 7 月 4 日。

22 下载于 http://www.imo.org/Conventions/contents.asp?doe-id =678&topic_id=258#2003，2005 年 12 月 4 日。

辖权的扩大。[23] 如果沿海国依据此修正案在领海、专属经济区之内制定限制单壳油轮通过的法规，则尽管此类规定涉及到了“外国船舶的设计、构造、人员配备或装备”，但由于其依据为MARPOL 73/78，则不仅在MARPOL73 /78 框架下可行，在《联合国海洋法公约》框架下亦为可行。

（二）国际条约在中国的适用问题

若要探讨驱逐单壳油轮这一法令在台湾海峡内的实际执法效果，必须首先讨论国际条约在中国的适用问题。由于世界上普遍接受了一个中国的概念，台湾并非联合国的成员，也没有加入世界上绝大多数的国际条约，因此国际条约在国内的适用问题，主要针对中国大陆而言。就针对驱逐单壳油轮这一国际规则而言，所涉及的在中国适用问题，主要有以下两点：

1. 法律冲突对国际条约适用的影响

1983 年国务院公布的《防止船舶污染海域管理条例》中对于国际条约的执行问题未作规定，而 1999 年修订的《海洋环境保护法》第 97 条规定：“中华人民共和国缔结或者参加的与海洋环境保护有关的国际条约与本法有不同规定的，适用国际条约的规定;但是，中华人民共和国声明保留的条款除外。”该条款以国际条约与中国国内法存在冲突作为优先适用国际条约的前提条件。而 MARPOL 73/78 的 2003 年淘汰单壳油轮的修正案并非与中国国内法相冲突的条款。《海洋环境保护法》第 64 条规定：“船舶必须配置相应的防污设备和器材。载运具有污染危害性货物的船舶，其结构与设备应当能够防止或者减轻所载货物对海洋环境的污染。”因此，MARPOL 73/78 的 2003 年修正案实际上进一步细化和阐明了《海洋环境保护法》第 64 条的要求。鉴于《海洋环境保护法》第 97 条的明确规定，这种细化和阐明在中国现行法律制度下不能被直接适用，而只能通过制定国内法的方式。

2. 法律规范的属性对国际条约适用的影响

《海洋环境保护法》的性质是行政管理法，它与民商法在适用模式上截然不同。我们可以通过 MARPOL 73/78 与《联合国国际货物买卖合同公约》的对比而清楚地了解这一点。中国已加入《联合国国际货物买卖合同公约》。中国《民法通则》第 142 条第 2 款规定：“中华人民共和国缔结或者参加的国际条约同中华人民共和国的民事法律有不同规定的，适用国际条约的规定，但中华人民共和国声明保留的条款除外。”据此，中国法院在审理涉外民商事案件时，可以直接适用《联

23 MARPOL 73/78 共有 6 个附件，分别规制不同的船源污染事项。而针对油污的附则 1 和针对有毒有害物质的附则 2 被列入必须接受的一般性义务的范畴内，其余附件则是可选择加入的。IMO 淘汰单壳油轮的修正案属于附件 1 部分，因此构成 MARPOL 73/78 必不可少的组成部分。

合国国际货物买卖合同公约》中的内容，并不需要针对《联合国国际货物买卖合同公约》的内容而专门制定一部使之有效的国内法。但是，行政管理法的执行主要并不是依靠法院的审判，而是依靠行政机关履行其职能。只有当行政相对人对行政管理行为不服，对此提起行政诉讼，行政法方能在法院得到适用。因此，作为预防船源污染的技术性规范，在一国国内首先执行 MARPOL 73/78 的必然是行政机关。然而行政机关却无法依据《海洋环境保护法》的规定而直接适用 MARPOL 73/78，原因在于，依据依法行政的原则，只有在法律有明确规定的情形下行政机关方能行使其权力。尽管《海洋环境保护法》中规定了可以直接适用国际条约，但相关规范应具体由哪一个行政管理机关依照什么样的程序来执行，却是一个依然没有得到回答的问题。这在中国目前海上执法权限划分不明确的情况下，是一个格外突出的问题。[24]

3. 小结

从上述分析来看，我们可以得出结论，即驱逐单壳油轮这一国际规范，无法在中国境内得以直接实施，必须经过国内法的明确规定方能实现。

（三）中国现行的立法情况

2005 年 4 月 5 日，中国交通部就 MARPOL 73/78 的 2003 年修正案发布公告，称 MARPOL 73/78 对中国具有约束力，中国将遵照执行。[25] 但是，交通部的公告仅仅声明了该修正案对国家的拘束力，并没有制定相关的国内法、或发布国内行政命令来执行这一规定。尤其是，交通部将这一公告抄送中国远洋运输（集团）总公司、中国海运（集团）总公司、中国外贸运输（集团）总公司、长江航运（集团）总公司这四大国有航运企业，以及中国船级社和中国船东协会，这意味着：中国对于国内航运企业做出了履行 MARPOL 73/78 的 2003 年修正案要求的命令，而对于在中国管辖海域内的外国船舶没有做出国内法上的要求。亦即，中国履行了在防污公约下作为船旗国的义务，但是并没有行使在该公约下作为沿海国的权利。如此，当外国公司运营的老旧单壳油轮在中国管辖海域内行驶时，中国并没有直接可适用的法令来禁止其航行，而此类国际条约在中国亦无法得到直接适用。因此，中国将无法阻止外国单壳油轮在中国管辖海域内的运营。

依据交通部资料，目前中国国内从事国际运输的油轮运力尚不能完全满足进

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24 目前在中国享有海上执法权限的部门有交通部（海事局）、农业部（渔业部）、国土资源部（国家海洋局）、环境部门（国家环保总局）以及军队等，这些机构之间的分工并不十分明确。

25 中华人民共和国交通部《关于〈73/78 防污公约〉附则 I 修正案和〈状况评估计划〉修正案生效的公告》，交通部公告 2005 年第 4 号。下载于 http://www.moc.gov.cn/zhengwu/zhengwu/t20050405_12688.htm，2005 年 4 月 20 日。

口石油运输总量的要求，中国石油战略储备计划的实施，将刺激更多的国外油轮加入进来。[26] 另有数据显示，中国海上进口石油运输中的 90% 是从国外租借或委托外轮承运的。[27] 在中国石油运输倚重外力的情况下，中国自身对国内单壳油轮进行规制的努力将流于无效，因为国外的单壳油轮仍然自由地航行于中国所辖水域。

MARPOL 73/78 第 4 条第 2 款规定："在任一缔约国管辖区域以内的任何违反本公约要求的事件，根据该缔约国的法律，应予禁止，并给予制裁。"这实际是 MARPOL 73/78 赋予缔约国的一项义务。当该缔约国的法律缺失时，禁止和制裁都无从实现。在此项义务下，缔约国不仅仅要从船旗国的身份规制本国船舶，而且要以沿海国的身份在本国所管辖水域内切实执法。如此才能有效地在全球范围内驱除单壳油轮和其他各种低标准船，保障海上安全和环境。

就台湾方面而言，其尚未直接参与到《联合国海洋法公约》和 MARPOL 73/78 的框架之中。因此，在台湾当局看来，其没有驱逐单壳油轮的义务。但是，台湾依然有保护其海洋、海岸环境的需要。从理论上说，台湾是中国的一部分，中国所缔结的国际条约自然适用于台湾，但在台海对峙的局面下这一理论的实际效用并不大。然而，不论台湾当局是否是《联合国海洋法公约》或 MARPOL 73/78 的成员，如果其采用国际通行的标准来管辖台湾海峡，都将得到国际社会的认可。

四、台湾海峡两岸就船源污染问题的合作

新加坡国立大学邹克渊研究员指出，关于台湾海峡的研究必须关注两条主线：其一是海洋法，其二便是海峡两岸关系。有价值的研究必须反映出这两条线索。[28] 事实上，海峡两岸间对船源污染规制的合作之成败与否，在根本上取决于两岸关系的好坏。但是，相对于其他问题而言，船源污染问题又有其特殊性，即海峡两岸对船源污染问题的控制，针对的不仅仅是海峡两岸所属船舶造成的污染，更针对的是外籍船舶所造成的污染。这是由台湾海峡作为重要海上航道的性质所决定的。海峡两岸的合作，实际上是大陆与台湾共同携手，行使海洋法公约赋予沿海国的权利，一致对外，保护台湾海峡的海洋环境。

台海两岸对海峡污染问题的合作，只有在最大程度上尊重现状、尊重彼此，方

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26 刘功臣：《建立符合中国国情的船舶油污损害赔偿制度》，载于《2005 上海国际海事论坛论文集》，第 2 页。

27 向春：《中国石油，全球布局》，载于《南方周末》2004 年 11 月 25 日 A6 版。

28 Zou Keyuan, Redefining the Legal Status of the Taiwan Strait, *International Journal of Marine and Coastal Law*, Vol. 15, No. 2, 2000, p. 250.

能实现。[29] 从这个意义上讲，目前两岸在海峡污染问题上，需要把对方都看作是一个实际的管辖权主体，双方在各自现存控制范围内享有排他管辖权。但就排他管辖的内容可以经协商而达成尽可能的一致。在双方的领海、内水之外，专属经济区水道之中，可以实行联合管辖。如此安排一方面符合大陆“一国两制，台湾享有高度自主权”的一贯政策，也能够避免台湾当局陷入统独之争，切实为台湾海峡内的环境保护做一些积极、正面的事情。

要实现台海两岸对海峡污染问题的合作，首先要分别确立两岸所管辖的水域。依照两岸所分别颁布的领海基线，两岸在各自的内水、12 海里领海之内享有完全的、排他的管辖权。在领海之外，24 海里之内的毗连区内，依据两岸各自的法律享有部分排他管辖权。但值得注意的是，金门、马祖及其附近岛屿周边的水域，大部分都包括在大陆划定的直线基线之内，成为大陆的内水。因此，将来两岸协商区分划定航道管制水域时，恐怕只能维持在对金门、马祖进出交通与安全防护上的必要程度。[30]

在两岸领海之外，尚存一专属经济区水道。这一水道是海上航行的重要航道，外国船舶在该水道内享有《联合国海洋法公约》第 58 条规定的航行自由。因此，相对于海峡两岸领海内的无害通过权而言，外籍船舶更倾向于在此水道内航行。而在此开阔水域内，每日众多往返的船舶，海峡两岸究竟如何管辖？从过去 40 多年来积累的默契来看，目前似乎只存有下列两项管辖原则：(1) 受管辖请求的一方有权管辖；(2) 依照大体中线区分管辖。但这并不足以圆满解决问题。[31]

针对此专属经济区水道的管辖而言，最根本的解决办法为，海峡两岸经协商划定双方各自的管辖水域。如果要划分，可以参考适用的规范只有《联合国海洋法公约》第 74 条，即参考海岸相向或相邻国家间专属经济区界限的划定办法来划定中国一国之内海峡两岸各自的专属经济区管辖界限。但若适用该条，则很可能被台独势力引为分裂国家、制造“一中一台”的口实，政治上的风险很大。在目前海峡两岸局势的大背景下，并不适合采用。

目前可作的，应是在原有的默契基础上，建立共同管辖区域，类似在北部湾建立的中越共同渔区一样，由两岸联合执法。在联合执法实现之前，应实现两岸间的执法合作，如海峡两岸加强沟通，分享对台湾海峡的科学观察、测量等数据，制定区域应急响应合作计划、污染发生后两岸合作以评估损失等。

要实现联合执法，必须存在一致的执法基础，即两岸应有统一立法。在美国

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29 Kuen-chen FU, Jurisdiction over Marine Environmental Violations in the Taiwan Strait Area; A Perspective from Each Side of The Strait, 载于傅崐成著：《海洋管理的法律问题》，台北：文笙书局 2003 年版，第 73 页。

30 傅崐成：《台湾海峡水域法律地位研究》，载于傅崐成著：《海洋管理的法律问题》，台北：文笙书局 2003 年版，第 387~395 页。

31 傅崐成：《台湾海峡水域法律地位研究》，载于傅崐成著：《海洋管理的法律问题》，台北：文笙书局 2003 年版，第 382 页。

这样的多重法域国家，统一立法常被用来解决管辖分歧问题。[32] 而在船源污染领域内，统一立法是比较容易实现的，因为国际海事组织已经在全球范围内在该领域里建立了一套高度统一的法律体系，它所主持的部分条约，如 MARPOL 73/78，已经被《联合国海洋法公约》引为“一般可适用的国际规则与标准”。因此，在国际海事组织建立的框架基础上实现两岸法规的统一并不困难。

要实现联合执法，还必须创设有利于联合执法的合作机制。而目前大陆的海洋执法制度尚有欠缺，在此基础上难以实现联合执法。

依据大陆《海洋环境保护法》第 5 条，国家海洋局、国家环保总局、交通部海事局、农业部渔业局、军队环境保护部分等五个主管机关，都有权管理海上环境事件。其中，一般商船的污染问题由海事局负责，渔船的污染问题由渔业局负责，军队环境保护部门则主要负责军舰的污染问题。海洋环境保护的执法权分属于不同的政府主管机关，难免出现各个部门彼此牵制、推诿的情况，难以保证执法效果。这曾经是 1982 颁布的《海洋环境法》存在的重大缺陷之一，也曾经是 1999 年修订这部法律的主要动因之一。[33] 但 1999 年的修订仍然没有解决这一问题。为了弥补这一缺陷，该法第 19 条规定：依照本法规定行使海洋环境监督管理权的部门可以在海上实行联合执法。但这种鼓励联合执法的政策态度，是否能够完全消除执法权分立带来的不利后果呢？答案并不令人乐观。

为了切实有效地控制台湾海峡内的船源污染问题，两岸之间的执法合作必不可少。但是，在执法权分立的情况下，两岸的合作必将十分困难。为了实现有效的合作，大陆方面有必要将执法权统一，以方便沟通和协调。比较可行的方案是，在大陆方面对台湾海峡内的船源污染享有管辖权的各个政府部门之上，设一个统辖机构，负责统一行使执法权。而与台湾方面的沟通，也应有一个类似机构全权负责。如此方可保证政令通畅，切实保护环境。

五、结　语

在近半个世纪台海对峙的局面下，基本上，台湾海峡是被两岸当局认为是一块特殊的政治、军事敏感区域，因而对它的有效管理和保护也迟迟没有被提上议

32　傅崐成：《台湾海峡污染的管辖问题》，载于傅崐成著：《国际法与中国论文集刊》，台北：台湾大学法学院 1991 年版，第 101 页。

33　Zhang Haoruo, Explanation of the Revised Draft of the Marine Environmental Protection Law of the People’s Republic of China, *Gazette of the Standing Committee of the National People’s Congress of the People’s Republic of China*, Vol. 7, 1999, p. 674 (in Chinese). Quoted from Zou Keyuan, Current Legal Development: People’s Republic of China-Curbing Marine Environmental Degradation: China’s New Legislation, *International Journal of Marine and Coastal Law*, Vol. 16, No. 2, 2001, p. 356.

事日程。但台湾海峡作为东亚重要海上通道的地位，以及中国整体经济飞速发展使得该水道内的通航压力迅速增大，都使得我们不得不正视台湾海峡的管理和环境保护问题。毕竟，台海两岸都只拥有这同一个海峡，它不仅仅是交通要道，海峡内广阔的水域中也包含着诸多渔场，海峡两侧优美的沿岸风光也是旅游业的重要资源。这些宝贵资源都可能毁于一次重大的油污事故或高强度辐射物质污染事件。因此两岸必须加强在此领域内的合作。此外，从政治上看，由于台湾不被认为是一个主权国家。因此，绝大多数的环境条约都将台湾排除在外。台湾也已经有人以环境恶化为名，在国际社会游说，企图以台湾自身挤进相关国际环境公约。[34] 在此情况下，北京若能以保护环境的目的，帮助台湾以中华台北或其他适当名义加入、实施国际环境公约，不仅就环境保护本身而言是有积极意义的，在政治上也会有正面影响。台湾海峡污染是两岸中国人民共同关心的问题，在该领域内的合作阻力也比较小，上述统一立法与联合执法的工作，值得两岸共同努力一试。

附表　过境通行权与无害通过权之比较[35]

过境通行	无害通过
过境通行之定义：对继续不停和为迅速过境的目的而行使之航行和飞跃自由（§38(2)）	无害通过之定义：通过只要不损害沿海国的和平，良好秩序或安全，就是无害的（§19(1)） 视为损害沿海国的和平、良好秩序或安全的活动规定于《联合国海洋法公约》§19(2)
过境通行并不排除在一个海峡沿岸国入境条件的限制下，为驶入、驶离该国或自该国返回的目的而通过海峡（§38(2)）	无害通过是在穿过领海或驶往或驶出内水或停靠这种泊船处或港口设施（§18(1)）
可以不需“继续不停”及“迅速过境”地通过者，系在通过被视为因不可抗力或遇难者（§39(1)(c)）	“继续不停”及“迅速过境”要件之例外：通常航行所附带发生的，或由于不可抗力或遇难所必要的或为救助遇险或遭难人员、船舶或飞机的目的为限
海峡沿岸国不应无故妨碍过境通行（§44）	除了按照本公约规定外，沿海国不应妨碍外国船舶无害通过领海（§24）
海峡沿岸国应将其所知的海峡内或海峡上空的航行或飞越有危险的任何情况妥为公布（§44）	沿海国应将其所知的领海内对航行有危险的任何情况妥为公布（§24(2)）

34 Daniel C. K. Chow, Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan’s Direct Participation in International Environmental Law Treaties, *Stanford Environmental Law Journal*, Vol. 14, 2001, p. 256.

35 K. L. Koh., Straits in International Navigation, New York: Oceana Publications, 1982, pp. 167~169. 转引自周怡：《从国际法论台湾海峡的法律地位》，载于《中正大学法学集刊》第 8 期。

（续表）

该权利明文赋予商用，及军用两者航空器飞越自由（§38(1)）	本权利只适用于船舶，不适用于航空器（明文授权）
船舶及飞机均享有过境通行权，过境通行不应受阻碍（§38）	对本权利之行使是否可以加以阻碍，法无明文。依本公约，沿海国似乎可以妨碍无害通行之行使（§24(1)）
过境通行的船舶应尊重按照本条制定的适用的海道和分道通航制（§ 41(7)）	行使无害通过权之船舶，被要求使用沿海国为管制船舶通过而指定或规定的海道和分道通航制（§22(1)）
海峡沿海国制定关于通过海峡的过境通行的法律和规章之权能较受限制（§42(1)）	沿海国被授权制定关于无害通过的法律和规章之范围较广（§21）
海峡沿岸国在指定或替换海道或在规定或替换分道通航制之前，应将提议提交主管国际组织，以期得到采纳（§41(4)）	沿海国对海道及分道通航制之指定和规定不需提交任何外在的主管机关，但在指定及规定时，应考虑主管国际组织对指定之海道或分道通航之规定的建议（§ 22）
海峡沿岸国指定航道或分道通航制时，该指定航道或分道通航制应符合一般接受的国际规章（§ 41(3)）	沿海国在领海内考虑到航行安全而指定航道或分道通航制时，并未明文规定沿海国此项作为必须符合一般接受的国际规章
该法律及规章不应在其适用上有否定、妨害或损害过境通行权的实际后果（§ 42(2)）	在依本公约制定任何法律或规章时，沿海国不应对外国船舶强加要求，而其实际后果等于否定或损害无害通过的权利（§ 24(1)(a)）
没有条文明文禁止潜水艇和其他潜水器在水面下航行	在领海内，潜水艇和其他潜水器，须在海面上航行并展示其旗帜
对于军舰是否可因不遵守海峡沿岸国之法律规章而被要求停止过境通行，无明文规定	军舰可能因不遵守沿海国之法律规章而被要求离开领海（§30）
对于非过境之通行的防止，无明文规定	沿海国可以在其领海内采取必要的步骤，以防止非无害的通过（§ 25(1)）
对于船舶提供特定服务是否收取费用，无明文规定	对外国船舶仅可因对该船舶提供特定服务之报酬而征收费用，且该费用之征收不应有任何歧视（§26(2)）
不允许海峡沿岸国以安全理由停止过境通行（§ 45(2)）	为保护国家安全，沿海国可在其领海之特定区域内，于事先妥为公布后，暂时停止外国船舶的无害通过（§ 25(3)）
船舶不须符合任何无害之标准无论特定与否	沿海国于决定通过系无害与否保留决定权，并有权防止非无害之通行
军舰有权在国际海峡过境通行	军舰是否有无害通过权，仍有极大的争议，尚无定论

核材料海上秘密运输的国际法问题

王小晖 *

内容摘要：近年来，随着科技的进步以及能源的紧缺，核能的利用已经成为一种现实的需要。因此核反应堆产生的核废料作为一种能源也得到了一些国家的青睐，这便使得核材料（主要是核废料）的国际贸易愈发频繁。这种贸易多数要经过海运，而且往往采取秘密运输的方式。这一问题就牵涉到传统的航行自由与保护海洋环境以及人类生命安全利益的冲突、预警原则的适用、事前通知要求以及国家责任的承担等。特别是由于海上运输核材料的国家主要是日本，虽然其运输航线保密，但无疑已经过南中国海以及我国的台湾海峡。因此，我国应该从国际法理论以及我国面临的潜在威胁出发，对核材料秘密运输问题予以关注，并寻求保障核材料安全运输的合作方案。

关键词：核材料秘密运输　航行自由　海洋环境

核材料是一种杀伤力极强的物质。人类如果受到该物质的辐射，将会导致死亡、癌症、基因变异等后果。因此，国际社会对于高放射性核材料进行严格的管制。但是，随着技术的发展和能源的短缺，核材料作为一种能源，受到了一些国家的青睐。因此，在对核材料进行加工后出口的频率已经大大提高。且这些核材料的转移往往会以海运的形式进行，且具有秘密运输的特点。由于核材料的海上运输，会给过境的沿海国带来潜在的严重威胁，从而遭到了很多国家的强烈反对。因此，在该问题上，沿海国与运输国之间产生了强烈的冲突。

总体来看，核材料海上运输问题主要涉及以下法律争议，即航行自由与海洋环境保护之间的争议、预警原则在该问题上的应用以及事前通知的必要等。

一、航行自由与海洋环境和人类生命安全之间的争议

在运输核材料问题上，传统的航行自由受到了人类生命安全利益以及保护海洋环境要求的制约。因此，运输国与过境的沿海国之间就此问题产生了强烈的争

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议。运输国认为，基于航行自由原则，载运此类物质的船舶应当同其他船舶一样，无需对沿海国作出事前通知便可通过；而沿海国认为，基于保障本国国民生命安全和保护海洋环境，传统的航行自由不能无限制的适用于此类船舶，因此要求事前通知并适用预警原则。要平衡二者之间的利益并从中做出选择，首先要了解与二者有关的国际法制度。

（一）与航行自由有关的国际法制度

有关高放射性核废料海上运输的法律制度主要体现在《联合国海洋法公约》（以下简称“《公约》”）、《日内瓦公约》以及一些国际习惯法当中。但从国家实践的角度来讲，目前各国通常都适用《公约》的规定，因此需要对《公约》和《日内瓦公约》中与航行自由有关的制度进行分析。

1. 领海通过制度——无害通过制

根据《领海及毗连区公约》和《公约》的规定，所有国家，不论为沿海国或内陆国，其船舶均享有无害通过领海的权利。[1] 此类通过权包括但不限于通过领海，还包括停船和下锚在内，但以通常航行所附带发生的或由于不可抗力或遇难所必要的或为救助遇险或遭难的人员、船舶或飞机的目的为限。[2]《公约》规定：除按照本公约规定外，沿海国不应妨碍外国船舶无害通过领海。[3] 但是《公约》同样赋予沿海国以相应的保护权，即沿海国可在其领海内采取必要的步骤以防止非无害的通过。[4]

无害通过权的验证标准，《公约》采客观说，即以实际行为而不以主观目的为标准。[5]《公约》规定：通过只要不损害沿海国的和平、良好秩序或安全，就是无害的。这种通过应当符合本公约以及其他国际法规则。因此，沿海国有权在其领海范围内采取必要措施以防止非无害的通过。[6] 并且在事前公布的情况下，如为保护国家安全包括武器演习在内而有必要，沿海国可在对外国船舶之间在形式上或事实上不加歧视的条件下，在其领海的特定区域内暂时停止外国船舶的无害通过。[7] 此外，如果通过违反了沿海国的和平、良好秩序或安全，也不能认定为无害通过。当然，对于可能发生事故，并可能给沿海国造成悲惨灾难的船舶的通过，沿海国有

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1 《联合国海洋法公约》第 17 条。
2 《联合国海洋法公约》第 18 条第 2 款。
3 《联合国海洋法公约》第 24 条。
4 《联合国海洋法公约》第 25 条第 1 款。
5 1930 年海牙会议就宣布，如果船舶通过沿海国的领海的目的有损于沿海国有关安全，公共政策或者财政方面的利益，则这种通过就不能算作是无害通过。League of Nations Doc. C. 351 (b). M. 145(b), 1930, p. 217.
6 《联合国海洋法公约》第 25 条第 1 款。
7 《联合国海洋法公约》第 25 条第 3 款。

权进行判断。

沿海国的主权及于领海，并可以制定适用于其领海范围内的法律和规章，以防止或减少或控制外国船舶的船源污染，其中包括享有无害通过权的外国船舶，只要这种法律和规章不违反《公约》第二部分第三章所规定的无害通过制度。

2. 适用于国际航行的海峡的通行制——过境通行制

《公约》对用于国际航行的海峡的规定，相对于无害通过权来讲，赋予了通过船舶更多的自由。基本上取消了无害通过之中的条件要求。《公约》规定除某些例外情形，过境通行制适用于在公海或专属经济区的一个部分和公海或专属经济区的另一个部分之间的用于国际航行的海峡。[8]《公约》不允许沿海国中断过境通行的船舶，同时也未将“无害性”作为过境通行的一般性要求加以规定。但《公约》却对过境通行制加以类似的限制，即：

过境通行必须是以继续不停和迅速过境的目的而行使航行和飞越自由。但是，对继续不停和迅速过境的要求，并不排除在一个海峡沿岸国入境条件的限制下，为驶入、驶离该国或自该国返回的目的而通过海峡。[9]

过境船舶必须遵守：(1) 为国际社会普遍接受的关于海上安全的国际规章、程序和管理，包括《国际海上避碰规则》；(2) 一般接受的关于防止、减少和控制来自船舶的污染的国际规章、程序和惯例。[10] 并且要求过境的船舶和飞机在行使过境通行权时应：(1) 毫不迟延地通过或飞越海峡；(2) 不对海峡沿岸国的主权、领土完整或政治独立进行任何武力威胁或使用武力，或以任何其他违反《联合国宪章》所体现的国际法原则的方式进行武力威胁或使用武力；(3) 除因不可抗力或遇难而有必要外，不从事其继续不停和迅速过境的通常方式所附带发生的活动以外的任何活动。[11] 并且规定，外国船舶，包括海洋科学研究和水文测量的船舶在内，在过境通行时，非经海峡沿岸国事前准许，不得进行任何研究或测量活动。[12]

进行与过境通行权无关的其他活动时，过境船舶则应当遵守《公约》中其他的相关规定。[13] 此类活动则应当遵守适用于领海的无害通过制度：即如果通过并非是无害的，则沿海国有权中断。如果通过不符合《公约》第 38 条第 2 款中所规定的持续并迅速通过的要求，则不得适用过境通行制。[14]

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8 《联合国海洋法公约》第 37 条。
9 《联合国海洋法公约》第 38 条第 2 款。
10 《联合国海洋法公约》第 39 条第 2 款。
11 《联合国海洋法公约》第 39 条第 1 款。
12 《联合国海洋法公约》第 40 条。
13 《联合国海洋法公约》第 38 条第 3 款。
14 Duncan E. J. Currie, The Right to Control Passage of Nuclear Transport Vessels under International Law, at http://www.globelaw.com/Nukes/, 5 October 2006.

同时，《公约》还规定了海峡沿岸国关于过境通行的法律和规章，即在海峡沿岸国可对下列各项或任何一项制定关于通过海峡的过境通行的法律和规章，只要这种法律和规章不应在形式上或事实上在外国船舶间有所歧视，或在其适用上有否定、妨碍或损害本章规定的过境通行权的实际后果。并应当使有关在海峡内排放油类、油污废物和其他有害物质的适用的国际规章有效，以防止、减少和控制污染。[15]

除享有主权豁免权以外的其他船舶，如违反《公约》第 42 条第 1 款第（a) 项和第 (b) 项所指的法律和规章，对海峡的海洋环境造成重大损害或有造成重大损害的威胁时，海峡沿岸国可采取适当措施。[16]

整体上来看，《公约》针对用于国际航行的海峡虽然作了比无害通过权更为宽松的规定，但还是强调在通过此类航行的海峡时所应遵循的安全规则，特别是防止发生海上污染的规则。

3. 群岛海道通过制

《公约》针对群岛国或由彼此相关的岛屿组成的国家，规定了特殊的国际法制度。根据《公约》第 47 条规定：群岛国可划定连接群岛最外缘各岛和各干礁的最外缘各点的直线群岛基线，该基线以内的这部分水域叫做群岛水域，群岛国对该基线以内的这部分水域享有主权。[17] 根据《公约》的特殊规定，在该部分水域内适用的是群岛海道通行权，与无害通过权的重要区别在于，船舶只有在群岛国指定的海道范围内享有无害通过权。如群岛国没有指定海道，船舶可通过正常用于国际航行的航道，行使群岛海道通过权。[18]

4. 专属经济区的通过制

专属经济区是指从测量领海宽度的基线量起不超过 200 海里的那部分水域。根据《公约》的规定，沿海国对该区域享有海洋环境的保护和保全的主权性权力。[19]《公约》第 58 条规定：在专属经济区内，所有国家，不论为沿海国或内陆国，在本公约有关规定的限制下，享有第 87 条所指的航行和飞越的自由。《公约》还规定，沿海国在专属经济区内根据本公约行使权利和履行义务时，应适当顾及其他国家的权利和义务，并应以符合本公约规定的方式行事。[20] 同时，第 88 条至第 115 条以及其他国际法有关规则，只要与本部分不相抵触，均适用于专属经济区。如此看来，实际上，在专属经济区内船舶的航行权适用的是公海航行自由的有关规定。但是，笔者认为，这并非意味着运载核材料的船舶享有完全的航行自由。因为《公

15 《联合国海洋法公约》第 42 条第 2 款。
16 《联合国海洋法公约》第 233 条。
17 《联合国海洋法公约》第 49 条。
18 《联合国海洋法公约》第 53 条。
19 《联合国海洋法公约》第 56 条第 2 款第（c) 项。
20 《联合国海洋法公约》第 56 条第 2 款。

约》还规定了海洋环境的保护和保全，以及生物资源的养护和管理等内容。而高放射性材料的海上运输，一旦发生事故造成泄漏，无疑会给海洋环境和其中的生物资源造成毁灭性影响。因此，在专属经济区内，运载核材料的船舶也并非无须遵循有关规则特别是预警原则的制约。

特别是《公约》在赋予船舶航行自由权时，作了一定程度的限制，最明显的就是要尊重沿海国的利益，其目的也是为了保护海洋环境和沿海国人民的生命安全。特别是《公约》序言规定："认识到有需要通过本公约，在妥为顾及所有国家主权的情形下，为建立一种法律秩序，以便利用国际交通和促进海洋的和平用途，海洋资源的公平而有效的利用，海洋生物资源的养护以及研究、保护和保全海洋环境"。从序言的这一条来看，有效利用交通以及保全和保护海洋环境都是《公约》的重要宗旨。因此，对于运载核材料的船舶应该享有何种程度上的航行自由是一个值得我们重新讨论的重要问题。

（二）有关保护海洋环境及人类生命安全的国际法

目前来看，海洋环境的保护和保全是沿海国管辖权的重要内容。《公约》第 194 条规定：1. 各国有保护和保全海洋环境的义务，并应当于适当情形下个别或联合地采取一切符合本公约的必要措施，防止、减少和控制任何来源的海洋环境污染，为此目的，按照其能力使用其所掌握的最切实可行方法，并应当在这方面尽力协调它们的政策。2. 各国应采取一切必要措施，确保在其管辖或控制下的活动的进行不致使其他国家及其环境遭受污染的损害，并确保在其管辖或控制的范围内的事件或活动所造成的污染不致扩大到其按照本公约行使主权权利的区域之外。3. 依据本部分采取的措施，应针对海洋环境的一切污染来源。这些措施，除其他外，应包括旨在在最大范围内尽量减少污染的措施，其中就包括 (b) 来自船只的污染，特别是为了防止意外事件和处理紧急情况，保证海上操作安全，防止故意和无意的排放，以及规定船只的设计、建造、装备和操作和人员配备的措施。还规定，各国采取措施防止、减少或控制海洋环境的污染时，不应对其他国家依照本公约行使其权利并履行其义务所进行的活动有不当的干扰。[21] 可见《公约》实际上在保护海洋环境和保护海上活动自由方面，一直在寻找一种平衡，以便在不破坏海洋环境的前提下，保证海上活动的顺利进行。

《公约》第 220 条第 7 款还规定，虽有第 6 款的规定，无论何时如已通过主管国际组织或另外协议制订了适当的程序，从而已经确保关于保证书或其他适当财政担保的规定得到遵守，沿海国如受这种程序的拘束，应立即准许该船继续航行。为保护其海岸或有关利益，包括捕鱼，免受海难或与海难有关的行动所引起，

21 《联合国海洋法公约》第 194 条。

并能合理预期造成重大有害后果的污染或污染威胁，各国有权依据国际法，不论是根据习惯还是条约，在其领海范围以外，采取和执行与实际的或可能发生的损害相称的措施的权利。

以上是《公约》项下关于保护海洋环境的相关规定。这些规定构成了对核材料运输船舶航行自由权的反限制。

与航行自由相矛盾的另外一个国际法问题就是人类生命安全的重大利益。显然，相对于船只的航行自由来讲，人类生命安全利益更为重要。当核材料的运输对该国重大安全利益产生或可能产生严重影响的情况下，任何国家有权中止该行为。[22] 即便没有发布停止该运输核材料的通告，有关国家依然有权中止此类运输核材料的行为。因为该行为要么将会对沿海国的和平、良好秩序和国家安全造成不利影响，要么违反国际社会相关法律法规。《公约》对损害沿海国和平、良好秩序和安全的行为进行了罗列。毋庸置疑，在沿海国领海内的任何属于其第 19 条所列的行为都属于损害其和平、良好秩序和安全的行为，但是，该条对有害行为的罗列并非包罗万象。因此，第 19 条所罗列的行为以外的活动，只要对沿海国的环境造成灾难性的损害，就都属于违反沿海国和平、良好秩序和安宁的行为。[23] 加拿大在 1970 年制定的《北极水域污染防治法》中也有类似规定。加拿大政府认为，防止本国环境遭遇严重破坏是其自卫权中最重要的一项内容之一。[24] 有关海洋环境污染的传统国际法原则主要考虑的是船旗国船舶航行自由的权利，但是现在国际社会中这些船旗国运输的是大量高放射性核废料，并面临多重危险，一旦发生海难，必然给沿海国的和平、安宁和良好秩序造成严重的威胁。很显然，在这种情形下，再援引旧的国际法原则不能从整体上保护国际社会的海洋环境利益，因此是不合时宜的。

（三）国际社会对此问题的调和结果——分道通航制

为调和这二者之间的矛盾，国际社会曾做过很大的努力。《公约》中的海道制度就是二者妥协的产物。

《公约》当时在某种程度上已经预见到运载核材料的船舶之无害通过权与沿

22 《联合国海洋法公约》第 25 条第 3 款。
23 《联合国海洋法公约》第 19 条。
24 See 9 ILM 607,610. The Canadian reply to a United States protest also further stated that “Such concepts are particularly relevant, however, to an area having the unique characteristics of the Arctic, where there is an intimate relationship between the sea, the ice and the land, and where the permanent defilement of the environment could occur and result in the destruction of whole species.” It should be noted that this was over twenty years ago and subsequent to the Rio declaration and the entry into force of UNCLOS the rights and du-ties of coastal states to protect the environment have been further extended.

海国保护海洋环境二者之间的冲突了。于是第 22 条作出特别规定，允许沿海国为核物质船舶的通过划定特别的海道，核物质船舶仅在该特定的海道内享有无害通过权。[25] 该公约第 22 条第 2 款规定：特别是沿海国可以要求油轮、核动力船舶和载运核物质或材料或其他本质上危险或有毒物质或材料的船舶只在上述海道通过。该海道和分道通航制在国际航行的海峡以及群岛水域制度中均有规定。

该制度目的在于调和航行自由以及沿海国保护海洋环境二者之间的关系。该条既支持载运核物质或核材料的船舶享有无害通过权的主张，同时又维护了沿海国的领海主权以及保护海洋环境利益的需要。再配之以《船舶安全载运包装式辐射核燃料、钚及高放射性核废物国际章程》（以下简称“《国际章程》”）[26] 的规定，以及国际原子能机构对跨界运输核材料所做的规定及保障措施，能在二者之间找到一种平衡。

笔者认为，虽然在核材料运输过程中一旦发生核事故，后果将不堪设想。但现实是，能源短缺，核能贸易已经成为一种必需。因此无论是沿海国还是运输国，都不能固执己见地坚持针锋相对的立场，或者要求享有无害通过权等航行自由权，或者依然强硬的坚持拒绝运载核物质的船舶通过。因为，一方面，运输国坚持享有无害通过权的主张是一个严重的错误。因为，明显的事实就是核材料的泄漏会对周围环境造成致命的不可逆转的威胁，因此“无害”一词不能适用于此类船舶，坚持无害通过权是一种不负责任的强词夺理。而另一方面，一旦沿海国一再阻碍这些船舶通过的话，运输国则会继续采取秘密运输的方式，从而避免沿海国的监控。因此，运输国和沿海国双方应开诚布公的进行合作，要认识到监管的必要和促进核能的利用。在没有其他可选方案的情况下，分道通航制是目前最适合核材料海上运输的解决方案之一了。

二、预警原则在核材料海上运输问题上的应用

（一）预警原则的缘起及含义

预警原则这个名词，并没有一个简单清楚的法律定义。有德国学者认为，预警原则最早可能出现在西德和瑞士 1980 年代的国内立法中。当时这两国的法律体系内已有所谓的“Vorsorgeprinzip”。[27] 由于人类对于全球性环境生态破坏问题，迄今还没有一套完整的科学数据用来精确地控制污染源，因此，人们越来越多的

25 《联合国海洋法公约》第 22 条，第 23 条。
26 《国际规章》于 2001 年被《海上生命安全国际公约》所采纳从而正式生效，它主要规定有关核材料运输方面的操作规程和条件要求。
27 傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 97~98 页。

认为，面对这样的科学不确定性，宁可采取过渡小心谨慎的“预警方法”，立刻进行管理，也不该任由情况继续恶化下去，以免将来科学证据数字弄清楚了，但环境生态的破坏，已经成为永远无法挽回的灾难。这样的基本立场，我们即可称为“预警原则”。[28]

（二）预警原则的重要意义

可以说，预警原则是一项政策导向，要求决策者在制定政策时具有前瞻性和计划性。它同时要求一旦具有环境损害的威胁，虽然没有确定的科学依据来确定这种损害会有多严重，也要立即采取措施以减少这种损害的发生。[29] 这样，借口科学数据的不确定而拖延时间或者决策者基于科学的不确定性而迟迟不宣布命令就不为国际法所允许。各国也不得借口科学不确定性拖延对那些可能带来环境损害的行为发布禁令。荷兰起草的一份讨论稿提出了这样的观点：实际上在执行预警原则这一问题上有 2 个重点，一是要采用预防性标准和规范，一是要启用能起到预防作用的程序。[30] 后者极为强调时间性：执行预防原则排除了在采取措施之前继续等待确定的科学依据的做法，而是要求遇有情况立即行动。这样，即便在尚未得出环境污染的确定性的情况下，也可以提前采取行动。

预警原则实际上导致了举证责任倒置的法律后果。也就是说，一旦特定行为可能产生的影响尚不确定的情况下，承担举证责任的义务转移到了行为者（污染者）身上，必须由行为者来证明其行为不会造成环境污染。这就免去了潜在的受害者（或称受害国）的举证责任。从理论上来分析，这对于保护环境、对行为者即将实施的可能对环境造成的潜在威胁提出了更高的要求，是一种公平的做法。毕竟，如果让受害者去承担某项他国行为可能对海洋环境带来损害的估计或证明，难度会相当大，也是不现实、不可行的。因此，让行为者承担举证责任，会促进行为人对其行为的安全性和谨慎性更加注意，这种责任倒置，对于更好的保护环境，无疑是有益无害的。

根据《公约》有关保护和维持海洋环境的规定，各国承诺，要根据本国政策、当前形势以及资源等因素，力图防止、减少和控制海洋环境的恶化，以便维持和提高其维持生计的能力和各项生产能力。说到底，有必要作出以下努力，即在防止海洋环境污染问题上，适用预警原则，以便防止海洋环境恶化和减少对海洋环境

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28 傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 97~98 页。

29 Relevance and Application of the Principle of Precautionary Action to the Caribbean Environment Programme, *CEP Technical Report*, No. 21, 1993, p. 3.

30 Eugnene R. Fidell, Maritime Transportation of Plutonium and Spent Nuclear Fuel, *International Lawyer*, Vol. 31, 1997, p. 757.

造成的长期的不可逆转的负面影响。[31]

同样的，作为运输核材料船舶的船旗国，也应该采用该预警原则来防止核事故对环境可能造成的严重损害，正如沿海国应该对其领海、毗连区以及专属经济区负责一样，船旗国和运输国都应当对其船舶行为负责。也就是说，根据预警原则，运输国应该做出环境影响评估以及安全方案，并将其提交给沿海国或相关的国际组织，以便确认此类运输行为符合环境及安全标准的要求。

三、事前通知义务的适用

对事前通知义务的不同看法也是基于对无害通过权的理解和适用范围而引发的另外一个争议。对于该问题，有核国家或者说是核材料运输国认为，事前通知义务与《公约》中规定的航行自由是互相抵触的。但值得注意的是，在实践中，这些国家往往在通过其所信赖的国家或者政治同盟国水域时，都会作出事前通知。[32] 日本于 1997 年 12 月 18 日声明：1998 年时，运输核材料的船舶从法国启航后，日本将会宣布该船舶此次航行的航线。英国也针对 1998 年的运输活动向其所经过的巴拿马运河的巴拿马委员会做出了事前通知。然而，对一些小国如加勒比国家却置之不理，因此在通知义务方面，有核国家采用的是双重标准，将弱小国家视为国际社会的“第二国民”，很显然这种双重标准完全违反了国际法中国家无论大小一律平等的重要原则，因此是不公平、不可接受的。

（一）事前通知的必要

事前通知的作用在于，一方面，由于向有关国家做出了事前通知，使透明度有所增强，因此它能够减少海上运输核材料所带来的各种传闻，不至于引起国际社会的轩然大波。另一方面对跨界海上运输核材料的活动所可能带来的海上事故进行有效的事前准备。此外，相关国际公约，例如《巴塞尔公约》以及国际原子能机构的有关规章都将其作为运输国的一项重要义务加以规定。

（二）与事前通知相关的国家实践

目前为止，对于具有危险性的船舶，已经有大量的事前通知过境国的先例存在。丹麦、挪威、瑞典均要求外国军舰在进入领海前作出事前通知。从 1991 年开

31 Agenda 21, Chapter 17. 17. 22.

32 Eugnene R. Fidell, Maritime Transportation of Plutonium and Spent Nuclear Fuel, *International Lawyer*, Vol. 31, 1997, p. 757.

始，加拿大政府批准了美国核潜艇通过其内水的申请。另外一个重要的例子就是1996 年 10 月在土耳其伊兹密尔市签订的一项名为《防止危险废物越境转移和处置污染地中海的议定书》的草案。该草案第 6 条要求过境船舶必须在事前得到过境国批准的情况下才能通过其领海。第 6 条第 4 款规定，根据过境船舶提出的事前申请，过境国将对其过境行为予以必要的关注。最近的一项调查显示，不同国家对于过境船舶在事前通知方面有着不同的实践：（一）只要求事前通知的国家有：加拿大、吉布提、巴基斯坦、葡萄牙、阿拉伯联合酋长国；（二）要求必须得到本国授权才能通过的国家有：埃及、几内亚、伊朗、马来西亚、阿曼、沙特阿拉伯国家、土耳其和也门共和国；（三）无论是否作出事前通知，都不允许此类船舶通过的国家有：阿根廷、海地、象牙海岸、尼日利亚、菲律宾、委内瑞拉。[33]

可见，对于核材料海上运输问题，有大量的国家实践要求运输船舶需要事前通知过境国。如在日后依然有大量的要求事前通知的国家实践继续存在，且这些国家实践足够有力使得运载核材料的船舶避免进入任何国家的领海或专属经济区，则此类国家实践将会发挥重大意义。因为，如此多的国家实践很可能大大改变并推动新的有关事前通知义务的国际法制度的形成。同时，一旦提起相关诉讼，此类国家实践很可能被相关法庭或仲裁庭作为形成事前通知义务的国际习惯法的佐证。另外，在对《公约》进行解释时，此类国家实践也很可能受到相关法庭或仲裁庭的考量和认可。因为，根据 1969 年《维也纳条约法公约》第 31 条的规定，该条约各当事国对该条约的解释意思一致的该条约适用上的任何嗣后惯例，应被认定为对该条约进行解释的一个重要因素。[34]

实际上，大量的国家实践已经使得运载此类物质的船舶在选择航线时有所忌惮。此类船舶在上个世纪 90 年代遭受约有 40 多个国家的强烈反对之后，逐渐的选择避免进入任何国家的领海。特别是 1999 年的运输路线，不仅仅绕开马六甲海峡和东南亚各国的领海，并且也绕开了巴拿马运河。[35]

因此，大量的要求事前通知的国家实践，应该引起国际社会的重视。同时，相关国家应一如既往的要求运载此类物质的船舶在进入各国领海之前进行事前通知，而不得采取秘密方式。我国作为运载核材料船舶的过境国，也应当采取与太平洋及其他沿海国相同的立场并采取同样的国家实践，要求事前通知，反对核材料秘密运输。

四、核材料海上秘密运输对我国的影响及我国对策

33 Jon M. Van Dyke, The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials, *Ocean Development & International Law*, Vol. 33, 2002, pp. 77~108.

34 《维也纳条约法公约》第 31 条第 3 款第 2 项。

35 Radioactive Sea Shipment, at http://www.nci.org/seatrans.htm, 24 June 2006.

（一）核材料海上秘密运输对我国的影响

我国是日本核材料运输船舶的过境国：实际上，日本有九家电力公司发电后的高放射性核废料在运往英国、法国进行重炼的来回航行运送的航线，都可能会经过台湾海峡。[36] 运输船舶至少有一次曾经经马六甲海峡后，穿过我国的南海，绕过台湾岛返回日本。[37] 我国的南海属于《公约》中所规定的“半闭海”。这类海域受其特殊的地理条件所限，自净能力差，更容易集聚污染物、遭受污染的损害，可以归为“脆弱的生态系统”；而我国的台湾海峡南端较宽，约有 350 海里，北端则相对较窄，约有 135 海里，是一个用于国际航行的海峡。目前，依据大陆和台湾地区各自公布的相关法律和规章，两岸各自划定了领海、毗连区及 200 海里专属经济区。无论这些核材料穿越南海、还是台湾海峡，一旦发生任何意外，都会对海洋环境造成灾难性后果，甚至可能毁灭其中的生物资源，也会对海峡两岸居民的生产和生活带来长期的负面影响。

（二）我国的对策

笔者建议台湾海峡东西两岸以及东南亚各国应该合作，对日本秘密运输核材料事项采取以下措施：

1. 划定“特别敏感海域”

笔者建议，我国及相关国家应向国际海事组织申请，将南中国海海域及台湾海峡水域划定为“特别敏感海域 "。特别敏感海域的设定是用来管理那些沿海国领海范围以外且航行环境脆弱的水域的一种手段。国际海事组织将“特别敏感海域”定义为“那些对生态、社会经济以及科学具有重要意义同时又容易遭受国际航行损害污染而需要国际海事组织采取特殊保护措施的海域”。[38] 一个海域一旦被批准为特别敏感海域，该水域则可以使用特别附加措施来控制海上活动，诸如航线措施、强制性船舶报告系统、船舶交管服务等。鉴于核材料运输的特点，以及我国台湾海峡特殊的水文特征以及南中国海特殊的地理环境，笔者认为，将以上 2 个地区划定为“特别敏感海域”首要措施就是采取强制港口监管措施，且这一措施并不违背航行自由原则。因为虽然《公约》规定，沿海国为执行该公约第六章所

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36 傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 368 页。

37 赵亚娟：《对日本秘密海运极端危险核物质的法律思考》，载于《中国海洋法学评论》2005 年第 1 期。

38 Annex 2, Assembly Resolution A. 927(22), Guidelines for the Designation of Special Areas under MARPOL73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, Adopted on 29 November 2001, A 22/Res. 927.

规定的执行的目的，只能对其专属经济区制定符合通过主管国际组织或一般外交会议制定的一般接受的国际规则和标准的法律和规章。但该公约第 211 条第 6 款却允许例外，即允许沿海国向国际海事组织提出建议，要求采取防止来自船只污染的特别强制措施，只要这些措施在事实上对船舶的航行权不构成拒绝、妨碍或削弱。实际上，截至 2004 年 7 月 13 日，国际海事组织已经原则上批准了 3 个特别敏感海域，即波罗的海海域、加拉帕哥斯群岛（厄瓜多尔）和加那利群岛水域（西班牙）。[39]

南中国海作为世界上最为繁忙的水道之一，岛屿密集，作为交通要道的宽阔的或狭窄的海峡，拥挤狭小的河口、人口众多的国家以及对海洋鱼类的大量需求，丰富但日益减少的珊瑚礁、海草地以及红树林资源，危险物质包括核废料的秘密运输等现象构成了南中国海独特的环境特征，我国完全有立场向国际海事组织提出申请，将其划为特别敏感海域。如此一来，对核材料海上运输划定特别航道、采取强制港口监管措施或者建立报告制度就能得到国际组织的帮助，而不仅仅由我国以及周边国家来关注。

2. 进行区域合作

除了向国际海事组织申请划定“特别敏感海域”外，另外一种解决途径就是进行区域合作，实施港口国联合监管措施。

诚如上文所述，南中国海地理上有其特殊性，根据《公约》的规定，符合半闭海的规定，有着区域合作的基础和条件。但是由于历史原因，南中国海海域存在领土争议，周边国家对南中国海诸岛存在领土争端，加之南中国海与公海相连的 2 个重要海峡——台湾海峡和马六甲海峡。其中，台湾海峡由于台湾问题属于外交事务与军事事务方面的敏感地带。马六甲海峡在军事上具有重要意义以及外部势力对其控制渗透，都使得这一地区的合作历来呈现复杂化的状态。一旦合作，将涉及在这些敏感海域进行海上执法的问题，各国之间的外交谈判以及争执有使区域合作搁浅的威胁。根本原因就在于区域历史文化背景的多元化，现阶段政治经济发展水平的差异以及南中国海的领土争端。

但这并不意味着在核材料运输问题上东南亚各国不能找到共同的利益。因为核污染无国界。因此，在日本秘密运输核材料问题上，东南亚各国很可能找到一个合作的理由。特别是在该问题的合作，可以坚持贯彻中国政府所提出的“搁置争议，共同开发”的主张中的“搁置争议”的态度。因为，其实港口国联合监管与历史上存在的领土争端的问题可以分开来解决。因此，对于海上运输核材料问题，各国的合作并不存在很大的难题。但关键的一个问题是日本。该国与其核材料合作方法国和英国对核材料的运输路线等信息严格保密，因此，在我们对日本核废

39 See http://www.sdmsa.gov.cn/n435777/n435800/n435827/n435858/n435866/4543.html, 24 June 2006.

料运输一无所知的情况下，日本政府的通告、中国以及其他沿岸国家港口监管或者应急措施都无从谈起。因此，在倡导区域合作的过程中，中国政府一定要和东南亚各国与日本进行谈判，使其明白，实施港口联合监管的目的不在于限制或禁止日本运载核材料的船舶的通过权，而是为了加强对其监管，防范海上核事故的发生。并在可能达成协议的情况下，要求日本向沿岸国提交报告以及一切核废料运输船舶所需要提供的一切单证，并且接受沿岸国的上船检查。

可以说，如果我们对南海或台湾海峡水域申请“特别敏感海域”不能获得批准或者在获得批准之前，可选择的方案就是采取区域合作的方式，在适当的时候发起区域性谈判，建立港口国联合监管的模式，并适时地向日本施加压力，使其加入区域合作安排。

3. 加强两岸合作实现分道通航

海峡两岸即大陆和台湾地区应就该问题展开合作，尽早协商共建分道通航制。《公约》第 22 条规定：“……要求行使无害通过其领海权利的外国船舶适用其为管制船舶通过而指定或规定的海道和分道通航制”。同条第 2 款规定：“特别是沿海国可要求油轮、核动力船舶、和载运核物质或材料或其他本质上危险或有毒物质或材料的船舶，只在上述海道通过。”实际上，核材料问题通过台湾海峡对两岸人民和海峡周边的海洋环境有着共同的深远影响。对于这一建议，傅崐成教授在论及台湾海峡水域法律地位时，就已提出。[40] 笔者认为，实施分道通航有以下好处：

首先，为其指定特殊航线，可以使得此类船舶尽可能少的经过过境国的领海。相关国家可以通过协议的方式确定此类船舶的航线。与预警原则相配套，通过指定特定航线，可以为遇有核事故时，使有关国家迅速及时地做出反映进行救助。因为，在各国清楚地知晓船舶航线的情况下，比在船舶运输路线保密的情况下能更快地做出反映。

其次，在指定路线时，可以尽可能地避免此类船舶经过环境敏感区域。这样，即便遇有核事故，也可以减少其对环境所带来的损失。在选定路线时，需要考虑的另外一个因素就是天气因素。也就是说，要尽量避免经过天气恶劣的海域。例如，位于赤道和北回归线之间的海域在天气方面就要比合恩角和好望角海域条件更好一些。

再次，通过指定特殊的航线，能够保障途经船舶的数量有所减少。因为只有此类船舶才经过所指定的航线，而其他商船则走普通的航道。这将大大降低发生船舶碰撞的机率。

因此，笔者建议，两岸有识之士应首先在分道通航问题上展开合作，这也是一项最为现实可行的办法。

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40 傅崐成著：《海洋法专题研究》，厦门大学出版社 2004 年版，第 359~377 页。

试论取消航海过失免责中的管船过失免责

梁永刚 * 李忠胜 **

内容摘要: 航海过失免责一般表述为:船长、船员、引航员或承运人的受雇人在驾驶船舶或管理船舶中的行为、疏忽或不履行职责所造成的货物灭失或损坏,免除承运人的赔偿责任。迄今为止,航海过失免责一直是承运人可援用的最重要的免责条款,航海过失免责制度的存废也一直是各国和国际海上货物运输立法关注的焦点之一。本文通过分析航海过失免责的内涵,探悉航海过失免责产生和发展的社会经济根源,考察当今船货双方利益和风险的分担情况,综合考虑相关因素,得出对航海过失免责制度进行合理性变革的结论。

关键词: 航海过失免责 利益均衡 区分 制度变革

航海过失是驾驶船舶过失和管理船舶过失的合称。法律条文一般表述为:“船长、船员、引航员或者承运人的其他受雇人在驾驶船舶和管理船舶中的过失。”驾驶船舶过失,是指船长、船员和引航员等在船舶航行和停泊操纵上的过失;管理船舶过失是指船长、船员等在维持船舶性能和有效状态上的过失,这里的管理既非经营管理也非行政管理。[1]

生效于 20 世纪 30 年代的《海牙规则》在第 4 条第 2 款中规定:“船长、船员、引航员或承运人的受雇人在驾驶船舶或管理船舶中的行为、疏忽或不履行职责所造成的货物灭失或损坏,免除承运人的赔偿责任。”这就是著名的航海过失免责。迄今为止,航海过失免责一直是承运人可援用的最重要的免责条款。航海过失免责的存废一直是各国和国际海上货物运输立法关注的焦点之一。

笔者认为在当今的航海情况下,尤其是像我国这样既是贸易大国又是处于上升时期的航运大国,既不应该继续守住航海过失免责不放,亦不能过早废除这一制度,应当将驾驶船舶的过失和管理船舶的过失区分开来,保留相对合理的驾驶船舶过失免责,而废除已经不合理的管理船舶过失。本文将分 2 个步骤进行论述:第一,分析航海过失免责的内涵,考察航海过失免则的历史并探察其根源;第二,综合分析各个相关因素,最终得出保留驾驶过失而废除管船过失的结论。

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1 司玉琢主编:《海商法》,北京:法律出版社 2003 年版,第 113 页。

一、航海过失免责的内涵、历史及社会经济根源

（一）航海过失免责的内涵

航海过失免责一般表述为：船员、引航员或承运人的受雇人、代理人在驾驶船舶或管理船舶中的疏忽或不履行职责所造成的货物灭失或损坏，免除承运人的赔偿责任。[2]

显然，这一制度突破了 2 项传统的民事责任归责原则：过错责任原则和雇主责任原则。按照过错责任原则，船员在驾驶船舶和管理船舶过程中的过失造成的货物损失，船员应当承担赔偿责任；同时，按照雇主责任原则，船东作为船员的雇主，应当承担船员在履行职责过程中产生的赔偿责任。然而，法律将船东这一责任免除，而由货主自己负担由船员的过失造成的货物损失。表面上看，货主是无辜的受害者，船东逃脱了本应承担的责任，这是不公正、不合理的。然而，船东在船舶开航之前需尽职责，使船舶适航，开航之后发生的驾驶和管理船舶的过失免责，这在当时的历史条件下是合理和实际的。[3]

从立法体制上看，航海过失免责所确立的风险分担制则使用多重责任标准，通过概念、定义和结构间的搭配来完成责任的分担。[4]

（二）航海过失免责的确立及沿革

历史是一面显示的镜子，回顾航海过失免责制度的确立及沿革有助于我们理解和分析该制度的社会经济意义和根源，有助于我们以更清晰的思路去对待这一制度。

“航海过失免责”的概念其实是由美国 1893 年《哈特法》率先确立的。《哈特法》颁布之前英美普通法在违约责任上采取严格责任原则。19 世纪以前，由于通讯不发达，托运人把货物交给承运人之后，即失去了全部联系与控制，而承运人却能够有效地控制并详细了解货物在运输中发生的具体情况，托运人很难甚至不能证明承运人或其代理人的过失。普通法规定只有天灾、公敌行为、货物的固有缺陷及包装不良、共同海损牺牲和火灾等 5 种情形造成的货物损失，船东可以免责。普通法虽然赋予船东 5 项免责权利，但同时亦加诸船东身上 3 种默示义务：1. 使船舶处于绝对适航的状态；2. 禁止船舶不合理绕航；3. 尽责速遣。如果船东没有

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2 《海牙规则》第 4 条第 2 款。
3 杨良宜著：《提单》，大连：大连海事大学出版社 1994 年版，第 304 页。
4 吴焕宁主编：《海商法学》，北京：法律出版社 1996 年版，第 114 页。

尽到第 1 项义务，那么因此导致的损失应由船东负责；若船东违反了第 2 和第 3 项义务，则连普通法赋予船东的 5 项免责权利亦同时失去，除非船东能证明即使船东没有违反该 2 项义务，货主的损失一样必然会因上述 5 项免责事由之一的发生而产生。[5] 可见，在当时的普通法下，船东承担的责任是很大的。当时的这种严格责任规则在某种程度上是对海运业的束缚。[6]

同时，在航海技术不发达的年代，海上运输风险巨大，船舶抵御风险的能力低弱，海上航行危险四伏，航海被称为“海上冒险”。船员承担生命危险的同时，由于建造远洋船舶需要巨额资金，承运人也承担着巨大的资金风险。而且，由于当时信息技术落后，承运人难以对船员进行有效的控制和管理，海上的特殊生活也使船员职业行为的风险远远大于陆上运输。在这种人身和财产双重特殊风险存在的情况下，以严格责任原则为承运人承担合同责任的基础，船货双方的利益和风险的分担出现了严重的失衡，极大地阻碍了航运业的发展。

于是，船东为了扭转自己的不利地位，基于“契约自由”的理念在运输合同中任意地加入免责条款，加大免责范围。只要该免责条款清楚明白，当时的法院都会承认其效力。“契约自由”作为现代民法三大原则之一，理应受到法律的尊重，但在实践中因为缔约双方的谈判实力悬殊，作为承运人的船东谈判势力很大，一般的托运人势力弱小，不可能与船公司公平地拥有订约自由，因此签订的运输合同条款极不平等，甚至实际上达到船东除了收取运费的“义务”以外无须承担任何责任的程度。[7] 显然，船东的这些举措不但没有合理分担船货双方的利益和风险，反而使这种失衡走向了另一个极端。提单持有人经常收不到货物，大大削弱了提单在国际贸易上的信用，阻碍了国际贸易的正常开展，也反过来影响了航运业自身的利益。

在这种情况下，国际航运业和贸易业都迫切需要一项制度来平衡货主和船东之间的利益和风险的分担，促进航运业的发展，保证国际贸易的正常开展。美国 1893 年《哈特法》应运而生。《哈特法》规定了一套船东应尽的最低义务和可获免责的最高标准。主要内容有：1. 相对适航责任不得减轻；2. 管理货物之疏忽不得免责；3. 驾驶或管理船舶的过失、天灾、公敌的行为、货物固有缺陷、包装不固、依法逮捕、海上救助等原因造成的损失，船方无须负责。《哈特法》赋予船东非常广泛的免责权利，打破了普通法下船东的严格责任，同时也强制规定了船东的最低责任，结束了自由资本主义阶段在“契约自由”之法律理念下船东免责无边的情

5 石圣科：《论归责原则和航海过失免责》（硕士学位论文），上海：上海海运学院 2001 年 12 月版，第 7 页。

6 司玉琢：《提单责任基础的重大改变》，载于《大连海运学院海事法律系海商论文集》，北京：北京学术书刊出版社 1989 年版。

7 石圣科：《论归责原则和航海过失免责》（硕士学位论文），上海：上海海运学院 2001 年 12 月版，第 7 页。

况，以尽力平衡货主和船东双方之间的利益。

正是因为《哈特法》具备了上述特质，其颁布后对各国和国际的航运立法产生了巨大影响，各国纷纷效仿《哈特法》对驾驶和管理船舶的过失给予免责，如 1904 年澳大利亚《海上运输法》，1908 年新西兰《航运及海员法》、1910 年加拿大《加拿大水运法》等等。我国《海商法》第 51 条亦规定了航海过失免责。

1924 年，国际上通过了《统一提单的若干法律规定的国际公约》，即《海牙规则》，在国际上确立了航海过失免责制度的地位。1968 年，国际上又通过了《修订统一提单的若干法律规定的国际公约的议定书》，即《海牙—维斯比规则》，规定承运人的受雇人和代理人也可以援引航海过失免责，扩大了可援用航海过失免责的主体范围，同时将侵权纳入航海过失免责可以对抗的请求理由，扩大了可抗辩的请求范围。[8]

然而，自从 1924 年《海牙规则》将航海过失免责制度推广到国际社会之后，随着航运和国际贸易的发展，国际社会关于航海过失免责存废的争论越来越激烈，废除航海过失免责的呼声越来越高，各国都基于本国的利益提出观点。航运比较发达的国家主张保留航海过失免责，而贸易比较发达国家则主张取消航海过失免责，相关国际组织亦在积极协调和出台相关方案。在这一过程中，1978 年《汉堡规则》废除了航海过失免责，实行严格的过失责任制，且全部实行承运人过失推定；[9] 1999 年美国《海上货物运输法草案》亦取消了航海过失免责，但实行了举证责任倒置，即全部实行承运人无过失推定；[10] 国际海事委员会自 1999 年开始起草的《联合国国际贸易法委员会运输法草案》（联合国国际贸易法委员会第 16 次会议稿，下同），亦实行了承运人的完全过错责任制，但在免责范围内实行无过失推定，免责范围之外实行承运人有过失推定。[11]

（三）航海过失免责制度产生和发展的社会经济根源

航海过失免责制度的产生和发展，是由各个历史时期的经济发展水平和航海贸易状况所决定的，集中反映了承运人对其所承运的货物应承担的责任的归责原则或基础。[12]

尽管美国制定 1893 年《哈特法》的初衷是为了维护本国货主的利益，但航海过失免责制度的确定，为船货两方利益的平衡找到了一个法律支点。在当时的科

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8 《海牙—维斯比规则》第 3 条第 1、2 款。
9 《海牙—维斯比规则》第 3 条第 1、2 款。
10 美国 1999 年《海上货物运输法草案》第 9 条 C、D 款。
11 《联合国国际贸易法委员会运输法草案》第 14 条。
12 赵月林、胡正良：《论取消航海过失免责对承运人责任义务和其他海事法律制度的影响》，载于《大连海事大学学报》2002 年第 4 期。

技和经济发展水平下，航海过失免责建立了船东和货主利益之间的一种平衡，合理地分摊了双方的风险，同时也追求了社会效益的最大化。承运人利用航海过失免责而获得的利益来发展航海事业，改进航海技术，提高船舶抵御海上风险的能力，尽最大程度地使船舶适航，船舶适航程度的提高反过来对货方也产生了好处。航海过失免责这一低成本的法律制度导致了国际海运业飞速发展，获得了国际货物贸易繁荣昌盛的高额回报。[13] 正是这一深层的社会经济根源赋予了航海过失免责制度顽强的生命力。

然而，随着科技和经济的进步，现代科技在航海上广泛应用，现代海上保险业飞速发展，当时由航海过失免责建立的平衡开始逐渐走向了不平衡，这正是各国和国际社会对航海过失免责制度进行质疑甚至主张废除的根本原因。因此，需要对航海过失免责制度进行变革，寻找一个新的法律支点，重新建立船货双方之间利益的平衡。

二、综合考虑相关因素，对航海过失免责进行合理变革

（一）我国主张废除或保留航海过失免责的主要理由

1. 代表货主利益的实体或学者往往主张取消航海过失免责，他们的理由可以概括为以下几个方面：

（1）海商法是由航运发展早期的惯例发展而来的，而这些惯例与当时的航海实践紧密相连。但是，随着科技的进步，现代科技在航海上的广泛应用大大增强了抵御海上风险的能力。船舶的性能、导航设施的运用、船上通信设备的运用都得到了极大的提高，早期的“海上冒险”之说已不复存在，立法上给予船东特殊保护、豁免和特权的事实基础亦不复存在。

（2）承运人对船员的控制能力大大加强，当时设置船长、船员航海过失免责的理由之一是当时的通信手段落后，船东很难控制船舶，甚至对船舶上发生的事一无所知，无法适用雇主责任原则来确认承运人的责任。而随着科技的进步，船舶与岸上的通信十分便捷，船东可以有效地控制船舶。这也使航海过失免责的继续存在失去了基础。

（3）经 1995 年修正后的《1978 年国际海员培训、发证和值班标准公约》和《国际船舶安全营运和防止污染管理规则》的实施，将使船长、船员驾驶船舶和管理船

13 倪学伟：《航海过失免责存废论》，载于《海商法研究》第 3 辑，北京：法律出版社 2001 年，第 84 页。

舶的过失减少。

（4）随着货物运输的集装箱化和专门化（主要是油类、散装货物等），件杂货的运输逐渐减少，使得运输程序简单化，货物的周转加快，货损、货差明显减少，船方所承担的责任和风险大大降低，现有承运人的责任归责原则使得船方和货方的利益和风险失去了平衡。

（5）航海过失免责的存在，将很可能导致承运人逃避因管货过失而产生的赔偿责任，因为管货过失和管船过失往往难以区分，货主很难举证何种是由于管货过失所造成的，何种是由于管船过失所造成的。

（6）从其他运输方式看，国标铁路和公路运输采取的都是严格责任体制，为了统一多式联运的责任体制，也应取消航海过失免责。

（7）1978 年《汉堡规则》、1999 年美国《海上货物运输法草案》以及《联合国国际贸易法委员会运输法草案》无一不反应了国际社会废除航海过失免责的大趋势。

2. 代表船东利益的实体或学者往往主张保留航海过失免责，他们的理由可以概括为以下几个方面：

（1）尽管航海技术不断进步，但目前海损事故如碰撞、搁浅等仍时有发生，船舶吨位、运输货物的危险性也非早期所能比拟，大型集装箱船舶、化学品船、油船的出现使其本身就是一个巨大的“风险物”。随着船舶的大型化和专业化，船舶的操纵变得更为困难和复杂，而且一旦发生事故，所造成的损失往往是灾难性的。

（2）尽管承运人对船员的控制和规范有了很大的加强，但随着船舶大型化的发展，船员配额的压缩，使船员的心理压力在某种程度上比以前更大，此并非简单的规范操作所能解决，最近几十年来海上失事之人为因素居高不下即为明证。

（3）目前在风险分担方面，货主和船东之间已经达成微妙平衡。而且保险、共同海损相关机制已经趋于完善和稳定，不宜轻易打破。

（4）取消航海过失免责，将很可能导致承运人因恶劣天气等海上风险造成货损、货差免责权利的丧失，因为航海过失与海上风险往往联系在一起，承运人很难举证何种是由于航海过失所造成的，何种是由于海上风险所造成的。

（5）目前，国际上绝大多数国家采用的是实行不完全过失责任的《海牙规则》或《海牙—维斯比规则》，而采纳《汉堡规则》的国家较少，采用《汉堡规则》的大多数是航运不发达的第三世界国家，其并没有被任何航运或者贸易大国所接受。

（6）我国如果单方面取消航海过失免责，加重承运人的责任，只会大大削弱我国航运业的竞争力。航运业与国民经济、国防的关系密切，我国航运法规的制定、修改应有利于促进航运的发展，我国作为世界上的航运大国之一，应切实保护船东的利益，在取消航海过失免责方面不应走得太快。

现阶段，我国大多数学者虽然承认航海过失免责制度存在的弊端，但基于民

族利益的角度考虑，主流观点仍然是保留航海过失免责。[14] 但是，不管是主张保留航海过失免责，还是主张废除航海过失免责，不管各种理由基于什么考量，似乎都没有重视和研究驾驶船舶和管理船舶的区分。随着经济和社会的飞速发展，驾驶船舶和管理船舶的差别越来越明显，不管是在难度上、风险上，还是在产生的后果上。二者适用相同的归责原则已经不再公平合理，也不再有效率，故应当对二者进行区分，区别对待。

（二）区分驾驶过失免责和管船过失免责

国际社会对驾船过失和管船过失一直是区别对待的。早在制定《汉堡规则》时，专家们就一致认为应该废除管船过失免责，但对驾驶过失则存在很大争议。有很多专家认为应该保留驾驶过失免责，而取消管船过失免责。驾驶过失和管船过失的区分主要体现在以下几点：[15]

1. 产生的主体不同。产生驾驶船舶过失的主体是使船舶位移的人员，即驾驶台和轮机部的当班人员。而管理船舶的主体为全体船员。凡是到船上工作的人员其目的只有一个：维护船舶的有效状态并在此基础上安全驾驶。可见，驾驶船舶的主体范围要比管理船舶的主体范围小得多。

2. 产生的途径不同。驾驶船舶过失是在使船舶产生位移过程中的过失。而管理船舶过失则是维持有效状态上的过失。驾驶船舶的难度和复杂程度通常要比管理船舶大。

3. 产生的后果不同。驾驶船舶过失所造成的后果一般仅限于碰撞、搁浅、触礁或被风浪所掀沉，也就是说，驾驶船舶过失所造成的损害一般直接针对船体且后果比较严重，而管理船舶过失所造成的后果比较纷杂，对船体损害一般不严重。这一特点也导致船员在驾驶船舶上比较小心谨慎，而对管理船舶则容易疏忽大意。

（三）综合考虑相关因素，主张保留驾驶过失免责、取消管理过失免责

根据上文对驾驶船舶和管理船舶所做的比较，综合考虑以下因素，[16] 得出保留驾驶过失免责、取消管船过失免责的结论：

1. 秩序的公平合理，利益的均衡。在考虑海上货物运输的高投入、高风险的

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14 石圣科：《论归责原则和航海过失免责》（硕士学位论文），上海：上海海运学院 2001 年 12 月版，第 46 页。

15 徐仲建：《浅析航海过失和管货过失》，载于《浙江万里学院学报》2002 年第 4 期。

16 某个因素可能不具有很强的说服力，但论述内容相辅相成，互相支持，共同支持文章观点。

同时，还应注意到承运人应尽的基本义务，使船东和货主的利益得到平衡。

利益决定法律制度的制定和实施，法律的根本任务是调整相关各方的利益。[17] 能够合理分配相关各方的权利和责任的法律制度，能够使各方的利益和风险达到一种平衡，从而实现公平。实现公平是法律制度的基本价值和重要任务，[18] 能够通过利益调整实现公平的法律制度是具有更高价值的法律制度。

决定航海过失免责存废最根本的因素就是船货双方利益的对比，而双方利益的对比又取决于各个历史时期的经济发展水平和航海贸易状况。从美国 1893 年《哈特法》到《海牙规则》，从《汉堡规则》到 1999 年美国《海上货物运输法草案》，再到新近的《联合国国际贸易法委员会运输法草案》，立法者对航海过失免责的确立、保存和废除，无一不反映了船货双方利益对比的变化和调整，也反映了各国之间航运利益的冲突和协调。

如前所述，航海过失免责产生最直接的原因就是早期航海的特殊风险，为了均衡船货双方的利益和风险，将一部分本应该由承运人承担的风险转移到货主身上。然而，随着科技的进步，现代科技在航海上得到的广泛应用大大增强了抵御海上风险的能力。随着船舶定位方法、物标识别手段、通信设施的不断更新和进步，整个船舶操作和管理系统将朝着数字化、标准化、模块化、智能化和接口标准化方向不断完善和发展。[19] 人类预防和抵抗海上风险的能力得到了极大的加强，海上事故大大减少，早期所谓的“海上冒险”如今确实已经不复存在。

当然，尽管航海技术不断进步，海上事故仍无法避免。而且随着船舶的大型化和专业化，危险货物的增多，一旦发生事故，所造成的损失往往是非常巨大的。这意味着海上运输的风险仍然非常巨大。

但是，如今航海的海上风险同早期航海的海上风险已经不可同日而语，两者之间存在着本质的区别。在早期航海时代，海上风险之所以巨大，主要原因在于人类对海上风险的认知和征服能力非常有限，人们控制和减少海上事故的能力很低，海上事故频繁，船员们时刻面临着生死的考验，船东也面临着巨大财产随时消灭的风险。而如今的海上风险已经大不相同，人类对海上风险的认知和抵御能力已经有质的飞跃，船员的安全保障也有了很大的提高，海上风险主要体现在单次事故的巨大破坏性上，而且主要体现在财产损失上，同时，由于现代海上保险业的发展，这种风险也在很大程度上得到了分散和缓解。当代的航海风险已经不是传统意义上的“海上冒险”，随着科学技术的发展和应用，很多高科技、高投资的行业都存在类似风险。

正如前文所述，相对于管船过失而言，驾驶过失更容易造成船舶的灾难性事

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17 张文显著：《法理学》，北京：法律出版社 1997 年版，第 270 页。
18 李龙主编：《法理学》，北京：人民法院出版社 2003 年版，第 242 页。
19 金永兴、武晓云：《新世纪航海技术的展望》，载于《中国航海》2002 年第 1 期。

故，从而给船员生命和船东财产造成巨大的损失，因此驾驶人员在驾驶船舶的过程中通常都非常谨慎，但是由于驾驶人员需要在各种复杂的动态环境中操作巨型船舶，工作节奏变化快，工作难度和心理压力大，往往由于技术水平和经验的不足而产生驾驶过失，因此严格的适用过错责任原则仍然有失公平。而管理船舶的人员则大不相同。他们的工作更多是日常的、分散的工作，难度相对较低，节奏相对较慢，船员压力也较小，而且随着通信手段的发展和应用，他们能够得到承运人更多的协助和指挥。同时由于管船过失的后果比较纷杂，往往不会造成船舶的灾难性事故，更多情况下是造成货物损失或迟延交付，这使得管船人员往往没有较强的责任心，更容易在主观上疏忽大意，因此理应适用过错责任原则，将管船过失引起的货损赔偿责任重新回归到承运人身上。

针对上述变化，基于平衡船货双方风险和利益的目的，参考过错责任原则，笔者认为应当重新分配船货双方的权利和责任，保留驾驶过失免责，而取消管船过失免责。

2. 制度变革的成本和收益。任何一项法律制度的变革都需要一定的成本，如果一项变革付出较低的成本，获得较高的社会和经济收益，这项变革就是相对合理的。

社会的法律运行、资源配置的进化过程就是以交易成本最低为原则，不断地重新配置权利、调整权利结构和变革实施程序的过程。[20]

主张保留航海过失免责的观点所持有的主要理由之一就是制度变革的巨大成本。这一观点认为，目前在风险分担方面，在货主和船东之间，已经达成微妙平衡，而且保险、共同海损以及船舶碰撞等相关制度已经趋于完善和稳定，轻易打破将付出巨大代价。

根据新制度经济学的理论，在制度变迁中，存在着一种报酬递增和自我强化的机制，即所谓的“路径依赖”。路径依赖就是指在历史的某一阶段，一旦我们选择了一项制度，由于这一制度是存在于一定的制度环境中的，又由于制度环境中的各项制度是相互关联的，这样我们的这一制度选择必然会影响其他制度的构建，从而也就实现了其自我强化。[21]

航海过失免责这一制度自从产生开始，也在不断的自我强化。海上运输中的其他相关制度也会受其影响，并要与其保持协调，如海上保险制度、共同海损制度和船舶碰撞制度等等。因此，航海过失免责的变革意味着相关的配套制度也要进行变化，这一变化就涉及到了制度变革的成本问题。

尽管变革航海过失免责制度会使其他相关制度随之变革，但这种变革不是根

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20 [美] 理查德• A•波斯纳著，蒋兆康、林毅夫译：《法律的经济分析》，北京：中国大百科全书出版社 1992 年版，中文版译者序言第 18 页。

21 卢现祥著：《新制度经济学》，武汉：武汉大学出版社 2004 年版，第 168 页。

本性的，更不是破坏性的，有些时候还是建设性的。这一结论可以从海上保险和共同海损这 2 项主要相关制度受到的影响来说明：

（1）海上保险制度。对承运人责任保险人而言，由于取消管船过失免责，保险责任的内容必然要有所增加，责任保险人在提高费率的同时亦需增强自己的赔付能力。对货物保险人而言，由于管船过失导致的保险赔偿可以向承运人进行追偿，因而风险降低，费率也随之降低。

（2）共同海损制度。航海过失免责制度的变革，并不会影响共同海损的成立，仅仅影响到共同海损的分摊，主要体现在理算规则的修改上。而且，取消管船过失免责使得实际的共同海损范围缩小，更符合共同海损制度最初的旨意，平衡有关当事人的关系。[22]

可见，航海过失免责制度的变革不会带来巨大的成本问题。更重要的是，航海过失免责的变革能够带来巨大的社会和经济收益。人们对自己的过失负责，这不仅符合公平的理念，而且也符合效率的理念。让人们对他人的行为负责，由于对他人的行为缺乏控制，难以采取措施避免过失的发生，所以往往也是没有效率的。相反，让人们对自己的过失行为负责，更能激励人们采取各种办法避免过失的发生，降低过失发生的概率，从而可以减少由过失导致的损失，节约社会财富。传统的过错责任原则也正是基于公平和效率的考虑确立起来的。航海过失免责变革带来的收益主要体现为高效率地减少事故，从而节约社会财富。这种收益是根本性的、主要的，而制度变革的成本与之相比是次要的，不能因为成本问题而阻止经济制度和社会的进步。

因此，从制度变迁成本受益的角度考虑，应当将管船过失的责任重新回归到承运人身上，从而通过消耗较小的制度变革的成本，获得较大的经济和社会收益。而之所以保留驾驶过失免责，原因前文已有所述，即驾驶过失往往不是由于主观上的疏忽大意导致，而是由于船员技术水平和经验不足导致，因此如果废除驾驶过失免责，将很难得到上述的经济和社会收益。从制度变迁的成本收益角度考虑，现阶段不宜废除驾驶过失免责。

3. 法律制度的可操作性。任何一种法律制度的确立，必须具有较强的可操作性，才能减少争议的发生，降低诉讼费用。

在航海过失免责制度的司法实践操作中，一直存在着两对很难区分的法律定性识别：（1）海上意外风险和驾驶过失；（2）管船过失和管货过失。在调查导致货损事故发生的原因时，海上意外风险和驾驶过失难以区分，管船过失和管货过失同样难以区分，给司法实践带来了很多困难，增加了纠纷的数量和解决纠纷的成本。

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22 赵月林、胡正良：《论取消航海过失免责对承运人责任义务和其他海事法律制度的影响》，载于《大连海事大学学报》2002 年第 4 期。

船舶在遭遇突如其来的自然灾难的时候，船舶驾驶人员必然以其合理船技尽力避免事故的发生，然而由于海上自然环境的复杂和多变，驾驶人员在紧急情况下很难将一切危险情况都一一化解。海上事故一旦发生，通常即产生货物损失。此时，海上事故的发生原因往往是海上意外风险和驾驶过失这 2 种因素交织在一起，很难查清到底是由海上自然灾难造成的，还是由驾驶过失造成的，也无法划分 2 种原因的比例。在这种情况下，由于海上自然灾难是免责的，如果取消驾驶过失免责，不管由哪一方负举证责任，双方都将会产生难以解决的分歧和争议，继而增加纠纷甚至导致诉讼的产生。

同样，由于管船工作的特点，管船过失同管货过失往往也难以区分。同一行为，往往即可以看作是管理船舶的行为，也可以看作是管理货物的行为。由于这 2 种行为难以区分，在各国司法实践当中，产生了许多区分标准，主要有以下 4 种：(1) 行为的目的和对象，(2) 行为的最初性质与目的，(3) 造成货损的直接原因，(4) 过失行为的危机对象。[23] 面对同一案件，不同的区分标准会产生不同的结论，这使得管船过失和管货过失的区分更加复杂和困难，进而增加纠纷和诉讼。取消管船过失免责，必然会减少这部分争议，减少纠纷和诉讼成本。

因此，从增加法律的操作性、减少纠纷、节省诉讼成本的角度考虑，应当保留驾驶过失免责，取消管船过失免责。

4. 法律制度对本国经济的保护

取消航海过失免责在一定程度上加重了承运人的责任，会对我国还处在起步阶段的航运业产生一定的不利影响。这是主张保留航海过失免责的观点所持的主要理由之一。

但是笔者认为，在保留驾驶过失免责的前提下，尽管取消管船过失免责会加重承运人的责任，从而导致责任保险费的增加，进而导致运输成本的增加，最终导致运费的增加；但同时，由于取消了管船过失免责，货主承担的风险大幅度降低，必然导致货物运输保险费的降低，两者在一定程度上得到了充抵。因此，我国取消管船过失免责不会导致价格竞争上的明显劣势。

而且从长远的角度考虑，这一举措不仅不会削弱反而会增加我国航运业的竞争力。随着我国航运业的发展和我国加入 WTO 后航运业竞争的加剧，我国参与国际航运竞争的能力有了很大的提升，国际市场的竞争也日趋激烈。取消管船过失免责，能够适度地维护和保护货方的利益，从而能够为我国航运业赢得更大的市场；同时，取消管船过失免责可以在我国航运业的承受范围内更高效地刺激管理船舶的改进和完善，从而增强我国航运业在国际航运市场中的竞争力。

5. 国际的统一性和前瞻性。海商法具有很强的国际性，如其有关法律制度不能与世界上大多数国家的航运立法保持一致，势必将增加各国之间的法律冲突，

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23 徐仲建：《浅析航海过失和管货过失》，载于《浙江万里学院学报》2002 年第 4 期。

影响和阻碍国际贸易和航运的发展。

从《汉堡规则》到美国 1999 年《海上货物运输法草案》，再到新近的《联合国国际贸易法委员会运输法草案》，国际上取消航海过失免责的呼声日益高涨，取消航海过失免责的大趋势是显而易见的。

尽管《汉堡规则》在国际上的影响力仍然非常有限，各国对美国 1999 年《海上货物运输法草案》也颇有微词，[24]《联合国国际贸易法委员会运输法草案》至今仍未能成为国际公约，关于航海过失免责制度的改革和废除一直在反反复复。然而，我们仍然可以清楚的看到，随着航运业和国际贸易业的飞速发展，航海过失免责制度的改革以至废除是必然的趋势。

但是在当今国际航运立法的态势下，全盘取消航海过失免责的时机仍不成熟。目前，在承运人责任制度上，《海牙规则》和《海牙—维斯比规则》的相关规定在国际上的应用仍然是最广泛的，航海过失免责在国际上仍然是主流，绝大多数国家仍旧保留航海过失免责。尽管《汉堡规则》取消了航海过失免责，但通过国只限于非洲等第三世界小国，美国、法国等一些代表货主利益的发达国家都未参加《汉堡规则》，更不用说英国、北欧等航运大国，可见世界各大航运国甚至货主大国对此都持谨慎的态度，我国对此更不能过于草率。

制度的建立和变革应当体现一定的国际统一性和前瞻性，在最终取消航海过失免责的大趋势下，保留驾驶过失免责而取消管船过失免责能够保证承运人责任制度的国际统一性和前瞻性，又能避免由于制度变化过激导致的权利义务的失衡和法律冲突的加剧。

三、结　论

航海过失免责制度随着航海技术的不断发展和船员管理方式的日益完善，其不合理、高成本、低效率已经越来越凸显出来，国际上的立法也逐渐显现出取消航海过失免责的趋势，况且用这样的制度来保护我国落后的航运业，也并非是最佳的选择。因此，笔者根据本文上面的一系列论证，认为在当前的情况下，应该对航海过失免责制度进行变革，保留驾驶过失免责而取消管船过失免责。

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24 很多学者都认为：尽管美国 1999 年《海上货物运输法草案》取消了航海过失免责，但由于其将举证责任从承运人转换到货主身上，最终结果往往是承运人仍然获得了航海过失免责。

论海上紧追权的权利内涵及其实践

周忠海 *

内容摘要: 紧追权是由国家主权引申出来的一项国家属地管辖权，是沿海国管辖权的扩大和延伸，是公海自由的一种例外。作为沿海国执行措施中的一项主要手段，紧追权已经有了新的发展。1982 年《联合国海洋法公约》发展和扩大了紧追权，紧追权现在可以从沿海国的毗连区、群岛水域、专属经济区和大陆架的上覆水域开始。紧追权也是沿海国海上有效执法的主要手段和形式，发生在沿海国的领海、毗连区、专属经济区，特别是专属渔区的违法违规的渔业事件，引发越来越多的紧追权的行使，其他海事案件的发生也造成紧追权的行使，国际犯罪、国际刑事案件中也有紧追权的行使，如中东、亚洲、非洲、欧洲各国、北美和大洋州等全球性的走私、贩毒、偷渡、海盗及海上恐怖主义等。

关键词: 海上紧追权　联合国海洋法公约　权利内涵

国际法上的紧追权分为陆地上的紧追权、海洋上的紧追权和空中紧追权。

国际海洋法上的海上紧追权是指，沿海国主管当局有充分理由认为外国船舶违反该国法律和规章时，可对该外国船舶进行紧追，这项权利在国际法上叫做紧追权。紧追权是由国家主权引申出来的一项国家属地管辖权，是沿海国管辖权的扩大和延伸，是公海自由的一种例外。紧追权是传统国际法上的一项权利，是一项习惯国际法规则。早在 19 世纪前半期，在英美等国的实践中就已出现了紧追权这一事实，到 1930 年海牙国际法编纂会议时，已成为各国普遍承认的国际实践，如孤独号案（1935 年）。紧追权这一习惯国际法规则直到第一次海洋法会议，才在国际法《公海公约》中明确下来，成为国际法规则，为国际社会所普遍承认和接受。当时仅限于外国船舶在沿海国内水、领海内违反该国法律和规章。国际海洋法中的紧追权已经成为一条国际法规则，不仅拘束 1982 年《联合国海洋法公约》的缔约国，而且以国际习惯法规则的形式拘束非缔约国。自从这种权利在 1958 年日内瓦海洋法会议上最后编纂之后，就几乎没有变化。随着联合国第三次海洋法会议期间国际海洋法的逐渐发展，海上紧追权出现了新的发展，且与行使紧追

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权的地区相联系。

一、《联合国海洋法公约》和紧追权的新发展

紧追权是沿海国拥有对违反其法规并从该国管辖范围内的海域向公海行驶的外国船舶进行追逐的权利。沿海国行使紧追权应遵循以下规则：1. 紧追行为只能由军舰、军用飞机或得到正式授权且有清楚可识别标志的政府船舶或飞机从事；2. 紧追可以开始于一国内水、领海、毗连区或专属经济区；3. 紧追应在被紧追船舶的视听范围内发出视觉或听觉的停止信号后才可开始；4. 紧追可以追入公海中继续进行，直至追上并依法采取措施，但必须是连续不断的；5. 紧追权在被紧追船舶进入其本国或第三国领海时立即终止。

依据国际海洋法的规定，从实质内容和法律依据看，海上紧追权实际上是国家主权引申出来的一项属地管辖权，是沿海国管辖权的扩大和向外延伸。沿海国行使的是国家主权，是司法权，是紧追、登临、检查，拿捕等执行权，沿海国所行使的权利符合国际法的国内法律和规章。沿海国的权利具体包括以下几个方面：1. 国家主权所引申出来的一项属地管辖权（领土主权的行使）；2.《联合国海洋法公约》所赋予沿海国在其专属经济区和大陆架这一新区域内的专属管辖权（二项主权权利三项专属管辖权）；3. 国际法所赋予各国的普遍管辖权（公海上）；4. 这是沿海国管辖权的扩大和延伸，是公海自由的一种例外。

《联合国海洋法公约》第 111 条明确规定了紧追权适用条件：[1]

> 1. 沿海国主管当局有充分理由认为外国船舶违反该国法律和规章时，可对该外国船舶进行紧追。此项追逐须在外国船舶或其小艇之一在追逐国的内水、群岛水域、领海或毗连区内时开始，而且只有追逐未曾中断，才可在领海或毗连区外继续进行。当外国船舶在领海或毗连区内截获停驶命令时，发出命令的船舶并无必要也在领海或毗连区内。如果外国船舶是在第 33 条所规定的毗连区内，追逐只有在设立该区所保护的权利遭到侵犯的情形下才可进行。
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> 2. 对于在专属经济区内或大陆架上，包括大陆架上设施周围的安全地带内，违反沿海国按照本公约适用于专属经济区或大陆架包括这种安全地带的法律和规章的行为，应比照适用紧追权。
>
> 3. 紧追权在被追逐的船舶进入其本国领海或第三国领海时立即终止。
>
> 4. 除非追逐的船舶以可用的实际方法认定被追逐的船舶或其小艇之一或

1 《联合国海洋法公约》（汉英），北京：海洋出版社 1996 年版，第 52 页。

作为一队进行活动而以被追逐的船舶为母船的其他船艇是在领海范围内，或者，根据情况，在毗连区或专属经济区内或在大陆架上，紧追不得认为已经开始。追逐只有在外国船舶视听所及的距离内发出视觉或听觉的停驶信号后，才可开始。

5. 紧追权只可由军舰、军用飞机或其他有清楚标志可以识别的为政府服务并经授权紧追的船舶或飞机行使。

6. 在飞机进行紧追时：

⑷ 应比照适用第 1 至第 4 款的规定；

⑸ 发出停驶命令的飞机，除非其本身能逮捕该船舶，否则须其本身积极追逐船舶直至其所召唤的沿海国船舶或另一飞机前来接替追逐为止。飞机仅发现船舶犯法或有犯法嫌疑，如果该飞机本身或接着无间断地进行追逐的其他飞机或船舶既未命令该船停驶也未进行追逐，则不足以构成在领海以外逮捕的理由。

7. 在一国管辖范围内被逮捕并被押解到该国港口以便主管当局审问的船舶，不得仅以其在航行中由于情况需要而曾被押解通过专属经济区的或公海的一部分为理由而要求释放。

8. 在无正当理由行使紧追权的情况下，在领海以外被命令停驶或被逮捕的船舶，对于可能因此遭受的任何损失或损害应获赔偿。

公约第 111 条第 2 款的规定反映了海上国际法的新发展。在纽约和日内瓦一年内连续举行的两次会议中，在“大陆架”一词后面加上了一句：“包括大陆架上置设周围的安全地带内”。显然第 111 条第 2 款规定的措辞清楚地表明，对于适用 1982 年《联合国海洋法公约》第 76 条第 5 款的国家来说，根据该款，甚至可以从测算领海宽度的基线量起 350 海里以内，或者从连接 2500 公尺深度各点的 2500 公尺等深线 100 海里以内开始紧追。而且，正如可能出现的情况那样，在向违法的船舶发出停止航行的命令时，沿岸国的巡逻船可以在专属经济区 200 海里的限度以外，甚至可以在大陆架 350 海里的最大限度以外紧追。当把 1982 年《联合国海洋法公约》第 111 条第 1 款和第 2 款的某些部分放在一起读时，这一点是很清楚的：“当外国船舶在领海或毗连区内截获停驶命令时，发出命令的船舶并无必要也在领海或毗连区内。”这也同样适用于专属经济区中和大陆架上的违法行为。

关于被追船舶进入其本国或第三国专属经济区时，紧追是否应当停止，公约未作明确规定，按第 111 条第 3 款推定，被追船进入其本国或第三国专属经济区时应视情况而定，一般在不影响其区域经济权利时可继续进行，但考虑国际关系亦可停止。另外，外国船舶在公海上，而使用其小艇到沿海国领海内或该国管辖水域内从事违法活动，沿海国可以逮捕外国船舶，并可行使紧追权。

紧追权实施的区域，特别是关于海上紧追权的实施，各国的实践在联合国第三次海洋法会议期间或之后，有了较大的发展，涉及到大陆架和专属经济区这一新的管辖区域设立后所产生的主权权利和专属管辖权。科技的发展也已经并会继续在实践中对紧追权产生冲击和影响。这些变化都是为了适应沿海国在新的主权权利和专属管辖区域内执法方式的需求和其基础设施的现代化。紧追权作为沿海国执法的主要手段的作用有所增加。

二、渔业事件和紧追权

发生在沿海国的领海、毗连区、专属经济区，特别是专属渔区的违法违规的渔业事件，引发了越来越多的紧追权的行使。其他海事案件的发生也造成紧追权的行使。

自从规定有紧追权的《公海公约》出现之后，在各国出现了几个有关紧追权的案例。这些案件中大部分是发生在沿海国的领水或为保护渔业建立的临接区或毗连区中的渔业违法。随着 200 海里专属经济区的建立或者渔业区向公海扩展 200 海里，渔业事件正如预期的那样成倍增加。有一些案子是对非法走私应纳税货物或麻醉品的船舶和非法移民的船舶进行紧追的。[2]

还应当提到中西非国家环境会议，该会议制定了 1981 年《阿比让公约》，并建议授予对当场发现在参加国管辖水域造成污染的船舶的紧追权。[3] 塞内加尔和冈比亚之间也曾经就专属经济区内的紧追权问题进行过讨论。该地区国家还曾经举行过多边会谈，以在几内亚湾区域渔业委员会内和次区域渔业委员会框架内进行联合监督，也曾就在专属经济区内行使紧追权的条件和情况进行了详细的讨论。[4] 在其他地区，中东部大西洋渔业委员会为了渔业的管理和发展监督 1982 年《联合国海洋法公约》的实施，中东部大西洋渔业委员会下属北部区域渔业委员会决定“建立一个类似于南太平洋论坛渔业机构的地区渔船登记机构”，更为重要的是该委员会通过了“对紧追权联合监督运作的地区公约”。该地区性公约也规定：“被追逐的船舶在其领水内寻求庇护的缔约国，有责任逮捕该船舶，并将其移送实施

2 这种有关走私非法移民的行为过去特别经常发生在古巴和美国或海地和美国之间。然而，用土耳其的小艇或小船从亚洲向东爱琴海的希腊群岛走私非法移民的行为也日渐增加。在几起希腊海岸警备队船舶和土耳其走私者的武装遭遇中，后者为了逃避希腊海岸警备队的追逐，强迫他们运输的非法移民跳入大海，造成了许多人丧生。后来，希腊法庭开始对被逮捕的土耳其走私者判处严厉的监禁刑，常常是入狱 10–17 年。

3 See *International Legal Materials*, 1981, p. 738; See *The Right of Hot Pursuit*, pp. 137~144, Cf. also Gr. Tiamagenis, *International Control of Marine Pollution*, Vol. I, 1980, p. 60.

4 See FAO Fisheries Report, No. 406, Fisheries Management, p. 1376.

紧追的巡逻船”。[5]

渔业事件引起的紧追权案件增多，如“拉姆特号”和“考利万号”案就是一例。1972 年 1 月 17–18 日夜间，在白令海的圣马太岛附近发生了一起严重事件。苏联捕捞加工船“拉姆特”号和拖网渔船“考利万号”被美国海岸警备队破冰船“浮冰号”逮捕。“拉姆特号”是 80 艘鲱鱼船队的旗舰。这两艘船舶被逮捕时位于陡角外 9.4 海里，距离阿拉斯加大陆大约 250 海里。“浮冰号”船员登临这两艘苏联船舶，并带领苏联船返回阿拉斯加。

后来“拉姆特号”的船长声称逮捕是非法的，因为他们当时并没有捕鱼，只是由于恶劣的天气误入美国的 12 海里渔业毗连区。于是他驾驶着船舶，带着美国登临人员驶向外海，美国的“浮冰号”开始紧追。美国“浮冰号”开始紧追后，报告了华盛顿特区的海岸警备队总部。总部许可船长在苏联被追船穿越美国渔业区驶向公海时向被追逐的苏联船舶开枪警告。同时，美国国务院向在华盛顿哥伦比亚特区的苏联大使馆通知了有关逮捕苏联拖网渔船事件的进展。[6]

在追逐过程中，海岸警备队破冰船“浮冰号”船长通过无线电台警告正在逃跑的苏联船“拉姆特号”，命令其“立即停船，否则开火”。然而，在持续两小时的整个追逐过程中，并没有开火。“拉姆特号”上的美国船员在整个追逐过程中从未处于危险之中。最后，苏联指挥官乌拉迪米尔阿特莫夫第二次投降。但“拉姆特号”和“考利万号”都拒绝接受驶往阿留申群岛的阿达克的命令。当美国海岸警备队的“浮冰号”不能逮捕苏联船时，另一艘更大的美国破冰船“凤仙花号”从阿达克驶往现场，将两艘苏联船舶带至美国领土。阿达克的美国法院对这两艘苏联船舶的船长和大副判处罚金总计 25 万美金。华盛顿哥伦比亚特区的苏联大使馆借口恶劣的天气条件，或者不可抗力造成的困境，迫使两艘苏联船舶进入美国的 12 海里毗连渔业区。[7] 本案中美国遵守有关行使紧追权的国际法条款是值得赞赏的。美国海岸警备队的船舶在迫使苏联船舶停止航行时，没有滥用国际法允许使用的武力。在本案有关的情况中，苏联船舶在被逮捕后带着一队在船上的美国登临人员逃往公海，美国实施紧追的船舶“浮冰号”为迫使被追逐船舶停驶，根据国际法有权合理使用武力。如果使用武力是合理的，就不能认为美国政府应该承担国际

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5 See The Law of the Sea, Annual Reviews of Ocean Affairs, Law and Policy, Law of the Sea Review, United Nations, 1993, pp. 21~22.

6 在逮捕船舶后通过外交渠道通知船旗国，虽然不是强制性的，但是也是应该做的。1982 年《联合国海洋法公约》第 73 条第 4 段规定：“在逮捕或扣留外国船只的情形下，沿海国应通过适当途径将其所采取的行动及随后所施加的任何处罚迅速通知船旗国。”

7 如果苏联船舶被拦截的时候是在美国的领水，以不可抗力或危难为辩护可能等同于无害通过权。如果这样一个合法辩护是站得住脚的，美国就不能干扰这些船舶的无害通过。见《日内瓦领海和毗连区公约》第 14 条第 3 段和 1982 年《联合国海洋法公约》第 18 条第 2 段。

责任。更不用说美国政府已经立即通知在华盛顿哥伦比亚特区的苏联大使馆，并且随后授权“浮冰号”为了使逃逸船舶停止航行可以适度使用武力。[8]

美国海岸警备队报告的 48 起外国渔业船舶在美国领水或毗连渔业区内非法捕鱼的案件，其中只有 25 起案件中逮捕了船舶。在其他案件中，有的巡逻飞机发现了违反美国渔业法的行为，但是在当时并不能有效地抓获违法船舶，也有几起巡逻飞机发现的违法案件中，逮捕了船舶。1970 年以后，对违法的外国渔船的处罚变得非常严厉。1974 年 3 月 20 日被逮捕的日本渔船“Ebisu 丸第 88 号”受到了最为严厉的处罚：30 万美金。前面所说的苏联船舶“拉姆特号”和“考利万号”，以及 1974 年 2 月 5 日被逮捕的“阿玛特斯茄克号”同样受到严厉的处罚，罚金总计 25 万美金。其原因是它们拒绝服从海岸警备队的命令。

这些变化[9]使得沿海国需要在新的主权和专属管辖区域内加强执行措施，并使其现代化。[10]作为沿海国执行措施中的一项主要手段，紧追权已经有了新的发展。

有一些案子是有关对非法走私应纳税货物或麻醉品的船舶和非法移民的船舶进行紧追的。[11]同样令人吃惊的是，加拿大新斯科舍省高等法院在审理有关紧追权案件[12]时，法官们完全没有提及 1982 年《联合国海洋法公约》。《联合国海洋法公约》处理“紧追权”的第 111 条基本上继续保留了之前的 1958 年《日内瓦公海公约》的规定。它代表了对所有国家都有效的国际法规则，甚至对那些没有签署或

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8 然而，在日本渔船 The Shikoku 号案中，美国海岸警备队船舶克朗代克号击沉了 Shikoku 号，并导致两人丧生。这一次使用武力不是正当合理的，美国政府应当承担国际责任。

9 The Right of Hot Pursuit Especially Under the Geneva Convention on the High Seas, *AHDI*, 1961, pp. 196~224; The Freedom of Navigation: Some Recent Developments, *Shipping, International Monthly Review*, December 1987, p. 27.

10 有关这一点，见 N. M. Poulantzas, Recent Developments in Canada Relating to Enforcement Measures in an Expanded Fisheries Zone, *RHDI*, 1977, pp. 109~119.

11 See *The Right of Hot Pursuit*, pp. 137~144, Cf. also Gr. Timagenis, *International Control of Marine Pollution*, Vo1. I, 1980, p. 60.

12 See R. V. Sunila and Soleyman, *Nova Scotia Supreme Court Appeal Division*, No. I, 2 January 1986, pp. 300~308; No. 5; Supreme Court, Trial Division, 28 January 1986, pp. 308~314; No. 3, 6 February 1986, pp, 315~319; No. 4, 11 February 1986, pp. 319~322; No. 5, 24 March 1986, pp. 322~326, *Nova Scotia Reports* (second series), Vol. 73, cited (1986), 73 N. S. R. (2d) 30; See also the original decision by Judge Glube of 8 August 1985, in C. J. T. D.

批准 1982 年《联合国海洋法公约》的国家也具有习惯法意义上的效力。[13] 人们当然易于理解和同情加拿大当局和加拿大司法机关对加拿大管辖的贩运毒品案件的关心，贩毒已经成为一种主要犯罪和对文明世界国家的长期威胁。[14] 但是国际法应当严格遵守。虽然 1982 年《联合国海洋法公约》和 1958 年《日内瓦公约》相比前进了一步，但仍然没有规定毒品贩运是一项国际罪行（像海盗和奴隶贸易那样），也没有承认在公海上对外国船舶登临和搜查的权利。[15] 它在第 108 条第 1 段中简单地号召各国合作打击非法贩运毒品。在该条第 2 段中，公约规定任何国家如有合理根据认为一艘悬挂其旗帜的船舶从事非法贩运麻醉药品或精神调理物质，可要求其他国家合作，制止这种贩运。

三、国际犯罪和海上紧追权

海上紧追权的最新发展是对新的国际犯罪分子行使紧追。

1. 从中东、亚洲和非洲等地向欧盟国家、北美和澳大利亚用船舶走私非法移民，现在被视为一种国际犯罪。

走私是犯罪，甚至是有组织的国际团伙犯罪，他们每年从非法贸易中赚得数 10 亿美元。仅仅在希腊（藏匿着大约 150 万移民），2001 年，6864 名外国人被海岸警备队逮捕，这也只是进入希腊的非法移民的一小部分，137 名走私者被逮捕，绝大多数是土耳其人。对希腊来说，穆斯林移民的非法人境已经成为安全威胁。

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13 See M. L. Mash ed., *Digest of United States Practice in International Law*, Washington, D. C.: Department of State. 近来美国督促加勒比海国家加强合作打击贩运毒品。按照美国政府的说法，走私到美国的毒品 40％来自加勒比海国家。1996 年 11 月 17 日的 *BBC News Bulletin* 称，最近在巴巴多斯举行的加勒比共同体会议上，美国要求这些国家允许美国海岸警备队和其他美国政府船只在他们的领海中继续紧追贩运毒品的外国船舶。据 BBC 报道，牙买加和巴巴多斯拒绝授予美国政府这样的权利。根据其他让出这权力的加勒比海国家过去的经验，美国当局会滥用这种权利。在船旗国一方的几次抗议之后，美国政府正在考虑它在公海上单方登临和逮捕向美国贩运毒品的外国船舶的立场。See, e.g. the case of United States v. Gonzalez, 7 76F 2d 931, U. S. Court of Appeals, 11th Cir., 1 November 1985. 美国政府借助《公海大麻法案》（美国国会于 1981 年制定）寻求对公海上的外国船舶的单方域外管辖。1986 年《海上毒品法实施法案》是《公海大麻法案》的修订版本，它要求外国同意美国登临公海上的外国船舶。有关加拿大和美国的域外刑事管辖权，见 see N. M. Poulantzas, *Extraterritorial Criminal Jurisdiction: The Canadian Experience, Revue de droit international*, No. 4, Geneva, 1982, pp. 262~272.

14 最近，德国司法部门官员、英国政府官员和法国政府谴责 Mrs. Citer（土耳其外交部部长、前首相）正在积极卷入和支持向这几个国家和其他欧洲国家以及美国贩卖土耳其麻醉品。See inter alia, *Kathimerini, Athens*, 28 January 1977; *The Ottawa Citizen*, 6 July 1977; etc.

15 有关沿海国对外国船舶“无害”通过其领海期间的刑事管辖权（在贩运毒品的情况下），见 Article 19(d) of the Geneva Convention on the Territorial Sea and the Contiguous Zone (1958) and Article 27(d) of the UNCLOS (1982).

土耳其拒绝接回这些非法移民，虽然这两个国家已经签署了一份特别备忘录。希腊、意大利和法国之间也签署了相似的协定，数以千计取道希腊秘密进入意大利和法国的非法移民返回希腊。1996 年 4 月，土耳其和希腊之间发生了一起严重的外交事件，一艘希腊巡逻船（在紧追中）向一艘据信是运送伊朗难民进人希腊的土耳其船开火。土耳其提出抗议，雅典指责安卡拉“对走私者视而不见，保护奴隶贸易”。[16] 1997 年 3 月 29 日，美国批评意大利政府对阿尔巴尼亚进行海上封锁。意大利答复说该海上封锁是根据和阿尔巴尼亚之间的协定建立的，目的是“阻止从阿尔巴尼亚到意大利海岸的非法移民”。[17] 现在，几乎每天都出现新的在海上紧追奴隶船的案件，特别是在土耳其西海岸和爱琴海的希腊岛屿之间。[18]

2. 毒品贩运肯定会成为一种国际罪行，虽然 1982 年《联合国海洋法公约》并没有像对海盗和奴隶贸易那样对其做出规定（海盗和奴隶贸易是两种允许在公海上对外国船舶有登临和搜查的权利的罪行）。[19] 然而，1982 年《联合国海洋法公约》第 108 条第 1 段吁请各国合作打击这种犯罪。2002 年 6 月 12 日，美国、西班牙、希腊和法国之间进行了共同的长期合作，使用船舶、飞机和监视卫星，最终登临和逮捕了 100 米长的船舶“胜利者”。该船悬挂柬埔寨国旗，但是由一家名叫“城邦”的希腊公司管理，该公司的基地在希腊的比雷埃夫斯。

3. 在 9•11 之后，美国采取猛烈的措施打击国际恐怖主义。然而，美国政府反对国际恐怖主义的行为大大超出了国际法的规定，特别是在国家主权和囚犯待遇中的人权等方面。近来，美国要求几个欧洲国家，像法国、意大利、西班牙、葡萄牙和挪威等，授权美国海军在其领海内拦截和登临任何被怀疑进行恐怖主义活动的船只，可能还包括对这些船只进行紧追的权利。到目前为止，只有土耳其满足了美国的这种要求。希腊政府合理地拒绝了美国政府这种夸张的要求。[20]

美国政府另一个夸张的要求是所谓的“集装箱恐怖主义”。美国要求所有拥有集装箱码头的国家接受美国的监督员，目的是在集装箱船所载货物离开港口进入美国之前对其进行检查。[21] 这是因为数量巨大的集装箱船进入美国港口，美国当局害怕国际恐怖主义分子通过集装箱船将大规模杀伤性武器运进美国港口，制造一起和纽约双塔倒塌相似，甚至是更大的灾难。这些担忧看起来很不合理，美国政府的要求忽视了有关海港和国家主权的国际法规则。

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16 See *International Herald Tribune*, 28 June 1996.
17 *BBC News Bulletin*, 29 March 1997.
18 See *International Herald Tribune*, 28 June 1996.
19 See R. V. Sunila and Soleyman, *Nova Scotia Supreme Court Appeal Division*, No. I, 2 January 1986, p. 26.
20 See *Eleftherotypia*, 1 June 2002.
21 Cf. also N. M. Poulantzas, *International Terrorism 1970-1980*, Dept. of External Affairs of Canada, Ottawa, 1980, p. 230

四、紧追权适用的范围和对象的发展变化

1. 对于在群岛水域、毗连区、专属经济区内或大陆架上，包括大陆架上设施周围的安全地带内，违反沿海国按照本公约适用于专属经济区或大陆架包括这种安全地带的法律和规章的行为，应比照适用紧追权；

2. 紧追权可以从上述扩大的水域内开始；

3. 紧追权比照适用于飞机、潜水艇及水空两用航行器。

4. 行使紧追权时，应在海洋法公约规定的基础上，扩大适用范围。为扣押海盗船可以在另一国专属经济区，甚至领海进行紧追。但要同时通知沿海国，求得该国协助，并在捕获后交沿海国协商处理；

5. 在海上的国际犯罪，国际刑事案件和非传统安全案件及反恐行动中，扩大紧追权的行使的范围，但要同时通知沿海国，求得该国协助，并在捕获后交沿海国协商处理。

一方面来看，1958 年和 1982 年的 2 个《海洋法公约》都认可沿海国在其内水、领海、毗连区内对有违法行为的外国船舶进行紧追。当执法船开始紧追时，如果被紧追船受到沿海国管辖范围的限制，紧追则是合法的。但是，由于沿海国的管辖水域有不同的法律地位，因此紧追权行使的开始是有区别的：内水和领海水域是沿海国的主权范围，在这个领域内，只要外国船违反沿海国的任何法律、规章即可以从该地进行紧追；如果违反了无害通过制度，可以从违法发生地开始实施紧追；毗连区不是一国的完全主权范围，因此在毗连区内只能对违反海关、移民、卫生和其他安全法规的船舶实施紧追；在专属经济区和大陆架水域内，仅在外国船舶违反了沿海国有关专属经济区和大陆架的符合《联合国海洋法公约》规定的有关法律和规章，如违反专属经济区法、大陆架法、渔业法、环境保护法、人工岛屿和设施及科学研究等规章时，才能对其进行紧追。国际法专家认为，沿海国在专属经济区和大陆架对违反其法律、法规的外国船只进行紧追的这种权力是国家对它的沿海资源管辖的必然结果。一些沿海国家已经对违反其专属经济区法律和规章的行为确认使用紧追权，并且有的国家已经在它的专属经济区内行使了渔业法律赋予的权力。对违反沿海国大陆架，包括对大陆架设施周围安全区的法律和规章的船舶的追逐，即使在宽度可能超过 200 海里专属经济区以外的大陆架上的追逐，同样被 1982 年《联合国海洋法公约》所认可。这种紧追权在保护近海石油设施、防止恐怖力量袭击等方面发挥了重要作用。

可以说，目前紧追权理论的最重要的现代发展是沿海国主张的管辖范围中海洋区域的增加和迅速扩大。大量的沿海国除了宣布其领海以外，还陆续宣布了毗连区、专属经济区和大陆架。根据 1982 年《联合国海洋法公约》第 111 条，沿海

国可以在以上的任何管辖区域内开始紧追。

从另一方面看，之所以要将这个问题单列出来说，就是为了强调，除了在前面提到的区域可以行使紧追权外，还可以在公海上行使紧追权。换句话说，就是在除了被追船船旗国或第三国领海以外的区域，在不损害沿海国家权利的基础上，紧追都可以进行。而且，如果有船旗国或第三国的同意，紧追甚至可以在这些国家的领海内进行。

五、关于使用武力

1958 年《联合国公海公约》第 23 条和 1982 年《联合国海洋法公约》第 111 条关于紧追权的条文中都没有涉及到紧追过程中使用武力的问题。然而十分明显的是，国际法授予了在逮捕违法船中使用武力的权利，因为逮捕嫌疑船的权利是由上述两个国际公约授予的。而且，从原因上来考虑，逮捕没有适当的武力是不能充分实施的;不诉诸于武力，紧追权将可能是无效的法律行为。美国等国家早已认可并使用了这种极端的措施。他们认为，执法船舶或飞机在追逐一艘将要受到扣押的船舶时，如果该船舶不停驶，作为最后手段而使用武力是正当的。

但是，目前国际上在紧追中怎样使用武力以及使用武力的范围是不确切的和有争议的。在紧追事件中，执法国家的船只由于过分滥用武力或者是在无证据情况下使用武力已经导致了仲裁裁决。国际海洋法法庭对在追逐中使用武力问题建议如下:武力的使用必须尽可能地避免。在不可能避免的地方，必须不超过当时情况的合理性与需要性，尽一切努力确保人的生命不受危害。

目前，有的国际法专家认为，如果为了迫使逃跑船舶停驶而有必要使用武力，在开火前必须作出特别的警告。这通常要求执法船舶或飞机首先使用非致命的方法防止船舶逃跑，并且最后要保证任何射击实际上是以逃跑船舶为目标，目的是使该船只丧失逃跑的能力，而不是击沉或针对其船上人员的，要尽量不造成对方人员的伤亡。由此可见，武力没有被禁止使用，但其使用条件是十分严格的。这里还需要考虑的一个相关问题就是，是否必须将逮捕或击沉被追船的事实告诉其船旗国。目前公约和国内法中并没有明确规定必须通知，当然，若有关国家之间的领事协定或其他条约中有约定，则从其约定。但是有的学者主张，出于国际习惯和国家之间的和平共处，还是应该将这一事件通过外交途径通知船旗国。

六、因不当行使紧追权所引起的损害赔偿

不当行使紧追权的赔偿问题实际上是有关国家的国际责任问题，因为紧追权只可由军舰、军用飞机或其他有清楚标志可以识别的为政府服务并经授权紧追的

船舶或飞机行使，是归因于国家的行为。在无正当理由行使紧追权的情况下，在领海以外被命令停驶或被逮捕的船舶，对于可能因此遭受的任何损失或损害应获赔偿。

（一）有关公约规定

有关紧追权的国际法编纂活动并不都对国家在非法使用紧追权后的损失赔偿有所关注。在 1930 年海牙会议的最后决议中，关于紧追权的第 11 条没有提到当国家非法行使紧追权后的国际责任问题。在国际法委员会上，尽管有详细阐述紧追权的条款，但对国际责任问题也没有提及。因此，虽然国际法委员会在第八次会上的报告涉及了这个问题，但 1958 年联合国海洋法会议中，关于紧追权的第 47 条并没有任何一项是关于国家对非法行使紧追权造成的损害承担责任的。

1958 年 4 月 8 日，英国政府建议在第 47 条中增加一项内容：“当船只在公海上因不当行使紧追权被拦阻或逮捕时，可以就因此受到的任何损害或损失要求赔偿。”1958 年 4 月 9 日，以色列也提议在第 47 条第 6 项后面增加第 7 项，即：“第 46 条第 3 项适用紧追权。”第 46 条第 3 项规定如下：“如果嫌疑被证明并不成立，而且船只没有任何所指控的罪名，那么必须对因此受到的任何损害或损失进行赔偿。”1958 年日内瓦《公海公约》第 23 条第 7 款规定：“在无正当理由行使紧追权的情况下，在公海上被命令停驶或被逮捕的船舶，对于可能因此遭受的任何损失或损害应获得赔偿。”而 1982 年《联合国海洋法公约》则在第 111 条第 8 款规定：“在无正当理由行使紧追权的情况下，在领海以外被命令停驶或被逮捕的船舶，对于可能因此通受的任何损失或损害应获赔偿。”

（二）有关法律问题

因不当行使紧追权而提起损害赔偿要求的主体，一般有两类：一是被紧追船舶的所有人及其他受侵害人；二是被紧追船舶的国籍国。

在第一类主体情况下，一般是作为个人或私人实体向行使紧追权的船舶所属国提出损害赔偿要求，这通常需要适用该国的国内法律程序来解决。比如在“拉普鲁文思”号案中，冰岛怀疑法国拖网船“拉普鲁文思”号在其领海内从事非法捕鱼，船长被卫思特曼岛的执行官判高额罚金，同时判令没收船舶及船上的鱼。1929 年 10 月 10 日，冰岛最高法院撤销了上述决定。船舶所有人在雷克雅未克法院提起损害赔偿要求。1932 年 6 月 4 日法院驳回了上述请求，理由如下：冰岛海岸警卫队逮捕该船是依照国际法进行的；由于证据缺乏，船长被宣告无罪。所以法院认为在此案件中没有损害发生。

“伊塔塔”号案中，事件发生后美国国内法院均判被告（“伊塔塔”号）无罪。判决作出后，“伊塔塔”号船主向美国智利赔偿委员会（事件发生之后，根据美国和智利达成的协议成立）提出了损害赔偿请求。委员会最后作出了不利于美国的决定，理由是负责紧追的美国船舶已经进入了智利领海，并且逮捕是发生在“伊塔塔”号未受拦截地进入美国领海之后。委员会最终决定船主可以获得赔偿。

如果在用尽该国所有救济程序后，船舶所有人及其他受侵害人的损害没有得到有效的救济（用尽当地救济原则），其国籍国可以为其提供外交保护，通过外交途径解决其赔偿问题。国家为个人或私人实体遭受的损害向行使紧追权的国家要求赔偿一般需要具备以下条件：

1. 受侵害者应当持续地具有请求国的国籍，这个在外交保护中称为国籍的连续性原则

需要注意的是，如果被紧追的船舶是外国船，但船舶所有人为紧追船所属国国民的话，则不在赔偿范围之内。“孤独”号案清楚地说明了这一点。该案仲裁委员会认为，“孤独”号尽管是一艘在加拿大注册的英国船舶，但事实上却几乎全部由美国公民拥有和控制，并在关键时期经营管理，该船的航行由这些人掌握，船上的货物亦由他们管理和处置。所以在仲裁裁决中拒绝了加拿大代船舶所有人对船货进行赔偿的要求，拒绝的理由是船货所有人是美国公民，而非加拿大公民。但船长和船员多为英国人，他们虽然为一只走私船工作，但不是直接违反美国法律的人，由此造成的非法侵害，美国应当赔偿。最终委员会认为美国应认识其行为的非法性，给该船的船长和船员赔偿 25666.5 美元。在此案中，仲裁委员会实际上将对请求国实施的不当行为与对船舶所有人实施的不当行为区分开来。

2. 用尽当地救济原则

指由于不当行使紧追权遭受损害的受侵害者，应当首先向行使紧追权的船旗国的司法或行政机关提出赔偿要求。如果已经用尽了该国一切有关程序和方法还没有得到有效赔偿，可以由其本国为其提起外交保护，通过外交或法律途径解决，这时原本由个人或私人实体提出的赔偿要求演变为国家之间的问题。解决的方法可以是通过外交途径解决，当然国家同意的情况下，也可以提交国际法庭或仲裁庭通过法律方法解决。

不过在不当行使紧追权引起的赔偿案件中，是否像其他外交保护案件那样必须用尽当地救济原则呢？由于紧追行使不当造成的非法侵害，受侵害的可能不止是船舶所有人、经营人这样的个人或私人实体，作为被紧追船舶的国籍国同样会受到侵害，如果这两者属同一国的话。所以我们经常看到类似“孤独”号这样的案件，被紧追船舶的国籍国可能会因国家受到侵害和本国人受到侵害同时与侵害国进行交涉，解决损害赔偿问题。在“孤独”号案中，仲裁委员会还同时建议美国向英国和加拿大政府道歉，赔偿 25000 美元，作为在公海上击沉悬挂其国旗船舶的一种实质性补偿。不过“孤独”号案中没有涉及对船上法国船员的赔偿问题，因为

英国没有权利为法国人进行外交保护，代其向美国要求赔偿。由此可见，在紧追权的损害赔偿案件中，如果双方国家愿意通过国家代个人或私人实体来解决问题的话，用尽当地救济原则可能就不是一个必需的条件。

3. 干净的手原则

根据一些学者的观点，一国为其国民向另一国家提起赔偿主张的条件是该个体的行为是正当的。在审查与紧追权相联系的国家责任问题时，受侵害者没有不法行为是非常重要的。这种观点认为只有在被紧追船只的所有行为均为合法时，紧追才是违法的，因此受损个体才有权利请求该国籍国进行外交保护。通常，是否违法应当依据紧追船舶所属国国内法或国际法。

实际上，受侵害者没有前科原则是由美国政府在委员们处理著名的“孤独”号案件前提出的。在该案中，美国政府认为由于“孤独”号的非法行为导致加拿大政府没有理由要求赔偿，加拿大政府则认为摆在仲裁委员会面前的程序并不应建立在对该船的道德标准上。委员会在1935年1月5日的最终报告中指出，尽管“孤独”号的活动是非法的，但加拿大政府可以因为悬挂本国船旗船舶被非法击沉而要求美国政府赔偿。

不过此原则是否存在是有疑问的。因为紧追权不当行使是指违反了关于紧追权的有关国内法尤其是国际法规则的行为，并不能以被紧追船舶行为是非法还是合法作为判断的标准。一旦构成不当行使，当作为受侵害者的个人或私人实体用尽当地救济原则都无法获得赔偿时，应可以由其国籍国为其提起外交保护。

在第二类主体情况下，不当行使紧追权应当是对国家造成了损害后果。这又可分为两种情况，一种是不当行使紧追权针对的是国家船舶，这种情况是极其罕见的，因为通常国家船舶是享有豁免权的。另一种情况是针对其他船舶，通常是个人或私人实体的船舶。针对这类船舶不当行使紧追权通常不会发生国家财产的直接损害，也就不会有损害赔偿问题。但是“孤独”号案的裁决被认为确立了由于精神的非物质的损害而对受害国给予实质损害 赔偿的第一个先例：仲裁委员会建议美国向英国加拿大政府道歉，赔偿25000美元，作为在公海上击沉悬挂其国旗船舶的一种实质性补偿。

应当说在不当行使紧追权引起的损害赔偿问题上，首先要解决的一个问题是不当行使紧追权是否确实存在，如果有充分的证据证明不当行为确实存在的话，受侵害者就有权要求不当行使方进行赔偿。在无正当理由行使紧追权的情况下，在领海以外被命令停驶或被逮捕的船舶，对于可能因此遭受的任何损失或损害应获赔偿。

因不当行使紧追权所引起的损害赔偿提交到国际法庭或仲裁委员会求偿时，要区别两种情况：一是因不当行使紧追权对国家财产造成损害；二是因不当行使紧追权对个人或对私人实体造成损害。在第一种情况下，如果有关于因不当行使紧追权造成国家财产损害的证据，该受损害的国家可以立即到国际法庭或国际仲裁

机构寻求赔偿，或者通过外交途径得到补偿。在第二种情况下，要到国际法庭或仲裁机构寻求赔偿，受伤害的个人或私人实体首先要得到其国籍国的支持，因为个人或私人实体不是国际法主体。并且应具有下列条件：(1) 持有连续国籍；(2) 国籍国支持或给予外交保护；(3) 用尽当地救济；(4) 受伤害者没有前科。

为扣押海盗船可以在另一国专属经济区，甚至领海进行紧追。但要同时通知沿海国，求得该国协助，并在捕获后交沿海国协商处理。

七、结　论

国际海洋法中的紧追权已经成为一条国际法规则，不仅拘束 1982 年《联合国海洋法公约》的缔约国，而且以国际习惯法的形式拘束非缔约国。这些变化是随着联合国第三次海洋法会议的召开和《联合国海洋法合约》的生效逐渐出现和发展的。国际海洋法上的紧追权的最近发展主要表现在：

1. 1982 年《联合国海洋法公约》对紧追权的发展和扩大。紧追现在可以从沿海国的毗连区、群岛水域、专属经济区和大陆架的上覆水域开始。

2. 紧追权是沿海国海上执法的主要手段和形式。

3. 发生在沿海国的领海、毗连区、专属经济区，特别是专属渔区的违法违规的渔业事件，引发越来越多的紧追权的行使，其他海事案件的发生也造成紧追权的行使。

4. 国际犯罪、国际刑事案件中紧追权的行使，如在中东、亚洲、非洲、欧洲各国、北美和大洋洲等全球性的走私、贩毒、偷渡、海盗及海上恐怖主义等。

5. 紧追须在被追船进入其本国或第三国领海、群岛水域时终止。

所谓紧追权是指沿海国以什么方式或手段保证其享有的权利和管辖能够得以实施。沿海国的主权权利和管辖权的行使可归纳如下：(1) 沿海国有权制定其专属经济区的法律规章，行使其在专属经济区内的主权权利和管辖权，其他任何国家不得干涉；(2) 在管辖权的行使中，具体的强制执行者是国家机关授权的官员、军舰、军用飞机和其他由政府明确授权的人员或船舶；(3) 管辖权中强制执行的具体内容包括监督、登临、搜查、逮捕、扣留和没收、进行司法程序等；(4) 对一切自然资源的主权权利，对大际架、人工岛屿、设施和结构的专属管辖权，对海洋科学研究，防止污染及航行、飞越、铺设海底电缆和管道的管辖或限制分别予以行使。

对于在群岛水域、毗连区、专属经济区内或在大陆架上，包括大陆架上设施周围的安全地带内，违反沿海国按照本公约适用于专属经济区或大陆架包括这种安全地带的法律和规章的行为，应比照适用紧追权。行使紧追权时，应在海洋法公约规定的基础上，扩大适用范围。为扣押海盗船可以在另一国专属经济区，甚至领海进行紧追。但要同时通知沿海国，求得该国协助，并在捕获后交沿海国协商

处理。在海上的国际犯罪、国际刑事案件和非传统安全案件及反恐行动中，可以扩大紧追权的行使的范围，但要同时通知沿海国，求得该国协助，并在捕获后交沿海国协商处理。

我国是《联合国海洋法公约》的缔约国，是一个海洋大国，对于海上紧追权，《中华人民共和国领海及毗连区法》有明确规定：中华人民共和国有关主管机关有充分理由认为外国船舶违反中华人民共和国法律、法规时，可以对该外国船舶行使紧追权。紧追权由中华人民共和国军用船舶、军用航空器或者中华人民共和国政府授权的执行政府公务的船舶、航空器行使。追逐须在外国船舶或者其小艇之一或者以被追逐的船舶为母船进行活动的其他船艇在中华人民共和国的内水、领海或者毗连区内时开始。如果外国船舶是在中华人民共和国毗连区内，追逐只有在安全、海关、财政、卫生或者入境出境管理的法律、法规规定的权利受到侵犯时方可进行。追逐只要没有中断，可以在中华人民共和国领海或者毗连区外继续进行。在被追逐的船舶进入其本国领海或者第三国领海时，追逐终止。但是，我国在这方面的立法尚不健全，执法力度也尚欠力度，我们应加强对紧追权的调研，完善立法，加大执法力度，以维护我国的主权和海洋权益，维护世界秩序和安宁。

海盗罪及其在我国国内立法中的问题

王 震* 沙云飞**

内容摘要: 海盗行为已经是国际刑法中一种比较严重的犯罪，但是到目前为止，我国国内刑法中尚没有对海盗罪的规定。从战略意义出发，我们很有必要对海盗罪的罪名进行规定，这样不仅有利于打击海盗罪，而且也有利于保护国家利益。

关键字: 海盗罪 私人目的 国内立法

海盗罪是目前国际上非常严重的一种犯罪，也是公认的最古老的国际犯罪之一。我国在国内刑法中还没有对海盗罪的明确规定，而近年来海盗罪的发展已经呈现出了愈演愈烈的趋势，所以从打击犯罪的角度出发，我们还是很有必要对海盗罪进行相应规定的，这样一方面为打击海盗行为提供了更为明确的法律依据，另一方面也对我们国家海洋利益的保护有一定的积极意义，本文将对这些相关问题进行探讨。

一、海盗行为目前的现状

从人类有能力征服海洋开始，已经注定了海洋是犯罪活动的另一个温床。所以从早期的古代希腊海盗开始，海盗行为就一直存在着。目前从全世界来看，海盗行为的发展已经有了较新的趋势，现代海盗活动有这样一些特点:装备越来越先进、手段越来越残忍、其行为越来越集团化和国际化。这就使得海盗的威胁越来越大，因为在先进的武器和严密的组织之下，海盗行为正在造成越来越大的危害。当今世界公认的 5 大海盗横行的恐怖水域包括马六甲海峡、红海与亚丁湾一带、西非海岸、索马里半岛和孟加拉湾沿岸。其中，马六甲海峡更是一个重灾区，发生在这里的海盗袭击事件占到了全球总数的 56%。[1] 由于中国的石油 80% 要通过马

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1 下载于 http://news.sohu.com/s2005/xdhhd.shtml，2006 年 5 月 16 日。

六甲海峡运输，[2] 所以这条航道的海盗猖獗对我国经济发展也造成了巨大的威胁。

近年来也发生了一系列比较恶劣的海盗犯罪。1998 年 9 月，巴拿马籍货船“藤屿”号在马六甲海峡被劫持，16 名船员全部失踪，可能遇害。几个月后，该船以全新面目出现在国际航运界，新的名字、新的船员，有关部门也无能为力。2000 年 2 月的一天，一群全副武装的海盗在马来西亚海域劫获日本油轮“战神”号，17 名韩国和缅甸船员被丢上一艘救生艇，3 天后才被渔民发现获救，该船可能已经被重新油漆和换上新的船名了。2003年 3 月 20 日凌晨，永丰远洋渔业有限公司“福远渔 225 号”渔轮在斯里兰卡海域进行拖网作业时，遭 8 艘海盗船的围劫和炮击而沉没，17 名船员死亡。[3] 2005 年 11 月 5 日清晨，载有 300 多人的美国豪华游轮“精灵”号在印度洋遭到 2 艘海盗快艇的突然袭击，他们用火箭弹助推榴弹和机枪发起袭击，并企图攻上游轮抢劫。船长下令引爆安装在船舷一侧的非致命武器“声弹”震退了众海盗并趁机加速逃离。最终“精灵”号成功脱险，只有 1 名船员受轻伤。[4] 就在最近还发生了一起海盗袭击事件：羊城晚报消息，一艘载有 4 名美国人的游艇于今年 4 月 16 日在也门东部海域遭到了一伙海盗的袭击，但未造成人员伤亡和财产损失。[5]

从这些典型的案例中，我们已经可以看出海盗罪的危害之大及其对国际社会影响之严重。我国是一个海洋大国，有着漫长的海岸线，而且我国石油等重要战略性物资的运输多数都是通过海上进行的，所以采取一些有效的措施对我国利益进行保护是十分必要的，我们在这里之所以探讨海盗罪也是出于这样一种目的。法律上的研究可以使我们更好的以法律武器对海盗行为进行惩罚，后文将会对我国在海盗罪立法上的问题进行相应的探讨。

二、海盗罪的概念和特征

海盗行为，依照其原始和严格的意义，是指一艘私有船舶在公海上以劫夺的意图对于另一艘船舶所作的任何未经授权的暴力行为。[6] 这是国际法上关于海盗罪最初的一个基本含义，与其他的概念相比，这个概念缺乏对于这种犯罪出于私人目的的限制，且在暴力行为的界定上缺乏一定的明确性，所以我们认为我国台湾学者黄异的概念更为贴切一些，他认为：国际习惯法上的海盗是指利用船舶在公海上对其他的船舶或船舶上之人或物，为私人目的，实施掠夺、扣留或其他犯罪行

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2 下载于 http://news.sohu.com/20050804/n226564358.shtml，2006 年 5 月 16 日。
3 下载于 http://news.sol.com.cn/news_msg.asp?id=51535，2006 年 5 月 18 日。
4 下载于 http://news.sol.com.cn/news_msg.asp?id=51509，2006 年 5 月 18 日。
5 下载于 http://www.sun2008.com/news/world/20060417/102213.shtml，2006 年 5 月 18 日。
6 詹宁斯、瓦茨修订，王铁崖等译：《奥本海国际法》（第一卷第二分册），北京：中国大百科全书出版社 1995 年版，第 174 页。

为。[7] 可以说这些都是早期对海盗罪内涵的界定，由于科技手段的限制，最初的海盗罪基本上都是从一艘船舶上对另一艘船舶进行的犯罪，当然这仍然是目前海盗罪的主要表现形式。但是由于形势的发展，从一架飞机上对另一架飞机或船舶进行海盗行为已经成为可能，当然这样的案例还是少数，但从理论上进行一定的界定已经成为必要。所以 1982 年《联合国海洋法公约》中已经明确将飞机也界定为一种可以实施海盗罪的工具。根据《联合国海洋法公约》第 101 条的规定：

> 下列行为中的任何行为构成海盗行为：
>
> ⑷ 私人船舶或私人飞机的船员、机组成员或乘客为私人目的，对下列对象所从事的任何非法的暴力或扣留行为，或任何掠夺行为：
>
> ⑴ 在公海上对另一船舶或飞机，或对另一船舶或飞机上的人或财物；
>
> ⑵ 在任何国家管辖范围以外的地方对船舶、飞机、人或财物；
>
> ⑹ 明知船舶或飞机成为海盗船舶或飞机的事实，而自愿参加其活动的任何行为；
>
> ⑹ 教唆或故意便利 (a) 或 (b) 项所述行为的任何行为。

实施上述的（a）（b）（c）行为也就构成了国际法上的海盗罪。目前国内学者常见的教材基本上都是采用这个定义。[8] 所以本文也采取了这个定义。这个概念对国际法上目前界定为海盗罪的几种情形概括得非常清晰，而且将参与海盗行为以及对海盗行为的教唆和帮助行为都包括了进来，所以这个概念还是比较全面的。下面将对海盗罪的特征进行简要分析，以便对海盗罪有更为深刻的认识。

海盗罪的特征有如下几个方面：

1. 海盗罪的主体是私人船舶或私人飞机的船员、机组成员或乘客。这是最常见的海盗罪的犯罪主体，我们通常见到的案例中这些较为普通的主体占了绝大多数。另外，根据《联合国海洋法公约》第 102 条的规定，军舰、政府船舶或政府飞机由于其船员或机组成员发生叛变并控制该船舶或飞机而从事第 101 条所规定的海盗行为，视同私人船舶或飞机所从事的行为。所以军舰、政府的船舶和飞机必须在同时具备叛变和进行第 101 条规定的海盗行为这 2 个条件之下才能够构成海盗罪，而这时的军舰和政府飞机船舶已经被私人所占有，他们的行为已经是私人行为，此时不能因为军舰、政府的船舶和飞机属于国家就认为这时的海盗行为属于国家行为。

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7 黄异著：《国际海洋法》，台北：渤海堂文化事业有限公司 1992 年版，第 84 页。

8 甘雨沛、高格著：《国际刑法学新体系》，北京：北京大学出版社 2005 年 5 月版，第 263 页；贾宇著：《国际刑法学》，北京：中国政法大学出版社 2004 年 9 月版，第 278 页；张智辉著：《国际刑法通论》，北京：中国政法大学出版社 1999 年版，第 212 页。

2. 海盗罪的主观方面表现为犯罪故意，且犯罪目的是出于私人目的，这种私人目的主要体现为意图抢劫和掠夺另一船只或飞机上的财物。军舰、政府船舶或者政府飞机的船员或飞机组成员，出于政治目的，依照某一团体或政府的命令，在公海上对船舶、飞机及其所载人员或财物实施暴力、截留或掠夺等行为，不构成海盗罪。2006 年 4 月 27 日，我国海南省琼海市的一艘渔船在我国南沙群岛传统渔场正常生产时，遭到一艘外国武装船只的枪击、抢劫，4 名渔民被打死，3 名渔民被打伤，船上财物被洗劫一空。[9] 我们的媒体在报道这一事件时并没有因为表面上符合海盗罪的客观表现就妄下论断称其为海盗行为，而是定义为“南沙群岛海域发生的最恶劣的一次我国渔民被打死打伤事件”。这是很正确的，因为如果该外国武装船是私人船只且只出于私人目的，那么当然的是海盗罪，但是如果是出于国家指示下的政治目的那么就不属于海盗行为了。所以在认定海盗罪时私人目的是一个关键之所在。

但是，如果军舰、政府船舶或政府飞机的船员或飞机组成员发生叛变或起义并控制船舶和飞机，在公海或无管辖区域，为私人目的对另一船舶或飞机或船舶、飞机上的人或财物实施非法的暴力，截留或掠夺行为，则上述人员的行为视同私人的海盗行为，在这种情况下，上述人员的犯罪目的实质上是被拟制为私人目的。[10]

另外，关于海盗罪的故意，在《联合国海洋法公约》第 101 条（a）中的规定很明确就是故意，而且通常都表现为直接的故意；（b）中规定的是参加海盗船舶和飞机的行为，而这个参加的行为要求主观方面为明知，这就要求犯罪人主观上明确知道是海盗船舶和飞机而自愿参加；而在（c）项中规定的是教唆或故意便利（a）（b）项的行为，也就是教唆或故意便利实施直接的掠夺行为或参加海盗船舶和飞机的行为。这也表现为一种故意，是教唆的故意或提供便利条件的故意。

由于当前恐怖主义的猖獗，海上的那些船只、飞机也很可能成为恐怖袭击的目标或工具，如果这样的情况发生的话，该如何去定性？我们认为出于恐怖袭击而进行的夺取船只或飞机的行为由于不再是出于一种私人目的进行的行为，所以在主观上并不符合海盗罪的构成要求，应当将其归入恐怖主义的犯罪。

3. 海盗罪客观方面的表现根据《联合国海洋法公约》的规定有如下几个方面：

（1）行为人对其他船舶或飞机进行了非法的暴力、扣留或掠夺，或对其他船

9 下载于 http://news.qq.com/a/20060501/000670.htm，2006 年 5 月 20 日。

10 张胡：《海盗罪新解——国际法的视角》，载于《云南大学学报（法学版）》2005 年第 6 期。

舶或飞机上的人、财物进行了非法的暴力、扣留或掠夺的行为。当今的海盗已经不再限于对船上人、财物的杀人越货，往往也对船舶或飞机进行扣留转卖来牟取利益，这样的例子我们在前面也提到过（如“藤屿”号事件）。当今海盗进行的这种暴力、扣留或掠夺的行为往往由于现代手段的介入而变得更加的残忍，他们使用枪支弹药及一些重型的武器对船上和飞机上的人员进行残酷的打击，往往造成非常重大的伤亡。

另外根据《联合国海洋法公约》的规定，行为人明知是海盗船舶或飞机而自愿加入的行为也构成海盗罪。这种单纯的加入行为就已经构成犯罪，而不要求必须进行前述的暴力、掠夺或扣留的行为，这也是我们在立法当中应当考虑加以借鉴的。同时对海盗行为的教唆或帮助也构成海盗罪，这也是符合我们国内刑法的共犯的理论的。

（2）行为人的行为对象是其他的船舶和飞机。这就要求行为人必须从一艘船舶或飞机上对另一艘船舶或飞机及其上人和财物进行上述的行为。这就要求同时要有侵害船舶或飞机和被害船舶或飞机存在。而侵害船舶或飞机也就是海盗船舶或飞机，根据《联合国海洋法公约》第 103 条的规定，如果处于主要控制地位的人员意图利用船舶或飞机从事第 101 条所指的各项行为之一，该船舶或飞机视为海盗船舶或飞机。如果该船舶或飞机曾被用以从事任何这种行为，在该船舶或飞机仍在犯有该行为的人员的控制之下时，上述规定同样适用。受到了这些海盗船舶或飞机侵害的船舶飞机就是被害船舶或飞机。确定这个海盗飞机和船舶的概念是十分有意义的，因为各国对于海盗船舶和飞机都有紧追权和登临检查的权利，所以对它们进行明确的定义是有很大的实践价值的。

这里有一个常见的问题就是如果是一艘船舶或飞机上的人员对自身所在的船舶或飞机发起上述的暴力、扣留或劫夺的行为，那么应该如何定性，是否应当依据海盗罪来定性处理。我国的一些学者认为这时应当依照海盗罪来处理。[11] 作者认为这种观点是值得商榷的，因为在此种情形之下，该船舶或飞机的所属国应该根据船旗国管辖的原则，拥有对该行为的管辖权，所以我们认为不应当将这种情况划入海盗行为。但是有一个例外，就是如果事先已经有海盗组织成员的人混上了船舶或飞机，而发起了对其所在的船舶或飞机的攻击，这样的情况就应该定为海盗罪。

（3）海盗罪的发生地点是在公海和任何国家管辖范围之外。按照 1982 年《联合国海洋法公约》第 86 条的规定，公海是指不包括在国家的专属经济区、领海或内水或群岛国的群岛水域内的全部海域。[12] 而“国家管辖范围以外的地方”，有些学者认为“应指南极大陆、公空、临近区、专属经济区及大陆架。质言之，在公海

11 周忠海主编：《国际法》，北京：中国政法大学出版社 2004 年版，第 471~472 页。
12 张智辉著：《国际刑法通论》，北京：中国政法大学出版社 1999 年版，第 212 页。

及各国领域（领土、领海、领空）以外的地方。”[13] 我们认为，这样的界定还是比较准确的，而且也比较便于把握。

但是，随之而来的一个非常现实的问题就是当今世界上一些海盗行为的发生仅仅局限在国家主权管辖的范围之内，例如马六甲海峡。那么，对于像这样并不符合国际刑法上对海盗罪发生在“公海和任何国家管辖范围之外”的要求，而在国家管辖范围内发生的情况该如何对待呢？它是否符合国际刑法上的海盗罪呢？

这些都是十分现实的问题。首先，我们分析一下此种情况是否构成国际刑法上的海盗罪。从理论上说，依照传统的国际刑法上海盗罪的定义，此种情况从发生区域上当然是不符合的。为了处置此种情况，不外乎 2 种选择，或者扩张国际刑法上海盗罪的内涵，将其包容进去；或者是认为这种情况不属于国际刑法上的海盗罪，而依照该国国内刑法进行处理。[14] 我们认为后一种选择是明智的。因为扩张国际刑法上的海盗罪的定义，在操作上是不可行的，想要在各国间达成这样一个共识是非常困难的。另外如果真的将此种情况也归入国际刑法上的海盗罪，各国都可以实施普遍管辖权的话，那么这里的普遍管辖权和国家主权之间难免会发生激烈的冲突，所以将这种情况归入国内刑法管辖是非常明智的。其次，在进行具体管理时则并不限于必须由该主权国家来进行。以马六甲海峡为例，马六甲海峡的防务就是由沿岸国马来西亚、印度尼西亚和新加坡进行共管的，[15] 即使这里的海盗行为是发生在一个国家的管辖范围之内的，也是由这 3 个国家共同进行管理的，这是一个可以借鉴的管理模式。当该主权国家自身力量不足时，可以谋求沿岸国进行共管或者进一步寻求与该地区有相关利益的国家进行一些物质和军事上的帮助，但是为了保证国家主权原则，这样的帮助是否有必要则完全由主权国家来决定。

三、各国的立法及对我国海盗罪立法的建议

目前世界各国关于海盗罪的立法先例主要如下：

加拿大刑法专门规定了海盗罪，并将海盗罪在国际刑法和国内刑法中分开进行规定：

依国际法的海盗罪

第 74 条　(1) 依国际法，任何人为海盗行为，为海盗罪。

13　黄异著：《国际海洋法》，台北：渤海堂文化公司 1992 年版，第 86 页。

14　下载于 http://www.publiclaw-events.com/legalsh/ArticleShow.asp?ArticleID=192，2006 年 5 月 20 日。

15　于坤：《马六甲海峡：安全谁来管？》，载于《当代世界》2006 年第 5 期。

处罚

（2）任何人，于加拿大境内外期间，犯有海盗罪构成可诉罪，处终身监禁。

海盗行为

第 75 条 任何人，于加拿大境内外期间，为下列行为，构成可诉罪，处 14 年以下监禁：

（a）偷盗加拿大船舶；

（b）偷盗、或未经合法许可，从船上扔下、损坏或毁坏加拿大船上之货物、供应品或设备。

（c）于加拿大船舶上，为或意图为反叛之行为，或

（d）唆使他人为（a）、（b）或（c）项述及之行为。[16]

《日本改正刑法草案》第 199 条规定："使用暴行或者胁迫，或者使人陷入意识不明或者其他不能抵抗的状态，强夺航行中的船舶或者航空器，或者肆意支配航运的，处无期或者 6 年以上的惩役。以前项方法，强夺航行中的船舶或者航空器内的财物的，处无期或者 5 年以上的惩役。前 2 项之罪，就第 327 条至第 329 条（强盗致死伤、强盗杀人、强盗强奸）以及第 331 条（未遂）规定的适用，视为强盗罪。"[17]

俄罗斯刑法是这样规定的：

第 227 条 海盗行为

（1）为了攫取他人的财产，使用暴力或以使用暴力相威胁袭击海洋船舶或内河船舶的，处 5 年以上 10 年以下的剥夺自由。

（2）多次实施或使用武器或使用其他物品作为武器实施上述行为的，处 8 年以上 12 年以下的剥夺自由，并处没收财产。

（3）本条第 1 款或第 2 款规定的行为，如果有组织的集团实施或过失致人死亡或造成其他严重后果的，处 10 年以上 15 年以下剥夺自由，并处没收财产。[18]

当然世界各国关于海盗罪的立法有很多，不可能一一列举，这里只是举了几个较为典型的国家。下面将分析这几个国家的立法特点及可以借鉴的地方。

加拿大关于海盗罪的立法是很有特点的，它将国际刑法上的海盗罪与国内刑法上的海盗罪分开规定。加拿大分开规定就使得它的国际刑法上的海盗罪与国内

16 卞建林等译：《加拿大刑事法典》，北京：中国政法大学出版社 1999 年版，第 44~45 页。

17 张明楷译：《日本刑法典》，北京：法律出版社 1998 年版，第 158 页。

18 [俄] 库斯拉托夫、列别捷夫主编，黄道秀译：《俄罗斯联邦刑法典释义（下）》，北京：中国政法大学出版社 2000 年版，第 612 页。

刑法上的海盗罪的构成条件有了很大的不同，构成国际刑法的海盗罪要求私人船舶、飞机为私人目的，而构成国内刑法上的海盗罪则较为宽泛，不要求私人船舶也不要求私人目的，为政治目的也可以构成海盗罪。而且在客观表现上，在国内刑法的规定中偷盗也是行为的一种表现形式，而在国际刑法中的海盗罪则强调暴力、扣留和掠夺，所以还是有比较大的差异的。加拿大刑法中对于海盗罪规定的优势在于能够使其关于国际刑法中的海盗罪的概念与《联合国海洋法公约》中的海盗罪概念接轨，而且又不影响其在国内刑法意义上比较宽泛地适用海盗罪，也利于它保护国内法上的相关法益。

而在日本和俄罗斯的刑法当中都是将海盗行为规定到了一个罪名中，这样可以保持国内刑法上罪名的完整性，保证其刑法的稳定性。同时，由于它们在一个罪名中规定，就等于将国际刑法上的海盗罪直接纳入了国内刑法的规定当中，这样的规定操作起来也更为方便一些。

我国的立法先例并没有将国际刑法中涉及到的犯罪罪名单独规定，而是都与国内刑法归入到一个罪名，也就是采取了日本和俄罗斯的做法，作者认为这样的做法是可取的。所以对海盗罪的规定也可以采取这样的方式。

关于应该把海盗犯罪归入哪一章的问题，学者们的观点还是有很大差异的。有些认为对于海盗罪的规定放在财产犯罪一章中比较合适。因为，海盗罪的本质特征是侵害公海上的船舶和飞机的财产安全，其对人身安全的侵害往往只是其实现侵犯财产目的的方式或随附结果。[19] 有学者建议增订第 236 条之一（海盗罪），（1）驾驶乘坐私人船舶、航空器，在公海或任何国家管辖以外处，对另一船舶、航空器或其上之人员、财务，施以暴力、胁迫、扣留或掠夺者，为海盗罪，处 7 年以上有期徒刑、无期徒刑或者死刑；（2）船机组员或乘客意图为前项行为，而驾驶或指挥航空器、船舶者以海盗罪。（3）因而致人于死者，处死刑，致重伤者，处无期徒刑或者死刑。[20] 也有学者提出将其拟制放入危害公共安全罪一章当中。[21] 我们较为支持后一种观点，尽管海盗罪的直接犯罪目的一般确实是针对财物进行的，但是海盗罪从一开始出现就一直伴随着对人身的赤裸裸的伤害，所以在客观的结果上震撼人们心灵的不仅仅是海盗行为造成的财产损失，更是对不特定或多数人生命和身体的伤害。鉴于海盗罪侵犯的法益是不特定或多数人的生命、身体或者财产，我们认为应当将其划入危害公共安全罪这一章中。

在具体的规定上，我们认为可以参照我国刑法第 120 条组织、领导、参加恐怖组织罪进行概括的规定，而没必要具体地将每个细节都规定出来，这样可以避

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19 郭琪、赵文艳：《国际海盗犯罪的国内刑事立法研究》，载于《广东外语外贸大学学报》2003 年 12 月第 4 期。

20 傅崐成著：《海洋管理的法律问题》，台北：文笙书局 2003 年版，第 402 页。

21 覃珠坚：《中国海盗犯罪的刑法适用》，载于《福建公安高等专科学校学报（社会公共安全研究）》2001 年 3 月第 3 期。

免海盗罪的主客观方面受到私人目的及暴力、扣留和掠夺的限制，而在发生的地点上也不限于在国际刑法中的“公海和各国管辖范围之外”，这样可以更好的保护法益，同时也涵盖了国际刑法上的海盗罪的基本内涵，当有国际刑法意义上的海盗罪出现时仍然可以进行有力的打击。所以我们认为可以以这样的模式进行立法：“从事海盗行为的，处……；积极参加海盗组织的，处……；其他参加海盗组织的，处……。”而前述《联合国海洋法公约》中的第 101 条海盗行为中的（c）项由于已经可以被我国总则共犯理论中的教唆犯和帮助犯所处理，所以这里不必再进行单独的规定。

如果从犯罪构成要件的几个方面来概括，我们认为应该这样来界定几个要件。第一，本罪的犯罪主体是一般主体，既可以是自然人也可以是单位。具体而言主要包括私人船舶或私人飞机的船员、机组成员或乘客，军舰、政府船舶或政府飞机由于其船员或机组成员发生叛变并控制该船舶或飞机实施海盗行为的也构成海盗罪。单位有组织地实施了海盗行为也可以构成本罪，而且从世界上目前海盗罪的发展趋势来看，一些有组织的海盗行为往往是有一些大的集团作为他们行为的后盾，所以才能够发展得如此迅速，所以将单位也作为海盗罪的犯罪主体是十分必要的。这样在我国双罚制的体制之下，可以更为有效的打击海盗行为。第二，本罪的主观方面是故意，既包括直接故意也包括间接故意，过失不能构成本罪。国际刑法上的海盗罪还要求出于“私人目的”，这一点在国内刑法中不宜吸收进来。出于私人目的或政治目的以及其他目的都应该能够构成国内刑法上的海盗罪。这样可以避免我们在打击海盗行为时自缚手脚，能够更为有效地打击海盗犯罪。第三，本罪客观方面的表现在法条中可以概括地规定为从事海盗行为或者是参加海盗组织。进行概括的规定可以赋予海盗行为更为广义的内涵，既包括行为人对其他的船舶或飞机进行了非法的暴力、扣留或掠夺，或对其他船舶或飞机上的人、财物进行了非法的暴力、扣留或掠夺的行为，也包括偷盗船舶、飞机等行为。随着时代的发展变化，本罪客观方面的表现形式也在不断变化。我们在海盗罪犯罪构成要件规定上的一个主导想法就是让其能够尽量的概括，以便我们的立法更能够适应客观形势的发展，也能够具有更大的灵活性。

海盗罪的规定不仅仅是一个完善我国立法的问题，在另外一个方面，也是保护我国海上利益的一个具有战略意义的重大问题。它既可以更为有力地打击海盗犯罪，同时也可以避免其他国家以这样的借口来介入我国周边海域的事务。所以，加强海盗罪的研究，尽快进行相关立法对我国十分必要。

海洋领域非传统安全因素对海洋法律秩序的影响

——以日本构建多边海上安全机制为例

龚迎春 *

内容摘要: 1982 年《联合国海洋法公约》(以下简称“《公约》”) 成立后, 出现了一些《公约》未作任何规定、或仅作了原则性规定的新问题。为此, 一些国家开始摸索新形势下的安全机制模式。针对诸如海盗和海上武装抢劫、海上恐怖活动、大规模杀伤性武器的扩散等非传统安全威胁, 部分国家通过缔结特别条约或修订现有国际条约, 扩大了非船旗国在公海等海域的管辖范围;与此同时, 美、日等国通过本国或国家集团的单方面行动, 对《公约》中未作明确规定的空白部分或仅有原则性规定的部分通过国内法或国家实践进行“填补式”或“具体化”的适用, 促成对其有利的新的制度或秩序的形成。日本在亚洲构建以海上共同执法为最终目标的多边海上安全机制对亚太地区海上秩序的现状可能产生重大的影响。由于国际法并不禁止国家出于自愿、以缔结区域协定或事先授权的方式把属于本国主权管辖的事项委托别国代为行使管辖权, 因此, 海上共同执法行动在法理上具有一定的可行性, 在国家实践中也有一些先例存在。但是, 海上共同执法也暗含着一系列值得研究的国际法问题:如多国共同执法和公海航行自由原则的关系;第三国参加海上共同执法的国际法依据;第三国经沿岸国授权对位于沿岸国领海内的外国船舶行使管辖权和领海无害通过原则的关系等。今后, 本地区的多边海上安全机制的形成及其走向值得密切关注。

关键词: 非传统安全因素　海上维和　多边海上安全机制　海上共同执法

一、海洋领域非传统安全因素的出现

1982 年《联合国海洋法公约》(以下简称“《公约》”)成立至今已经 25 年过去了。在此期间, 出现了《公约》起草阶段尚未出现的、因而《公约》也未作明确规定的

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海洋领域的新问题。例如，油轮数量增多、体积增大，使得国际海峡等国际航道的沿岸国遭受大规模海洋污染的潜在威胁也随之加大，对此，一些沿岸国提出海峡使用国应共同承担维护航道安全、预防油轮污染等负担的要求。[1]

2001 年“9•11”事件之后，美国主导的防止大规模杀伤性武器以及化学武器扩散的安全倡议中有关船舶登临检查的拦截原则的内容，显然与《公约》中有关领海的无害通过原则以及公海、专属经济区的船旗国管辖原则相悖，但由于安全倡议中的措施客观上符合了一些国家对现实安全的需求以及来自美国的压力，因而出现了参加国逐渐增加的趋势。这种在《公约》体系之外另设制度的做法，不可避免地对《公约》船舶管辖的法律制度产生影响。

出于恐怖分子和海盗相结合共同威胁马六甲海峡海上通道安全的担忧和渲染，海峡沿岸国联合域内其他国家展开联合巡逻行动，以杜绝海上强国借机介入海峡防务。上述国家对联合巡逻从拒绝到主动接受、特别是邀请非沿岸国泰国参加，反映了东南亚国家在共同维持海洋安全事务上的一个新动向。

此外，《公约》中海盗行为的发生地点限定于“在公海上或在任何国家管辖范围以外的任何其他地方”（第 101 条），因此，公约第 105 条关于对海盗船舶和海盗飞机各国均有权行使普遍性管辖的规定，并不适用于发生在沿岸国领海内的类似行为。而近年来在发生在印尼、马来西亚等沿岸国领海的、同时又是用于国际航行的海峡中针对外国货轮和船员的绑架乃至杀害、抢劫财物等海上武装抢劫行为并不在《公约》所规定的海盗定义的范畴之内，如何有效打击此类海上犯罪成为沿岸国和海峡使用国面临的新问题。

由于每个国家的国情不同，各自所面临的非传统安全因素和亟待解决的轻重缓急度也各不相同。[2] 在传统安全和非传统安全的界限以及非传统安全因素的范畴等尚不确定的情形下，列举海洋领域非传统安全因素的全部内容几乎是不可能的。但是海洋领域的非传统安全因素应至少具备普遍性和跨国性的特点，海上恐怖活动、海盗和海上武装抢劫、大规模海洋污染、非法海上移民、毒品和武器走私、大规模杀伤性武器和化学武器的扩散等问题都应可列入海洋领域非传统安全因素的清单中。

二、海洋领域非传统安全因素对海洋法律秩序的影响

海洋领域非传统安全因素的出现，对《公约》中有关公海船舶的管辖制度产生了一定的影响，具体来说，公海及专属经济区内适用船旗国管辖的例外事项增多

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1 龚迎春：《马六甲海峡使用国合作义务问题的形成背景及现状分析》，载于《外交评论》2006 年第 1 期。

2 王逸舟：《中国与非传统安全》，载于《国际经济评论》2004 年第 6 期。

了，船旗国管辖原则在一定程度上受到挑战。这种挑战通过两个途径得以体现：一是通过缔结特别条约或修订现有国际条约，扩大了非船旗国在公海等海域的管辖范围。另一个途径是一些海上强国通过本国或国家集团的单方面行动，对《公约》中未作明确规定的空白部分或仅有原则性规定的部分通过国内法或国家实践进行“填补式”或“具体化”的适用，促成对本国有利的新的制度或秩序的形成。

前者如国际海事组织的缔约国通过对《1988 年制止危及海上安全非法行为公约》（以下简称“SUA 条约”）及其议定书的修订案，[3] 使得该修订案的缔约国有权对位于沿岸国领海之外的、运送大规模杀伤性武器和生物、化学武器等国际条约所禁止物资的其他缔约国的船舶行使停船、登临检查等管辖权。修订前的《SUA 条约》只是规定了缔约国对于实施危及海上航行安全罪行的嫌疑人具有诉讼管辖权和不起诉即引渡的义务，而对于船舶本身的管辖仍限于船旗国管辖。但是修订后的《SUA 条约》则创立了缔约国对于其他缔约国船舶实施停船、登船、搜查、询问等管辖权。该公约第 8 条的新增条款规定，对于有上述嫌疑的船舶实施登临检查等措施需获得船旗国的同意，但同时又规定，缔约国的政府船舶在各沿岸国领海之外的海域发现可疑船舶时，有权向该嫌疑船舶主张的国籍国（同时也必须是缔约国）提出确认国籍的请求，如果船旗国在 4 小时内没有做出回应，即可认为该船旗国已经默认同意由请求国行使停船、登船、搜查、询问等管辖权。[4]

后者如美国单方面倡导的《防扩散安全倡议》拦截原则，美国与利比里亚、巴拿马、马绍尔群岛等方便旗国签订的船舶登临检查双边协定的内容在《〈SUA 条约〉及其议定书的 2005 年修正案》中得到反映就是一个典型的例子。[5]《SUA 条约》及其议定书的修订是美国在 2003 年 9 月公布防扩散安全倡议拦截原则声明后，作出的“在必要时以适当的方式努力加强相关的国际法及国际框架”的一个具体行动。

与后者有关的是日本在亚洲构建多边海上安全机制的国家实践。日本在海上共同执法领域的法理探讨和国家实践对亚太地区海上秩序的现状可能产生重大的影响。

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3 IMO Document, LEG/CONF.15/DC/1, 13 October 2005, adopted by the Diplomatic Conference on the Revision of the SUA Treaties, 10–14 October 2005, at http://www.imo.org.

4 该项有关默认同意的条款需缔约国在批准、承认、加入《SUA 条约》修订条款或在此后的任何时候，通过书面通知的方式事先做出接受的承诺，此承诺可随时撤回。

5 具体表现在：《防扩散安全倡议》活动的对象成为《〈SUA 条约〉及其议定书的 2005 年修正案》这一国际条约中规定的犯罪行为、一定条件下缔约国对船旗国船舶行使管辖权、以及 4 小时规则的确立等。

三、日本与多边海上安全机制的构建

近年来，日本的不少学者和政策研究人员主张：日本作为一个海洋国家，应从国家战略的高度发挥日本在政策构想力、指导力和资金力等方面的优势，联合亚太地区的海洋国家和岛国，主导亚太地区的海洋事务以及海洋秩序的建立。[6] 在海上安全领域，日本防卫厅防卫研究所研究人员早在 1996 年就提出多边海上安全机制——海洋维和的战略构想。由于东南亚国家对以日本海上自卫队为参与主体的海洋维和行动持警戒的态度，因此当时对日本的提案未作积极的回应。但是，日本在随后的几年里对海洋维和构想作出了修正：即在构建以日本为主导的多边海上安全机制这一战略目标不变的前提下，通过把“军事力量用于警察目的”，[7] 弱化了海洋维和构想的军事色彩。2000 年以来，日本以执行海上警察任务的海上保安厅 [8] 作为对外合作的主要机关，通过日本国际协力机构和日本财团等半官方和民间机构，以帮助东南亚国家创建海岸警备队并提供人员、技术、设备的援助方式，加强了与东南亚各国在海上安全领域的双边合作，并在此基础之上，促成了以日本为主导的亚洲反海盗多边合作机制的形成。这一机制同时也为最终建立日本主导下的多边海上安全机制奠定了基础、构建了框架、储备了人才。日本出面在亚太地区构建海上多边安全机制的目的还在于“帮助美国填补因政治等因素而无法直接军事介入南海以及马六甲海峡事务而导致的安全保障上的空隙”。[9]

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6 竹田伊佐美：《亚太地区岛国协作：依海而生的亚洲岛国论坛》（亚太地区岛国协作研究项目），载于《东京财团 2003 年度研究报告书》，下载于 http://www.tkfd.or. jp/division/public/asia/pdf/2003shimaguni.pdf，2003 年 10 月 20 日；秋山昌广：《吉田茂与海洋国家日本》，下载于 http://www.sof.or.jp/ocean/newsletter/077/a0l.php，2003 年 10 月 15 日。

7 参见日本防卫厅长官石破茂于 2004 年 6 月 5 日在第三次英国国际战略研究所亚洲安全保障会议上的发言，下载于 http://www.iiss.org/conferences/the-shangri-la-dialogue/2004-speech-archive/second-plenary-shigeru-ishiba，2004 年 8 月 19 日。

8 2000 年，日本海上保安厅的英文名称从 Japanese Maritime Safety Agency 改为 Japan Coast Guard,

9 东京财团、面向新防卫大纲制定的紧急提案委员会：《关于制定新防卫大纲的 18 个提案》，下载于 http://www.tkfd.or.jp/division/research/pr/pdf/2004_08_teigen.pdf，2004 年 8 月 21 日。

（一）海上维和概念的提出

海上维和是日本防卫厅防卫研究所研究人员于 1996 年首次提出的海上安全机制的新概念。1998 年 6 月，日本防卫研究所第一研究室室长高井晋撰文专门介绍了海上维和的含义和行动依据、海上维和的主体、行动的方式和对象以及活动范围、行动的必要性和预期效果、海上维和与建立区域安全保障机制的关系等：[10]

1．海上维和的含义和行动依据。海上维和是指以《公约》为依据，通过区域协定或获得相关国家的事先授权，由区域内国家的海上防卫力量对违反本区域内沿岸国法令的犯罪事实进行搜查和取缔的海上共同执法行动。

2．海上维和的主体、方式和行动对象。亚太地区国家的“海军要员”乘坐由日本或美国提供的护卫舰或飞机在东海、南海、马六甲海峡及周边海域进行巡逻，对有违反《公约》或沿岸国国内法令的嫌疑船舶进行停船、搜查、拿捕等执法行动。但此种海上维和行动必须以区域协定或以事先获得沿岸国的执法权权限转让为前提。

3．海上维和的必要性和任务。该文从 2 个角度论证了海上维和的必要性。首先，《公约》规定了沿岸国在渔业资源的可持续利用和海洋环境保护方面的国际义务。为了履行条约义务，沿岸国有权通过制定国内法和实施有效的执法行动对违法的外国船舶行使停船、搜查、拿捕以及交付司法程序等管辖权。如果沿岸国因法制不完备或执法力量薄弱导致有关海洋环境保护的国际规则或基准未得到适用或者对渔业资源未采取有效措施进行适当的保护和管理，该沿岸国有可能被提起国际诉讼或被付诸国际仲裁，并承担由此造成的损害赔偿责任。另一方面，沿岸国也可能因为与周边国家存在岛屿主权争端使得本国的执法范围不确定，导致沿岸国无法切实履行《公约》规定的义务。对此，作者提出，在有争议的水域由多个国家的海上防卫力量共同参加的海洋维和行动有利于促进区域内的政治和军事稳定，防止南沙群岛等岛屿的主权归属问题和资源利用问题导致周边国家间的武装冲突。由此可见，海洋维和行动的任务不仅限于沿岸国渔业资源和海洋环境的保护，还包括维护区域内海上航路和海上要道的安全与在争议水域的巡逻和执法行动。

4．海上维和与建立区域安全保障机制的关系。海洋维和行动通过各国要员互相搭乘对方的舰船、飞机，并在本国和对方国家的专属经济区内实施停船、搜查、收集违法证据等执法行为，能够增加彼此的连带意识，有利于维系区域内的安全合作机制。为此，应考虑在日本设立国际性的培训中心，对亚太各国派遣的要员

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10 高井晋：《关于 OPK 研究的介绍》，下载于 at http://www.bk.dfma.or.jp/~sec/1998/06/opk.htm，1998 年 9 月 21 日；高井晋：《OPK 与海洋安全保障合作》，载于《NIDSNEWS》2003 年 6 月号。

进行包括通讯、舰船和飞机的操作与养护、搜查方法、海洋环境保护、渔业资源的保护和管理等方面的教育与培训。

日本最初提出的海上维和构想由于其参加主体为区域内各国的海军，行动范围包括沿岸国的专属经济区乃至领海，行动的依据在于区域协定或沿岸国的执法权的权限转让，因而在提出之后遇到“主权壁垒”、东南亚国家“长久以来的对日警戒心”和财政困难等问题，当时并未得到相关国家的积极回应。[11]

（二）日本构建多边海上安全机制的具体步骤

2001 年“9•11”事件的发生以及近年来马六甲海峡周边水域海盗活动的猖獗，使得海上安全问题一时成为各国关心的焦点。2002 年以后，美国主导了包括《集装箱安全倡议》、《防止扩散安全倡议》和《地区海上安全方案》等一系列海上安全倡议，并促成《SUA 公约》及其议定书的修订。但上述安全倡议中，向马六甲海峡派遣军队、直接介入海峡沿岸国防务的《地区海上安全方案》遭到了马六甲海峡沿岸国马来西亚和印尼的明确反对。

在美国的直接军事介入遭拒的同时，日本则另辟蹊径，日本主导下的区域多边海上安全机制正通过下列实施步骤悄然形成。

1. 日本主导下的亚洲反海盗合作机制的形成

1999 年 10 月，载有价值 12 亿日元铝块的日本货船“亚龙卓彩虹”号（船籍国为巴拿马）在马六甲海峡遭遇海盗，货船和货物被劫持，包括日本船长在内的 17 名船员被迫乘坐救生筏在海上漂流了 10 天后被泰国渔民救助。以此事件为契机，从 2000 年起日本通过与东南亚国家在政府和海上警备机关等层面上的合作，初步建立了以日本为主导的亚洲反海盗合作机制。

首先，在政府层面上，2000 年 4 月在日本的倡议之下，包括东盟 10 国和日本、中国、印度、韩国等 17 个国家和地区的海上警备机关和负责海事政策的官员以及船主协会代表参加的“打击海盗及武装劫掠船舶区域会议”在东京召开。此次会议的一个重要成果是通过了《2000 年亚洲海盗对策挑战》。该文件规定会议参加国的海上警备机构对于打击海盗要在“一切可能的范围内”进行海盗情报交流、停船和拿捕措施、技术援助等具体事项上的合作，并召开各国海上警备机关专家会议以讨论具体的实施办法。

此后，日本通过采取和东南亚国家进行意见交流、情报收集、共同训练等措施，积极推进了和这些国家在打击海盗问题上的双边合作。2000 年 9 月，日本政府向菲律宾、马来西亚、新加坡和印尼分别派遣由外务省、运输省以及海上保安厅官员

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11 山田宽：《和东南亚的反恐合作是日本成长的良机》，载于《日本人的力量》第 10 号，下载于 http://www.tkfd.or.jp/publication/reserch/chikaral0_5.shtml，2004 年 7 月 22 日。

共同组成的“海盗对策政府调查团”，就打击海盗领域的区域合作、相关国际会议的召开、日本有意进行合作援助的意向、巡逻舰船的互访和共同演习、专家会议的召开、共同巡逻等事项交换了意见。

经过上述准备工作，2000 年 11 月日本海上保安厅派遣巡逻舰艇访问印度和马来西亚，并和两国分别举行了海盗对策共同演习。此后，日本又于 2001 年的 10 月和 12 月以及 2002 年的 3 月和 8 月，分别和菲律宾、泰国、印尼、文莱举行了海盗对策共同演习。[12]

2001 年 10 月在日本提议之下又召开了“海盗对策亚洲合作会议”。由于日本的最终目标是要建立日本主导下的多边海上安全机制，这次会议的目的就是要把停留在双边合作层面上的反海盗合作提升到多边合作的层面。在这次会议上日本海上保安厅的代表提议：由多个国家的海上警备机构的官员搭乘巡逻艇或飞机，在海盗出没的海域进行共同巡逻。这一提案实际上是前述海洋维和构想的修正版，只不过日本方面的参加主体不再是海上自卫队，而是执行海上警察任务的海上保安厅。2001 年 11 月在文莱举行的东盟 10+3 首脑会议上，日本倡议制订一个法律框架以更加有效地打击海盗、促进区域合作。此后，在日本的主导之下，包括东盟 10 国、中国、韩国、印度、斯里兰卡、柬埔寨在内的 16 个国家参加了该法律框架的起草和制定，并于 2004 年 11 月通过了《亚洲地区反海盗及武装劫船合作协定》。自此，日本主导的亚洲反海盗合作机制通过区域协定的方式固定下来。截至 2006 年 1 月，日本、新加坡、老挝、泰国已经完成了签署《协定》以及缔结《协定》的国内程序，并向《协定》寄存国新加坡政府提交了通知书。此外，柬埔寨、菲律宾和文莱也已经签署了该《协定》，但尚未完成国内程序。《协定》将在新加坡政府接到第 10 个缔约国的通知书后第 90 日开始生效。

2. 协助东南亚国家创建海岸警备队以及人员、技术和设备支援

在推动反海盗多边合作机制的同时，日本继续加强与东南亚各国海上执法机构在具体部门层面上的双边合作和交流，为日本构建更为广泛的多边海上安全机制奠定了基础、构筑了框架、储备了人才。

由于东南亚各国大多存在海上执法能力不足、执法力量分散的问题，因而对于日本提出支援其海上执法能力建设、协助其创建海岸警备队并提供人员、技术以及设备援助的提议持欢迎的态度。从 2001 年起，日本海上保安厅每年都为亚洲各国的海上警备机构人员举办打击海盗、偷渡、武器和毒品走私等海上犯罪的研修，隶属于海上保安厅的海上保安大学从 2001 年 4 月起，接受了来自亚洲 15 个国家和地区的相关部门派遣的留学生。[13] 日本海洋政策研究人员为此还建议日

12 《海盗问题的现状和我国的对策》，下载于 http://www.mofa.go.jp/mofaj/gaiko/pirate/index.html，2004 年 7 月 19 日。

13 《海盗问题的现状和我国的对策》，下载于 http://www.mofa.go.jp/mofaj/gaiko/pirate/index.html，2004 年 7 月 19 日。

本应建立亚洲海岸警备队研究院或类似研修机构，以便为东南亚国家培养更多海上执法人员，普及日本警察文化、统一执法手段、为未来的海上共同执法做好人才储备。[14]

(1) 对菲律宾海岸警卫队的援助

菲律宾海岸警备队成立于 1968 年，隶属于海军。1998 年从海军中分离出来，目前隶属于运输通讯省。从 2002 年起，日本国际协力机构开始实施为期 5 年的菲律宾海上保安人才培训计划，长期派驻 5 名日本海上保安厅官员对菲律宾海上执法人员进行国际法、搜查器材的使用、逮捕以及证据搜查方法等的指导。2004 年 12 月，日本海上保安厅派遣舰船和菲律宾海岸警备队在马尼拉湾举行了海上执法、打击海盗、防治油污的联合训练演习。2006 年 1 月 24 日，在菲律宾和台湾之间的巴塘岛东侧海域，日本和菲律宾进行了两国首次海上搜索救助训练演习。[15]

(2) 对马来西亚设立“海事法令执行厅”的援助

2003 年 7 月日本海上保安厅派遣巡逻舰艇访问马来西亚，并实施了“以海上警备机构人员为对象的乘船研修”。[16] 2004 年，马来西亚决定成立“海上法令执行厅”。日本海上保安厅官员参与了海上法令执行厅的组建工作。2005 年 2 月，800 人规模的海上法令执行厅正式成立后，日本除继续派遣海上保安厅官员进行人员培训之外，日本财团还于 2006 年 4 月 25 日把为海上法令执行厅建造的一艘造价为 8 亿 3000 万日元的海上训练船赠予海上法令执行厅使用。[17]

(3) 对印尼设立海上警察组织“海上治安调整机构”的援助

1998 年以后的印尼新政权开始酝酿设置海上警察组织——海上治安调整机构。2003 年 3 月，日本海上保安厅通过日本国际协力机构向印尼国家开发计划厅派遣 3 名海上保安厅的专家，对印尼即将设置的海上警察组织的体制、装备、设施

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14 东京财团：《亚洲太平洋岛国合作论坛》（亚洲太平洋岛国合作研究项目），载于《2004 年度研究报告》，下载于 http://nippon.zaidan.info/seikabutsu/2004/00312/contents/0010.htm，2004 年 10 月 27 日。

15 东京财团：《亚洲太平洋岛国合作论坛》（亚洲太平洋岛国合作研究项目），载于《2004 年度研究报告》，下载于 http://nippon.zaidan.info/seikabutsu/2004/00312/contents/0010.htm，2004 年 10 月 27 日。

16 《海上保安厅推动的国际合作》，下载于 http://www.kaiho.mlit.go.jp/info/books/report2005/honpen/p114.html，2005 年 12 月 20 日。

17 日本财团：《应建立针对海盗、海上恐怖活动的区域合作》，下载于 http://www.nippon-foundation.or.jp/org/press/05141/051411.html，2006 年 3 月 18 日。

的配备等给与必要的建议。[18] 2004 年 1 月，日本外务大臣町村在访问印尼首都雅加达时表示日本考虑于 2006 年利用政府开发援助预算，向印尼无偿提供两、三艘船体约为 20 米的中型巡逻艇。[19] 限定为 20 米以下的理由是 30 米以上大型巡逻艇的提供有可能和政府开发援助大纲中“实施援助的原则”所规定的“避免用于军事用途和助长国际争端”的要求相抵触。

日本通过对菲律宾、马来西亚、印尼等国现有的和正在组建中的海岸警备队进行人员培训、技术和装备等方面的援助，客观上满足了受援国家在提高海上执法的人力、物力方面的需求。同时，由于援助的途径是通过日本国际协力机构、日本财团以及海上保安厅等机构，因而也更容易为受援国所接受。但是，由于上述东南亚国家的海上保安机构都是从原来的海军等武装力量中分离出来的，日本向上述国家提供包括巡逻艇在内的援助实际上具有隐性的军事援助的色彩。

3. 建立日本主导下的多边海上安全机制，实现区域内海上共同执法

2003 年，东京财团资助的一项研究报告 [20] 对日本正在构建中的多边海上安全机制的步骤和前景作了如下的说明：即通过点、线、面的建设，最终形成一个以日本为主导的多边海上安全机制。所谓的点是指东南亚各国建立的海岸警备队；所谓的线是指日本通过对东南亚各国海上警备机关提供包括巡逻艇、人员培训等援助，把点和点连接起来形成线；所谓面是指通过日本和上述东南亚国家的海上共同执法和巡逻，向对方舰船互派海上警察，使本来只能由沿岸国行使的专属经济区甚至领海内的管辖权和执法活动，通过事先获得相关国家的授权并以共同执法的形式间接参与，最终达到扩大日本海上巡逻和执法范围的目的。

日本处心积虑、从点到面建立亚洲多边海上安全机制的目的显然并不仅限于打击海盗和恐怖主义，而是有着更加深远的战略目标。2004 年 12 月 10 日，日本内阁会议通过了确定今后 10 年日本防卫政策的《新防卫大纲》，其中首次明确提出“应警惕中国的军事现代化和不断扩大海洋活动范围的举动”；此外，日本海洋政策研究人员提出“台湾不应被置于多边海上安全机制之外”、“应活用多边海上安全机制，使之成为日美军事同盟的补充”等观点都在一定程度上说明了日本构建多边海上安全机制的真实意图。

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18 《关于对印度尼西亚设立海岸警备队构想的合作和援助》，下载于 http://www.kaiho.mlit.go.jp/info/kouhou/hl5/k20030312/in-dex.html，2006 年 3 月 21 日。

19 《关于海洋问题的日印尼联合发表》，下载于 http://www.mofa.go.jp/mofaj/area/indonesia/ji_seimei/kh_m.html，2006 年 3 月 21 日。

20 竹田伊佐美：《亚太地区岛国协作：依海而生的亚洲岛国论坛》（亚太地区岛国协作研究项目），载于《东京财团 2003 年度研究报告书》，下载于 http://www.tkfd.or.jp/division/public/asia/pdf/2003shimaguni.pdf，2003 年 10 月 20 日。

四、我国面临的挑战

海洋领域出现的恐怖主义、海盗以及海上武装抢劫、毒品和武器交易、化学武器以及大规模杀伤性武器的扩散、大规模海洋环境污染等非传统安全因素，使得海上执法能力较弱的沿岸国家受到无力切实履行《公约》的条约义务和由此引起的美、日等军事大国欲直接介入沿岸国防卫事务的双重压力。较之美国的直接军事介入，东南亚国家选择接受了日本倡导的“军事力量用于警察目的”的新安全观。

目前，我国海军虽然也开始提出“海洋公共安全”的概念[21]以及构建海上安全体系的设想，[22]但在理论构筑、行动开展、部门配合、财政、技术支持等方面都处于相对滞后的不利局面。在海上执法方面，虽经有关各方呼吁多年，但我国的海上执法力量薄弱、权力分散的局面至今尚未改善；而东南亚各国纷纷建立以日本海上保安厅为蓝本的海上警察组织，并在执法手段、设备、人员等方面全面接受日本警察文化的影响，这一动向对未来亚太地区海上秩序的形成可能产生深远的影响。

值得注意的是，日本提出的共同执法的设想是以不违背《公约》或其他国际法原则为前提的。日本强调共同执法行动必须基于区域协定或获得相关沿岸国家的事先授权。因此，从法理上讲，具备上述任何一个前提的共同执法行动在实际操作上并不违反国际法。因为国际法并不禁止国家出于自愿把本属于该国主权管辖的事项委托别国代为行使管辖权。这样，即使一个船旗国不赞同或没有加入共同执法，当该国的船舶在他国的专属经济区或领海违反沿岸国法律、法令时，也不得不接受经过沿岸国事先授权的共同执法行动的管辖。这种海上共同执法的模式一旦为区域内国家所接受，将会对现存的海上法律制度产生深刻的影响。

例如，可能会出现沿岸国在对违反本国法律、法令的外国船舶行使紧追权时，请求第三国或更多国家的海上执法力量共同执法的多国紧追行动。实际上，多国紧追行动并非没有先例。2003 年 8 月 7 日，澳大利亚从本国的专属经济区内开始了针对非法捕获圆鳕鱼的乌拉圭籍船舶的紧追，时间先后持续 21 天，距离长达 3900 海里。在紧追过程中，在澳大利亚的请求之下，南非和英国的政府船舶也加入了紧追。最终，乘坐英国政府船舶的澳大利亚海关和渔业官员登上 2 艘澳大利

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21 《构建有效的海上安全体系》，载于《光明日报》2006 年 1 月 11 日第 9 版。

22 段廷志、张晓峰：《东亚地缘战略环境与中国海上安全》，载于《当代亚太》2004 年第 4 期，下载于 http://iaps.cass.cn/Bak/ddyt/0404-1.htm，2005 年 11 月 21 日。

亚的小船接近乌拉圭渔船，并对该渔船进行了登临检查等。[23] 另一方面，此类共同执法行动也暗含着一系列国际法问题：如多国共同执法和公海航行自由原则的关系；经沿岸国授权、但本国合法权益并未受到侵害的第三国参加共同执法的国际法依据；第三国在沿岸国的领海经沿岸国授权对第三国船舶行使管辖权和领海无害通过原则的关系等。对此，有必要在今后进行更加细致的法理研究。

综上所述，海洋领域的非传统安全威胁由于具有普遍性和跨国性以及和传统安全威胁相互交织、转化的特点，导致出现了现有的国际海洋法律制度乃至传统的军事同盟无法涵盖的安全空隙。为此，一些国家在维持现有的军事同盟的同时，开始摸索新形势下的安全机制模式。在亚太地区，日本无疑是走在了前面。日本主导下的反海盗多边合作机制在很大程度上是为美国试图建立的亚太地区多边战略联盟提供了雏形，同时也巧妙地回避了可能来自于本地区其他国家的警觉等政治风险。[24] 对于正在形成中的以日美为主导的多边海上安全机制，我国一方面需要在各个渠道的安全对话中继续倡导共同安全、综合安全、协调安全、合作安全等新安全理念；另一方面，应主动参与机制的形成过程，把握本地区海上秩序的走向，防止亚太地区的海上安全机制朝着准军事同盟的方向发展。

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23 此案中，行使紧追权的澳大利亚和参加紧追的英国和南非，以及被紧追渔船的国籍国乌拉圭都是 1982 年生效的《南极海洋生物资源保护公约》的缔约国。Molenaar E. J., Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa and the South Tomi, *The International Journal of Marine and Coastal Law*, Vol. 19, 2004, pp. 20~22.

24 Chris Rahman, Naval Cooperation and Coalition Building in Southeast Asia and the South-west Pacific: Status and Prospects, Working Paper No. 7, Royal Australian Navy, Sea Power Centre and Centre for Maritime Policy, October 2001.

无居民海岛权属问题的立法分析

刘 兰* 李永祺** 任 洁***

内容摘要：无居民海岛蕴藏着极为丰富的资源，是我国国民经济和社会可持续发展的重要基础，其特殊的地理位置对于维护国家领土完整、维护海洋权益具有独特和不可取代的作用。但无居民海岛权属缺乏明确的法律规定，权属不清，造成了开发利用中的秩序混乱、开发利用水平低下、环境与资源破坏严重，使得国家和社会利益受到影响，损害国家权益、威胁国防安全等问题日益突现。因此，加强海岛立法，明确无居民海岛法律地位及其权属，对于维护国家的主权和领土完整，维护国家的国防安全，强化无居民海岛的管理都是十分必要的，具有重要的理论和现实意义。

关键词：无居民海岛 海岛主权 海岛权属 海岛立法

从地理上说，领土是地球上隶属于某个国家主权支配下的特定部分，领土是国家的要素，是国家行使主权的空间和范围，领土和主权是 2 个密切联系和不可分割的概念。国家在其领土上行使主权，领土在国家主权的支配下维护其独立和完整的地位。领土主权就是领土和主权 2 个概念的统一。领土包括领陆、领海、领空和底土。无居民海岛位于领海中的部分，理应是我国领土的一部分。无居民海岛蕴藏着极为丰富的资源，因此，明确其权属，有利于充分实现其价值。本文即是在明确无居民海岛所有权属于国家所有的前提下，提出处理无居民海岛的权属问题的有关建议。

一、我国已颁布的法律没有明确海岛的权属

海岛具有民法意义上物的特征，故海岛的权属属于物权制度的范畴。物权是对物的直接支配权，[1] 是民事主体依法对特定的物进行管领支配并享受物之利益

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1 尹田：《论物权的定义与本质——从一种方法论的角度》，下载于 http://article.chinalawinfo.com/article/user/article_display.asp?ArticlelD=24504，2006 年 3 月 13 日。

的排他性权利。[2]《中华人民共和国物权法》(草案)第2条第3款对物权作了释义:“本法所称的物权,指权利人直接支配特定的物的权利,包括所有权、用益物权和担保物权。”国家所有权是指“作为社会主义条件下的一种所有权形式,是国家对国有财产的占有、使用、收益和处分的权利。本质上是全民所有制在法律上的表现”。[3] 但由于国家是政治组织而不是经济组织,不可能直接经营和利用海岛,为了充分实现海岛的经济价值,客观上就决定了国家必须将其所有的海岛的开发利用交由单位、个人或经济实体经营使用。海岛的权属研究要回答的问题主要是:海岛属于谁,谁是海岛的主人;权利人对海岛享有哪些权利,他人负有怎样的义务;以及怎样保护海岛所有权,侵害者要承担哪些民事责任。简而言之,海岛的权属核心问题在于确认海岛的归属、利用和保护。海岛的归属(权属)是利用和保护的前提。但迄今为止,我国的宪法,以及海洋、土地、矿产、林业、自然保护等等已出台的法律,都没有明确海岛的所有权。

《中华人民共和国宪法》(1982年12月4日全国人民代表大会通过并公布施行,1993年3月29日第八届全国人民代表大会修正)第9条、第10条确立了自然资源属国家所有的原则,但条文中所列的自然资源并没有明确指出包括海洋和海岛。海洋岛屿,大多数人理解属于海洋的一部分,但第9条中却没有明确列举出海洋(应当说是《宪法》存在的明显缺陷)。对于水流是否包括陆地的河流、湖泊和海洋,没有说明。尽管海水是流动的,但一般人认为水流主要是河流,国内外学者都没有人将海洋归在“水流”这一范畴内。至于“滩涂”,它与海岛并非同义词。

如果将海岛理解为已包括在第9条“等自然资源”中,海岛的权属仍然不清晰。因为我国有多种所有制,是属于国有,即全民所有;还是属于集体所有,仍然不明确。也有可能某些无居民海岛属于国家所有,如基线点的岛屿,而某些海岛属于集体所有。我们认为,在较长时间内,没有将海洋(包括海岛)明确列入《宪法》中,是造成海洋、海岛开发无序、无度、无偿的一个重要原因。

除了《宪法》,在《中华人民共和国土地管理法》(1998年)、《中华人民共和国森林法》(1998年)、《中华人民共和国野生动物保护法》(1989年)、《中华人民共和国矿产资源法》(1996年)、《中华人民共和国渔业法》(2000年修正)、《中华人民共和国环境保护法》(1989年)等一系列法律中,都未明确海岛的权属。

《中华人民共和国物权法(草案)》(2005年7月公布征求意见)[4] 调整的是

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2 李开国著:《民法基本问题研究》,北京:法律出版社1997年版,第269页。

3 佟柔主编:《中国民法》,北京:法律出版社1994年版,第249页。

4 全国人大常委会办公厅在关于公布《中华人民共和国物权法(草案)》征求意见的通知中指出,这部法律“是一部明确物的归属,保护物权,充分发挥物的效用,维护社会主义市场经济秩序,维护国家基本经济制度,关系人民群众切身利益的民事基本法律草案”。

有形财产的关系，回答了财产属于谁，权利人对财产享有哪些权利，以及怎样保护物权等问题。关于重要资源的所有权，《物权法》都作了明确的规定。[5]《物权法》（草案）再次明确地规定海域属于国家所有，国务院代表国家行使所有权。但该法与《海域使用管理法》一样，都没有明确海岛的所有权问题。无居民海岛是国家重要的资源，海岛作为特殊的生态系统，被认为是海域的重要组成部分，其所有权应归属国家。因此在《物权法》中应明确海岛属于国家所有，并在此基础上，对海岛的利用作相关规定。

二、我国无居民海岛权属现状

我国无居民海岛的权属，即归谁所有，谁是无居民海岛的主人，是核心问题。因为按法律讲，无居民海岛归谁所有，谁就有使用、处置和收益的基本权能。我国是社会主义国家，生产资料以公有制为主，实行多种经济成分并存，形成了以国家、集体、个人 3 类所有制较为复杂的权利结构，加之社会主义市场经济体制的建立，以及我国已颁发实施的有关资源法律在所有制的规定方面不尽一致，至今对无居民海岛的权属也没有明确的规定。因此，我国沿海无居民海岛的权属情况也较复杂，历史和现实存在的问题较多，不少问题有待深入探讨。

从我国目前的情况看，如按谁说了算为准，目前我国无居民海岛实际上存在着 3 种所有制，即国家所有（全民所有、部队所有）、集体（村）所有，以及个人（个体或以公司名义）所有。

（一）国家所有

根据《海域使用管理法》第 3 条规定“海域属于国家所有，国务院代表国家行使海域所有权”，无居民海岛屹立在大海中，其所有权应属于国家。目前，大多数无居民海岛实际上是在地方政府的管辖下。北方大多数近岸无居民海岛的岛滩以及周围海域已按《海域使用管理法》的有关规定，发放了养殖许可证。多数沿海老百姓，对于远岸岛，以及国家特殊保护和利用的海岛，认为应属于国家所有，由国家管理。

不少驻军海岛属于无居民海岛。军事用岛是为了国防安全，应当首先确保。

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5 第 51 条“矿藏、水流、海域和城市的土地等属于国家所有”。第 52 条“森林、山岭、草原、荒地、滩涂等自然资源，属于国家所有，但法律规定属于集体所有的除外”。第 53 条“农村和城市郊区的土地、野生动植物资源等，法律规定国家所有的，属于国家所有”。第 54 条“矿藏、水流、海域和国家所有的土地、草原等自然资源，由国务院代表国家行使所有权”。

军事用岛应属于国家所有范畴内。目前出现的问题主要是有些海岛驻军撤出后，其岛的处置情况较为复杂。有的海岛，驻军撤出后交给地方政府或委托地方政府管理，如山东省千里岩岛（又名千里岛、千里山，位于南黄海，北纬 36°15'57"，东经 121°23'09"，面积 0.2 平方公里，海拔 90.9 米，距陆地最近点海阳市码头 24.8 海里），2001 年驻岛部队撤出前，与海阳市政府签署协议，委托代管岛上 40 亩的营产和 100 多间营房。但在浙江省舟山市，驻岛部队撤出后，有的委托地方政府代管，有的由部队直接租给公司或个人开发、利用，情况较为复杂。如位于舟山市定海区的凤凰山岛，面积仅 0.09 平方公里，离舟山本岛最近处仅 1 公里，且周围山、海景致优美，在岛上的部队撤出后，浙江欣晖工贸有限公司和宁波华茂房地产有限公司联合投资在岛上开发“凤凰岛假日酒店”，第一期建设投资约 4000 万元（包括码头、海堤、宾馆等，现已开始营业），第二期建设正在进行中，计划 2006 年完成。酒店经理并不清楚该岛的转让手续、转让费用情况，但正在向土地局申请土地证。由于该岛原是驻军岛，根据军事设施不能破坏的原则，岛上 2 个炮台仍然保留。

（二）集体所有

迄今，仍然有不少在海边长期居住的村民，片面地认为靠近村的海岛就是本村的。因此，有些近岸无居民海岛的开发利用，大多是经村委会批准或口头同意的，开发利用大多是在岛滩围池进行海水养殖，或在岛礁和周围海域进行海珍品增养殖活动。比如，青岛市崂山区王哥庄街道办事处的港东村，经村委会领导同意，有几户居民在兔子岛（北纬 36°16'27.3"，东经 120°42'49.6"，面积 0.505 平方公里，离岸 1.62 海里）的岛滩筑池进行鲍（鱼）、海参养殖，以及在岛滩、潮下带增养殖海参。青岛海尔集团已在兔子岛上修建小型码头、植树，拟开辟为海尔集团国际培训中心的休闲度假基地，但因岛滩已被村民占用，养殖户不让他人通过岛滩，海尔集团只好请崂山区政府海洋主管部门出面与港东村协商，聘请山东海事司法鉴定中心对养殖设施、养殖品种的价值进行评估，给村委会和养殖户经济补偿，以取得对整个兔子岛的开发利用权。

再如，舟山市是我国唯一的以群岛设置的地级市，位于浙江省的东北部，坐落在长江口以南，杭州湾外缘的东海海域中。全市辖 2 区 2 县：定海区、普陀区、岱山县和嵊泗县，总面积为 22216 平方公里，其中海域面积 20599.06 平方公里，陆域面积 1256.94 平方公里。全市辖区内大潮平均高潮位以上面积大于或等于 500 平方米的海岛有 1390 个。全市共有无居民海岛 1311 个，占全市岛屿总数的 94.32％。无居民海岛总面积为 52.79 平方公里，占全市陆地面积的 4.2%。其中超过 1 平方公里（100 公顷）的海岛有 4 个，即嵊泗县的徐公岛、岱山县的大西案岛、普陀区的西峰岛和梁横山岛。在无居民海岛中，大西案岛的面积最大，达 2.52

平方公里。其他的无居民海岛面积在 1~100 公顷之间的有 422 个，1 公顷以下的有 865 个。由于舟山市是千岛市，不管是有居民海岛还是无居民海岛，解放后当地政府已按国家土地、林业的有关法律法规，将海岛的土地、林业确权给集体，并颁发了所有权证。如 1982 年岱山县政府颁发的山林所有权证，有县政府的公章、县长签字，明确规定“根据国家政策规定，确认山林……为公社所有，特发给山林所有证，受国家法律保护，任何单位和个人无权侵犯”。土地、山林确权给集体后，大多又进一步承包到户。

（三）个人或公司所有

有些离大陆近且面积小的无居民海岛，由于权属不清，几乎处于无人管理的状态，邻近村民将这些岛屿称为“荒岛”，有的村民在岛上进行小规模农耕或水产增养殖活动，他们大多自认为是“荒岛”的主人。

有些无居民海岛，由于权属不清，有些资金较雄厚的公司便捷足先登进行开发，认为谁先占有，谁就是该岛的主人。比如，位于山东省荣成市崖头镇桑沟湾北侧的五岛（又名斜口岛，北纬 37°06'24"，东经 122°28'42"），是个无居民小岛，面积仅 0.0005 平方公里，最高点海拔 3.4 米，但由于离岸近（仅 0.63 海里），有家公司即登岛进行施工建设，挖掘机、推土机均上了岛。再如福建厦门大兔屿，在 1998 年建了 3 栋别墅，因属于违章建筑，未完工就废弃了。

从以上分析可以看出，由于无居民海岛所有权性质不确定，对相关问题也没有明确有效的政策、措施和办法，造成我国无居民海岛权属性质不清，甚至有些沿海地方政府、单位和个人就认为与本行政区相毗邻的无居民海岛归本地、本单位和个人所有，擅自占用、出让、转让和出租海岛，使得无居民海岛的开发秩序更加混乱。

三、关于无居民海岛权属问题的几点建议

（一）完善我国海洋物权法律制度

海洋是支撑我国经济与社会发展的重要自然资源，包括海域和海岛。其中，《海域使用管理法》建立了我国海域物权管理制度，有居民海岛纳入我国现有城市、乡村体系，适用现有相关物权法律法规，无居民海岛则是近年来才为社会所逐渐重视的一类特殊的自然资源，其所有权性质没有明确的法律规定。鉴于无居民海岛具有很高的国家主权、安全、交通、能源等综合资源价值，并且陆域狭小、土壤稀缺、没有淡水、灾害频繁、海洋属性显著，基本不具备可开发的土地，不能

作为耕作、养殖、畜牧等农地使用，以及其生态的高度脆弱性和基本不可恢复性等特征，无居民海岛不宜纳入农民集体所有范畴，应当根据《宪法》第 9 条“矿藏、水流、森林、山岭、草原、荒地、滩涂等自然资源，都属于国家所有，即全民所有；由法律规定属于集体所有的森林和山岭、草原、荒地、滩涂除外”，将无居民海岛视为独立的资源种类，像山岭、滩涂、草原、荒地等资源一样，在法律规范及法律制度管理中，作为一个专门、独立的资源类型，只是它与上述这些资源不同，其所有权为单一性的，必须归入《宪法》未予明确的其他自然资源即“等自然资源”之列，而归国家所有，[6] 并通过法律建立相对独立完整的物权制度。当前由于无居民海岛权属没有法律规定，随意占有、利用和破坏无居民海岛的现象较多，特别是近年来兴起的“岛主”热潮，许多企业、个人通过多种渠道开发利用无居民海岛，已经在加剧海岛资源浪费、生态破坏，扰乱海岛开发秩序，甚至威胁到国家主权和安全。因此，尽快通过立法建立无居民海岛物权制度，完善我国海洋物权法律体系，已经迫在眉睫。

此外，针对各地海岛差异较大、历史遗留较多的情况，则可以由地方上再制定具体的细则（办法）。在实际应用中，一定要妥善处理老百姓的利益，维护社会的稳定。

无居民海岛归国家所有。但是，对于现实中已经被占用（使用）的无居民海岛，国家如果要收回，也要根据不同情况采取不同的方式：首先要看是无理占用，还是合理占用，有无合法手续。如果纯属私自占用，没有办理任何手续，则应当收回使用权；如果是合理使用，包括已向村委会办了手续，如要收回，则应当按照有关规定给予相应的补偿；如果是几个养殖户合伙开发经营，则可以按照相关规定在交付使用金之后继续使用；有关出台之前归村集体使用的海岛，如开发利用是在保护无居民海岛的基础上进行的，应当列为合法经营（使用）之列。

（二）充分发挥国家海洋主管部门对无居民海岛的综合管理作用

无居民海岛是国有资产，应属于全体人民所有，由国务院代表国家行使所有权。但是，国务院显然不可能代表国家在全国各地具体行使无居民海岛的所有权和使用权，因此，必须明确国务院的具体主管部门和调动沿海省市地方的积极性。党的十六大报告提出：“继续调整国有经济的布局和结构，改革国有资产的管理体制，是深化经济体制改革的重大任务。在坚持国家所有的前提下，充分发挥中央和地方两个积极性。国家要制定法律法规，建立中央政府和地方政府分别代表国家履行出资人职责，享有所有者权益、权利、义务和责任相统一，管资产和管人、

6 蒋承菘、翟勇：《自然资源法律规范的宪法原则》，下载于 http://www.chinalawedu.com/news/2004_7/2/1340484979.htm,2006 年 7 月 20 日。

管事相结合的国有资产管理体制。”

由于无居民海岛具有多种价值，因此国务院涉及无居民海岛资源的管理部门也较多，如海洋、土地、林业、矿产、渔业、交通、旅游、环保等等，其中由海洋行政主管部门实施相对集中的综合管理为最佳选择。其主要理由是：

首先，海岛是海洋的一个有机组成部分，而上世纪六、七十年代，大多数国家对海洋的管理都是以资源利用效益最大化为出发点，管理的模式是以部门为导向，如交通部门管港口、水产部门管渔业、旅游部门管娱乐、化工部门管盐业等等。各个主管部门主要考虑所分管资源的最大利益，部门之间彼此缺乏协调，所依据的学科基础比较单一，有的甚至将对陆地的管理模式简单延伸到海洋。大量事实表明，传统的部门分头管理模式是导致海洋资源利用冲突、环境退化的一个重要原因。进入 90 年代，随着人类对海洋重要性、对海洋生态系统认识的深化，在对海洋管理经验的总结基础上，纷纷提出了对海洋实施综合管理的模式，提出了部门间的综合、不同层次机构的综合（如国家的、省的及地方的）、空间的综合（不同海域）、科学与管理的综合，以及国际间的综合。到 20 世纪末，学术界和管理界又提出了基于生态系统途径的管理。这种模式全面考虑了生物和非生物资源的所有联系，而不是孤立地考虑单个问题。

海岛是海洋生态系统的重要组成部分，而海岛本身又构成了边界较明确、又较完整的独特生态系统，又称海岛生态系统。其结构的基本单元可以分为海域、海陆过渡带和陆域 3 大地理单元，或者分为岛陆、岛滩、岛基和周围海域 4 个组分（亚系统）。海岛生态系统的主要特征以及其物流和能流，主要是受海洋的控制和制约的。因此，海岛的管理需要以海洋科学研究和技术手段为基础，海岛的管理与海洋的管理具有不可分割性。国家海洋局不是单一资源的主管部门，其对海洋的管理具有综合性，由国家海洋局代表国务院具体管理全国无居民海岛，能较好地避免单一资源管理引发的冲突与矛盾，有利于对无居民海岛实行综合的、生态系统的管理。

其次，国务院在“三定”方案中明确由国家海洋局负责海岛的有关工作，近 20 年来该局已经形成比较成熟的海岛管理制度和规范。1988 年至 1996 年，国家海洋局会同有关部门组织开展了全国海岛资源综合调查工作，之后又建立了海岛开发试验区、海岛管理示范区等 3 批海岛试点。1996 年，国家海洋局根据联合国环境与发展大会精神，以及《中国 21 世纪议程——中国 21 世纪人口、环境与发展白皮书》的未来发展战略，制定了《中国海洋 21 世纪议程》。其中第四章“海岛可持续发展”，分别对海岛经济开发、海岛资源和环境保护、无人岛屿的管理和保护，以及海岛基础设施建设和社会发展 4 个领域提出了战略性的发展框架，并明确地提出了海岛保护和利用的基本原则，“为了达到可持续发展的目的，必须加强海岛综合管理。要合理、适度地开发利用海岛资源，避免盲目和破坏性的生产活动；在开发过程中重视生态环境的保护，要特别重视那些在保持生物多样性中能发

挥重要作用的岛屿”。在此基础上，2003 年国家海洋局、民政部和总参谋部联合颁布了《无居民海岛保护与利用管理规定》，开始了我国海岛保护与管理的制度建设，指导和积极地推动沿海地方人大和政府的海岛管理工作。目前，从国家到地方海洋主管部门已经形成了比较成熟的海岛管理制度和规范。

再者，对无居民海岛的管理需要特殊的海上工作条件，如船只 , 导航通讯 , 海上调查、探测、监测、监视仪器和设备，以及熟悉海上工作的技术和管理人员，缺少这些条件是很难对无居民海岛进行有效管理的。目前，这些设备和人员海洋主管部门已经具备。而如果按传统的管理模式对无居民海岛进行多部门管理，需要大量增加设备和人员，将造成国家经济上的浪费，也不利于对无居民海岛实施相对集中的、综合的管理。

（三）充分发挥地方管理无居民海岛的积极性

目前，我国对海洋的管理开始实行国家统一领导下中央与地方分级管理海洋事务的新体制。正如《海域使用管理法》第 7 条规定：“国务院海洋行政主管部门负责全国海域使用的监督管理。沿海县级以上地方人民政府海洋行政主管部门根据授权，负责本行政区毗邻海域使用的监督管理。渔业行政主管部门依照《中华人民共和国渔业法》，对海洋渔业实施监督管理。海事管理机构依照《中华人民共和国海上交通安全法》，对海上交通安全实施监督管理。”第 10 条：“国务院海洋行政主管部门会同国务院有关部门和沿海省、自治区、直辖市人民政府，编制全国海洋功能区划。沿海县级以上地方人民政府海洋行政主管部门会同本级人民政府有关部门，依据上一级海洋功能区划，编制地方海洋功能区划。”第 12 条、第 17 条和第 18 条规定了海洋功能区划实行分级审批。

对无居民海岛的管理应参照《海域使用管理法》的基本精神，实行国家统一领导下中央与地方分级管理海岛事务。海岛已成为我国海洋经济发展新的前沿阵地，而物权制度已从以所有制为中心向以利用为中心发展。从所有权到使用权的进展，涉及到一系列方针、政策和大量的细致工作。地方能管的事尽量下放给地方。有关无居民海岛的管理工作，涉及主权、国家利益、全国性规划、立法、方针、政策、发展战略、标准，组织全国性海岛调查、监测、监视、科研计划，重点保护无居民海岛名录和基线点的确定，以及对地方管理工作的指导等重要职能，应由中央一级管理（有些职能也可授权派出机构，如国家海洋局 3 个分局）；而地方政府主要是按照全国海岛规划编制本地区海岛规划，接受审理非全国重点保护海岛开发利用和保护的申请，对本地区管辖的无居民海岛进行监督、检查，按规定征收海岛使用金，以及按照有关法律所赋予的职责对违反海岛的行为进行处罚等。因此，在立法中也要充分体现地方管理部门的作用，以充分调动其工作的积极性。

海底政治与国际法：巴里·布赞的《海底政治》述评

——兼论国际海底政治的新发展

刘中民* 黎兴亚**

内容摘要：本文介绍了加拿大学者巴里·布赞的《海底政治》的主要内容及研究方法。该书以翔实的史料、历史的方法分析了国际海底制度发生、发展的政治进程，通过海底政治考察经济价值与政治进程的互动关系，以及国家、国际组织的政治行动与国际法律制度的相互作用、相互影响。巴里·布赞的思想对于研究现今的国际海底制度以及海洋法甚至整个国际法制度，都有着重要意义。在评介巴里·布赞思想的基础上，本文对该书出版后 30 年来国际海底制度的新发展进行了论述。

关键词：海底政治 海洋法 大陆架 区域 国际海底制度

从古罗马开始，人们就开始渐渐关注海洋这片蔚蓝色的水域，海洋制度也几经变迁。而在几千年的海洋制度变迁过程中，海底一直沉睡着，几乎从未受到人类社会的注意。当历史的车轮跨入 19 世纪，人类科学技术突飞猛进，海底的重要性日渐显露：在海底铺设电报电缆、近海石油开采，以及海底表面各种结核矿的经济价值都使得这片曾被长时间忽视的区域越来越多地吸引着人们的关注。当经济触角伸向海底时，各国之间围绕海底的政治斗争也就随之展开，其核心和关键在于海底的归属及其相关的利益分配。也正是围绕国际海底制度的斗争及联合国海底委员会的建立导致了整个国际海洋法的深刻变革，并直接导致了联合国第三次海洋法会议的召开和《联合国海洋法公约》的产生。但是，就国际法和国际政治的研究来看，对国际海底制度则鲜有系统的研究。加拿大学者巴里·布赞的《海底

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政治》[1]一书是国际海底制度研究领域最具代表性的著作。

巴里•布赞是加拿大不列颠哥伦比亚大学国际关系研究所研究员，曾参加过联合国三届海洋法会议。在其《海底政治》一书中，他用翔实的史料对海底问题的产生、发展、演变以及海底法的发展和斗争过程进行了系统论述，并以敏锐的洞察力准确地分析预测了其后国际海底形势的发展。在 1976 年巴里完成此书时，围绕海底的较量尚未结束，联合国第三次海洋法会议仍在继续，作为这段历史的记录者与总结者，为后来的研究奠定了坚实的基础。到现在，虽然这本书已经出版 30 年，海底法也又走过了曲折发展的 30 年历程，但海底法的发展并没有完结，如今重温巴里•布赞的思想，借鉴其独特的分析方法对于今天研究海底法以及海洋法甚至整个国际法制度，都不无裨益。

一、《海底政治》的主要内容

《海底政治》一书共十一章。在导言部分，巴里•布赞首先提出了三个问题，即(1)谁掌握海底的所有权，如何控制海底开发和利用，它是怎样发展成为一个国际性问题的？(2)这个问题是如何解决的？(3)对这一问题的解决起决定作用的因素有哪些？通过这三个问题，提出了海底政治研究的主要对象即海底所有权和控制权问题的产生、解决、影响因素。从第一章到第十章，他参考了大量史料，以编年纪事的形式详尽叙述海底问题产生、发展的政治斗争过程以及海底法的演变进程，深入分析了围绕海底进行的国际政治较量的过程。在这一部分，他主要从以下三个方面进行分析:使海底的价值不断提高的经济和技术因素的发展;各国就海底问题采取的行动，尤其是各国对海底区域提出的权利主张;各国际组织就海底问题所采取的行动，特别是着重分析这类行动在促成积极的国际管辖和监督方面的可能性。第十一章也即本书的最后一章是总结、结论部分，根据前面的史料分析，作者得出自己的见解:海底政治的产生在于受经济、技术因素的影响而逐渐成为国际性问题，并体现了经济价值与政治过程的互动;各国行动以及国际组织的行动谋求使海底问题得到解决，其影响因素是十分深刻而又复杂的;海底问题的解决有赖于国际组织发挥其主动性，积极参与解决国际海底事务，并促进组织机构的发展;围绕海底政治产生了各种利益集团和政治结盟，也对海底问题的政治进程、海底法、海洋法的发展产生深刻影响。该书按照时间线索对海底政治进行了如下具体分析和研究:

(一)1945 年以前:海底政治的萌芽

1 [加拿大]巴里•布赞著，时富鑫译:《海底政治》，上海:三联书店 1981 年版。

巴里·布赞指出，提到海底政治的历史，必然要要谈到海洋政治的发展史。在古罗马时期，海洋被视为“共有物”，当时无所谓公海、领海之分，人们认为整个海洋就像空气一样，取之不尽，用之不竭，任何人可以共同利用，但不得占有。到了中世纪，由于商业和航海事业的发展，海洋竞争促使海洋国家对海洋提出主权要求。1493 年，为了确认葡萄牙和西班牙的地理新发现，罗马教皇亚历山大六世颁布谕旨将太平洋上的一条子午线作为葡萄牙和西班牙两国在海洋行使控制权的分界线，此时，古罗马时期认为是共有物的海洋秩序已为海洋分割所代替。海洋的分割妨碍了资本主义的发展，引起霸占海洋与维护海洋自由之间的尖锐斗争。1609 年，被誉为“近代国际法之父”的荷兰法学家格老秀斯发表《海洋自由论》，提出“海洋自由”的主张，他的主张引起代表传统海洋国家利益的英国法学家塞尔顿的反对，掀起了一场“闭海论”与“海洋自由论”的斗争，到 17 世纪，这场斗争终于以确立海洋自由和领海主权的海洋法律秩序而告终，相当于 3 海里左右的距离逐渐成为沿海国管辖权的普遍界限。

在海洋制度的变迁中，海底由于一直是人类活动所无法达到的领域，因此很少受到注意，但随着科技的突飞猛进，人类在海洋的活动逐渐把注意力从海的表面转向海的深处。海洋深度的勘测、海底电报电缆的铺设使得海底的重要性开始显示出来。与此同时，随着海洋科技、捕鱼技术等方面的发展，各国对旧的沿海国管辖权开始表示不满，一些国家开始提出单方面扩大沿海管辖权的主张。在 1930 年的国际法编纂会议上，明显呈现出以维护原有海洋制度的海洋强国及其盟国为一方和要求改变有损其利益的旧制度的弱小国与非海洋国一方的两派对立的情形。由于 1930 年的此次会议未能就领海界限达成一致协议，会后越来越多的国家采取单方面行动，这些行动标志着沿海国单方面扩大管辖权这一漫长过程的开端。对这一时期海底政治的状况，作者只是在第一章中用小量篇幅简单介绍这是海底问题的开始，也是关于海底的科学技术的最初发展及取得的初步成绩，“对海底所作的漫长而又乏味的勘测工作到了十九世纪末已经取得了大量资料，足以证明大陆架是大陆板块的自然延伸。”[2] 这一科技发展的结论为其后各国纷纷对大陆架提出权利主张打下基石。

（二）海底政治发展的第一阶段：1945 年—1958 年[3]

二战结束后，在各沿海国家通过加大领海宽度、改变计量基线、宣布特殊毗连区等各种方式扩大国家海域管辖权时，1945 年 9 月 28 日，美国总统杜鲁门发表《关

2 [加拿大] 巴里·布赞著，时富鑫译：《海底政治》，上海：三联书店 1981 年版，第 12 页。

3 在巴里·布赞《海底政治》一书中，他所指的海底问题既包括大陆架，也包括深海底，并非仅仅指现在意义上的“国际海底区域”。

于大陆架的底土和海底的自然资源的政策的总统公告》，宣称“处于公海下但毗连美国海岸的大陆架的底土和海底的自然资源属于美国，受美国的管辖和控制”，[4] 此声明又一次突破传统的海洋秩序，将各国的注意力引到大陆架上来。此后，关于大陆架的权利主张更多地成为扩大沿海国管辖权的一个重要因素，如墨西哥、危地马拉、伊朗和菲律宾等国都照美国的方式宣布对资源行使职能性管辖权。

伴随着对大陆架提出单方面权利主张的浪潮而来的是许多国家纷纷主张更宽的领海。阿根廷、智利、哥斯达黎加、厄瓜多尔、萨尔瓦多、秘鲁等国家就借此对大陆架提出领土要求，并对大陆架上覆水域主张权利；智利政府宣布对沿海 200 海里海域实行保护和管制；萨尔瓦多更是宣布实行一项完全的200海里领海政策。这些极端的权利主张事实上是在利用海底来争取更加宽阔的捕鱼区。

在单方面行动日渐增多的时候，在较小的地区范围内具有共同海洋政策的国家开始发表联合宣言，围绕海底政治的结盟开始出现。1952 年 8 月，拉美的智利、厄瓜多尔、秘鲁三国发表《圣地亚哥宣言》，声明三国政府“对邻接本国海岸并从该海岸延伸至二百海里的海域，享有完全的主权和管辖权”，[5] 这一宣言成为维护当时最极端的沿海国立场而结成的长期的积极的联盟的基石。但对当时的整个拉美地区来说，由于地理状况不同等原因，拉美国家并未在海洋法问题上达成地区性的一致意见。

对于越来越多的单方面行动，国际社会也作出了积极反应。有鉴于各国海洋立法的飞速发展，1949 年开始，国际法委员会多次研讨了领海、公海和大陆架方面的各种问题，并提出各项海洋法条款草案，为以后的联合国海洋法会议提供了一套可作讨论基础的系统建议。

（三）海底制度的初步建立与破坏：1958 年—1967 年

《海底政治》第二、三章分别阐述了第一、二届联合国海洋法会议的过程和结果，以及会后国际力量的对比使得日内瓦各公约日渐不适应新形势发展的过程。到 1958 年第一届联合国海洋法会议和 1960 年第二次海洋法会议时，海洋技术大大发展，海洋活动日益多样化，如海军技术的研究和发展、海洋科学的研究和近海石油工业的发展。尤其是近海石油工业的发展使人们开始意识到海洋资源的可枯竭性，也使得国际社会逐渐广泛同意沿海国扩大其大陆架资源管辖权。此时，关于领海界限的争论也愈发激烈，在出席联合国海洋法会议的国家中至少有半数希望获得超过 3 海里的海域管辖权。

在 2 次海洋法会议上出现了各种国家集团，有 29 个属于西方集团、10 个属

4 [加拿大] 巴里 • 布赞著，时富鑫译：《海底政治》，上海：三联书店 1981 年版，第 15 页。
5 [加拿大] 巴里 • 布赞著，时富鑫译：《海底政治》，上海：三联书店 1981 年版，第 28 页。

于苏联集团、20 个是拉美国家、9 个是阿拉伯国家，还有 16 个亚洲国家、2 个非洲国家。这些国家从其各自的权利主张出发，形成不同的结盟，一方是极大多数的西方国家，另一方是阿拉伯国家和东欧国家，拉美国家和亚非国家则差不多围绕上述两个集团对半平分。结盟活动导致了两极分化，支配大会的是冷战双方的分歧和海洋国与沿海国的对立，这一局面反映出当时的冷战结盟状况与在这一争议上真正的利益分歧情况。西方发达国家及其属地和盟国出于传统和经济利益坚持领海的窄界限制度，希望为海洋使用者保持最大限度的海洋自由；拉美及阿拉伯各国等发展中国家则希望扩大沿海国对于近海资源和近海活动的控制范围和控制形式。由于冷战、捕鱼和安全等目的，苏联集团也与发展中国家立场一致，希望获得更多的沿海利益，这使得以海洋利益为基础的结盟与以沿海利益为基础的结盟的双方对抗变得势均力敌，冷战对立与海洋利益分歧的交织也使问题愈加复杂化。

1958 年会议产生了四个公约即日内瓦四公约：《领海与毗连区公约》，《公海公约》，《捕鱼与养护生物资源公约》及《大陆架公约》，由于这次会议没能就领海宽度达成一致，1960 年召开了第二次海洋法会议专门研究领海及渔区问题，但因分歧无法弥合，此次会议未达成任何协议。就海底问题来说，1958 年会议确立了大陆架原则，沿海国获得勘探、开发大陆架自然资源的专属权利，“沿海国对大陆架的权利不决定于有效或象征的占领或任何明文公告”。[6] 并对大陆架作出定义：“邻接海岸但在领海范围以外，深度达 200 米或超过此限度而上覆水域的深度容许开采其自然资源的海底区域的海床和底土。”[7] 这一定义采纳了“可开发性”的灵活界限，减少了制度制定的难度，为当时广泛接受，使海底政治在一定时间内得以平静，但“毗连”、“可开发性”等含糊的概念也为后来的制度突破埋下伏笔。

参加 1958 年会议的 86 个国家中，发达国家占多数，发展中的亚非拉国家只有 30 个，日内瓦四公约更多地体现了发达国家的意志。20 世纪 60 年代以后，大量新兴国家的出现使国际力量的对比发生了重大的变化，日内瓦四公约日益不能适应新的形势。加之科技的迅速发展，大陆架 200 米的可开发深度也越来越落后于科技的开发能力，日内瓦四公约中的某些原则和规则难以发挥作用。

民族独立运动的大规模兴起使得发展中国家不断摆脱与前殖民国家的联系，日渐成为一个具有共同利益的集团，77 国集团就成为发展中国家用以与发达国家相抗衡的一大力量；60 年代非洲大量新国家的涌现，非洲统一组织的建立，使得非洲集团在国际政治中的力量逐渐壮大。到 1967 年前，越来越多的发展中国家主张较宽的领海界限，12 海里的立场一改以前被围攻的地位，变得与窄界限立场旗鼓相当。此时，西方发达国家则致力于运用海洋技术和海洋能力，苏联也提高了自己公海捕鱼和海洋研究的能力，树立起海洋大国的地位，并与美国展开一场

6 《大陆架公约》第 2 条。
7 《大陆架公约》第 1 条。

“海洋竞赛”。海洋活动的进展，尤其是近海石油工业的迅猛发展势头再次引发人们对海底的关注，海底结核矿开采前景也引起了公众注意。从 1966 年开始，联合国大会对海底问题日益关注，发展中国家也意识到它们在这一问题上的共同利益，不愿看到少数发达国家利用技术优势来垄断尚未明确为任何人占有或控制的区域内的一大批新的重要资源。种种迹象预示，第二轮围绕海底的政治较量即将开始。

（四）海底政治的第二阶段：1967 年—1976 年[8]

《海底政治》的第四章到第十章讲述了围绕海底的第二轮政治较量的过程。1967 年 8 月 17 日，马耳他大使阿维德•帕多代表马耳他向第 22 届联合国大会提出一项“关于保留现在处于国家管辖范围以外的海域下的海床和洋底作和平用途并利用其资源为人类谋福利的宣言和条约”的提案。帕多提案成为海底政治历史上的一个关键性事件，它使海底问题再一次成为人们注意的中心。他所提出的在各国管辖范围以外的海床和洋底及其资源是人类共同继承财产的重要原则很快得到联合国及大多数国家的支持。同年 12 月，联合国大会通过第 2340 号决议，设立三十五国特别委员会（以下简称“海底特委”）来研究国家管辖范围以外的海床和洋底的和平利用问题。海底特委搜集和整理了大量有关海底问题的背景资料，逐步明确各派分歧点，并力图达成一项关于海底的原则宣言的协议，由于 1968 年联大未能达成一项关于海底的原则宣言，1968 年 12 月，联大第 2467 号 A 决议通过设立一个由 42 名成员组成的常设海底委员会，即“和平利用国家管辖范围以外海床洋底委员会”（以下简称“海底委员会”），基本继续了海底特委的工作。经过海底委员会 2 年草拟原则宣言的努力，各利益集团不断地分化、结合、对抗、妥协，1970 年第 25 届联大通过第 2749 号决议，即《关于各国管辖范围以外海床洋底与下属土壤的原则宣言》，宣言包含了帕多提案中所有最重要的观点，国际海底区域被宣布为共同遗产，各国不得占有，海底收益用于促进发展，该区域应保留用于和平目的并为此建立一个国际制度和机构。

从 1969 年到 1970 年 2 年间，海底问题的政治背景开始发生变化，海底政治与海洋政治中沿海利益与海洋利益的对抗冲突交织起来，就海底制度进行的讨论逐渐扩展为就所有海洋法问题进行广泛讨论。

到 1970 年，由于更多的国家主张宽领海界限，对大陆架的权利要求也越来越多，国际社会达成了更多的划界协议，也出现了更多的划界冲突。与此同时，伴随国际社会展开有关海底问题的大辩论，各国关于此问题的种种结盟开始日渐成

8 事实上，海底政治的磋商到 1976 年并未结束，只是因为《海底政治》一书仅写至此时，本文便依书中内容将时间段先划至此时，至于 1976 年以后的发展在下文中加以介绍。

形。《海底政治》一书中将结盟分为会外结盟、地区性结盟及特定问题结盟等种类。最突出的会外结盟就是发达国家和发展中国家的 77 国集团的两极对立局面，77 国集团要求建立与新的国际政治经济秩序总目标相一致的国际海洋制度，并利用国家数目众多的优势，在表决权上发起对旧的海洋制度的挑战；发达国家此时则利用其经济和技术优势力图维护对之有利的旧海洋制度。但随着海底磋商的深入，仅分析这两派结盟已经无法涵盖所有的相关利益集团，愈到磋商后期，地区性结盟和特定问题的结盟愈显重要。在地区性结盟中，拉美与非洲成为两个重要角色，沿海国集团与内陆国集团则是特定问题结盟中较早形成的独立力量。

由海底问题为先导引发的相关一系列海洋问题，导致整个海洋法问题都被列入联大的议事日程中。1971 年，海底委员会变成一个负责为召开第三届联合国海洋法会议作准备的大型筹备委员会，正式成员也增至 91 国。扩大的海底委员会分成三个工作小组，分别担负研究海底问题、海洋法问题、海洋环保和科研三方面的任务。此时，发达国家在深海底的结核矿的开采工作不断发展，美国矿业界反复向国会提出一个深海底硬矿物资源法案，反应出美国矿业界支持国家对深海底的资源开采拥有管辖权的立场，这一法案遭到发展中国家的强力谴责，引发了一场激烈辩论，但因分歧十分严重，双方没有达成关于开采的全面暂停协议，美国在 1973 年初否决了这个法案，使事态得以暂时平静。这一插曲使继续进行的海底磋商气氛紧张，但在各国有关海底制度和机构问题的提案中显示两派对立的立场仍然很突出。大部分发达国家希望建立一个松散型的国际机构，而发展中国家则认为由于发达国家掌握开发海底的经济、技术优势，希望有一个强有力的国际机构。1971 到 1973 年间，较之僵持不下的海底状况，更广泛的海洋法问题更多地吸引了人们的注意，非洲集团不断强大，成为统一的整体，内陆国与架锁国这两类主要的“地理条件不利国”联合起来，成为对抗沿海国的力量。由于整个海洋问题的政策分歧更加错综复杂，因此在这一问题上起关键作用的更多的是这些地区性结盟或特定问题结盟，200 海里专属经济区就是在这一时期由一个地区性结盟发起从而得到各国广泛认可的。

1973 年 12 月 3 日，第三届联合国海洋法会议在纽约开幕，到 1975 年底《海底政治》一书完稿时，一共举行了三期会议，第 2 期在委内瑞拉的加拉加斯召开，第 3 期在日内瓦召开。在这几期会议中，磋商不断进行，大陆架制度和专属经济区的 200 海里界限最终得到一致认可，然而关于海底制度和机构的分歧仍然相当严重，会议的进展也使人们意识到只有达成一揽子协议，整个海洋法问题才有可能得以解决。

二、《海底政治》一书的主要理论成就：就海底问题分析国际法主体的政治行动与国际法的关系

国家和国际组织是国际法最主要的两大主体，在《海底政治》的结论一章中，巴里 • 布赞对这两大主体的行动在海底政治中所起到的各种作用进行了详细分析，并且提出了关于海底政治相互作用的模式（见下图），这一鲜明的特色及其结论也构成了《海底政治》一书的主要理论成就。

如图所示，二战后受海底技术、捕鱼业发展及各国对资源的需求不断增长等因素影响，海底的经济价值提高，从而引发各国纷纷对大陆架采取单方面权利主张。这种经济价值对国家行动的影响又推动了国际行动。因各国单方面权利主张的增多，促使国际上采取了召开国际法委员会和联合国海洋法会议等行动，1958年的日内瓦四公约便是此次国际行动的一个成果。公约签订之后各国的行动又受到公约的影响，一方面，新的海洋制度引发许多海域争端，在北海、波斯湾、波罗的海、南中国海、爱琴海等海域都出现剧烈程度不一的大陆架划界争端；另一方面，许多新的大陆架划界协议产生，而在《大陆架公约》之后的大陆架划界协议中更多地体现了公约所认可的等距离中间线的划界方法。随着经济、政治的进一步发展，越来越多的国家对《日内瓦四公约》的内容不再满意，公约也无法再对某些海洋权益争议进行有效平衡，由海洋权利争端诱发的国际政治矛盾促使国际社会必须尽快拿出一个总的方案，对海洋问题进行全面彻底的制度安排。

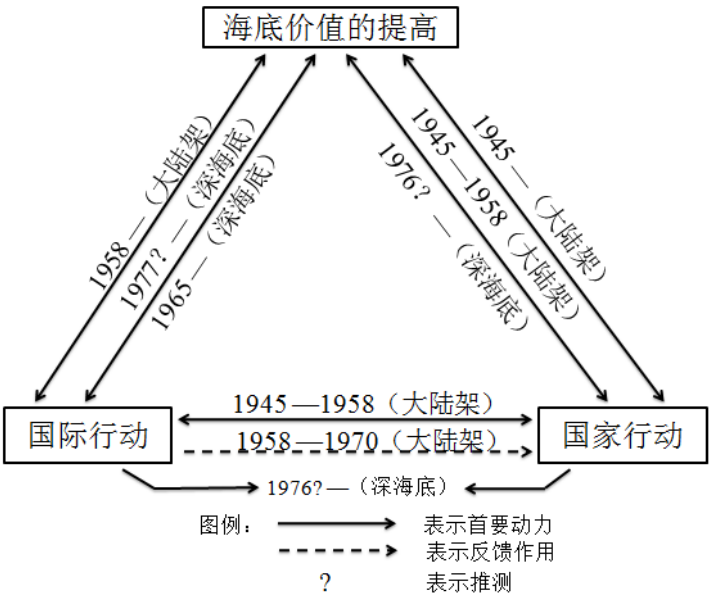

图 1　海底政治相互作用的模式[9]

20 世纪 60 年代中后期，海底经济价值的提高则直接导致了国际行动，此时，深海底的价值尚未在各国引起强烈关注，而国际组织采取了积极主动的态度：

9　[加拿大] 巴里 • 布赞著，时富鑫译：《海底政治》，上海：三联书店 1981 年版，第 319 页。

1967 年帕多在联合国论坛的提案，以及 1970 年的联大决议宣布海底为人类共同继承财产等行动，都为深海底制度的确立奠定了基础。

由于国家、国际组织的政治行动而产生的某一区域的国际法律制度反过来又对这一区域的资源开发产生影响，正如前两次海洋法会议所缔结的公约对之后的海洋政治、海洋经济产生作用一样，第三次海洋法会议的结果同样会对其后的世界海洋秩序发挥重要影响作用。

在对国际社会中经济价值、政治行动与法律规则之间的互动关系进行总体论述之后，巴里•布赞又通过分析此阶段的国际政治磋商过程，得出关于国际磋商、国际组织以及国际法的相关结论。

（一）以海底政治进程为例分析对国际政治磋商进程产生影响的各种因素及其作用

在对磋商的分析中，作者主要是从影响磋商进程、影响大陆架的磋商、影响海底制度和机构三方面来阐释，并就影响磋商的速度、影响各国是否承担国际义务、磋商的具体内容三方面因素展开论述。

就磋商速度来看，延缓进程的因素作用远大于促进因素，海底问题的复杂性、大量国家参与磋商的程序问题、无法进行硬性的限期规定等都使得海底政治磋商成为一个旷日持久的过程。尤其需要注意的是有关议事规则的作用，在经济、政治实力为后盾的国家结盟对峙中，海底问题磋商采取了协商一致的议事规则，这使得磋商进程不得不减慢，而这也正体现出主要由经济、技术实力决定的行动力量的强大影响。虽然发展中国家集团占国家数量中的大多数，但其经济技术实力远不敌少数的发达国家，而建立统一的海洋制度如果缺失了这些强大的少数国家，整个制度也将不能稳定，这种行动力量的强大影响力使得发展中国家即使能够得到大量票数支持，其在国际讲坛上的话语权仍然可能被削弱。

从各国承担义务方面分析出的结论是更多各国对承担国际义务持积极态度。无论是发达国家还是发展中国家，都希望建立起稳定的海洋秩序，以使海洋资源、海底资源充分发挥效益。另外，海上贸易自由流通、避免军事冲突、海洋环境污染等问题的发展也令各国同意对涉及几乎所有国家共同利益的某些国际问题只有在国际一级才能获得解决。且一般来说，某一区域稳定的法律制度总是会使该区域的经济价值得以提升，对此法律制度的期待正是在深海底问题上虽然各国分歧严重但磋商一直没有破裂的原因之一，也正是这种种期待的心态，支撑着旷日持久的海底磋商的继续进行。

磋商的具体内容则是经济价值的提高、国家单方面行动、各国家结盟的政治主张、国际组织的提案等诸多因素共同作用的结果。以上种种因素交织起来，就构筑了国际政治磋商的进程及结论架构，以上分析也隐现出第三次联合国海洋法

会议从争论、僵持、妥协直至最后达成某种结果的整个过程。

（二）探讨国际组织在国际政治中发挥主动作用的经验、教训及意义

从海底政治发展的两个阶段来看，第一阶段主要与大陆架有关，首先是国家单方面权利主张，然后才是国际一级的采取行动，直至通过国际会议达成各国的初步一致，在这一阶段，国际组织主要在某种程度上给各国提供了国际磋商的平台。在第二阶段，有关分歧更多地集中在深海底，这一阶段是国际组织把握先机。1967 年之后在各国尚未就深海底价值提出权利主张时，帕多在联大的提案使得联合国主动反应，从而主导了此阶段海底政治的整个格局。那么这种国际组织采取主动以形成政策的方式在国际实践中到底是否可行呢？巴里认为磋商进程的拖长是回答这一问题最大的未知因素，“如果磋商进展过于缓慢，那么各种各样的因素都可能对磋商发生影响。”[10] 更甚之的是如果进展过于缓慢，各种减缓、破坏作用可能将使整个磋商进程陷于崩溃。但从对国际制度的作用来看，即使国际组织主动行为的作用有限，这些行为也能使某些国家占支配地位的国际制度发生一些渐进的变革。

另外，分析海底政治进程也能看出审慎地计划和组织各种国际行动的意义，在国际政治磋商中，有一些延缓因素是可以通过努力来避免的，只是这种审慎的设计、准备的工作又有可能因国际行动受某些强大国家操纵而削弱其实践意义。但无论如何，国际组织在海底问题上的主动行为及其结果对未来国际组织的发展和各类国际制度的创建都意义非常。

（三）从过程和结果两方面分析海底政治进程对国际法的影响

“国际法主要是国家之间的法律，国家受国际法的拘束，同时又是国际法的制订者。因此，国际法效力的根据应在于国家本身，即在于国家的意志。”[11] 海底政治过程中各国希望达成的一致规则将成为国际法的一部分新内容，那么因沿海国和发展中国家的兴起，海洋法的内容可能会因缔结主体的多元化、利益集团的多重性而跟以前有所不同，在新的海洋秩序中可能将体现出更多主体之间的利益平衡。对此后的其他国际法内容，海洋法的这种新发展也将起到影响、借鉴作用。

从海底政治磋商进程缓慢却一直继续的状况来看，一方面“大多数国家都出

10 [加拿大]巴里•布赞著，时富鑫译：《海底政治》，上海：三联书店 1981 年版，第 347 页。
11 王铁崖主编：《国际法》，北京：法律出版社 1995 年版，第 9 页。

乎意料地坚决承担对国际法的基本义务”，[12] 这种对国际法确信的态度表明貌似脆弱的国际磋商实际上可能具备更强的承受压力的能力，看似分歧四伏、岌岌可危的国际政治进程事实上可能具有出人意料的柔韧度，即使磋商真的破裂也能对国际关系产生不小的影响力。无论第三次联合国海洋法会议的最终结果如何，这次会议都将对国际法产生重大影响。另一方面，从大陆架问题磋商缓慢客观上加强了沿海国的地位来看，国际习惯法在此发挥了重要作用：一项挑战传统的主张提出来，随着时间推移获得越来越多的国家认同，从某种程度来说是这项主张在逐渐取得合法地位。这样两方面分析会使人们即使在经历一次次挑战国际法权威的危机事件之后，仍然坚信国际法的重要作用，同时也会在处理国际关系问题时更加关注类似的国际法创建程序对结果的影响。

“起草国际法的政治过程在最后案文中留下了一些标记”，“这些标记表现为措词含糊的妥协，而且往往就是这一法律施行时的最大困难所在。”[13] 在海底政治第一阶段，日内瓦四公约作为政治进程成果，其本身就打上了当时政治拉锯的烙印，这些含糊妥协之处也成为规则的薄弱环节，其后《大陆架公约》等公约的破坏也正是由这一制度裂隙扩张开来。而第二阶段，在国际磋商过程中存在严重分歧无法调和的问题上，抽象含糊以求各方均能接受的案文内容自然也会在之后的实践中造成实施困难而产生新的矛盾，随着这些矛盾冲突的不断缓和、激化、妥协，国际法也将不断修改、完善、发展。

三、《海底政治》一书出版后海底政治的新发展

《海底政治》一书出版已经 30 年有余，在这 30 年间，第三届联合国海洋法会议早已结束，并通过一部被誉为“综合性的海洋宪章”的《联合国海洋法公约》（以下简称《公约》），缔造了包括国际海底制度在内的国际海洋法律制度，并几经周折终于在 1994 年生效。但是，第三届联合国海洋法会议比巴里 • 布赞在《海底政治》中预计的时间还要长，直到 1982 年，经过了 9 年时间共 11 期会议的磋商，各利益集团终于达成妥协平衡的“一揽子协议”。《公约》在重新规范公海自由等习惯国际法的同时，确立了领海制度、过境通行制度、群岛国制度、专属经济区制度、大陆架制度、国际海底制度及有关海洋环境保护和科研等一系列制度，为海洋建立起一整套完整的法律秩序。

《公约》确立了国际海底区域及其资源为人类的共同继承财产的制度，[14] 应专为和平目而利用。“1. 任何国家不应对‘区域’的任何部分或其资源主张或行使

12 [加拿大] 巴里 • 布赞著，时富鑫译：《海底政治》，上海：三联书店 1981 年版，第 350 页。
13 [加拿大] 巴里 • 布赞著，时富鑫译：《海底政治》，上海：三联书店 1981 年版，第 349 页。
14 《联合国海洋法公约》第 136 条。

主权或主权权利，任何国家或自然人或法人，也不应将‘区域’或其资源的任何部分据为己有。任何这种主权和主权权利的主张或行使，或这种据为己有的行为，均应不予承认。2. 对‘区域’内资源的一切权利属于全人类，由管理局代表全人类行使。这种资源不得让渡。但从‘区域’内回收的矿物，只可按照本部分和管理局的规则、规章和程序予以让渡。3. 任何国家或自然人或法人，除按照本部分外，不应对‘区域’矿物主张、取得或行使权利。否则，对于任何这种权利的主张、取得或行使，应不予承认。”[15]《公约》设立了专门的国际海底管理局对国际海底区域进行控制及资源管理，以“平行开发制”为过渡时期开发“区域”资源的制度。[16]

海底制度的通过克服了种种困难，《公约》关于海底的制度基本定型于 1977 年。但美国及西方一些工业化国家纷纷出台与此制度相对立的国内法，并要求重新审查《公约》草案。因此，在第三届联合国海洋法会议临近结束时，不得不放弃协商一致的原则而采用了表决方式，最终以 130 对 4 票，17 票弃权的压倒性多数通过《公约》，然而这一方式的运用就意味着各利益集团关于海底的分歧仍将继续存在。

由于不满意《公约》的国际海底制度部分，美国、英国、德国等西方国家均未签署《公约》并要求对《公约》海底部分重开谈判。一些发达国家甚至通过缔结小型条约的方式来与《公约》相对抗，推行其深海海底采矿制度，如 1982 年 9 月美、德、英、法缔结《关于深海海底多金属结核的临时措施的协议》，1984 年美、德、法、日等国《关于深海底问题的临时谅解》。鉴于公约的完整性和普遍性、建立国际海底管理局和海洋法法庭的庞大费用负担，以及深海底采矿并不如当初想象中乐观的市场形势等问题，发展中国家被迫作出让步。1989 年 77 国集团发表声明：为确保《公约》接受的普遍性，77 国集团愿意与任何集团、任何已签署或未签署《公约》的国家，就《公约》和海底筹委会工作的任何问题进行谈判。1990 年 7 月，联合国秘书长致函安理会 5 个常任理事国和其他有关国家，建议就国际海底问题进行非正式磋商，以谋求《公约》的普遍性与完整性，促使《公约》早日生效。从 1990 年 7 月至 1994 年 6月，经过两轮共 15 次非正式磋商会议，《关于执行 1982 年 12 月 10 日〈联合国海洋法公约〉第十一部分的协定的决议》终于达成。《执行协定》对《公约》第十一部分关于国际海底管理局各机构的决策程序、企业部职能和运作方式、深海采矿的生产政策、财政条款等规定作出重大调整，关于临时适用

15 《联合国海洋法公约》第 137 条。

16 “区域”的开发可由管理局的开发机构企业部与各国或私人同时进行，其作法是：任何国家或企业要进入国际海底开发，须首先向国际海底管理局提出申请并取得开发合同，申请者要向管理局提供两块具有同样经济价值的“矿址”，并提供两地的资料数据，管理局选择其中一块作为“保留区”，由企业部或与发展中国家合作开发，另一块作为“合同区”由管理局批准给申请者开发。申请者须向企业部转让技术，并向管理局按比例上交利润，管理局将此利润分发给发展中国家。这一制度实行 15 年，然后向单一开发制过渡。

的规定和临时成员制度的安排等照顾并考虑了有关各方的不同利益与要求，尤其是照顾了主要发达国家和潜在深海底采矿国的利益和要求，为全面执行《公约》奠定了基础，避免了两种国际海底区域制度并存局面的出现。1994 年 11 月 16 日，《公约》正式生效，国际海底管理局成立，它标志着一套公认的国际海底区域制度的基本确立。

海底制度从最初提出到基本确立的历程可谓曲折复杂，如果说 1982 年《公约》的表决通过是一次集体力量的胜利，数目众多的国家集团体现了其表决权的威力，那么在其后的进程中，发达国家以其强大的经济和技术力量在国际磋商中占尽上风。第三次联合国海洋法会议以海底问题为先导，引发了整个海洋法律制度的重建，最后又回到海底问题上来。分析影响这一磋商的各种因素可以看出，发达国家单方面行动的压力一方面导致磋商僵持，另一方面又使这些国家在国际磋商中的强硬要求获得了重要筹码。1977 年之后发达国家有关海底制度的国内立法及小型条约虽然违背了“国际海底区域为人类共同继承遗产”的原则，但却在国际社会产生了强大的政治效应。但并不是所有的单方面行动都能达到其目的，发达国家的要求之所以能够实现是以其强大的资金和技术实力为后盾的。相反，资金、技术的不足，以及有关海底情报信息的缺失则是发展中国家集团在国际磋商中的软肋，使得发展中国家的表决权优势在与发达国家强大经济技术实力的对决中处于下风。从建立国际海洋新秩序角度看，《公约》第十一部分的修改无疑是发展中国家在争取国际经济新秩序过程中遭遇的一次挫折，这是发展中国家集团迫于发达国家压力的一次重大妥协，它也表明这种妥协只是一方的暂时退让，双方严重的分歧并未得以弥合。从海底政治的发展轨迹来看，随着发展中国家综合国力的增强，国际政治、经济新秩序的逐步建立健全，有关海底制度的暂时平静将被打破的可能性依然存在。

但是，应该看到的是，此次有关《执行协定》的磋商是由联合国秘书长发起并召集的，国际组织在新一轮的国际磋商中再度发挥了主动作用，积极促成了《公约》的普遍适用，以及国际海底管理局等机构的建立。国际组织发挥主动权对制度和机构和创建性作用对于今后国际政治进程以及国际法律制度构建都开辟了新的思路。

中华人民共和国高速客船安全管理规则

（2006 年 2 月 13 日经第 3 次交通部部分会议通过，自 2006 年 6 月 1 日起施行）

第一章　总则

第一条　为加强对高速客船的安全监督管理，维护水上交通秩序，保障人命财产安全，依据《中华人民共和国海上交通安全法》、《中华人民共和国内河交通安全管理条例》等有关法律和行政法规，制定本规则。

第二条　本规则适用于在中华人民共和国通航水域航行、停泊和从事相关活动的高速客船及船舶所有人、经营人和相关人员

第三条　中华人民共和国海事局是实施本规则的主管机关。

各海事管理机构负责在本辖区内实施本规则。

第二章　船公司

第四条　经营高速客船的船公司应满足《国内船舶运输经营资质管理规定》的要求，取得相应的经营资质。

第五条　船公司从境外购置或光租的二手外国籍高速客船应满足《老旧运输船舶管理规定》的要求。

第六条　船公司在高速客船开始营运前，应以手册形式编制下列资料和指南：

（一）航线运行手册；

（二）船舶操作手册；

（三）船舶维修及保养手册；

（四）培训手册。

上述各项手册所应包含的内容由主管机关确定。

第七条　经营高速客船的船公司应当建立适合高速客船营运特点的安全管理制度，包括为防止船员疲劳的船员休息制度。

第三章 船舶

第八条 高速客船须经船舶检验合格，并办理船舶登记手续，持有有效的船舶证书。

第九条 高速客船投人营运前，应向主要营运地的海事管理机构申请办理《高速客船操作安全证书》。

申请办理《高速客船操作安全证书》，应提交下列资料：

（一）船舶检验证书；

（二）船舶所有权证书和船舶国籍证书；

（三）船员适任证书和特殊培训合格证；

（四）航线运行手册；

（五）船舶操作手册；

（六）船舶维修及保养手册；

（七）培训手册；

（八）法律、法规规定的其他资料。

海事管理机构对经审核符合要求的，予以签发《高速客船操作安全证书》。高速客船取得该证书后方可投入营运。

高速客船应随船携带最新的适合于本船的航线运行手册、船舶操作手册、船舶维修及保养手册和培训手册。

第十条 高速客船必须按规定要求配备号灯、号型、声响信号、无线电通信设备、消防设备、救生设备和应急设备等。高速客船上所有的设备和设施均应处于完好备用状态。

第四章 船员

第十一条 在高速客船任职的船员应符合下列要求：

（一）经主管机关认可的基本安全培训并取得培训合格证，其中船长、驾驶员、轮机长、轮机员以及被指定为负有安全操作和旅客安全职责的普通船员还必须通过主管机关认可的特殊培训并取得特殊培训合格证

（二）船长、驾驶员、轮机长、轮机员按规定持有相应的职务适任证书。

（三）取得高速客船船员职务适任证书者，在正式任职前见习航行时间不少于 10 小时和 20 个单航次。

（四）男性船长、驾驶员的年龄不超过 60 周岁，女性船长、驾驶员的年龄不超过 55 周岁。

在非高速客船上任职的船员申请高速客船船长、大副、轮机长职务适任证书时的年龄不超过45周岁。

（五）船长、驾驶员的健康状况，尤其是视力、听力和口语表达能力应符合相应的要求。

第十二条 主管机关授权的海事管理机构负责高速客船船员的培训管理和考试、发证工作。有关培训、考试、发证的规定由主管机关颁布实施。

第十三条 高速客船应向办理船舶登记手续的海事管理机构申领最低安全配员证书。高速客船的最低配员标准应满足本规则附录的要求。

第十四条 高速客船驾驶人员连续驾驶值班时间不得超过两个小时，两次驾驶值班之间应有足够的间隔休息时间，具体由当地海事管理机构确定。

第五章 航行安全

第十五条 高速客船航行时应使用安全航速，以防止发生碰撞和浪损。高速客船进出港口及航经特殊航段时，应遵守当地海事管理机构有关航速的规定。

高速客船在航时，须显示黄色闪光灯。

第十六条 高速客船在航时，值班船员必须在各自岗位上严格按职责要求做好安全航行工作。驾驶台负责了望的人员必须保持正规的了望。无关人员禁止进入驾驶台。

第十七条 高速客船在港口及内河通航水域航行时，应主动让清所有非高速船舶。高速客船在海上航行及高速客船与其他高速船舶之间避让时，应按避碰规则的规定采取措施。高速客船在特殊航段航行时，应遵守海事管理机构公布的特别航行规定。

第十八条 海事管理机构认为必要时可为高速客船推荐或指定航路。高速客船必须遵守海事管理机构有关航路的规定。

第十九条 遇有恶劣天气或能见度不良时，海事管理机构可建议高速客船停航。

第二十条 高速客船应按规定的乘客定额载客，禁止超载。高速客船禁止在未经批准的站、点上下旅客。

第六章 安全保障

第二十一条 高速客船应在专用的码头上下旅客，如需使用非专用码头时，应经海事管理机构审核同意。

第二十二条 高速客船应靠泊符合下列条件的码头：

（一）满足船舶安全靠泊的基本要求；

（二）高速客船靠泊时不易对他船造成浪损；

（三）避开港口通航密集区和狭窄航段；

（四）上下旅客设施符合安全条件；

（五）夜间有足够的照明；

（六）冬季有采取防冻防滑的安全保护措施。

第二十三条 高速客船对旅客携带物品应有尺度和数量限制，旅客的行李物品不得堵塞通道。严禁高速客船载运或旅客携带危险物品。

第二十四条 高速客船应每周进行一次应急消防演习和应急撤离演习，并做好演习记录；每次开航前，应向旅客讲解有关安全须知。

第二十五条 高速客船应建立开航前安全自查制度，制定开航前安全自查表并进行对照检查，海事管理机构可对开航前安全自查表进行监督抽查。

第二十六条 高速客船应按规定办理进出港口手续，并缴纳规费。国内航行的高速客船每天至少应办理一次船舶签证手续，国际航行的高速客船可申请不超过 7 天的定期进出口岸许可证。

高速客船不得夜航。但航行特殊水域的高速客船确需夜航的，应当向当地海事管理机构申请船舶进出港口许可，经批准后方可夜航。

第二十七条 高速客船发生交通事故、遇险或人员落水，应采取措施积极自救，并立即向就近海事管理机构报告。

第七章 法律责任

第二十八条 违反本规定的，由海事管理机构依照有关法律、行政法规以及交通部的有关规定进行处罚。

第二十九条 高速客船违反本规则经海事管理机构处罚仍不改正的，海事管理机构可责令其停航。

第三十条 海事管理机构工作人员违反规定，滥用职权，玩忽职守，给人民生命财产造成损失的，由所在单位或上级主管机关给予行政处分；构成犯罪的，依法追究其刑事责任。

第八章 附则

第三十一条 本规则所述“高速客船”系指载客 12 人以上，最大航速（米／秒）等于或大于以下数值的船舶：3. 7 * 0. 1667，式中“*”系指对应设计水线的排水体积（立方米）。但不包括在非排水状态下船体由地效应产生的气动升力完全

支承在水面上的船舶。

本规则所述“船公司”系指船舶所有人、经营人或者管理人以及其他已从船舶所有人处接受船舶的营运责任并承担船舶安全与防污染管理的所有义务和责任的组织。

第三十二条 外国籍高速客船不适用本规则第二、三、四章的规定，但应满足船旗国主管当局的要求。

第三十三条 本规则未尽事宜，按国家其他有关法规和我国加入的国际公约执行。

第三十四条 本规则由交通部负责解释。

第三十五条 本规则自 2006 年 6 月 1 日起施行。交通部 1996 年 12 月 24 日发布的《中华人民共和国高速客船安全管理规则》（交通部令 1996 年第 13 号）同时废止。

附录：高速客船最低安全配员

一、沿海及国际航线

安全配员 P<200 人 P ≥ 200 人

T<2H 船长 1 人轮机长 1 人驾驶员 1 人轮机员 1 人普通船员 1 人船长 1 人轮机长 1 人驾驶员 1 人轮机员 1 人普通船员 2 人

2H ≤ T<4H 船长 1 人轮机长 1 人驾驶员 1 人轮机员 1 人普通船员 2 人船长 1 人轮机长 1 人驾驶员 1 人轮机员 1 人普通船员 3 人

T ≥ 4H 船长 1 人轮机长 1 人驾驶员 2 人轮机员 1 人普通船员 2 人船长 1 人轮机长 1 人驾驶员 2 人轮机员 1 人普通船员 3

注：1．普通船员中应至少有 1 人为水手。

2. 客运部和无线电人员的配员参照《中华人民共和国船舶最低安全配员规则》的海船最低安全配员表进行核定。

3. T—单航次航行时间 P—载客定额 H—小时

二、内河航线

安全配员 P<100 人 P ≥ 100 人

T<2 H 船长 1 人轮机员 1 人驾驶员 1 人船长 1 人轮机长 1 人驾驶员 1 人普通船员 1 人

2H ≤ T<4H 船长 1 人轮机长 1 人驾驶员 1 人普通船员 1 人船长 1 人轮机长 1 人驾驶员 1 人普通船员 2 人

T ≥ 4H 船长 1 人轮机长 1 人驾驶员 1 人轮机员 1 人普通船员 2 人船长 1 人轮机长 1 人驾驶员 2 人轮机员 1 人普通船员 2 人

注：1．普通船员中应至少有 1 人为水手。

2．客运部人员的配员参照《中华人民共和国船舶最低安全配员规则》的内河船舶最低安全配员表进行核定。

3. T—单航次航行时间 P—载客定额 H—小时

国务院关于印发《中国水生生物资源养护行动纲要》的通知

（国发 [2006] 9 号）

我国海域辽阔，江河湖泊众多，为水生生物提供了良好的繁衍空间和生存条件。受独特的气候、地理及历史等因素的影响，我国水生生物具有特有程度高、孑遗物种数量大、生态系统类型齐全等特点。我国现有水生生物 2 万多种，在世界生物多样性中占有重要地位。以水生生物为主体的水生生态系统，在维系自然界物质循环、净化环境、缓解温室效应等方面发挥着重要作用。丰富的水生生物是人类重要的食物蛋白来源和渔业发展的物质基础。养护和合理利用水生生物资源对促进渔业可持续发展、维护国家生态安全具有重要意义。为全面贯彻落实科学发展观，切实加强国家生态建设，依法保护和合理利用水生生物资源，实施可持续发展战略，根据新阶段、新时期和市场经济条件下水生生物资源养护管理工作的要求，制定本纲要。

第一部分　水生生物资源养护现状及存在的问题

一、现状

多年来，在党中央、国务院的领导下，经过各地区、各有关部门的共同努力，我国水生生物资源养护工作取得了一定成效。

（一）制定并实施了一系列养护管理制度和措施。渔业行政主管部门相继制定并组织实施了海洋伏季休渔、长江禁渔期、海洋捕捞渔船控制等保护管理制度，开展了水生生物资源增殖放流活动，加强了水生生物自然保护区建设和濒危水生野生动物救护工作；环保、海洋、水利、交通等部门也积极采取了重点水域污染防治、自然保护区建设、水土流失治理、水功能区划等有利于水生生物资源养护的措施。

（二）建立了较为完整的养护执法和监管体系。全国渔业行政及执法管理队伍按照统一领导、分级管理的原则，依法履行渔业行业管理、保护渔业资源、渔业水域生态环境和水生野生动植物、专属经济区渔业管理以及维护国家海洋渔业权益等职能。环保、海洋、水利、交通等部门也根据各自职责设立了相关机构，加强了执法监管工作，为水生生物资源养护工作提供了有效的组织保障。

（三）初步形成了与养护工作相适应的科研、技术推广和服务体系。全国从事水生生物资源养护方面研究和开发的科技人员有 13000 多人。建立了全国渔业

生态环境监测网和五个海区、流域级渔业资源监测网，对我国渔业资源和渔业水域生态环境状况进行监测和评估，为水生生物资源养护工作提供了坚实的技术支撑。

二、存在的主要问题

随着我国经济社会发展和人口不断增长，水产品市场需求与资源不足的矛盾日益突出。受诸多因素影响，目前我国水生生物资源严重衰退，水域生态环境不断恶化，部分水域呈现生态荒漠化趋势，外来物种入侵危害也日益严重。养护和合理利用水生生物资源已经成为一项重要而紧迫的任务。

（一）水域污染导致水域生态环境不断恶化。近年来，我国废水排放量呈逐年增加趋势，主要江河湖泊均遭受不同程度污染，近岸海域有机物和无机磷浓度明显上升，无机氮普遍超标，赤潮等自然灾害频发，渔业水域污染事故不断增加，水生生物的主要产卵场和索饵育肥场功能明显退化，水域生产力急剧下降。

（二）过度捕捞造成渔业资源严重衰退。我国是世界上捕捞渔船和渔民数量最多的国家，由于长期采取粗放型、掠夺式的捕捞方式，造成传统优质渔业品种资源衰退程度加剧，渔获物的低龄化、小型化、低值化现象严重，捕捞生产效率和经济效益明显下降。

（三）人类活动致使大量水生生物栖息地遭到破坏。水利水电、交通航运和海洋海岸工程建设等人类活动，在创造巨大经济效益和社会效益的同时，对水域生态也造成了不利影响，水生生物的生存条件不断恶化，珍稀水生野生动植物濒危程度加剧。

第二部分　水生生物资源养护的指导思想、原则和目标

一、指导思想

以邓小平理论和“三个代表”重要思想为指导，认真贯彻党的十六大和十六届五中全会精神，全面落实科学发展观，坚持科技创新，完善管理制度，强化保护措施，养护和合理利用水生生物资源，全面提升水生生物资源养护管理水平，改善水域生态环境，实现渔业可持续发展，促进人与自然和谐，维护水生生物多样性。

二、基本原则

（一）坚持统筹协调的原则，处理好资源养护与经济社会发展的关系。科学养护要与合理利用相结合，既服从和服务于国家建设发展的大局，又通过经济社会发展不断增强水生生物资源养护能力，做到保护中开发，开发中保护。科学调度、配置和保护水资源，强化节约资源、循环利用的生产和消费意识，在尽可能减少资

源消耗和破坏环境的前提下，把保护水生生物资源与转变渔业增长方式、优化渔业产业结构结合起来，提高资源利用效率，在实现渔业经济持续、健康发展的同时，促进经济增长、社会发展和资源保护相统一。

（二）坚持整体保护的原则，处理好全面保护与重点保护的关系。将水生生物资源养护工作纳入国家生态建设的总体部署，对水生生物资源和水域生态环境进行整体性保护。同时，针对水生生物资源在水生生态系统中的主体地位和不同水生生物的特点，以资源养护为重点，实行多目标管理；在养护措施上，立足当前，着眼长远，分阶段、有步骤地加以实施。

（三）坚持因地制宜的原则，处理好系统保护与突出区域特色的关系。根据资源的区域分布特征和养护工作面临的任务，分区确定水生生物资源保护和合理利用的方向与措施：近海海域以完善海洋伏季休渔、捕捞许可管理等渔业资源管理制度为重点，保护和合理利用海洋生物资源；浅海滩涂以资源增殖、生态养殖及水域生态保护为重点，促进海水养殖增长方式转变；内陆水域以资源增殖、自然保护区建设、水域污染防治及工程建设资源与生态补偿为重点，保护水生生物多样性和水域生态的完整性。

（四）坚持务实开放的原则，处理好立足国情与履行国际义务的关系。在实际工作中，要充分考虑我国经济社会的发展阶段，立足于我国人口多、渔民多、渔船多、资源承载重的特点，结合现有工作基础，制定切实可行的保护管理措施。同时，要负责任地履行我国政府签署或参加的有关国际公约和规定的相应义务，并学习借鉴国外先进保护管理经验。

（五）坚持执法为民的原则，处理好强化管理与维护渔民权益的关系。在制订各项保护管理措施时，既要考虑符合广大渔民的长远利益，也要考虑渔民的现实承受能力，兼顾各方面利益，妥善解决好渔民的生产发展和生活出路问题，依法维护广大渔民的合法权益。要积极采取各种增殖修复手段，增加水域生产力，提高渔业经济效益，促进渔民增收。

（六）坚持共同参与的原则，处理好政府主导与动员社会力量参与的关系。水生生物资源养护是一项社会公益事业，从水生生物资源的流动性和共有性特点考虑，必须充分发挥政府保护公共资源的主导作用，建立有关部门间各司其职、加强沟通、密切配合的水生生物资源养护管理体制。同时要加强宣传教育，提高全民保护意识，充分调动各方面的积极性，形成全社会广泛动员和积极参与的良好氛围，并通过建立多元化的投融资机制，为水生生物资源养护工作提供必要的资金保障。

三、奋斗目标

（一）近期目标。到2010年，水域生态环境恶化、渔业资源衰退、濒危物种数目增加的趋势得到初步缓解，过大的捕捞能力得到压减，捕捞生产效率和经济效益有所提高。全国海洋捕捞机动渔船数量、功率和国内海洋捕捞产量，分别由

2002 年底的 22.2 万艘、1270 万千瓦和 1306 万吨压减到 19.2 万艘、1143 万千瓦和 1200 万吨左右；每年增殖重要渔业资源品种的苗种数量达到 200 亿尾（粒）以上；省级以上水生生物自然保护区数量达到 100 个以上；渔业水域污染事故调查处理率达到 60%以上。

（二）中期目标。到 2020 年，水域生态环境逐步得到修复，渔业资源衰退和濒危物种数目增加的趋势得到基本遏制，捕捞能力和捕捞产量与渔业资源可承受能力大体相适应。全国海洋捕捞机动渔船数量、功率和国内海洋捕捞产量分别压减到 16 万艘、1000 万千瓦和 1000 万吨左右；每年增殖重要渔业资源品种的苗种数量达到 400 亿尾（粒）以上；省级以上水生生物自然保护区数量达到 200 个以上；渔业水域污染事故调查处理率达到 80%以上。

（三）远景展望。经过长期不懈努力，到本世纪中叶，水域生态环境明显改善，水生生物资源实现良性、高效循环利用，濒危水生野生动植物和水生生物多样性得到有效保护，水生生态系统处于整体良好状态。基本实现水生生物资源丰富、水域生态环境优美的奋斗目标。

第三部分　渔业资源保护与增殖行动

渔业资源是水生生物资源的重要组成部分，是渔业发展的物质基础。针对目前捕捞强度居高不下、渔业资源严重衰退、捕捞生产效益下降、渔民收入增长缓慢的严峻形势，为有效保护和积极恢复渔业资源，促进我国渔业持续健康发展，根据《中华人民共和国渔业法》、农业部《关于 2003-2010 年海洋捕捞渔船控制制度实施意见》等有关规定，参照联合国粮农组织《负责任渔业守则》的要求，实施本行动。

本行动包括重点渔业资源保护、渔业资源增殖、负责任捕捞管理三项措施：通过建立禁渔区和禁渔期制度、水产种质资源保护区等措施，对重要渔业资源实行重点保护；通过综合运用各种增殖手段，积极主动恢复渔业资源，改变渔业生产方式，提高资源利用效率，为渔民致富创造新的途径和空间；通过强化捕捞配额制度、捕捞许可证制度等各项资源保护管理制度，规范捕捞行为，维护作业秩序，保障渔业安全；通过减船和转产转业等措施，压缩捕捞能力，促进渔业产业结构调整，妥善解决捕捞渔民生产生活问题。

一、重点渔业资源保护

（一）坚持并不断完善禁渔区和禁渔期制度。针对重要渔业资源品种的产卵场、索饵场、越冬场、洄游通道等主要栖息繁衍场所及繁殖期和幼鱼生长期等关键生长阶段，设立禁渔区和禁渔期，对其产卵群体和补充群体实行重点保护。继续完善海洋伏季休渔、长江禁渔期等现有禁渔区和禁渔期制度，并在珠江、黑龙江、黄河等主要流域及重要湖泊逐步推行此项制度。

（二）加强目录和标准化管理。修订重点保护渔业资源品种名录和重要渔业资源品种最小可捕标准，推行最小网目尺寸制度和幼鱼比例检查制度。制定捕捞渔具准用目录，取缔禁用渔具，研制和推广选择性渔具。调整捕捞作业结构，压缩作业方式对资源破坏较大的渔船和渔具数量。

（三）保护水产种质资源。在具有较高经济价值和遗传育种价值的水产种质资源主要生长繁育区域建立水产种质资源保护区，并制定相应的管理办法，强化和规范保护区管理。建立水产种质资源基因库，加强对水产遗传种质资源、特别是珍稀水产遗传种质资源的保护，强化相关技术研究，促进水产种质资源可持续利用。采取综合性措施，改善渔场环境，对已遭破坏的重要渔场、重要渔业资源品种的产卵场制定并实施重建计划。

二、渔业资源增殖

（一）统筹规划、合理布局。合理确定适用于渔业资源增殖的水域滩涂，重点针对已经衰退的重要渔业资源品种和生态荒漠化严重水域，采取各种增殖方式，加大增殖力度，不断扩大增殖品种、数量和范围。合理布局增殖苗种生产基地，确保增殖苗种供应。

（二）建设人工鱼礁（巢）。制定国家和地方的沿海人工鱼礁和内陆水域人工鱼巢建设规划，科学确定人工鱼礁（巢）的建设布局、类型和数量，注重发挥人工鱼礁（巢）的规模生态效应。建立多元化投入机制，加大人工鱼礁（巢）建设力度，结合减船工作，充分利用报废渔船等废旧物资，降低建设成本。

（三）发展增养殖业。积极推进以海洋牧场建设为主要形式的区域性综合开发，建立海洋牧场示范区，以人工鱼礁为载体，底播增殖为手段，增殖放流为补充，积极发展增养殖业，并带动休闲渔业及其他产业发展，增加渔民就业机会，提高渔民收入，繁荣渔区经济。

（四）规范渔业资源增殖管理。制定增殖技术标准、规程和统计指标体系，建立增殖计划申报审批、增殖苗种检验检疫和放流过程监理制度，强化日常监管和增殖效果评价工作。大规模的增殖放流活动，要进行生态安全风险评估；人工鱼礁建设实行许可管理，大型人工鱼礁建设项目要进行可行性论证。

三、负责任捕捞管理

（一）实行捕捞限额制度。根据捕捞量低于资源增长量的原则，确定渔业资源的总可捕捞量，逐步实行捕捞限额制度。建立健全渔业资源调查和评估体系、捕捞限额分配体系和监督管理体系，公平、公正、公开地分配限额指标，积极探索配额转让的有效机制和途径。

（二）继续完善捕捞许可证制度。严格执行捕捞许可管理有关规定，按照国家下达的船网工具指标以及捕捞限额指标，严格控制制造、更新改造、购置和进口捕捞渔船以及捕捞许可证发放数量，加强对渔船、渔具等主要捕捞生产要素的有

效监管，强化渔船检验和报废制度，加强渔船安全管理。

（三）强化和规范职务船员持证上岗制度。加强渔业船员法律法规和专业技能培训，逐步实行捕捞从业人员资格准入，严格控制捕捞从业人员数量。

（四）推进捕捞渔民转产转业工作。根据国家下达的船网工具控制指标及减船计划，加快渔业产业结构调整，积极引导捕捞渔民向增养殖业、水产加工流通业、休闲渔业及其他产业转移。地方各级人民政府要加大投人，落实各项配套措施，确保减船工作顺利实施。建立健全转产转业渔民服务体系，加强对转产转业渔民的专业技能培训，为其提供相关的技术和信息服务。对因实施渔业资源养护措施造成生活困难的部分渔民，当地政府要统筹考虑采取适当方式给予救助，妥善安排好他们的生活。

第四部分　生物多样性与濒危物种保护行动

生物多样性程度是衡量生态系统状态的重要标志。近年来，我国水生生物遗传多样性缺失严重，水生野生动植物物种濒危程度加剧、灭绝速度加快，外来物种人侵危害不断加大。依据《中华人民共和国野生动物保护法》、《中华人民共和国渔业法》及《生物多样性公约》和《濒危野生动植物种国际贸易公约》等有关规定，为有效保护水生生物多样性，拯救珍稀濒危水生野生动植物，并履行相关国际义务，实施本行动。

本行动通过采取自然保护区建设、濒危物种专项救护、濒危物种驯养繁殖、经营利用管理以及外来物种监管等措施，建立水生生物多样性和濒危物种保护体系，全面提高保护工作能力和水平，有效保护水生生物多样性及濒危物种，防止外来物种人侵。

一、自然保护区建设

加强水生野生动植物物种资源调查，在充分论证的基础上，结合当地实际，统筹规划，逐步建立布局合理、类型齐全、层次清晰、重点突出、面积适宜的各类水生生物自然保护区体系。建立水生野生动植物自然保护区，保护白鳍豚、中华鲟等濒危水生野生动植物以及土著、特有鱼类资源的栖息地；建立水域生态类型自然保护区，对珊瑚礁、海草床等进行重点保护。加强保护区管理能力建设，配套完善保护区管理设施，加强保护区人员业务知识和技能培训，强化各项监管措施，促进保护区的规范化、科学化管理。

二、濒危物种专项救护

建立救护快速反应体系，对误捕、受伤、搁浅、罚没的水生野生动物及时进行救治、暂养和放生。根据各种水生野生动物濒危程度和生物学特点，对白鳍豚、白

鲟、水獭等亟待拯救的濒危物种，制定重点保护计划，采取特殊保护措施，实施专项救护行动。对栖息场所或生存环境受到严重破坏的珍稀濒危物种，采取迁地保护措施。

三、濒危物种驯养繁殖

对中华鲟、大鲵、海龟和淡水龟鳖类等国家重点保护的水生野生动物，建立遗传资源基因库，加强种质资源保护与利用技术研究，强化对水生野生动植物遗传资源的利用和保护。建设濒危水生野生动植物驯养繁殖基地，进行珍稀濒危物种驯养繁育核心技术攻关。建立水生野生动物人工放流制度，制订相关规划、技术规范和标准，对放流效果进行跟踪和评价。

四、经营利用管理

调整和完善国家重点保护水生野生动植物名录。建立健全水生野生动植物经营利用管理制度，对捕捉、驯养繁殖、运输、经营利用、进出口等各环节进行规范管理，严厉打击非法经营利用水生野生动植物行为。根据有关法律法规规定，完善水生野生动植物进出口审批管理制度，严格规范水生野生动植物进出口贸易活动。加强水生野生动植物物种识别和产品鉴定工作，为水生野生动植物保护管理提供技术支持。

五、外来物种监管

加强水生动植物外来物种管理，完善生态安全风险评价制度和鉴定检疫控制体系，建立外来物种监控和预警机制，在重点地区和重点水域建设外来物种监控中心和监控点，防范和治理外来物种对水域生态造成的危害。

第五部分　水域生态保护与修复行动

水域生态环境是水生生物赖以生存的物质条件，水生生物及水域生态环境共同构成了水生生态系统。针对目前水生生物生存空间被大量挤占，水域生态环境不断恶化，水域生态荒漠化趋势日益明显等问题，为有效保护和修复水域生态，维护水域生态平衡，促进经济社会发展与生态环境保护相协调，依据《中华人民共和国渔业法》、《中华人民共和国环境保护法》、《中华人民共和国水法》、《中华人民共和国水污染防治法》、《中华人民共和国海洋环境保护法》和《中华人民共和国环境影响评价法》等有关法律法规，实施本行动。

本行动通过采取水域污染与生态灾害防治、工程建设资源与生态补偿、水域生态修复和发展生态养殖等措施，强化水域生态保护管理，逐步减少人类活动和自然生态灾害对水域生态造成的破坏和损失。同时，积极采取各种生物、工程和技术措施，对已遭到破坏的水域生态进行修复和重建。

一、水域污染与生态灾害防治

各地区、各有关部门要建立污染减量排放和达标排放制度，严格控制污染物向水体排放。健全水域污染事故调查处理制度，建立突发性水域污染事故调查处理快速反应机制，规范应急处理程序，提高应急处理能力，强化污染水域环境应急监测和水产品质量安全检测工作，通过实施工程、生物、技术措施，减少污染损害，通过暂停养殖纳水、严控受污染的水产品上市等应急措施，尽量降低突发事故造成的渔业损失，保障人民群众食用安全。处置突发性水域污染事故所需财政经费，按财政部《突发事件财政应急保障预案》执行。渔业行政主管部门要加强渔业水域污染事故调查处理资质管理，及时确认污染主体，科学评估渔业资源和渔业生产者损失，依法对渔业水域污染事故进行调查处理，并督促落实。完善水域生态灾害的防灾减灾体系，开展防灾减灾技术研究，提高水域生态灾害预警预报能力，积极采取综合治理措施，减轻对渔业生产、水产品质量安全和水域生态环境造成的影响。

二、工程建设资源与生态补偿

完善工程建设项目环境影响评价制度，建立工程建设项目资源与生态补偿机制，减少工程建设的负面影响，确保遭受破坏的资源和生态得到相应补偿和修复。对水利水电、围垦、海洋海岸工程、海洋倾废区等建设工程，环保或海洋部门在批准或核准相关环境影响报告书之前，应征求渔业行政主管部门意见；对水生生物资源及水域生态环境造成破坏的，建设单位应当按照有关法律规定，制订补偿方案或补救措施，并落实补偿项目和资金。相关保护设施必须与建设项目的主体工程同时设计、同时施工、同时投入使用。

三、水域生态修复

加强水域生态修复技术研究，制定综合评价和整治修复方案。通过科学调度、优化配置水资源和采取必要的工程措施，修复因水域污染、工程建设、河道（航道）整治、采砂等人为活动遭到破坏或退化的江河鱼类产卵场等重要水域生态功能区；通过采取闸口改造、建设过鱼设施和实施灌江纳苗等措施，恢复江湖鱼类生态联系，维护江湖水域生态的完整性；通过采取湖泊生物控制、放养滤食鱼类、底栖生物移植和植被修复等措施，对富营养化严重的湖泊、潮间带、河口等水域进行综合治理；通过保护红树林、珊瑚礁、海草床等，改善沿岸及近海水域生态环境；通过合理发展海水贝藻类养殖，改善海洋碳循环，缓解温室效应。

四、推进科学养殖

制定和完善水产养殖环境方面的技术标准，强化水产养殖环境监督管理。根据环境容量，合理调整养殖布局，科学确定养殖密度，优化养殖生产结构。实施养

殖水质监测、环境监控、渔用药物生产审批和投入品使用管理等各项制度，加强水产苗种监督管理，实施科学投饵、施肥和合理用药，保障水产品质量安全。积极探索传统与现代相结合的生态养殖模式，建立健康养殖和生态养殖示范区，积极推广健康和生态养殖技术，减少水产养殖造成的污染。

第六部分　保障措施

一、建立健全协调高效的管理机制

水生生物资源养护是一项“功在当代、利在千秋”的伟大事业，地方各级人民政府要增强责任感和使命感，切实加强领导，将水生生物资源养护工作列入议事日程，作为一项重点工作和日常性工作来抓。根据本纲要确定的指导思想、原则和目标，结合本地实际，组织有关部门确保各项养护措施的落实和行动目标的实现。各有关部门各司其职，加强沟通，密切配合。要不断完善以渔业行政主管部门为主体，各相关部门和单位共同参与的水生生物资源养护管理体系。财政、发展改革、科技等部门要加大支持力度，渔业行政主管部门要认真组织落实，切实加强水生生物资源养护的相关工作，环保、海洋、水利、交通等部门要加强水域污染控制、生态环境保护等工作。

二、探索建立和完善多元化投入机制

水生生物资源养护工作是一项社会公益性事业，各级财政要在加大投入的同时，整合有关生物资源养护经费，统筹使用。同时，要积极改革和探索在市场经济条件下的政府投入、银行贷款、企业资金、个人捐助、国外投资、国际援助等多元化投入机制，为水生生物资源养护提供资金保障。建立健全水生生物资源有偿使用制度，完善资源与生态补偿机制。按照谁开发谁保护、谁受益谁补偿、谁损害谁修复的原则，开发利用者应依法交纳资源增殖保护费用，专项用于水生生物资源养护工作;对资源及生态造成损害的，应进行赔偿或补偿，并采取必要的修复措施。

三、大力加强法制和执法队伍建设

针对目前水生生物资源养护管理工作存在的主要问题，要抓紧制定渔业生态环境保护等方面的配套法规，形成更为完善的水生生物资源养护法律法规体系。不断建立健全各项养护管理制度，为本纲要的顺利实施提供法制保障。各地区要按照国务院有关规定，强化渔业行政执法队伍建设，开展执法人员业务培训，加强执法装备建设，增强执法能力，规范执法行为，保障执法管理经费，实行“收支两条线”管理，努力建设一支高效、廉洁的水生生物资源养护管理执法队伍。

四、积极营造全社会参与的良好氛围

水生生物资源养护是一项社会性的系统工程，需要社会各界的广泛支持和共同努力。要通过各种形式和途径，加大相关法律法规及基本知识的宣传教育力度，树立生态文明的发展观、道德观、价值观，增强国民生态保护意识，提高保护水生生物资源的自觉性和主动性。要充分发挥各类水生生物自然保护机构、水族展示与科研教育单位和新闻媒体的作用，多渠道、多形式地开展科普宣传活动，广泛普及水生生物资源养护知识，提高社会各界的认知程度，增进人们对水生生物的关注和关爱，倡导健康文明的饮食观念，自觉拒食受保护的水生野生动物，为保护工作创造良好的社会氛围。

五、努力提升科技和国际化水平

加大水生生物资源养护方面的科研投入，加强基础设施建设，整合现有科研教学资源，发挥各自技术优势。对水生生物资源养护的核心和关键技术进行多学科联合攻关，大力推广相关适用技术。加强全国水生生物资源和水域生态环境监测网络建设，对水生生物资源和水域生态环境进行调查和监测。建立水生生物资源管理信息系统，为加强水生生物资源养护工作提供参考依据。扩大水生生物资源养护的国际交流与合作，与有关国际组织、外国政府、非政府组织和民间团体等在人员、技术、资金、管理等方面建立广泛的联系和沟通。加强人才培养与交流，学习借鉴国外先进的保护管理经验，拓宽视野，创新理念，把握趋势，不断提升我国水生生物资源养护水平。

国务院

二〇〇六年二月十四日

国家海上搜救应急预案

1 总则

1.1 编制目的

建立国家海上搜救应急反应机制，迅速、有序、高效地组织海上突发事件的应急反应行动，救助遇险人员，控制海上突发事件扩展，最大程度地减少海上突发事件造成的人员伤亡和财产损失。

履行中华人民共和国缔结或参加的有关国际公约;实施双边和多边海上搜救应急反应协定。

1.2 编制依据

1.2.1 国内法律、行政法规及有关规定

《中华人民共和国海上交通安全法》、《中华人民共和国安全生产法》、《中华人民共和国内河交通安全管理条例》、《中华人民共和国无线电管理条例》和《国家突发公共事件总体应急预案》等。

1.2.2 我国加入或缔结的国际公约、协议

《联合国海洋法公约》、《1974 年国际海上人命安全公约》、《国际民航公约》、《1979 年国际海上搜寻救助公约》、《中美海上搜救协定》、《中朝海上搜救协定》等我国加入或缔结的有关国际公约、协议。

1.3 适用范围

1.3.1 我国管辖水域和承担的海上搜救责任区内海上突发事件的应急反应行动。

1.3.2 发生在我国管辖水域和搜救责任区外，涉及中国籍船舶、船员遇险或可能对我国造成重大影响或损害的海上突发事件的应急反应行动。

1.3.3 参与海上突发事件应急行动的单位、船舶、航空器、设施及人员。

1.4 工作原则

(1) 政府领导，社会参与，依法规范。

政府领导:政府对海上搜救工作实行统一领导，形成高效应急反应机制，及时、有效地组织社会资源，形成合力。

社会参与:依照海上突发事件应急组织体系框架，形成专业力量与社会力量相结合，多部门参加，多学科技术支持，全社会参与的应对海上突发事件机制。

依法规范:依照有关法律、法规，明确各相关部门、单位、个人的责任、权利和义务，规范应急反应的组织、协调、指挥行为。

(2) 统一指挥，分级管理，属地为主。

统一指挥：对海上突发事件应急反应行动实行统一指挥，保证搜救机构组织的各方应急力量行动协调，取得最佳效果。

分级管理：根据海上突发事件的发生区域、性质、程度与实施救助投入的力量所需，实施分级管理。

属地为主：由海上突发事件发生地海上搜救机构实施应急指挥，确保及时分析判断形势，正确决策，相机处置，提高应急反应行动的及时性和有效性。

(3) 防应结合，资源共享，团结协作。

防应结合："防"是指做好自然灾害的预警工作，减少自然灾害引发海上突发事件的可能；"应"是指保证海上突发事件发生后，及时对海上遇险人员进行救助，减少损失。防应并重，确保救助。

资源共享：充分利用常备资源，广泛调动各方资源，避免重复建设，发挥储备资源的作用。

团结协作：充分发挥参与救助各方力量的自身优势和整体效能，相互配合，形成合力。

(4) 以人为本，科学决策，快速高效。

以人为本：充分履行政府公共服务职能，快速高效地救助人命。

科学决策：运用现代科技手段，保证信息畅通；充分发挥专家的咨询作用，果断决策，保证应急指挥的权威性。

快速高效：建立应急机制，保证指挥畅通；强化人员培训，提高从业人员素质；提高应急力量建设，提高应急反应的效能和水平。

2 国家海上搜救应急组织指挥体系及职责任务

国家海上搜救应急组织指挥体系由应急领导机构、运行管理机构、咨询机构、应急指挥机构、现场指挥、应急救助力量等组成。

2.1 应急领导机构

建立国家海上搜救部际联席会议制度，研究、议定海上搜救重要事宜，指导全国海上搜救应急反应工作。在交通部设立中国海上搜救中心，作为国家海上搜救的指挥工作机构，负责国家海上搜救部际联席会议的日常工作，并承担海上搜救运行管理机构的工作。

部际联席会议成员单位根据各自职责，结合海上搜救应急反应行动实际情况，发挥相应作用，承担海上搜救应急反应、抢险救灾、支持保障、善后处理等应急工作。

2.2 运行管理机构

中国海上搜救中心以交通部为主承担海上搜救的运行管理工作。

2.3 咨询机构

咨询机构包括海上搜救专家组和其他相关咨询机构。

2.3.1 搜救专家组

国家海上搜救专家组由航运、海事、航空、消防、医疗卫生、环保、石油化工、海洋工程、海洋地质、气象、安全管理等行业专家、专业技术人员组成，负责提供海上搜救技术咨询。

2.3.2 其他相关咨询机构

其他相关咨询机构应中国海上搜救中心要求，提供相关的海上搜救咨询服务。

2.4 应急指挥机构

应急指挥机构包括：中国海上搜救中心及地方各级政府建立的海上搜救机构。

沿海及内河主要通航水域的各省（区、市）成立以省（区、市）政府领导任主任，相关部门和当地驻军组成的省级海上搜救机构。根据需要，省级海上搜救机构可设立搜救分支机构。

2.4.1 省级海上搜救机构

省级海上搜救机构承担本省（区、市）海上搜救责任区的海上应急组织指挥工作。

2.4.2 海上搜救分支机构

海上搜救分支机构是市（地）级或县级海上应急组织指挥机构，其职责由省级海上搜救机构确定。

2.5 现场指挥（员）

海上突发事件应急反应的现场指挥（员）由负责组织海上突发事件应急反应的应急指挥机构指定，按照应急指挥机构指令承担现场协调工作。

2.6 海上应急救助力量

海上应急救助力量包括各级政府部门投资建设的专业救助力量和军队、武警救助力量，政府部门所属公务救助力量，其他可投人救助行动的民用船舶与航空器，企事业单位、社会团体、个人等社会人力和物力资源。

服从应急指挥机构的协调、指挥，参加海上应急行动及相关工作。

3 预警和预防机制

预警和预防是通过分析预警信息，作出相应判断，采取预防措施，防止自然灾害造成事故或做好应急反应准备。

3.1 信息监测与报告

预警信息包括：气象、海洋、水文、地质等自然灾害预报信息；其他可能威胁海上人命、财产、环境安全或造成海上突发事件发生的信息。

预警信息监测部门根据各自职责分别通过信息播发渠道向有关方面发布气象、海洋、水文地质等自然灾害预警信息。

3.2 预警预防行动

3.2.1 从事海上活动的有关单位、船舶和人员应注意接收预警信息，根据不同预警级别，采取相应的防范措施，防止或减少海上突发事件对人命、财产和环境造成危害。

3.2.2 各级海上搜救机构，根据风险信息，有针对性地做好应急救助准备。

3.3 预警支持系统

预警支持系统由公共信息播发系统、海上安全信息播发系统等组成，相关风险信息发布责任部门应制定预案，保证信息的及时准确播发。

4 海上突发事件的险情分级与上报

4.1 海上突发事件险情分级

根据国家突发事件险情上报的有关规定，并结合海上突发事件的特点及突发事件对人命安全、海洋环境的危害程度和事态发展趋势，将海上突发事件险情信息分为特大、重大、较大、一般四级。

4.2 海上突发事件险情信息的处理

海上搜救机构接到海上突发事件险情信息后，对险情信息进行分析与核实，并按照有关规定和程序逐级上报。

中国海上搜救中心按照有关规定，立即向国务院报告，同时通报国务院有关部门。

5 海上突发事件的应急响应和处置

5.1 海上遇险报警

5.1.1 发生海上突发事件时，可通过海上通信无线电话、海岸电台、卫星地面站、应急无线电示位标或公众通信网(海上救助专用电话号，”12395”)等方式报警。

5.1.2 发送海上遇险信息时，应包括以下内容：

(1) 事件发生的时间、位置。

(2) 遇险状况。

(3) 船舶、航空器或遇险者的名称、种类、国籍、呼号、联系方式。

5.1.3 报警者尽可能提供下列信息：

(1) 船舶或航空器的主要尺度、所有人、代理人、经营人、承运人。

(2) 遇险人员的数量及伤亡情况。

(3) 载货情况，特别是危险货物，货物的名称、种类、数量。

(4) 事发直接原因、已采取的措施、救助请求。

(5) 事发现场的气象、海况信息，包括风力、风向、流向、流速、潮汐、水温、浪高等。

5.1.4 使用的报警设备应按规定做好相关报警与信息的预设工作。

5.2 海上遇险信息的分析与核实

海上搜救机构通过直接或间接的途径对海上遇险信息进行核实与分析。

5.3 遇险信息的处置

(1) 发生海上突发事件，事发地在本责任区的，按规定启动本级预案

(2) 发生海上突发事件，事发地不在本责任区的，接警的海上搜救机构应立即直接向所在责任区海上搜救机构通报并同时向上级搜救机构报告。

(3) 中国海上搜救中心直接接到的海上突发事件报警，要立即通知搜救责任区的省级海上搜救机构和相关部门。

(4）海上突发事件发生在香港特别行政区水域、澳门特别行政区水域和台湾、金门、澎湖、马祖岛屿附近水域的，可由有关省级搜救机构按照已有搜救联络协议进行通报，无联络协议的，由中国海上搜救中心予以联络。

(5) 海上突发事件发生地不在我国海上搜救责任区的，中国海上搜救中心应通报有关国家的海上搜救机构。有中国籍船舶、船员遇险的，中国海上搜救中心除按上述（2)、(3) 项报告外，还应及时与有关国家的海上搜救机构或我驻外使领馆联系，通报信息，协助救助，掌握救助进展情况，并与外交部互通信息。

(6) 涉及海上保安事件，按海上保安事件处置程序处理和通报。

涉及船舶造成污染的，按有关船舶油污应急反应程序处理和通报。

5.4 指挥与控制

5.4.1 最初接到海上突发事件信息的海上搜救机构自动承担应急指挥机构的职责，并启动预案反应，直至海上突发事件应急反应工作已明确移交给责任区海上搜救机构或上一级海上搜救机构指定新的应急指挥机构时为止。

5.4.2 应急指挥机构按规定程序向上一级搜救机构请示、报告和做出搜救决策。实施应急行动时，应急指挥机构可指定现场指挥。

5.5 紧急处置

5.5.1 应急指挥机构的任务

在险情确认后，承担应急指挥的机构立即进入应急救援行动状态：

(1) 按照险情的级别通知有关人员进入指挥位置。

(2) 在已掌握情况基础上，确定救助区域，明确实施救助工作任务与具体救助措施。

(3) 根据已制定的应急预案，调动应急力量执行救助任务。

(4) 通过船舶报告系统调动事发附近水域船舶前往实施救助。

(5) 建立应急通信机制。

(6) 指定现场指挥。

(7) 动用航空器实施救助的，及时通报空管机构。

(8) 事故救助现场需实施海上交通管制的，及时由责任区海事管理机构发布航行通（警）告并组织实施管制行动。

(9) 根据救助情况，及时调整救助措施。

5.5.2 搜救指令的内容

对需动用的、当时有能力进行海上搜救的救助力量，搜救机构应及时下达行动指令，明确任务。

5.5.3 海上突发事件处置保障措施

根据救助行动情况及需要，搜救机构应及时对下列事项进行布置：

(1) 遇险人员的医疗救护。

(2) 当险情可能对公众造成危害时，通知有关部门组织人员疏散或转移。

(3) 做出维护治安的安排。

(4) 指令有关部门提供海上突发事件应急反应的支持保障。

5.5.4 救助力量与现场指挥的任务

(1) 专业救助力量应将值班待命的布设方案和值班计划按搜救机构的要求向搜救机构报告，值班计划临时调整的，应提前向搜救机构报告，调整到位后，要进行确认报告。

(2) 救助力量与现场指挥应执行搜救机构的指令，按搜救机构的要求将出动情况、已实施的行动情况、险情现场及救助进展情况向搜救机构报告，并及时提出有利于应急行动的建议。

5.6 分级响应

海上突发事件应急反应按照海上搜救分支机构、省级海上搜救机构、中国海上搜救中心从低到高依次响应。

(1) 任何海上突发事件，搜救责任区内最低一级海上搜救机构应首先进行响应。

(2) 责任区海上搜救机构应急力量不足或无法控制事件扩展时，请求上一级海上搜救机构开展应急响应。

(3) 上一级搜救机构应对下一级搜救机构的应急响应行动给予指导。

(4) 无论何种情况，均不免除各省级搜救机构对其搜救责任区内海上突发事件全面负责的责任，亦不影响各省级搜救机构先期或将要采取的有效救助行动。

5.7 海上应急反应通信

海上搜救机构在实施海上应急行动时，可根据现场具体情况，指定参加应急活动所有部门的应急通信方式。通信方式包括：

(1) 海上通信，常用海上遇险报警、海上突发事件应急反应通信方式。

(2) 公众通信网，包括电话、传真、因特网。

(3) 其他一切可用手段。

5.8 海上医疗援助

5.8.1 医疗援助的方式

各级海上搜救机构会同当地卫生主管部门指定当地具备一定医疗技术和条件的医疗机构承担海上医疗援助任务。

5.8.2 医疗援助的实施

海上医疗援助一般由实施救助行动所在地的医疗机构承担，力量不足时，可

通过海上搜救机构逐级向上请求支援。

5.9 应急行动人员的安全防护

(1) 参与海上应急行动的单位负责本单位人员的安全防护。各级海上搜救机构应对参与救援行动单位的安全防护工作提供指导。

(2) 化学品应急人员进人和离开现场应先登记，进行医学检查，有人身伤害立即采取救治措施。

(3) 参与应急行动人员的安全防护装备不足时，实施救助行动的海上搜救机构可请求上一级海上搜救机构协调解决。

5.10 遇险旅客及其他人员的安全防护

在实施救助行动中，应根据险情现场与环境情况，组织做好遇险旅客及其他人员的安全防护工作，告知旅客及其他人员可能存在的危害和防护措施，及时调集应急人员和防护器材、装备、药品。

5.10.1 海上搜救机构要对海上突发事件可能次生、衍生的危害采取必要的措施，对海上突发事件可能影响的范围内船舶、设施及人员的安全防护、疏散方式做出安排。

5.10.2 在海上突发事件影响范围内可能涉及陆上人员安全的情况下，海上搜救机构应通报地方政府采取防护或疏散措施。

5.10.3 船舶、浮动设施和民用航空器的所有人、经营人应制订在紧急情况下对遇险旅客及其他人员采取的应急防护、疏散措施;在救助行动中要服从海上搜救机构的指挥，对遇险旅客及其他人员采取应急防护、疏散措施，并做好安置工作。

5.11 社会力量动员与参与

5.11.1 社会动员

(1) 各级人民政府可根据海上突发事件的等级、发展趋势、影响程度等在本行政区域内依法发布社会动员令。

(2) 当应急力量不足时，由当地政府动员本地区机关、企事业单位、各类民间组织和志愿人员等社会力量参与或支援海上应急救援行动。

5.11.2 社会动员时海上搜救机构的行动

(1) 指导所动员的社会力量，携带必要的器材、装备赶赴指定地点。

(2) 根据参与应急行动人员的具体情况进行工作安排与布置。

5.12 救助效果评估与处置方案调整

5.12.1 目的

跟踪应急行动的进展，查明险情因素和造成事件扩展和恶化因素，控制危险源和污染源，对措施的有效性进行分析、评价，调整应急行动方案，以便有针对性地采取有效措施，尽可能减少险情造成的损失和降低危害，提高海上突发事件应急反应效率和救助成功率。

5.12.2 方式

由海上搜救机构在指挥应急行动中组织、实施，具体包括：

(1) 指导救援单位组织专人，使用专用设备、仪器进行现场检测、分析。

(2) 组织专家或专业咨询机构对事件进行分析、研究。

(3) 使用计算机辅助支持系统进行分析、评估。

5.12.3 内容

(1) 调查险情的主要因素。

(2) 判断事件的发展趋势。

(3) 采取有针对性措施对危险源进行控制、处置。

(4) 对现场进行检测，分析、评价措施的有效性。

(5) 针对海上突发事件衍生出的新情况、新问题，采取进一步的措施。

(6) 对应急行动方案进行调整和完善。

5.13 海上应急行动的终止

负责组织指挥海上突发事件应急反应的海上搜救机构，根据下列情况决定是否终止应急行动：

(1) 所有可能存在遇险人员的区域均已搜寻。

(2) 幸存者在当时的气温、水温、风、浪条件下得以生存的可能性已完全不存在。

(3) 海上突发事件应急反应已获得成功或紧急情况已不复存在。

(4) 海上突发事件的危害已彻底消除或已控制，不再有扩展或复发的可能。

5.14 信息发布

中国海上搜救中心负责向社会发布海上突发事件的信息，必要时可授权下级海上搜救应急指挥机构向社会发布本责任区内海上突发事件的信息。

信息发布要及时、主动、客观、准确。信息发布通过新闻发布会、电视、广播、报刊、杂志等媒体作用，邀请记者现场报道形式进行。

6 后期处置

6.1 善后处置

6.1.1 伤员的处置

当地医疗卫生部门负责获救伤病人员的救治。

6.1.2 获救人员的处置

当地政府民政部门或获救人员所在单位负责获救人员的安置；港澳台或外籍人员，由当地政府港澳台办或外事办负责安置；外籍人员由公安部门或外交部门负责遣返。

6.1.3 死亡人员的处置

当地政府民政部门或死亡人员所在单位负责死亡人员的处置；港澳台或外籍死亡人员，由当地政府港澳台办或外事办负责处置。

6.2 社会救助

对被救人员的社会救助，由当地政府民政部门负责组织。

6.3 保险

6.3.1 参加现场救助的政府公务人员由其所在单位办理人身意外伤害保险。

6.3.2 参加救助的专业救助人员由其所属单位办理人身意外伤害保险。

6.3.3 国家金融保险机构要及时介入海上突发事件的处置工作，按规定开展赔付工作。

6.4 搜救效果和应急经验总结

6.4.1 搜救效果的总结评估

(1) 海上搜救机构负责搜救效果的调查工作，实行分级调查的原则。

(2) 海上交通事故的调查处理，按照国家有关规定处理。

6.4.2 应急经验总结和改进建议

(1) 海上搜救机构负责应急经验的总结工作，实行分级总结的原则。

(2) 海上搜救分支机构负责一般和较大应急工作的总结；省级海上搜救机构负责重大应急工作的总结；中国海上搜救中心负责特大应急工作的总结。

7 应急保障

7.1 通信与信息保障

各有关通信管理部门、单位均应按照各自的职责要求，制订有关海上应急通信线路、设备、设施等使用、管理、保养制度；落实责任制，确保海上应急通信畅通。

7.2 应急力量与应急保障

7.2.1 应急力量和装备保障

(1) 省级海上搜救机构收集本地区可参与海上应急行动人员的数量、专长、通信方式和分布情况信息。

(2) 专业救助力量应按照海上搜救机构的要求配备搜救设备和救生器材。

(3) 省级海上搜救机构依据《海上搜救力量指定指南》，收集本地区应急设备的类型、数量、性能和布局信息。

7.2.2 交通运输保障

(1) 建立海上应急运输保障机制，为海上应急指挥人员赶赴事发现场，以及应急器材的运送提供保障。

(2) 省级海上搜救机构及其分支机构应配备应急专用交通工具，确保应急指挥人员、器材及时到位。

(3) 省级海上搜救机构及其分支机构应与本地区的运输部门建立交通工具紧急征用机制，为应急行动提供保障。

7.2.3 医疗保障

建立医疗联动机制，明确海上医疗咨询、医疗援助或医疗移送和收治伤员的任务。

7.2.4 治安保障

(1) 省级海上搜救机构及其分支机构与同级公安部门建立海上应急现场治安秩序保障机制，保障海上应急行动的顺利开展。

(2) 相关公安部门应为海上应急现场提供治安保障。

7.2.5 资金保障

(1) 应急资金保障由各级财政部门纳入财政预算，按照分级负担的原则，合理承担应由政府承担的应急保障资金。具体参照《财政应急保障预案》有关规定执行。

(2) 中国海上搜救中心、省级海上搜救机构及其分支机构应按规定使用、管理搜救经费，定期向同级政府汇报经费的使用情况，接受政府部门的审计与监督。

7.2.6 社会动员保障

当应急力量不足时，由当地政府动员本地区机关、企事业单位、各类民间组织和志愿人员等社会力量参与或支援海上应急救援行动。

7.3 宣传、培训与演习

7.3.1 公众信息交流

公众信息交流的目的是使公众了解海上安全知识，提高公众的安全意识，增强应对海上突发事件能力。

(1) 海上搜救机构要组织编制海上险情预防、应急等安全知识宣传资料，通过媒体主渠道和适当方式开展海上安全知识宣传工作。

(2) 海上搜救机构要通过媒体和适当方式公布海上应急预案信息，介绍应对海上突发事件的常识。

7.3.2 培训

(1) 海上搜救机构工作人员应通过专业培训和在职培训，掌握履行其职责所需的相关知识。

(2) 专业救助力量、有关人员的适任培训由应急指挥机构认可的机构进行，并应取得应急指挥机构颁发的相应证书。

(3) 被指定为海上救援力量的相关人员的应急技能和安全知识培训，由各自单位组织，海上搜救机构负责相关指导工作。

7.3.3 演习

中国海上搜救中心应举行如下海上搜救演习：

(1) 每两年举行一次综合演习。不定期与周边国家、地区海上搜救机构举行海上突发事件应急处置联合演习。

(2) 每年举行一次海上搜救项目的单项演习，并将海上医疗咨询和医疗救援纳入演习内容。

(3) 每半年举行一次由各成员单位和各级海上搜救机构参加的应急通信演习。

8 附则

8.1 名词术语和缩写的定义与说明

(1) 海上突发事件是指船舶、设施在海上发生火灾、爆炸、碰撞、搁浅、沉没，油类物质或危险化学品泄漏以及民用航空器海上遇险造成或可能造成人员伤亡、财产损失的事件。

(2) 海上搜救责任区是指由一搜救机构所承担的处置海上突发事件的责任区域。

(3) 本预案中所指“海上”包括内河水域。

(4) 本预案有关数量的表述中，“以上”含本数，“以下”不含本数。

8.2 预案管理与更新

(1) 交通部负责国家海上搜救应急预案的编制及修改工作。

(2) 本应急预案的附录，属技术指导性文件的，由中国海搜救中心审定;属行政规章的，其修改工作由发布机关负责。

(3) 省级海上搜救机构及其分支机构负责编制各自的海上应急反应预案，报同级人民政府批准，并及时报送中国海上搜救中心。

(4) 专业搜救力量制定的预案应报同级应急指挥机构批准后实施，并接受应急指挥机构的监督检查。

8.3 国际协作

(1) 收到周边国家或地区请求对在其搜救责任区开展的海上突发事件应急反应给予救援时，视情提供包括船舶、航空器、人员和设备的援助。

(2) 在其他国家的救助机构提出外籍船舶或航空器为搜寻救助海难人员的目的进人或越过我国领海或领空的申请时，要及时与国家有关主管部门联系，并将是否准许情况回复给提出请求的搜救机构。

(3) 与周边国家共同搜救区内的海上突发事件应急反应，需协调有关国家派出搜救力量，提供必要的援助。

(4) 与周边国家搜救机构一起做出搜救合作和协调的行动计划和安排。

(5) 为搜寻海上突发事件发生地点和救助海上突发事件遇险人员，救助力量需进入或越过其他国家领海或领空，由中国海上搜救中心与有关国家或地区海上搜救机构联系，说明详细计划和必要性。

8.4 奖励与责任追究

8.4.1 在参加海上应急行动中牺牲的军人或其他人员，由军事部门或省、自治区、直辖市人民政府，按照《革命烈士褒扬条例》的规定批准为革命烈士。

8.4.2 军人或其他人员参加海上应急行动致残的，由民政部门按相关规定给予抚恤优待。

8.4.3 对海上应急工作作出突出贡献的人员，由中国海上搜救中心或省级海上搜救机构报交通部或省级人民政府按照规定，给予奖励。

8.4.4 对按海上搜救机构协调参加海上搜救的船舶，由中国海上搜救中心或省

级海上搜救中心给予适当的奖励、补偿或表扬。奖励、补偿或表扬的具体规定由中国海上搜救中心另行制订。

8.4. 5 对推诿、故意拖延、不服从、干扰海上搜救机构协调指挥，未按本预案规定履行职责或违反本预案有关新闻发布规定的单位、责任人，由海上搜救机构予以通报，并建议其上级主管部门依照有关规定追究行政责任或给予党纪处分；对违反海事管理法律、法规的，由海事管理机关给予行政处罚；构成犯罪的，依法追究刑事责任。

8.4.6 对滥用职权、玩忽职守的搜救机构工作人员，依照有关规定给予行政和党纪处分；构成犯罪的，依法追究刑事责任。

8. 5 预案实施时间

本预案自印发之日起施行。

国务院

二 00 六年一月二十三日

海洋石油安全生产规定

（2006 年 1 月 6 日国家安全生产监督管理总局局长办公会议审议通过，自 2006 年 5 月 1 日起施行，原石油工业部 1986 年颁布的《海洋石油作业安全管理规定》同时废止）

第一章　总则

第一条　为了加强海洋石油安全生产工作，防止和减少海洋石油生产安全事故和职业危害，保障从业人员生命和财产安全，根据《安全生产法》及有关法律、行政法规，制定本规定。

第二条　在中华人民共和国的内水、领海、毗连区、专属经济区、大陆架以及中华人民共和国管辖的其他海域内的海洋石油开采活动的安全生产，适用本规定。

第三条　海洋石油作业者和承包者是海洋石油安全生产的责任主体。

本规定所称作业者是指负责实施海洋石油开采活动的企业，或者按照石油合同的约定负责实施海洋石油开采活动的实体。

本规定所称承包者是指向作业者提供服务的企业或者实体。

第四条　国家安全生产监督管理总局（以下简称安全监管总局）对海洋石油安全生产实施综合监督管理。

安全监管总局设立海洋石油作业安全办公室（以下简称海油安办）作为实施海洋石油安全生产综合监督管理的执行机构。海油安办根据需要设立分部，各分部依照有关规定实施具体的安全监督管理。

第二章　安全生产保障

第五条　作业者和承包者应当遵守有关安全生产的法律、行政法规、部门规章、国家标准和行业标准，具备安全生产条件。

第六条　作业者应当加强对承包者的安全监督和管理，并在承包合同中约定各自的安全生产管理职责。

第七条　作业者和承包者的主要负责人对本单位的安全生产工作全面负责。

作业者和从事物探、钻井、测井、录井、试油、井下作业等活动的承包者及海洋石油生产设施的主要负责人、安全管理人员应当按照安全监管总局的规定，经

过安全资格培训，具备相应的安全生产知识和管理能力，经考核合格取得证书后方可任职。

第八条 作业者和承包者应当对从业人员进行安全生产教育和培训，保证从业人员具备必要的安全生产知识，熟悉有关的安全生产规章制度和安全操作规程，掌握本岗位的安全操作技能。

第九条 出海作业人员应当接受海洋石油作业安全救生培训，经考核合格后方可出海作业。

临时出海人员应接受必要的安全教育。

第十条 特种作业人员应当按照安全监管总局有关规定经专门的安全技术培训，考核合格取得特种作业操作资格证书后方可上岗作业。

第十一条 海洋石油建设项目在可行性研究阶段或者总体开发方案编制阶段应当进行安全预评价。安全预评价报告经评审后报海油安办备案。

在设计阶段，海洋石油生产设施的重要设计文件及安全专篇，应当经海洋石油生产设施发证检验机构（以下简称发证检验机构）审查同意。发证检验机构应当在审查同意的设计文件、图纸上加盖印章。

第十二条 海洋石油生产设施应当由具有相应资质或者能力的专业单位施工，施工单位应当按照审查同意的设计方案或者图纸施工。

第十三条 海洋石油生产设施试生产前，应当经发证检验机构检验合格，取得最终检验证书或者临时检验证书，并制订试生产的安全措施，于试生产前 45 日报海油安办有关分部备案。

海油安办有关分部应对海洋石油生产设施的状况及安全措施的落实情况进行检查。

第十四条 海洋石油生产设施试生产正常后，应当向海油安办申请安全竣工验收。

经验收合格并办理安全生产许可证后，方可正式投入生产使用。

第十五条 作业者和承包者应当向作业人员如实告知作业现场和工作岗位存在的危险因素和职业危害因素，以及相应的防范措施和应急措施。

第十六条 作业者和承包者应当为作业人员提供符合国家标准或者行业标准的劳动防护用品，并监督、教育作业人员按照使用规则佩戴、使用。

第十七条 作业者和承包者应当制定海洋石油作业设施、生产设施及其专业设备的安全检查、维护保养制度，建立安全检查、维护保养档案，并指定专人负责。

第十八条 作业者和承包者应当加强防火防爆管理，按照有关规定划分和标明安全区与危险区；在危险区作业时，应当对作业程序和安全措施进行审查。

第十九条 作业者和承包者应当加强对易燃、易爆、有毒、腐蚀性等危险物品的管理，按国家有关规定进行装卸、运输、储存、使用和处置。

第二十条 海洋石油的专业设备应当由专业设备检验机构检验合格，方可投

入使用。专业设备检验机构对检验结果负责。

第二十一条 海洋石油作业设施首次投入使用前或者变更作业区块前，应当制订作业计划和安全措施。

作业计划和安全措施应当在开始作业前 15 日报海油安办有关分部备案。

外国海洋石油作业设施进簇中华人民共和国管辖海域前按照上述要求执行。

第二十二条 作业者和承包者应当建立守护船值班制度，在海洋石油生产设施和移动式钻井船（平台）周围应备有守护船值班。无人值守的生产设施和陆岸结构物除外。

第二十三条 作业者或者承包者在编制钻井、采油和井下作业等作业计划时，应当根据地质条件与海域环境确定安全可靠的井控程序和防硫化氢措施。

打开油（气）层前，作业者或者承包者应当确认井控和防硫化氢措施的落实情况。

第二十四条 作业者和承包者应当保存安全生产的相关资料，主要包括作业人员名册、工作日志、培训记录、事故和险情记录、安全设备维修记录、海况和气象情况等。

第二十五条 在海洋石油生产设施的设计、建造、安装以及生产的全过程中，实施发证检验制度。

海洋石油生产设施的发证检验包括建造检验、生产过程中的定期检验和临时检验。

第二十六条 发证检验工作由作业者委托具有资质的发证检验机构进行。

第二十七条 发证检验机构应当依照有关法律、行政法规、部门规章和国家标准、行业标准或者作业者选定的技术标准实施审查、检验，并对审查、检验结果负责。

作业者选定的技术标准不得低于国家标准和行业标准。

海油安办对发证检验机构实施的设计审查程序、检验程序进行监督。

第三章 安全生产监督管

第二十八条 海油安办及其各分部对海洋石油安全生产履行以下监督管理职责：

（一）组织起草海洋石油安全生产法规、规章、标准；

（二）监督检查作业者和承包者安全生产条件、设备设施安全和劳动防护用品使用情况；

（三）监督检查作业者和承包者安全生产教育培训情况；负责作业者，从事物探、钻井、测井、录井、试油、井下作业等的承包者和海洋石油生产设施的主要负

责人、安全管理人员和特种作业人员的安全培训考核工作；

（四）监督检查海洋石油建设项目生产设施“三同时”情况，负责建设项目安全预评价报告的备案管理，组织建设项目生产设施安全竣工验收工作，负责安全生产许可证的发放工作；

（五）负责海洋石油生产设施发证检验、专业设备检测检验、安全评价、安全培训和安全咨询等社会中介服务机构的资质审查；

（六）组织生产安全事故的调查处理；协调事故和险情的应急救援工作。

第二十九条 监督检查人员必须熟悉海洋石油安全法律法规和安全技术知识，能胜任海洋石油安全检查工作，经考核合格，取得相应的执法资格。

第三十条 海油安办及其各分部依法对作业者和承包者执行有关安全生产的法律、行政法规和国家标准或者行业标准的情况进行监督检查，行使以下职权：

（一）对作业者和承包者进行安全检查，调阅有关资料，向有关单位和人员了解情况；

（二）对检查中发现的安全生产违法行为，当场予以纠正或者要求限期改正；

（三）对检查中发现的事故隐患，应当责令立即排除；重大事故隐患排除前或者排除过程中无法保证安全的，应当责令从危险区域内撤出作业人员，责令暂时停产停业或者停止使用；重大事故隐患排除后，经审查同意，方可恢复生产和使用；

（四）对有根据认为不符合保障安全生产的国家标准或者行业标准的设施、设备、器材予以查封或者扣押，并应当在 15 日内依法作出处理决定。

第三十一条 监督检查人员进行监督检查时，应履行以下义务：

（一）忠于职守，坚持原则，秉公执法；

（二）执行监督检查任务时，必须出示有效的监督执法证件，使用统一的行政执法文书；

（三）遵守作业者和承包者的有关现场管理规定，不得影响正常生产活动；

（四）保守作业者和承包者的有关技术秘密和商业秘密。

第三十二条 监督检查人员在进行安全监督检查期间，作业者或者承包者应当免费提供必要的交通工具、防护用品等工作条件。

第三十三条 承担海洋石油生产设施发证检验、专业设备检测检验、安全评价、安全培训和安全咨询的中介机构应当具备国家规定的资质。

第四章 应急预案与事故处理

第三十四条 作业者应当建立应急救援组织，配备专职或者兼职救援人员，或者与专业救援组织签订救援协议，并在实施作业前编制应急预案。

承包者在实施作业前应编制应急预案。

应急预案应当报海油安办有关分部和其他有关政府部门备案。

第三十五条 应急预案应当包括以下主要内容：作业者和承包者的基本情况、危险特性、可利用的应急救援设备；应急组织机构、职责划分、通讯联络；应急预案启动、应急响应、信息处理、应急状态中止、后续恢复等处置程序；应急演习与训练。

第三十六条 应急预案应充分考虑作业内容、作业海区的环境条件、作业设施的类型、自救能力和可以获得的外部支援等因素，应能够预防和处置各类突发性事故和可能引发事故的险情，并随实际情况的变化及时修改或者补充。

事故和险情包括以下情况：井喷失控、火灾与爆炸、平台遇险、飞机或者直升机失事、船舶海损、油（气）生产设施与管线破损 / 泄漏、有毒有害物质泄漏、放射性物质遗散、潜水作业事故；人员重伤、死亡、失踪及暴发性传染病、中毒；溢油事故、自然灾害以及其他紧急情况等。

第三十七条 当发生事故或者出现可能引发事故的险情时，作业者和承包者应当按应急预案的规定实施应急措施，防止事态扩大，减少人员伤亡和财产损失。

当发生应急预案中未规定的事件时，现场工作人员应当及时向主要负责人报告。主要负责人应当及时采取相应的措施。

第三十八条 事故和险情发生后，当事人、现场人员、作业者和承包者负责人、各分部和海油安办根据有关规定逐级上报。

第三十九条 海油安办及其有关分部、有关部门接到重大事故报告后，应当立即赶到事故现场，组织事故抢救、事故调查。

第四十条 无人员伤亡事故、轻伤、重伤事故由作业者和承包者负责人或其指定的人员组织生产、技术、安全等有关人员及工会代表参加的事故调查组进行调查。

其他事故的调查处理，按有关规定执行。

第四十一条 作业者应当建立事故统计和分析制度，定期对事故进行统计和分析。事故统计年报应当报海油安办有关分部、政府有关部门。承包者在提供服务期间发生的事故由作业者负责统计。

第五章 罚则

第四十二条 监督检查人员在海洋石油安全生产监督检查中滥用职权、玩忽职守、徇私舞弊的，依照有关规定给予行政处分；构成犯罪的，依法追究刑事责任。

第四十三条 作业者和承包者有下列行为之一的，给予警告，并处 3 万元以下的罚款：

（一）未按规定执行发证检验或者用非法手段获取检验证书的；

（二）未按规定配备守护船，或者使用不满足有关规定要求的船舶做守护船，或者守护船未按规定履行登记手续的；

（三）未按照本规定第十一条、第十三条、第二十一条和第三十四条的规定履行备案手续的；

（四）未按有关规定制订井控措施和防硫化氢措施，或者井控措施和防硫化氢措施不落实的；

（五）出海作业人员未按照规定经过海洋石油作业安全救生培训并考核合格上岗作业的。

第四十四条 本规定所列行政处罚，由海油安办及其各分部实施。

《安全生产法》等法律、行政法规对安全生产违法行为的行政处罚另有规定的，依照其规定。

第六章 附则

第四十五条 本规定下列用语的定义：

（一）石油，是指蕴藏在地下的、正在采出的和已经采出的原油和天然气。

（二）石油合同，是指中国石油企业与外国企业为合作开采中华人民共和国海洋石油资源，依法订立的石油勘探、开发和生产的合同。

（三）海洋石油开采活动，是指在本规定第二条所述海域内从事的石油勘探、开发、生产、储运、油田废弃及其有关的活动。

（四）海洋石油作业设施，是指用于海洋石油作业的海上移动式钻井船（平台）、物探船、铺管船、起重船、固井船、酸化压裂船等设施。

（五）海洋石油生产设施，是指以开采海洋石油为目的的海上固定平台、单点系泊、浮式生产储油装置、海底管线、海上输油码头、滩海陆岸、人工岛和陆岸终端等海上和陆岸结构物。

（六）专业设备，是指海洋石油开采过程中使用的危险性较大或者对安全生产有较大影响的设备，包括海上结构、采油设备、海上锅炉和压力容器、钻井和修井设备、起重和升降设备、火灾和可燃气体探测、报警及控制系统、安全阀、救生设备、消防器材、钢丝绳等系物及被系物、电气仪表等。

第四十六条 内陆湖泊的石油开采的安全生产监督管理，参照本规定相应条款执行。

第四十七条 本规定自 2006 年 5 月 1 日起施行，原石油工业部 1986 年颁布的《海洋石油作业安全管理规定》同时废止。

日本水产业协会法（一）

（1948 年 12 月 15 日法律第 242 号）
（最终修正：2004 年法律第 124 号）

杨立敏* 申政武** 孙 娜*** 译

第一章 总则

【这项法律的目的】

第一条 颁布这项法律是为了促进渔民及水产加工业者协会的发展，为了提升协会的地位，增进水产业的生产力，以促进国民经济的发展为目的。

【协会的类型】

第二条 水产业协会（以下本章及第七章至第九章简称为协会）由渔业协会、渔业生产协会、渔业协会联合会、水产加工业协会、水产加工业协会联合会和互助水产业协会联合会。

【协会的名称】

第三条 1. 协会必须使用渔业协会、渔业生产协会、渔业协会联合会、水产加工业协会、水产加工业协会联合会和互助水产业协会联合会的名称。

2. 非协会组织，其名称中不得出现渔业协会、渔业生产协会、渔业协会联合会、水产加工业协会、水产加工业协会联合会和互助水产业协会联合会的字眼。

【协会的目的】

第四条 协会以采取一系列的活动行为为会员提供直接服务为目的。

【协会的人格】

第五条 协会为法人实体。

【协会的住所】

第六条 协会的住所在其主要事务所的所在地。

【与禁止私人独占确保公平交易相关法律的关系】

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第七条 禁止私人独占确保公平交易的法律（昭和 22 年法律第 54 号，以下简称禁止私人独占法）的适用方面，协会被认为是符合私人独占法第 22 条第一号及第三号的基本条件。

第八条 协会（法人税法（昭和 40 年法律第 34 号）第二条第七号规定的相当于协会的组织）按照参与协会活动的比例和从事协会活动的比例给协会会员分红的比例，根据同法的规定，在相关协会同法规定的各事业年度所得金额和各联合事业年度联合所得金额上，算作亏损的金额。

【登记】

第九条 根据本法律的规定应该登记的事项，在未登记前不生效，不得以此对抗第三者。

【定义】

第十条 1．本法律中所说的渔业指水产动植物的采捕和养殖，水产加工业指以水产动植物为原料或材料生产食料、饲料、肥料、糊料、油脂或皮等。

2．本法律的渔民指经营渔业的个人或为经营渔业而从事水产动植物的采捕或养殖的人，水产加工业者指经营水产加工业的个人。

第二章 渔业协会

第一节 权利与义务

【权利与义务】

第十一条 1．渔业协会（本章及第四章简称为协会），可以行使以下全部或部分权利和义务；

一、水产资源的管理及水产动植物的增殖；

二、经营有关水产方面的业务及为了技术的提高采取技术性指导；

三、为协会成员的工作和生活提供必要的贷款业务；

四、办理协会成员的储蓄和定期存款等储蓄业务；

五、为协会成员的工作和生活提供必要的物资供给；

六、为协会成员的工作和生活提供必要的共同利用设备而采取相应措施；

七、负责协会成员的渔业收获物和其他生产物的搬运、加工、保管和贩卖；

八、有关渔场使用方面的措施（包括为确保各协会成员能稳定使用渔场而协会利用各协会成员的劳动力促进渔场的综合的利用）；

九、船舶停靠码头、卸货码头、渔礁场等协会成员所从事的渔业所必需的设备的完备；

十、有关预防协会成员遇难及遇难后的相关救济措施；

十一、采取有关协会成员的互助措施；

十二、有关增加协会成员的福利设施的措施；

十三、为提高协会成员对本行业各种知识的掌握而开展的教育，及为协会成员提供一般的情报而采取的措施；

十四、为改善协会成员的经济地位而谋求的团体协约的缔结；

十五、渔船保险协会的保险及渔业互助协会或渔业互助协会联合会所采取的交涉；

十六、以上各条所牵扯到的附带的权利和义务。

2．没有出资的协会（以下简称“非出资协会”）无权执行第三条、第四条和第十一条规定，其他不受限制。

3．执行第一条和第四条规定时，为了协会成员的利益可以执行以下全部或部分权利和义务：

一、支票打折；

二、汇票交易；

三、(1) 债务担保及票据担保；(2) 有价证券的买卖等（指有价证券的买卖、证券交易法（昭和 23 年法律第 25 号）第二条第八项第三号二规定的有价证券店头金融交易（除了同条第 24 项规定的有价证券先付交易）、同条第二十一项规定的有价证券指数等期货交易、同条第二十二项规定的有价证券的自由贸易和同条第二十三项规定的外国市场证券期货交易（需利用者提出书面申请才可）。

四、有价证券的租贷；

五、国债等（国债、地方债及政府为保证本地的偿还和利息的支付所发放的公司债券及其他债券，以下同上）的担保，及与担保相关的国债发放的受理；

六、针对特定少数投资家募集有价证券（只限于相当于国债的及证券交易法第二条第一项第七号 1、2 所列条项）；

七、农林中央金库及其他主管大臣指定的金融机关或者与此相关业务的代理；

八、国家、地方公共团体、公司等的金钱交纳及其他与金钱相关的事务的办理；

九、有价证券、贵重金属等物品的保护预存；

九之二　转帐业（指关于公司债券等的转帐的法律《平成 13 年法律第 75 号》第二条第四项规定中的帐户管理机关所实行的转帐业，以下皆同）；

十、汇兑；

十一、金融期货等的受托等（指金融期货交易法（昭和 63 年法律第 77 号）第二条第二项规定的事务，以下同）；

十二、附带于以上各号的事业。

4．同时举办第 1 项第三号及第四号事业的协会，在不妨碍这些事业顺利实行的限度内，可以对于证券交易法第六十五条第 2 项第一号及第四号规定中的有价证券，实行同一项第一号及第四号中规定的事业（根据前项规定而实行的事业除外）。

5．同时举办第 1 项第三号及第四号事业的协会，在不妨碍这些事业顺利实行的限度内，可以根据关于金融机关兼营信托业务的法律（昭和十八年法律第四十三号），可以实行与同法第一条第一项规定中的信托业务（以下作“信托业务”）相关的事业。

6．协会在第 3 项第五号事业中欲实行募集方法办理的事业时，必须得到行政厅的认可。

7．协会根据第 4 项的规定，欲实行同项规定中的事业时，该协会对于以下特定的多数人为对象的该事业，必须要确定其内容及方法，并得到行政厅的认可。欲变更已得到认可的该事业的内容及方法时，也要得到行政厅的认可。

8．协会根据第 5 项的规定，欲实行与信托业务相关的事业时，该协会必须确定该业务的种类及方法，并得到行政厅的认可。欲变更已得到认可的该信托业务的种类或方法时，也是如此。

9．协会实行第 3 项第八号事业时，关于商法（明治三十二年法律第四十八号）第一百六十八条第一项第八号但书、第一百七十条第二项、第一百七十五条第二项第十号、同条第四项（包括了准用于同法第二百十一条第三项及第二百八十条之四的场合）、第一百七十八条（包括了准用于同法第二百十一条第三项、第二百八十条之十四第一项、第二百八十条之三十七第四项及第三百四十一条之十三第三项的场合）、第一百八十九条（包括了准用于同法第二百八十条之十四第一项、第二百八十条之三十七第四项及第三百四十一条之十三第三项以及有限公司法＜昭和十三年法律第七十四号＞第十二条第三项＜包括了准用于同法第五十七条的场合＞的场合）、第二百八十条之六、第二百八十条之二十八第二项第五号及第六号、第三百四十一条之六第二项第三号及第三百四十一条之八第二项第五号、有限公司法第七条第七号但书及第十二条第二项（包括了准用于同法第二十三条之二及第五十七条的场合）、以及商业登记法（昭和三十八年法律第一百二十五号）第八十条第十号、第八十二条第四号、第九十五条第六号及第九十六条第二号（只限于与同法第八十二条第四号相关的部分）的适用，协会也被视作银行。

10．协会根据定款规定，可以让协会会员以外者利用其设施（第 3 项第三号及第四号规定的设施，只限于主管省令规定的利用者）。但是，与同项第二号至第十号及第十二号以及第 4 项中规定的设施相关的场合除外。一个事业年度内，协会会员以外者能利用的事业总量，不得超过该事业年度内协会会员能利用的事业总量（由政令决定的事业指的是政令决定的额度）。

11. 关于与以下各号事业的利用相关的前项但书的适用，可视各该号确定的人为协会会员：

一、第 1 项第三号事业对于协会会员相同家庭的人或者不以营利为目的的法人，以其存款或定期存款为担保提供贷款的人；

二、第 1 项第四号事业对于与协会会员相同家庭的人及不以营利为目的的法

人；

三、第 1 项第十一号事业及第十二号事业对于与协会会员相同家庭的人。

12．无论第 10 项规定如何，会员在不妨碍事业顺利实行的限度内，根据章程的规定，可以进行以下资金的贷与：

一、由政令决定的对地方公共团体的贷款；

二、由政令决定的对不以盈利为目的法人，主要出资者或成员或者占有一半基本财产的地方公共团体的贷款；

三、根据渔场整备开发法（昭和二十五年法律第一百三十七号）第六条第 1 项至第 4 项的规定，为整备由政令决定的市镇村长、都道府县知事或者农林水产大臣指定的渔港区域的产业基础设施或生活环境而需要的资金的贷款（前两号中的贷款除外）；

四、对银行及其他金融机关的贷款。

【资源管理规程】

第十一条之二 1．实行前条第 1 项第一号事业的协会，根据正确管理在一定水面的水产动植物采捕方法、期间及其他事项的规定，为正确管理水产资源，欲指定协会会员在该水面经营渔业（包括关于游渔船业合理化的法律＜昭和六十三年法律第九十九号＞第二条第一项规定中的游渔船业，以下此条皆如此）应遵守事项的规程（以下作“资源管理规程”）时，必须得到行政厅的许可。欲变更此规程时也必须得到许可。

2．资源管理规程应确定如下事项：

一、作为资源管理规程对象的水面区域以及水产资源及渔业的种类；

二、水产资源的管理方法；

三、资源管理规程的有效期间；

四、关于违反资源管理规程时处以罚金的事项；

五、其他由农林水产省令决定的事项。

3．欲得到第 1 项认可（包括同项的变更认可，第七项也如此）的协会，在根据第四十八条第 1 项第二号规定的大会决议前，必须得到作为该资源管理规程之对象的、在该水面经营渔业的三分之二以上的协会会员的书面同意。

4．前项情况下，如章程允许用电磁的方法（指利用电子信息处理装置的方法及其他利用信息通信技术的方法，且是农林水产省令决定的方法，以下同）行使决定权，可以用该电磁方法得到的对该资源管理规程的同意替代书面同意。

5．用前项的电磁方法（农林水产省令决定的方法除外）得到的对该资源管理规程的同意，在被保存到协会使用的电子计算机中的文件时，可视之传到了该协会。

6．在海洋水产资源开发促进法（昭和四十六年法律第六十号）第十三条第一项中规定的资源管理协定或者渔业法（昭和二十四年法律第二百六十七号）第八条第一项中规定的渔业权行使规则或人渔权（进入他人渔场的权利，译者注）行使

规则（以下此项作“渔业权行使规则等”）存在的情况下，资源管理规程的内容必须符合该资源管理协定或者渔业权行使规则等。

7. 对于协会违反了得到第 1 项认可的资源管理规程情况下的罚金，第二十三条规定不使用。

8. 除前面各项规定的以外，关于资源管理规程的必要事项由政令决定。

【出资总额的最低限度】

第十一条之三 1. 实行第十一条第 1 项第四号事业的协会的出资（第十九条之二第 2 项的周转出资金除外）总额，按照政令，必须在法定金额以上。

2. 前项的法定金额不得低于一亿日元（协会会员＜第二十一条第 1 项但书中的协会会员除外＞的人数、地理条件及其他事项符合法定要件的协会是一千万日元）

第十一条之四 1. 协会欲实行第十一条第 1 项第四号事业时，必须制定信用事业规程并得到行政厅的认可

2. 在前项信用事业规程中，必须记入有关信用事业（指第十一条第 1 项第三号及第四号＜包括了附带于这些的事业＞以及同条第 3 项至第 5 项的事业。第十一条之六第 1 项、第十一条之七第 2 项、第十一条之十、第十七条之二第 1 项、第十七条之三第 1 项、第三十四条第 3 项、第五十条第三号之二、第五十四条之二第 1 项、第 2 项、第 4 项及第 7 项、第五十八条之三第 1 项及第 4 项、第一百二十三条之二第 1 项及第 4 项、第一百二十七条第 1 项、第一百二十七条之二第 1 项、第一百二十七条之三第 5 项以及第一百三十条第 1 项第二十九号中也是如此）的种类及事业的实施方法的主管省令决定的事项。

3. 信用事业规程的变更（轻微事项及其他与主管省令决定的事项相关的除外）或者废止，如得不到行政厅的认可，不能生效。

4. 协会变更了与前项主管省令所决定的事项相关的信用事业规程时，必须迅速向行政厅报告其要点。

5. 第 1 项及第 3 项认可的申请，必须在申请书后附有主管省令规定的文件。

【对地方公共团体等的最高贷款限度】

第十一条之五 协会根据第十一条第 12 项规定的贷款，在一个事业年度内对协会会员及其他的协会会员以外者贷款的总额，超过了本协会在该事业年度内对协会会员及其他的协会会员以外者贷款总额之法定比例时，该事业年度内对协会会员及其他的会员以外者贷款的最高限度，必须得到行政厅的认可。

【确保经营健康性】

第十一条之六 1. 为有利于实行第十一条第 1 项第四号事业的协会的信用事业健康运营，作为判断其经营健康性的标准，主管大臣可以制定如下标准及其他标准：

一、参照该协会保有的资产等，该协会自己资本的充实状况是否恰当的标准；

二、参照该协会及其子公司和与该公司由主管省令确定的特殊关系的公司所

保有的资产等，该协会及有特殊关系的公司自己资本的充实状况是否恰当的标准；

三、该协会的剩余资金的处分方法是否恰当的标准。

2．前项规定中的“子公司”指的是，在协会中拥有全体股东决定权（指全体股东或全体职员的决定权＜与商法第二百一十一条之二第四项规定中的股票或者份额相关的决定权除外，包括了与根据同条第五项规定而被认为有决定权的股票或者份额相关的决定权，以下此条，第十七条之三、第八十七条之三、第八十七条之四及第一百二十二条也如此＞，以下同）的百分之五十的公司。这种情况下，该协会及其一个或两个以上的子公司，或者该协会一个或两个以上的子公司拥有全体股东决定权的百分之五十的其他公司，也被视作该协会的子公司。

3．前项情况下，协会或者其子公司拥有的决定权中，不含有与作为金钱或者与有价证券之信托相关的信托财产而拥有的股票或者与份额相关的决定权及其他由主管省令确定的决定权；但包含与作为信托财产的股票或者份额相关的决定权，且该协会或者其子公司是作为委托者或受益者行使，或者关于其行使可发布命令的决定权（主管省令确定的决定权除外）。

【对存款者等提供信息】

第十一条之七 1．实行第十一条第 1 项第四号事业的协会，关于存款或者定期存款的接受，为有利于保护存款者及定期存款者（以下此项作“存款者等”），根据主管省令，必须提供与存款或者定期存款相关的合同内容及其他参考信息。

2．除前项及其他法律规定外，同项的协会根据主管省令的规定，必须向利用者说明与该信用事业相关的重要事项，并采取其他确保其健康运营的措施。

【对同一人提供信用等】

第十一条之八 1．实行第十一条第 1 项第四号事业的协会对同一人（包括与该同一人有法定特殊关系的人，以下此条皆如此）的信用供给（指信用供给或者作为出资的法定事项，以下此条皆如此）额，不得超过法定比例乘以该协会自己资本额而得到的数额（以下此条作“信用供给等限度额”）。但是，接受信用供给者由于合并、共同新设分立（执法任何其他法人一起新设分立）或吸收分立，或者承受营业，以及其他有法定的不得已的理由的情况下，该协会对同一人的信用供给额超过了信用供给等限度额且得到了行政厅的承认时，不受此限。

2．前项协会有主管省令决定的公司以外的子公司（指第十一条之六第 2 项规定中的子公司，次条、第十七条之二、第十七条之三、第三十四条第 11 项及第五十八条之二第 2 项也是如此），以及其他与该协会有主管省令所决定的特殊关系者（以下次条作“子公司等”）情况下，该协会及该子公司等或者该子公司等对同一人的信用供给总额，不得超过法定比例乘以该协会及该子公司等的自己资本总额而得到的数额（以下此条作“合算信用供给等限度额”）。这种情况下，准用前项但书的规定。

3．前两项规定，对于对国家及地方公共团体的信用供给、政府保证偿还本金

及支付利息的信用供给及其他与此相同的法定信用供给等，不适用。

4．第 2 项情况下，协会及其子公司等或者其子公司等对同一人的信用供给总额超过了合算信用供给等限度额时，其超过部分的信用供给额可视作该协会的信用供给额。

5．除前面各项规定外，关于信用供给额，第 1 项规定中的自己资本额、信用供给等限度额、第 2 项规定中的自己资本总额及合算信用供给等限额的计算方法及其他第 1 项及第 2 项适用的必要事项，由主管省令决定。

【与特定关系者之间的交易等】

第十一条之九 实行第十一条第 1 项第四号事业的协会与其特定关系者（指该协会的子公司及其他与该协会有法定特殊关系者，以下此条皆如此）或者其特定关系者相关的利用者之间，不得发生以下交易或行为。但是，有主管省令所决定的不得已的理由之情况下，且得到行政厅的承认时，不受此限：

一、与该特定关系者之间的交易，而且参照该协会通常的交易条件，可能给该协会带来损失的由主管省令所决定的交易；

二、与该特定关系者或者与该特定关系者相关的利用者之间的交易或行为中，同于前号规定的交易或行为，而且是有可能阻碍该协会事业健康发展的由主管省令所决定的交易或行为。

【会计的区分处理】

第十一条之十 实行第十一条第 1 项第四号事业的协会，必须把与信用事业相关的会计和与其他事业相关的会计区分开来处理。

【栈单的发行】

第十二条 1．实行第十一条第 1 项第七号中的保管事业的协会，得到主管大臣的许可，可以对协会会员的寄存物发行栈单。

2．得到了前项许可的协会根据寄存者的请求，必须交付寄存物的栈单。

3．商法第六百二十七条第 2 项及第六百二十八条准用于第 1 项中的栈单。

4．仓库业法（昭和三十一年法律第一百二十一号）第八条第 2 项、第十二条第二十二条及第二十七条准用于第 1 项的情况。这种情况下，这些规定中的“国土交通相”可换作“主管大臣”，第十二条中的“第六条第 1 项第四号的标准”可换作“主管省令所决定的标准”。

第十三条 1．得到了前条第 1 项许可的协会做成的栈单上，必须记入冠有该协会名称的栈单之字样。

2. 不是协会做成的暂存单及质押单或栈单上，不得记入“渔业协会栈单”字样。

第十四条 1．协会发行了栈单的寄存物，其保管期间限定为自寄存之日起六个月以内。

2．前项的寄存物保管期间以六个月为限度，可以更新。但是，若更新时栈单的持有人不再是协会会员时，只限于不阻碍协会会员利用的情况。

第十五条 商法第六百十六条至第六百十九条及第六百二十四条至第

六百二十六条之规定，准用于协会发行栈单的情况。

【互助规程】

第十五条之二 1．协会欲实行第十一条第 1 项第十一号事业时，关于事业种类及其事业的实施方法、互助合同、互助费用及责任准备金的计算方法等由农林水产省令所决定的事项，必须制定互助规程，得到行政厅的认可。

2．互助规程的变更或废止如得不到行政厅的认可，不能生效。

【责任准备金】

第十五条之三 实行第十一条第 1 项第十一号事业的协会，根据农林水产省令，每个事业年度末必须计算事业的各个种类的责任准备金并积存。

【会计的区分处理】

第十五条之四 实行第十一条第 1 项第十一号事业的协会，必须把与同号事业相关的会计和其他事业相关会计区分开来处理。

【财产运用方法的限制】

第十五条之五 实行第十一条第 1 项第十一号事业的协会的财产，且属于根据前条规定，与同号事业相关的被区分开来进行会计处理之财产，除运用农林水产省令确定的方法外，不得运用其他方法。

【团体协约的效力】

第十六条 1．第十一条第 1 项第十四号的团体协约以书面形式生效。

2．协会会员缔结的合同之内容违反了前项团体协约之基准时，违反基准的合同部分可视作根据其基准所约定的部分。

【渔业之经营】

第十七条 1．据第十九条第 1 项规定让会员出资的，而且长年从事渔业或附带于此的事业的人的三分之一以上是会员或会员相同家庭的人的协会，除第十一条事业之外，还可以经营渔业及附带于此的事业。

2．根据前项规定，协会为了经营渔业，需要会员三分之二以上的书面同意。

3．前项情况下，若章程中规定可以用电磁方法来行使决定权时，可以用该电磁方法得到关于经营渔业的同意代替该书面同意。这种情况下，可视该协会得到了书面同意。

4．根据前三项规定，经营渔业及附带于此的事业的协会，缺少第 1 项条件时，必须迅速将其要点报告行政厅；与此同时，必须变更废止该事业的必要章程。这种情况下，直至章程变更，协会可以继续实行该事业。

第一节之二子公司等

【子公司的范围等】

第十七条之二 1．实行第十一条第 1 项第四号事业的协会，不得把实行相当于专营一项业务的国内公司（经营第一号业务的公司之情况下，只限于主要为了

该协会的事业而经营该业务的公司，以下此条作“子公司对象公司”）以外的信用事业之事业，或者经营从属、附随、关联于相当于信用事业之业务的公司作为子公司：

一、作为从属于协会实行的信用事业的业务，且由主管省令决定的（第四项及次条第一项中作“从属业务”）；

二、作为附随或关联于第十一条第 1 项第三号及第四号事业的业务，且由主管省令决定的。

2．子公司对象公司以外的公司由于同项的协会或其子公司实行担保权而取得股票或者份额，以及其他主管省令确定的事由，而成为该协会的子公司时，前项规定不适用。但是，该协会为了使成为其子公司的公司自该事由产生之日起一年以内不再是子公司，必须采取必要措施。

3．第一项中的协会符合以下各号中的任何一号时，根据主管省令的规定，必须将其要点报告行政厅：

一、欲使子公司对象公司成为子公司时（得到第五十四条之二第 3 项或者第六十九条第 2 项规定中的认可，欲进行第五十四条之二第 2 项中规定的信用事业的全部或部分的承受或者合并的情况除外）；

二、符合子公司对象公司条件的子公司不再是子公司时（得到第五十四条之二第 3 项规定的认可，进行了同条第一项规定中的信用事业的全部或部分的让渡之情况除外）；

三、符合子公司对象公司条件的子公司成为不再符合该条件的子公司时。

4．第 1 项情况下，公司为了协会的主要事业是否经营从属业务的标准，由主管大臣决定。

【取得决定权等的限制】

第十七条之三 1．实行第十一条第 1 项第四号事业的协会或其子公司，作为信用事业公司（指实行相当于信用事业的事业，或者经营从属、附随或关联于相当于信用事业的事业之业务的公司，以下此条皆如此），不得取得或保有超过其基准决定权数（指作为该信用事业公司的国内公司的全体股东的决定权乘以百分之十而得到的决定权数，以下此条皆如此）的决定权。

2．同项的协会或其子公司，由于担保权的实行而取得股票或份额，以及其他主管省令确定的事由，超过其基准决定权数而取得或保有作为信用事业公司的国内公司的决定权时，前项规定不适用。但是，关于该协会或其子公司超过其基准决定权数而取得或保有部分的决定权，事先得到了行政厅的承认的情况除外，但自取得或保有之日起，不得保有该决定权一年以上。

3．在前项但书的场合下，行政厅的承认对象中，不包括超过该决定权（指第 1 项中的协会或其子公司超过其全体股东等的决定权的百分之五十而取得或保有作为信用事业公司的国内公司的决定权时的决定权）的百分之五十部分的决定权。行政厅进行确认时，该协会或其子公司必须以迅速处理超过其基准决定权数部分

的决定权（指该协会或其子公司超过其基准决定权数而取得或保有的决定权）为条件。

4．第 1 项中的协会或其子公司在如下各号的情况下，不管同项规定如何，即使在作为信用事业公司的国内公司的决定权超过其基准决定权数情况下，同日以后，可以超过其基准决定权数而保有该决定权。但是，该协会或其子公司在以下各号情况下，超过全体股东等的决定权的百分之五十而保有作为信用事业公司的国内公司的决定权时，行政厅不得进行以下各号中的认可：

一、该协会得到第五十四条之二第 3 项的认可，全部或部分承受了同条第 2 项中规定的信用事业时（只限于主管省令确定的场合），全部或部分承受了信用事业之日；

二、得到第六十九条第 2 项的认可，该协会通过合并而成立时，成立之日；

三、该协会得到第六十九条第二项的认可而合并时（只限于该协会继续存在的场合），合并之日。

5．行政厅进行前项各号规定中的认可时，必须以自该各号确定的日期起五年以内，依据行政厅的基准，处理超过其基准决定权数部分的决定权（指第一项中的协会或其子公司超过其基准决定权数而保有的作为信用事业公司的国内公司的决定权）为条件。

6．第 1 项的协会或其子公司超过其基准决定权数而保有作为信用事业公司的国内公司的决定权时，其超过部分的决定权可视之为该协会取得或保有的。

7．第十一条之六第 3 项规定的前面各项情况下，准用于第 1 项中的协会或其子公司取得或保有的决定权。

第二节　　协会会员

【协会会员资格】

第十八条 1．协会会员须符合以下条件：

一、在协会所在地有住所，经营渔业或从事渔业时间全年超过 90 至 120 天的渔民；

二、在协会所在地有住所和工作场地的渔业生产合作协会；

三、(1) 在协会所在地有住所和工作场地的经营渔业的法人（除了协会和渔业生产协会）。一般来讲协会的从业人员不超过三百人，协会所使用的渔船（指渔船法（昭和 25 年法律第 178 号）第二条第一项规定的渔船，以下同此的合计总重量规定在 1 500 吨至 3 000 吨以下。

(2) 渔业法第八条第三项规定的在国内水域（湖沼、河川、运河、港湾、内海等）经营渔业或从事渔业或从事河川水产动植物的采捕养殖的人员为主要成员的协会（以下简称“国内水域渔业协会”）中不受本项第（1）号的规定约束，只要在协会所在地拥有住所，经营渔业或从事渔业或从事河川水产动植物的采捕养殖时间全

年超过 30 至 90 天的就有资格成为协会会员。

(3) 协会（除了以从事河川水产动植物的采捕养殖为主要会员的协会，下项同此）按照基本规定和第一项第一号以及前项的规定可以限定有会员资格的人从事渔业经营，其经营时间全年要超过 90 至 120 天（国内水域渔业协会超过 30 至 90 天）。

(4) 协会所在地在市、町、村或特别区区域以外的根据基本规定和前三项的规定可以限定有会员资格的人只能经营特定种类的渔业。

(5) 协会把符合前列各项规定以及以下几项中所列的视为有会员资格的。

一、(1) 根据前项规定有资格的会员以外的渔民和从事河川水产动植物的采捕养殖的人；

(2) 根据前面各项及前号规定协会会员的家人作为相当于利用协会设施的人中被政府认可的个人。

二、在协会所在地有住所或工作场所的经营渔业的法人（除了协会及本节第一项第二号、第三号或前项规定的有会员资格的法人除外）。一般协会的从业人员不超过 300 人，所使用的鱼船合计总重量在 3000 吨以下。

三、(1) 在协会所在地有住所及工作场所的、水产加工业者和从业人员一般在 300 人以下的、经营水产加工业的法人。

(2) 在协会所在地有住所和工作场所的经营游玩捕鱼船业（指第十一条二第一项规定的游玩捕鱼船业），从业人数不超过 50 人。

四、以相关协会的全部或部分地区作为地区的协会。

【出资】

第十九条一 1. 协会按规定可以让会员出资。

2. 按前项的规定让会员出资的协会（以下本章简称出资协会）的会员，出资必须（原稿不清楚）以上。

3. 出资的金额必须均一。

4. 出资协会的会员的责任，以出资金额为标准。

5. 会员关于出资，不得以相同的债权关系共同对抗出资协会。

【回转出资金】

第十九条二 1. 出资协会除了前项规定的出资外，按照基本规定，对协会会员按照对协会活动的参与率分红的金额的全部或一部分，可以让协会会员以五年为期限作为出资。

2. 对于前项规定中的出资（以下称为回转出资金），会员不得以相同的债权关系共同对抗出资协会。

第二十条 1. 出资协会的会员在没得到协会认可的前提下，不得擅自转让股份。

2. 非协会会员如有意想接受股份转让，需首先加入协会。

3. 接受股份转让的一方，同时也继承了转让人应承受的权力和义务。

4. 协会会员不可共有股份。

【决议权和选举权】

第二十一条 1．协会会员有决议权和对董事、代理的选举权。但第十八条第五项中规定的协会会员（以下及第四章简称为预备会员）没有决议权和选举权。

2．协会会员按照基本规定和第四十七条 5 的第三项（包含适用第四十三条第 2 项的）的规定，对预先通知的事项，协会会员可采取书面形式或委托代理人的形式履行决议权和选举权。如果不是协会会员的亲人、或是其雇用的人，或是本协会其他的会员（除了准会员），没有资格成为代理人。

3．协会会员按照基本规定和前项的规定，除了书面提出申请行使决议权，也可以用电磁的方法行使决议权。

4．按照前两项的规定行使决议权和选举权的人视为出席者。

5．代理人最多帮 5 个人代理。

6．代理人必须出具委托代理的书面证明，如果是用电磁的方法行使决议权，按照基本规定，不用书面证明，也可以用电磁的方法出具证明。

【经费】

第二十二条 1．协会按照基本规定，可以让会员分担经费。

2．有关经费的支付，协会会员不得以相同的债权关系对抗协会。

【罚款】

第二十三条　协会按照基本规定可以对违反规定、不履行义务的协会会员处以罚款。

【专项合同】

第二十四条 1．协会按照基本规定，在不超过两年的期限内，可以与协会会员缔结有关协会会员应认真利用该协会一部分主要设施的合同。

2．前项合同的缔结，协会不得以会员拒绝缔结条约而拒绝会员利用协会的设施。

【禁止限制会员加入】

第二十五条　具备会员资格的人有意加入协会，协会在没有正当理由的前提下，不得拒绝其加入，也不得附加比现会员当时加入时更为困难的条件。

【退会】

第二十六条 1．协会会员如要退会要提前 60 天告知，或在协会活动年终的时候退出。

2．前项的预告期，可以比规定的时间更长，但不能超过一年。

第二十七条 1．协会会员，因下列原因退会。

一、丧失会员资格。

二、死亡或解散。

三、除名。

2．对于符合以下任何一条的协会会员，其除名由总会会议决定。协会开会前 7 天至开会之日起需通知会员本人告知会议的主要内容，给他向总会辨明的机会

一、长时间不利用协会设施的会员；

二、不出资、不支付经费或对协会不履行义务的会员；

三、符合其他基本规定中所阐述的事由的会员。

3．如果没有告知已除名会员这些主要条例和告知本人已被除名，不得在此状态下对抗该会员。

【退会者股份的返还】

第二十八条一 1．出资协会的会员，在退会的时候，按照基本规定，可以要求返还其全部或部分股份。

2．前项的股份，在退会当年的年终时，被确定为是该协会的财产。

【退会者的缴费义务】

第二十八条二 在年终时，用协会的财产去偿还债务不够时，出资协会可以按照基本规定，要求在本年度内退会的会员交纳尚未交纳的出资额的全部或一部分。

【时效】

第二十九条 前两条规定的请求权，从退会之日算起两年之内有效，过时此权力自动取消。

【股份返还停止】

第三十条 退会会员的股份在本协会的债务偿还之后才能得以退回。

【出资数量的减少】

第三十一条 1．出资协会的会员按照基本规定，可以减少出资数。

2．前项的场合，适用于第二十八条至二十九条的规定。

第三节 管理

【应记入章程的事项】

第三十二条 1．协会的章程，必须记载以下事项，但作为非投资协会，而不进行第十一条第一项第五号—第七号有关事项的章程中，可以不记载第六、八、九号事项，在其他非投资协会的章程中，可以不记载第六号事项：

一、事业；

二、名称；

三、地区；

四、事务所所在地；

五、作为成员的资格及有关成员加入、退会的规定；

六、投资一份的金额及其支付方法，以及一成员能够投资份额的最高限度；

七、有关经费分担的规定；

八、有关剩余金额的处分及损失处理的规定；

九、储备金的金额及积累方法；

十、有关董事的人数、职务的分担及选举、选任的规定；

十一、企业年度；

十二、公告方法。

2．协会的章程中，除前面事项，设定协会存在时间时必须记载其时间；规定实物投资者时，必须记载其姓名、投资财产、价格及给其的投资份额。

3．主管大臣可规定标准的章程。

【可在章程中规定的事项】

第三十三条 左边事项，除了在章程中规定的事项之外，还可规定如下：

一、有关总会或总代会的规定；

二、有关业务的执行及会计的规定；

三、有关董事的规定；

四、有关成员的规定；

五、其他必要事项。

【董事】

第三十四条 1．在协会中，设置作为董事的理事及监察人。

2．理事 5 人以上，监察人设 2 人以上。

3．进行第十一条第一项第四号有关事业的协会，必须设置作为董事并担当其信用企业的理事；此时，担当理事中必须有一人以上不是代表该协会的理事。

4．根据章程，董事由协会成员（除了准协会成员）在总会（设立当时的董事创立总会）上选举。但，根据章程，董事也可以在总会外选举（设立当时的董事除外）。

5. 董事的选举，采取无记名投票。但，根据章程，董事侯选者在应选举董事人数以内的，可省略投票。

6．投票时，一人一票。

7．由章程规定投票方法，选举结果为得票多者为当选人（第 5 项中按规定省略投票时，该侯选者当选）。

8．在总会外进行董事选举时，投票场所必须设在不妨碍成员选举权行使的地方。

9．尽管有第 4 项规定，根据章程，协会成员（除了准协会成员）能在总会（设立时的董事创立总会）上选任董事。

10．协会理事的数量至少三分之二为准协会成员以外的成员（法人时，为其董事）。设立时理事人数至少三分之二必须是具有协会成员资格且赞成设立的人（法人时，为其董事）。

11．进行第十一条第一项第四号事业的协会（除了达不到政令规定规模的协会），其监察人中 1 人以上必须是该协会成员、该协会成员法人的董事或雇员以外的人，必须不是该协会前 5 年中就任的理事、雇员或分公司的董事长、执行人员、雇员。

12．进行第十一条第一项第四号事业的协会（除了达不到政令规定规模的协会）必须通过监察人的互选来决定监察人。

【经营管理委员】

第三十四条二 1．根据章程，协会可以设置理事、监察人以外的作为董事的经营管理委员。

2．经营管理委员的人数为 5 人以上，且该人数的至少四分之三必须为准协会成员以外的成员（法人时，为其董事）。设立时经营管理委员人数的至少四分之三必须是具有协会成员资格（除了准协会成员）且赞成设立的人（法人时，为其董事）。

3．设置经营管理委员的协会其理事的人数，尽管有前第 2 项的规定，要 3 人以上。

4．前项协会的理事，尽管有前第 4 项及第 9 项的规定，需由经营管理委员会选任。

5．前第 10 项规定不适用于第三项的协会。

【董事的任期】

第三十五条 1. 董事任期为三年以内。

2、设立时董事的任期，尽管有前项的规定，为创立总会（由合并而设立时，要设立委员）时规定的期限，不得超过一年。

【董事等的兼职及兼业的限制】

第三十五条二 1．进行第十一条第一项第四号事业的协会的代表理事（除了代表第三十四条 2 第三项协会的理事）及担任该协会常务董事（除去代表第三十四条 2 第三项协会的理事及经营管理委员）及参事，不能担任其他协会或法人的常务，不能经营企业，得到行政厅许可时除外。

2．有在前项中提及的书面许可申请时，行政厅在不确定与该申请有关的事项是否妨碍该协会业务健全顺利的运营时，不得许可。

3．第三十四条 2 第 3 项协会的理事，不能担任其他协会或法人的常务，不能经营企业。

4．经营管理委员不能兼任理事、监察或协会的雇员。

5．监察不能兼任理事或协会的雇员。

【理事会的职责】

第三十六条 理事会（第三十四条 2 第 3 项的协会遵守经营管理委员会的决定）决定协会业务的执行并监督理事职责的履行。

【经营管理委员会的职责】

第三十六条二 1．经营管理委员会，除本法律另有规定之外，要决定协会业务的基本方针、重要财产的取得及分配、及其他在章程中规定的有关协会业务执行的重要事项。

2．经营管理委员会可以让理事出席其会议，并做必要的说明。

3．理事会必要时可召集经营管理委员会。

4．商法第 259 条中的规定也适用于前项规定中关于召集的情况。

5．当理事违反下条第 1 项规定时，经营管理委员会可向总会请求解聘该理事。

6．经营管理委员会必须在总会开会 7 日前，送交与前项规定中请求有关的理事的解聘理由的书面文件，并给予其在总会上辩解的机会。

7．有关第 5 项中规定的请求，在总会中得到出席者过半数同意时，与此请求有关的理事此时被解聘。

【理事的忠实义务】

第三十七条 1．理事必须遵守法令、以法令为本的行政厅的处分、章程、规定、信用企业的规定及总会、经营管理委员会的决议，必须忠实地为协会履行其职责。

2．理事渎职时，该理事要与协会共同承担赔偿损失的责任。

3．理事在履行职责时如有恶意或重大过失，该理事要与第三者共同承担赔偿损失的责任。

4．对于应记入第四十条第一项文件的重要事项，理事如作虚假的记载、虚假的登记或公告，与前项相同。但，如证明理事对记载、登记或公告的事项疏于注意时除外。

5．商法第 266 条第 2 项、第 3 项、第 5 项、第 7 项（除去第 3 号）到第 9 项，第 10 项前段及第 17 项的规定，也适用于第 2 项中对于理事的责任。此时，同条第 7 项中“第 1 项第 5 号的行为”可换读为“水产业协会法第三十七条第 2 项中规定的应承担赔偿损失责任的行为”、“第 343 条”可换读为“同法第 50 条”、同条第 8 项及第 9 项前段中的“董事长”可以换读为“理事（水产业协会法第三十四条 2 第 3 项中协会的经营管理委员）”。

【理事与协会的合同】

第三十八条 理事只有得到理事会（第三十四条 2 第 3 项的协会中为经营管理委员会）承认时，才能与协会签订合同。此时，不适用于民法（明治 29 年法律第 89 号）第 108 条规定。

【章程及其他文件的设置、阅览等】

第三十九条 1．理事在制定章程、规定、信用企业规定、互助规定及渔业法第八条第 1 项的渔业权行使规则、捕鱼权行使规则（以下简称“渔业权行使规则”、“捕鱼权行使规则”）、同法第一百二十九条第一项的游捕规则（以下简称“游捕规则”）、资源管理规定及沿岸渔场整备开发法（昭和 49 年法律第 49 号）第八条第二项的培育水面的区域、培育水面利用规则（以下简称“培育水面”、“培育水面利用规则”）时，必须将这些规则置于各事务所，各主要事务所必须备有协会成员名册。

2．理事必须使十年来主要的事务所备有总会、理事会及经营管理委员会的议事录，必须使五年来的非主要事务所备有其副本。

3．协会成员名册中必须记载各协会成员的下列事实，但非投资协会的成员名册中可不记载第三号和第四号的事项：

一、姓名、名称及住所；

二、加入的年月日及是否具有协会成员资格;

三、投资股数及投资各股取得的年月日;

四、已缴纳投资额(除去运转投资的金额,下同)及缴纳的年月日。

4. 协会成员及协会的债权人,无论何时都可以向理事要求阅读和誊写第一项及第二项的文件。此时,理事如无正当理由不可拒绝。

【关于结算的文件的提出、设置及阅览等】

第四十条 1. 理事每营业年度必须作出不进行第 11 条第 1 项第 5 号到第 7 号事业的非投资合作组织的企业报告书及财产目录并得到理事会和经营管理委员会的承认;必须作出其他协会的企业报告书、借贷对照表、盈亏计算书、剩余资金处理方案、损失处理方案及附属 明细单,并得到理事会和经营管理委员会的承认。

2. 前项的文件,必须接受监察的检查。

3. 理事必须在定期总会开会日七周内向监察提交第一项的文件(除了附属明细单)。

4. 理事必须在提交前项文件后三周内,向监察提交第 1 项的附属明细单。

5. 监察必须在收到第三项的文件后 4 周内,向理事提交监察报告书。

6. 关于前项的监察报告书,也适用于商法第 281 条 3 第 2 项的规定。此时,同项第 2 号中"应记载或记录"换读为"应记载","记载或记录"换读为"记载",同项第 9 号中"第 281 条第 1 项"换读为"水产业协会法第 40 条第 1 项"、"记载或记录"换读为"记载",同项第 10 号中"董事长"换读为"董事及经营管理委员",同项第 11 号中"分公司"换读为"分公司(即所谓水产业协会法第 11 条 6 第 2 项规定的分公司)"。

7. 理事必须向定期总会提交监察报告书并第一项中的文件。

8. 理事必须在定期总会开会日 2 周前将第 1 项的文件及监察报告书配于五年来的主要事务所,将其副本配与三年来的非主要事务所。

9. 协会成员及协会的债权者,无论何时都可向理事要求阅读和誊写前项文件。此时,理事如无正当理由不可拒绝。

10. 第 1 项的企业报告书、借贷对照表、盈亏计算数及附属明细单的记载事项及记载方法,由农林水产省规定。

【明析各事业盈亏的文件的制作等】

第四十一条 1. 进行第 11 条第 1 项第四号事业的协会的理事,每经营年度,除前条第 1 项的文件外,还必须向总会提交由主管省划分的各事业起盈亏状况的文件。

2. 前项规定中向总会提交的文件,必须事先得到理事会及经营管理委员会的承认。

【特定协会的监察】

第四十一条之二 1. 进行第 11 条第 1 项第四号事业的协会(除去达不到政令规定规模的协会,以下此条中称为"特定协会")对于第 40 条第 1 项的文件,除监

察的检查外，还必须接受第 87 条第 11 项规定的全国联合会（以下此条中称为“全国联合会”）的检查。

2．特定协会的理事，必须在总会开会日 8 周前向监察及全国联合会提交第 40 条第 1 项的文件（除附属明细单）。

3．特定协会的理事，在提交前项文件后 3 周内，必须向监察及全国联合会提交第 40 条第 1 项的附属明细单。

4．全国联合会在收到第 2 项的文件后 4 周内，必须向特定协会的监察及理事提交监察报告书。5．前项的报告书中，必须记载适用于第 40 条第 6 项中监察报告书的商法第 281 条之三第 2 项第 1 号至第 7 号、第 9 号、第 11 号及第 12 号中的有关事项。

6．特定协会的监察可以要求全国连合会对第 4 项的监察报告书进行说明。

7，特定协会的监察必须在收到第 4 项的监察报告书后 1 周内向理事提交监察报告书，并向全国联合会寄送其副本。

8．前项的监察报告书必须记载如下事项：

一、当全国联合会的检查方法及结果不恰当时，记载其宗旨、理由及自己监查方法的概要、结果；

二、会计从外业务的监查方法概要；

三、适用于第 49 条第 6 项中监察报告书的商法第 281 条之三第 2 项第 8 号、第 10 号及第 12 中的事项。

9．第 4 项及第 7 项监察报告书的记载方法，由主管省制定。

10．第 1 项的全国联合会，适用商法第 274 条第 2 项及第 274 条之一，或关于股份公司监查等的商法其特例的法律（昭和 49 年法律第 22 号。以下此条及第 130 条中称为“商法特例法”）第 8 条到第 11 条及第 17 条规定。特定协会的理事，适用商法特例法第 16 条第 1 项规定。此时，商法第 274 条第 2 项中“董事长”换读为“理事、经营管理委员”，同法第 274 条之三中的“分公司”换读为“分公司（即水产业协会法第 11 条之六第 2 项中规定的分公司）”，商法特例法第 8 条第 1 项中的“董事长”换读为“理事或经营管理委员”、“检察机关”换读为“监察”，商法特例法第 10 条中“第 13 条第 1 项”换读为“水产业协会法第 41 条之二第 4 项”，商法特例法第 11 条中“董事长”换读为“理事，经营管理委员”，商法特例法第 16 条第 1 项中“据第 13 条第 2 项规定”换读为“适用水产业协会法第 41 条之二第 5 项”，“检察机关”换读为“各监察”，“记载（含各监察人意见的附记）”换读为“记载”、“同法第 283 条第 1 项”换读为“水产业协会法第 48 条第 1 项”、“同法第 281 条第 1 项第 1 号及第 2 号中有关记载”换读为“借贷对照表及盈亏计算书”，商法特例法第 17 条第 1 项中“第 2 条第 1 项中有关记载”换读为“水产业协会法第 40 条第 1 项的文件”、“监察机关及监查人”换读为“监察”。

11．特定协会，不适用第 40 条第 3 项到第 6 项的规定。

12．适用于特定协会的第 40 条第 7 项到第 9 项的规定中，同条第 7 项中“监

察报告书”应为“监察的监察报告书及全国联合会的监察报告书”,同条第8项中“及监察报告书”应为“监察的监察报告书及全国联合会的监察报告书”、同条第 9 项中“前项”应为“据第 41 条之二第 12 项规定可换读适用的前项”。

【董事的改选及解任的请求】

第四十二条 1. 协会成员(除准协会成员),在有总协会成员(除准协会成员)五分之一以上共同签名时,其代表人可请求改选董事(第 34 条之二第 3 项的协会,除其理事)。

2. 第 34 条之二第 3 项的协会中,其协会成员(除准协会成员)在有总协会成员(除准协会成员)5 分之 1 以上的共同签名时,其代表人可请求解任理事。

3. 前 2 项规定中的请求,必须在全体理事、全体经营管理委员及全体监察在场时同时进行。但以违反政令、以政令为本的行政厅的处分及章程、信用企业规定及互助规定为理由进行请求时,除外。

4. 据第 1 项和第 2 项的规定进行请求时,必须向理事提交记载改选、解任理由的书面文件(第 34 条之二第 3 项的协会中,为经营管理委员。以下此条相同)。

5. 据第 1 项和第 2 项的规定进行请求时,理事必须将请求提交总会审议。

6. 当有依据第 4 项规定的文件提出时,理事必须在总会开会前 7 天,送与此请求相关的董事此文件或副本,并给予其在总会上辩解的机会。

7. 依据第 1 项和第 2 项规定请求,在第 5 项的总会中得到出席者过半数的同意时,与此请求相关的董事此时被解职。

8. 第 47 条之三第 2 项及第 47 条之四第 1 项的规定,适用于第 5 项。

第四十三条 1. 由于无履行董事职责人员而有可能因迟缓而带来损失时,在协会成员及其他相关利害人员的请求下,行政厅可选任代理理事或选举董事(第 34 条之二第 3 项的协会,除理事。以下此项相同),或为选任而召集总会进行董事的选举或选任。

2. 第 47 条之五的规定,适用于前项总会的召集。

【与董事等相关的商法等的适用】

第四十四条 1. 商法第 254 条第 3 项、第 254 条之二、第 256 条第 3 项、第 258 条第 1 项、第 267 条第 1 项及第 3 项到第 7 项、第 268 条第 1 项到第 7 项、第 268 条之二及第 268 条之三的规定适用于理事、经营管理委员及监察,同法第 268 条第 8 项及第 269 条的规定适用于理事及经营管理委员。此时,同法第 254 条之二第 3 号中“本法”换读为“水产业协会法、本法”、同法第 267 条第 4 项中“前三项”换读为“第 1 项及前项”、同法第 269 条第 2 项中“董事(水产业协会法第 34 条之二第 3 项的协会中为经营管理委员)”。

2. 民法第 55 条及商法第 261 条、第 262 条、第 272 条的规定适用于理事,第 37 条第 1 项到第 3 项及第 5 项、第 38 条的规定适用于经营管理委员,第 37 条及同法第 274 条到第 275 条之四、第 278 条到第 279 条之二的规定适用于监事。此时,第 37 条第 4 项中“对应载入第 40 条第 1 项文件中重要事项的虚伪记载、虚伪

的登记或公告”换读为“对应载入监察报告书中重要事项的虚伪记载”，“记载、登记或公告”换读为“记载”，同条第5项中“商法第266条第2项、第3项、第5项、第7项（除第3号）到第9项及第10项前段”、适用于检查时换读为“据商法第2“条第5项、同条第18项的规定可换读适用的同条第7项（除第3号）、同条第8项及第10项前段”民法第55条中“总会”换读为“总会或经营管理委员会”，商法第261条第1项中“董事机构”换读为“董事会（水产业协会法第34条之二第3项的协会中为经营管理委员会）”同条第3项中“第258条”换读为“第258条第1项及水产业协会法第43条第1项”，同法第274条第1项中“董事长”换读为“理事及经营管理委员”同法第2项中“董事长”换读为“董事、经营管理委员”，同法第274条之二中“董事长”换读为“理事或经营管理委员”、同法第274条之三中“分公司”换读为“分公司（即水产业协会法第11条之六第2项规定中的分公司）”同法第275条中“董事长”换读为“董事长或经营管理委员”、同法第275条之二中“董事长”换为“理事”、同法第275条之四“董事长”换读为“理事或经营管理委员”、“第267条第1项”换读为“适用于水产业协会法第44条第1项中理事或经营管理委员的第267条第1项”、“适用于接受同法第2项中的第204条之二第2项的承诺”换读为“接受”、“第268条第6项”换读为“适用于同法第44条第1项中理事或经营管理委员的第268条第6项”、同法第278条种“董事长”换读为“理事或经营管理委员”。

3. 商法第259条第1项、第2项基地乡、第259条之二、第259条之三、第260条之二、第260条之三及第260条之四第1项到第3项的规定，适用于理事会及经营管理委员会。此时，同法第260条之四第2项中“记载或纪录”换读为“记载”。同法第260条之三第2项中“董事长”适用于经营管理委员会是换读为“理事或经营管理委员”。

【参事及会计主任】

第四十五条 1．协会可选任参事及会计主任，使其在各主要事务所和非主要事务所开展工作。

2. 参事及会计主任的选任及解任，由理事会的决议决定。

3. 商法第38条第1项及第3项、第39. 条、第41条、第42条的规定适用于参事。

第四十六条 1．协会成员（除准协会成员）在得到总协会成员（除准协会成员）十分之一以上的同意后，可对理事提出解任参事或会计主任的请求。

2．依据前项规定的请求，必须向理事提交记载解任理由的书面文件。

3. 有据第一项规定中的请求时，理事会必须决定是否解任该参事或会计主任。

4．理事在决定前项中解任与否的7天前，必须送交该参考理事或会计主任第2项的书面文件或副本，并给予其辩解的机会。

【禁止有竞争关系的人员就任董事等】

第四十七条 经营与协会进行的事业有实质性竞争关系的事业（除该协会成员经营的事业、从事的渔业及该协会所属的渔业协会联合会、互助水产业协会联

合会所进行的事业。以下各条件中称为“相互竞争事业”）、或从事相互竞争事业的人（包含经营该相互竞争企业的法人及其他团体的董事、职员）不能成为该协会的理事、经营管理委员、监察、参事、会计主任。

【总会的召集】

第四十七条之二 据章程规定，每经营年度必须召集一次定期总会。

第四十七条之三 据章程规定，必要时任何时候都可以召开临时总会。

2．协会成员（除准协会成员）得到总协会成员（除准协会成员）五分之一以上的赞成后，向理事（第 34 条之二第 3 项的协会，为经营管理委员。第 4 项中相同）提交记载会议的目的事项及召集理由的书面文件，请求召集总会时，理事会（同条第 3 项的协会，为经营管理委员会）必须决定自请求之日起 20 天以内召集临时总会。

3‘关于前项，章程中规定可采用电磁的方法来行使决议权时，代替该书面文件，可利用该电磁的方法提供应记入该书面文件的事项及理由。此时，被认为该协会的成员提交了该书面文件。

4．采用前项前段电磁的方法提供的应记入该书面文件的事项及理由，当达到理事使用的电子计算机中准备的文件夹时，被认为理事已收到。

第四十七条之四 1．若无行使理事（第 34 条之二第 3 项的协会，为经营管理委员。以下此项中相同）职务的人员，或有前条第 2 项请求而理事无正当理由却不办理召集总会的手续时，监察必须召集总会。

2．第 34 条之二第 3 项的协会，无行使经营管理委员及检查职责的人员时，理事必须召集总会。

【对协会成员的通知】

第四十七条之五 1．对协会的成员通知或催告时，只需寄往协会成员名册中记载的住所（当通知协会有另外接收通知或催告的地点时，为此地点）即可。

2．前项中的通知或催告，通常应到达时，被认为已到达。

3．召集总会的通知，必须在总会开会日一周前告知会议的目的事项。

【总会的决议事项】

第四十八条 下列事项必须通过总会的决议：一、章程的变更；

二、规章、资源管理规定、信用企业规定及互助规定的设定、变更及废止；

三、每经营年度事业计划的设定及变更；

四、经费的赋课及征收的方法；

五、事业的全部转让及第 11 条第 1 项第 5 号、第 7 号、第 11 号事业（含其附带事业）的全部或部分转让，户主合同的全部或部分转移（其部分转移只限于包括责任储备金核算基础相同的全部互助合同的转移（以下称为包括转移））；

六、事业报告书、财产目录、借贷对照表、盈亏计算书、剩余资金处理方案及损失处理方案；

七、每经营年度内借人金额的最高限度；

八、渔业权及与此相关的物权的设定、得失及变更；

九、渔业权行使规定、捕鱼权行使规定及游捕规定的制定、变更、废止；

十、渔业权及对于此相关物权的不服陈述、诉讼的提出、和解；

十一、培育水面的设定、变更及废止；

十二、培育水面利用规定的制定、变更及废止。

2．章程的变更（除与轻微事项及其他由农林水产省规定事项有关的章程）如无行政厅的认可，则不产生效力。

3．有对前项认可的申请时，适用第 63 条第 2 项、第 64 条及第 65 条规定。

4．协会在变更第 2 项中与农林水产省规定事项有关的章程时，必须立即向行政厅报告此情况。

5．与互助规定的变更相关的第 11 条第 1 项第 11 号事业，从在变更前后该事业的实施中协会应承担的全部互助责任附加在互助水产业协会联合会的互助上为条件来开展时，尽管有第 1 项规定，但根据政令规定，根据章程，可不需要经过总会的决议。

【总会的议事】

第四十九条 1．除此法律、章程和规定中的特别规定外，总会的议事由出席者的决议权的过半数来决定，同意与否决同数时，由议长决定。

2．每逢总会选任议长。

3．议长没有作为协会成员参加决议的权利。

【特别决议事项】

第五十条 下列事项需要总协会成员（除准协会成员）半数以上出席，并通过决议权三分之二以上的多数决议：

一、章程的变更；

二、协会的解散及合并；

三、(1) 协会成员的除名；

(2) 事业的全部转让、信用事业及第 11 条第 1 项第 5 号、第 7 号、第 11 号事业（包含附带事业）的全部转让及互助合同的全部转移；

四、渔业权及与之相关的物权的设定、得失及变更；

五、渔业权行使规定及捕鱼权行使规定的制定、变更、废除。

【关于总会的民法及商法的适用】

第五十一条 民法第 64 条及商法第 231 条、第 237 之三第 1 项、第 2 项，第 243 条，第 244 条第 1 项到第 3 项，第 247 条到第 252 条的规定，适用于总会。此时，民法第 64 条中“第 62 条”换读为“水产业协会法第 47 条之五第 3 项”，商法第 231 条中“董事会”换读为“理事会（水产业协会法第 34 条之二第 3 项的协会中为经营管理委员会）”，同法第 237 条之三第 1 项、第二项，第 247 条第 1 项及第 247 条第 1 项（包含适用于同法第 252 条的时候）中“董事长”换读为“理事、经营管理委员”，同法第 243 条中“第 232 条”换读为“水产业协会法第 47 条之五

第 3 项”，同法第 244 条第 2 项中“记载或纪录”换读为“记载”，同法第 3 项中“及出席的董事长”换读为“及出席的理事及经营管理委员”。

【总会的部会】

第五十一条之二 1．协会在拥有据渔业法第 14 条第 2 项及第 6 项规定因具备资格而被制定的特定区划渔业权（即同法第 7 条的特定区划渔业权。以下此条中相同）及共同渔业权（即同法第 6 条第 2 项的共同渔业权。以下此条中相同）时，经总会决议，设置关于与该特定区划渔业权相关的同法第 11 条中规定的当地地区（仅限于该协会地区中的区域）及与该共同渔业权相关的同条中规定的有关地区的部会，并可使总会对于与该特定区划渔业权及共同渔业权相关的在第 48 条第 1 项第八号到第十号中的有关事项的权限，（同项第 9 号中的事项，仅限于渔业权行使规定及游捕规定的制定、变更及废除）在部会中行使。

2．总会的部会由在部会所设定的前项中的当地地区及相关地区区域内有住处及企业场地的协会成员（除准协会成员）来组织。

3．除此法律、章程和规定中的特别规定外，总会中部会的议事由出席者决议权的过半数来决定，同意与否决同数时，由议长决定。

4．每逢总会的部会选任议长。

5．议长作为总会部会的组织者，没有增加该部会决议的权利。

6．议长作为组织总会中部会的协会及其总数的一半以上出席，并通过其决议权三分之二以上的多数决定：

一、特定区划渔业权、共同渔业权及与此相关的物权的设定、得失、变更；

二、渔业权行使规定的制定、变更及废除。

7．第 21 条，第 39 条第 2 项及第 4 项，第 47 条之三，第 47 条之四，第 47 条之五第 3 项，前条及第 125 条第 1 项、第 3 项的规定适用于总会的部会。此时，第 21 条第 1 项中“决议权及董事、总代表的选举权”换读为“决议权”，同条第 2 项中“第 47 条之五第 3 项（包含适用于第 43 条第 2 项的时候）”换读为“适用于第 51 条之二第 7 项的第 47 条之五第 3 项”，同项及同条第 4 项中“决议权或选举权”换读为“决议权”，第 47 条之三第 2 项中“协会成员（除准协会成员）为总协会成员（除准协会成员）”换读为“组织总会中部会的协会成员为组织该部会的协会成员的总数”，前条中“水产业协会法第 47 条之五第 3 项”换读为“适用于水产业协会法第 51 条之二第 7 项的同法第 47 条之五第 3 项”第 125 条第 1 项中“协会成员（除据第 18 条第 5 项规定的协会成员及据第 88 条第 3 号或第 4 号、第 98 条第 2 号、第 100 条之三第 3 号或第 4 号规定的会员）”换读为“组织总会中部会的协会成员为组织该部会的协会成员的总数”，“方法或选举”换读为“方法”，“决议、选举、当选”换读为“决议”。

【总代会】

第五十二条 1．协会成员（除准协会成员）总数超过 200 人的协会，据章程，可设立代替总会的总代会。

2．总代表必须是协会成员（除准协会成员）。

3．总代表的定数必须是协会成员（除准协会成员）四分之一以上。但协会成员（除准协会成员）总数超过 400 人的协会，只需百人以上即可。

4．总代表的任期，章程规定为 3 年以内。

5．总代表适用第 34 条第 4 项到第 8 项的规定。

6．总代会适用与总会有关的规定（除与总会中部会相关的规定）。此时，第 21 条第 2 项中“与协会成员同一户口者、协会成员的雇员及其他协会成员（除准协会）”换读为“其他协会成员（除准协会成员）”，同条第 5 项中“5 人”换读为“2 人”。

7．尽管有前项规定，在总代会中（除下一项的总代会）不能选举总代表，不能对第 50 条第 2 号、第 3 号之二及第 4 号的事项进行决议。

8．以在河川中捕捉养殖水产动植物作为主要构成人员的协会的总代会中，尽管有第 6 项规定，不能选举总代表，不能对第 50 条第 2 号、第 3 号之二的事项进行决议。

9．对于在总代会中已经决议的事项，在总代会决议之日起 3 个月以内召开的总会上，可对此进行进一步决议。此时，在总会中做出了与总代会不同的决议时，按照后来的决议。

【投资一股的金额的减少】

第五十三条 1．投资协会在决议减少投资一股的金额时，必须在决议后 2 周以内制出财产目录及借贷对照表，并且为了协会债权者的阅览，必须在主要的事务所配置这些文件。

2．投资协会在前项的期限内必须公告，如债权者有异议，在一定期限内阐述其意见，并必须分别催告储户、定期存款的人员及其他政令中规定的债权者以外的债权者。

3．前项的一定期限，不能少于一个月。

第五十四条 1．债权者在前条第 2 项的一定期限内不提出异议时，被认为同意减少投资一股的金额。

2．债权者提出异议时，投资协会必须偿还，或提供相当的担保，及以让债权者接受偿还为目的而把相当的财产委托给信托公司或经营信托业务的银行。但即使减少投资一股的金额，而不损害债权者利益时除外。

3．商法第 380 条规定适用于协会投资一股金额的减少。此时，同条第 2 项中“董事长”换读为“理事、经营管理委员”。

【信用事业的转让及继承】

第五十四条之二 1．进行第 11 条第 1 项第四号事业的协会，经总会的决议，可以将其信用事业的全部或部分转让给进行同号事业的其他协会、进行第 87 条第 1 项第四号事业的渔业协会联合会及进行第 93 条第 1 项第 2 号事业的水产加工业协会，进行第 97 条第 1 项第二号的水产加工业协会联合会。

2．进行第 11 条第 1 项第四号事业的协会，经总会决议，可继承进行同号事

业其他协会，进行第 87 条第 1 项第四号事业的渔业协会联合会，进行第 93 条第 1 项第二号事业的水产加工业协会及进行第 97 条第 1 项第二号事业的水产加工业协会联合会及其信用事业（包含适用于第 92 条第 1 项、第 96 条第 1 项及第 100 条第 1 项的第 11 条之四第 2 项中规定的信用事业）的全部或部分。

3．对于前两项中规定的信用事业的全部或部分的转让及继承，除政令规定之外，如得不到行政厅的认可，则不具有效力。

4．第 1 项中规定的协会在转让其信用事业的全部或部分时，必须进行公告。

5．据前项规定进行公告时，对于同项协会的债务者，被认为通过有据民法第 467 条规定的确定日期的证书已进行通知。此时，其公告日期为确定日期。

6．前 2 条规定，适用于第 1 项及第 2 项中规定的信用事业其全部或部分的转让及继承。

7．据第 1 项规定协会在转让其信用事业的全部时，必须立即通知行政厅，同时为了废除其信用事业必须变更必要的章程。

【互助事业的转让等】

第五十四条之三 1．进行第 11 条第 1 项第十一号事业（包含其附带事业。以下此条及第 130 条第 1 项第 29 号中称为“互助事业”）的协会，在转移其互助合同的全部或部分时，必须同进行互助事业的其他协会及互助水产业协会联合会签订合同。

2．据前项规定转移互助合同的全部或部分的协会，可据同项中制定的合同来规定与互助事业相关财产的转移。

3．第 53 条及第 54 条规定适用于与互助事业的全部或部分的转让及前项中规定的互助事业相关的转移。

4．前条第 7 项规定，对于经过据第 48 条第 1 项第五号规定的决议而转让其全部的互助事业的协会及转移其全部互助合同的协会适用。

【与账本等相关的商法的适用】

第五十四条之四 商法第 32 条、第 33 条、第 35 条及第 36 条规定适用于协会的账本及其他文件，同法第 285 条规定适用于协会的计算。此时，同法第 32 条第 1 项及第 33 条第 2 项中“借贷对照表”换读为“借贷对照表（在水产业协会法第 11 条第 2 项中规定的非投资协会中，进行同条第 1 项第五号至第七号中有关失业者的财产目录）”，同条第 1 项中“记载或纪录”换读为“记载”，同条第 3 项及第 4 项中“借贷对照表以书面形式制作时”换读为“借贷对照表（在水产业协会法第 11 条第 2 项中规定的非投资协会中，进行同条第 1 项第 5 号至第 7 号中有关事业者的财产目录）”，同法第 285 条中“应记载或纪录”换读为“应记载”。“不拘泥于第 34 条规定的法至省令”换读为“农林水产省令”。

【储备金及流存金】

第五十五条 1．协会（除不进行第 11 条第 1 项第五号至第七号事业的非投资协会。第 7 项及次条中相同）在达不到章程规定的金额时，必须将每经营年度剩

余金额的十分之一以上作为利益储备金积累下来。

2．前项的章程规定的利益储备金的数量，在投资协会中不能少于其投资总额的二分之一（进行第 11 条第 1 项第四号事业的协会中，为其投资总额）。

3．投资协会，必须将下列金额作为资本储备金积累下来：

一、投资一股的金额的减少而减少的投资的金额，超过作为份额的退还支付给该投资协会成员的金额及充当填补损失金额时，其超过

二、从因合并而消失的协会继承下来的财产的金额，超过从该协会继承的债务的金额及支付给该协会成员的金额，超过合并后存在的投资协会增加的投资额及因合并而成立的投资协会的投资额时，其超过额。

4．在前项第二号的超过额中，相当于因合并而消失的协会前利益储备金及其他该协会在合并前保留的利益额的金额，尽管有同项规定，可不转入资本储备金。此时，相当于其利益储备金数量的金额，必须转入合并后继续存在的投资协会既有合并而成立的投资协会的利益储备金。

5．第 1 项的利益储备金及第 3 项的资本储备金，除填补损失外，不可取消。

6．用利益储备金来填补损失，如无不足时，不能使用资本储备金。

7．协会，为了支付第 11 条第 1 项第二号及第十三号事业的费用，必须将每经营年度剩余金的二十分之一以上转入下一经营年度。

【剩余金的分配】

第五十六条 1．协会剩余金的分配，可以经营年度终了时的纯资产额（由借贷对照表上的资产额扣除负债额得到的金额。以下此项中相同）扣除下列金额而得到的数额为限度来进行：

一、投资总额；

二、前条第 1 项的利益储备金及同条第 3 项的资金储备金额；

三、据前条第 1 项规定，必须在其经营年度积累的利益储备金额；

四、前条第 7 项的转入金额；

五、其他由农林水产省规定的金额。

2．据章程规定，剩余金的分配，在每年 8％以内，在不超过政令规定比率的范围内，必须按照已缴纳的投资额及协会事业的利用者对其事业利用分量的比例。

第五十七条 据章程规定，投资协会，在其成员完成投资交纳前，可把分配给其成员的剩余金充当其交纳的投资。

【用循环按员金填补及退还损失】

第五十七条之二 1．投资协会，用循环投资金来填补损失。

2．投资协会，在用循环按员金填补损失后仍有剩余时，自产生用来支付的剩余金的经营年度其下一经营年度的开始之日起 5 年后必须退还。但，在该期间内，总会决议应该退还时及协会成员退会时，必须在该决议及退会时的经营年度末，退还给协会成员及退会者。

【财务基准】

第五十七条之三 除在第 11 条之七、第 11 条之十、第 15 条之三到第 15 条之五及第 54 条之四到前条中的规定外，协会为了理清与协会成员间的财务关系，为了保护协会成员的利益，作为正确处理财务的基准而必须遵守的事项，由政令规定。

【禁止协会取得份额】

第五十八条 协会不能取得其成员的份额，或以质权为目的来接受。

【业务报告书】

第五十八条之二 1．进行第 11 条第 1 项第四号事业的协会，每经营年度，必须做出记载其业务及财务状况的业务报告书，并提交给行政厅。

2．前项的协会有分公司等（指分公司及其他据主管省令与该协会有特殊关系的公司。以下此章及第 123 条之二中相同）时，该协会，每经营年度，除同项的业务报告外，还必须同时做出该协会及其分公司等的业务及财产状况的业务报告书，并提交给行政厅。

3．前 2 项的业务报告书的记载事项，提交日期及其他与业务报告书相关的必要事项，由主管省规定。

【随便阅览与业务及财产状况相关的说明文件】

第五十八条之三 1．进行第 11 条第 1 项第四号事业的协会，每经营年度，必须做出记载由主管省规定的与业务财产状况相关事项的说明文件，并配置于该协会的事务所（除主要负责信用事业以外的事务所及其他由主管省令规定的事务所。以下此条中相同），以供公众随意阅览。

2．前项的协会有分公司等时，该协会，每经营年度，除同项的说明文件外，必须做出记载由主管省规定的与该协会及其分公司等的业务及财产状况相关事项的说明文件，并配置于该协会的事务所，以供公众随意阅览。

3．除前 2 项中规定外，在将前 2 项的说明文件提交给公众随意阅览期间，其他适用于此规定的必要事项，由主管省令规定。

4．第 1 项的协会，除同项及第 2 项中规定的事项外，为了使储户及其他信用事业的利用者能了解该协会及其分公司等的业务及财产状况，必须尽力展示能参考的事项。

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*, 以下简称《评论》) 是全国性的海洋法领域优秀学术著述的汇辑，着重研究与海洋相关的法律与政策，秉承“海纳百川，有容乃大”的精神，力求吸取国内外该领域的一切先进成果。同时在现有法学学科划分的基础上，打破学科藩篱，将视野拓展到一切关于海洋的法学理论、司法实践以及法律运作实务。本刊对于理论探索与实证究并重，以期推动海洋相关法律科学的发展，为各位专家学者提供学术研究和交流的平台。

《评论》由厦门大学法学院以及厦门大学海洋政策与法律中心（Xiamen University Center for Oceans Policy and Law, XMU-COPL）主办，由（香港）中国评论文化有限公司出版，每年两期。为此，热忱欢迎各位学界同仁及实务界人士不吝赐稿，并立稿约如下：

一、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，语言限于中文或英文，且须同一语言下未曾在任何纸质和电子媒介上发表。

二、来稿请注明作者姓名、学位、工作单位及职务、职称、研究领域和通讯方式等。编辑部在收到来稿两个月内将安排匿名审稿。届时未接到用稿通知者，作者可自做他用。来稿一律不退，请作者自留底稿。

三、来稿须严格遵守学术规范，来稿格式参见后附《〈中国海洋法学评论〉书写技术规范》。若文中引征网上文献资料，应将该页面另存为独立文档，发送至编辑部邮箱或者打印后寄送《评论》编辑部，以备查阅。

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。《评论》编辑部及其任何成员不承担由此产生的任何责任。

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《中国海洋法学评论》编辑部 敬启

《中国海洋法学评论》书写技术规范

为了统一《中国海洋法学评论》来稿格式，特制定本规范：

一、书写格式

1. 来稿由题目（中英文）、作者姓名及简介、内容摘要、关键词和正文构成。
2. 来稿正文各层次标示顺序按一、（一）、1、（1）、①、A、a 等编排。

二、注释

1. 注释采用页下重新计码制：全文以页下脚注形式重新编排，注释码置于标点符号之后。

2. 引用中文著作、辞书、汇编等的注解格式为：

（1）傅崐成著：《国际海洋法——衡平划界论》，台北：三民书局 1992 年版，第 118 页。

（2）魏敏主编：《海洋法》（高等学校法学教材），法律出版社 1987 年版，第 24 页。——教材应列明为何种教材。

（3）国家海洋局政策法规办公室编：《中华人民共和国海洋法规选编》，海洋出版社 2001 年第 3 版，第 56 页。——不是初版的著作应注明“修订版”或“第 2 版”等。

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（1）巴里• 布赞（Barry Buzan）著，时富鑫译：《海底政治》，三联书店 1981 年版，第 78 页。

（2）联合国新闻部编，高之国译：《〈联合国海洋法公约〉评介》，海洋出版社 1986 年版，第 67 页。

4. 引用中文论文的注解格式为：

（1）傅崐成：《中国周边大陆架的划界方法与问题》，载于《中国海洋大学学报（社会科学版）》2004 年第 3 期，第 5 页。

（2）司玉琢、朱曾杰：《有关海事国际公约与国内法关系的立法建议》，载于《海商法年刊》1999 年卷，大连海事大学出版社 2000 年版，第 5 页。

（3）傅崐成：《联合国教科文组织 2001 年〈水下文化遗产保护公约〉评析》，

载于厦门大学海洋法律研究中心编：《纪念〈联合国海洋法公约〉签署 20 周年学术研讨会论文集》（2002 年），第 58 页。——载于论文集中的论文。

（4）褚晓琳、傅崐成：《两岸合作开发南海渔业资源规划研究》，载于《中国海洋法学评论》2012 年第 2 期，第 7 页。

5．引用中译论文的注解格式为：

中川淳司：《生物多样性公约与国际法上的技术规限》（钱水苗译、林来梵校），载于《环球法律评论》2003 年第 2 期，第 248~249 页。

6．引用外文著作等注解格式为：

（1）Christopher Hill, *Maritime Law*, 3rd ed., London: Lloyd's of London Press Ltd, 1989, p. 69.

（2）Connie Peck and Yoy S. Lee ed., *Increasing the Effectiveness of the International Court of Justice*, Hague: Martinus Nijhoff Publishers, 1997, pp. 109~110. —— 编著应以 "ed." 标出。

7．引用外文论文的注解格式为：

Jonathan I. Charney, Compromise Clauses and the Jurisdiction of the ICJ, *American Journal of International Law*, Vol. 81, 1987, pp. 855~856.

8．引用网上资料的注解格式为：

（1）郭文路：《传统捕鱼权和专属经济区制度》，下载于 http://www.riel.whu.edu.cn/lunwenshow.asp?id=709，2004 年 5 月 11 日。（此处标明的日期为引用者上网查询的日期）

（2）John Hare, Maritime Law Update South Africa 2002, at http://www.ports.co.za/legalnews/article_0732.html, 14 May 2004.

9．引用报纸的注解格式为：

（1）王曙光：《海洋开发关乎民族复兴》，载于《人民日报》2003 年 4 月 28 日第 11 版。

（2）《中方重申钓鱼岛问题原则立场》（新华社北京 12 月 26 日电），载于《人民日报》2003 年 12 月 27 日第 3 版。

10．引用法条的注解格式为：

《中华人民共和国海洋环境保护法》第 11 条第 2 款。——条文用阿拉伯数字表示。

三、数字

1．年、月、日、分数、百分数、比例、带计量单位的数字、年龄、年度、注码、图号、参考书目的版次、卷次、页码等，均用阿拉伯数字。万以下表示数量的数字，

直接用阿拉伯数字写出，如 1458 等；万以上的数字以万或亿为单位，如 9 万、10 亿等。

2. 年份一般不用简写，如：1996 年不应简作 96 年。

3. 表示数值范围的起讫用“～”表示，如第 10 ~15 页；表示时间的起讫用“－”表示，如 1980 年－ 1982 年，1990 年 7 月－ 8 月。

四、图表

1. 表格规范：表的顺序号用阿拉伯数字，表号与表题空一个汉字位置，表题末不加标点。表题置于表格正上方，表内数据用阿拉伯数字。

2. 图的规范：图的顺序号用阿拉伯数字，图号与图题空一个汉字位置，图题末不加标点。图题置于图的正下方。

《中国海洋法学评论》编辑部编订

里海的海洋划界：法律问题

Erik Franckx*

近十年来，里海的法律制度一直是学术界相当感兴趣的主题。这主要是由潜在的政治和经济情况导致，并进而引出了一个问题：还有哪些东西可以加到该制度中？尽管大量有关里海的法学著作的附加价值有时会遭到怀疑，但更多的是提出了近来一些相当重要的论点。[1]

为了不被归到没有任何附加价值的范围内，这篇文章将主要介绍一系列可以从波罗的海划界中学到的经验，波罗的海的划界被视为具有一定特殊技术。由此，第一部分将介绍里海的独特性质；其次，将介绍当前沿海国家的相关实践。由此可知，其他地区的海洋划界经验，尤其是波罗的海的经验，并不会完全无用。

一、里海的特殊性质

本文的主题是“里海的海洋划界”。根据拉丁谚语“蝎子毒在尾巴上”，备受争议的问题是，里海是海还是湖。与世界上的其他地区不同，该问题的产生并非

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1 尤其是在这一领域的美国研究，参见 E. Sievers, The Caspian, Regional Seas, and the Case for a Cultural Study of Law, *Georgetown International Environmental Law Review*, Vol. 13, 2001, p. 361. 在这篇文章中，作者写到：“如果律师不像政治学家或经济学家那样，在不受同业互评压力的影响下行事和著书，那么什么是国际法学术研究？并不存在一个比既有的法律体系更加好的准则。在这个系统内部，学生考问学识、在不考虑语言和书写要求的时候便可以快速取得学术证书；此外，由于会议的举行多是偶然的，故而作者们可以避免受到草率而苛刻的反馈。作为一门学科，法律发展了怎样的机制以保证法律学者们可以发表其最好的作品、获得相关技能、读到了基础性文本，且不说保证作品的卓越标准。这些问题的答案使得作为一门独立学术部门的国际法处于一个异常脆弱的基础之上。大部分的国际法学者从没见过他们所写的人或者事物，从未用过那些人或地方的语言所编写的材料，且几乎从未做过原始的、档案研究。如果以发表的文献质量为指导，那么正确叙述故事并不是美国的国际法学者所重点关注的事项，因为这样做不会得到太多的回报。”

由于“里海”这个名词中的倒数第二个词造成的,如是“波斯湾”还是“阿拉伯湾”。[2] 至于里海,其地理特征的法律性质恰恰是争议的焦点。

认为里海是“海”的观点很容易遭到认为其是“湖”的观点的反击。在过去,称里海为海无疑是正确的,但现在的里海已经与其他的海洋分隔开来。究竟里海是否有一个天然出口,是一个备受争议的问题。[3] 从海洋学的角度出发,里海的咸度、动植物类型均表明里海是海;[4] 但里海比其他海平面低 26.5 米的事实使其与湖泊的概念有更紧密的联系。[5] 最后,如果关乎海洋归类的仅是面积大小,[6] 那么里海将被归为地球上最大的湖泊。[7]

面对各种各样互相矛盾的特征,难以被明确地归类,律师们通常在独特概念中寻找解决办法。吉德尔对里海作出了如下评论:

> 如果这块区域可以自由、自然地与外部的世界联系,那么其便要受国际海洋法管辖。由此,里海的问题可以是国际问题,因为在其沿岸分布着不同的国家:里海并非一定受国际海洋法的约束,因为其与海洋的其他部分并没有联系。[8]

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2 与此相反,里海的争议双方都同意里海是“伊朗和苏联的海”。参见苏联驻德黑兰大使 M. Filimonov 和伊朗外交部部长 M. A’ Lam 于 1940 年 3 月 25 日的换文。同日,双方签订《伊朗和苏联通商、通航条约》(该条约的英文版刊印于 *British and Foreign State Papers*, Vol. 144, 1940-1942, p. 419)。

3 波罗的海、黑海和里海海洋物种的杂化显示存在一定联系,但是当前里海的自然特性仍然遭到质疑。

4 联合国教科文组织政府间海洋学委员会原文表述为:“From an oceanographic point of view (composition of water, fauna, flora, the Caspian Sea should be considered as a sea.” 转引自 S. Vinogradov and P. Wouters, The Caspian Sea: Current Legal Problems, *Zeitschrift für ausländisches öf fentliches Recht und Völkerrecht*, Vol. 55, 1995, p. 604, note 54; S. Vinogradov, Transboundary Water Resources in the Former Soviet: Between Conflict and Cooperation, *Natural Resources Journal*, Vol. 36, 1996, p. 393, note 8.

5 经过了 150 年的水平面的逐渐下降,自 1977 年来这一趋势得到了急速逆转(在 15 年内上升了 2.5 米,导致该区域发生了各类严重的问题),以致苏联已经筹划了一段时间的将部分北部河流引入伏尔加河盆地的计划最终于 1986 年搁置。参见 E. Franckx, The Soviet North-South River Diversion: New Options for the Future, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 111,在该文中有 1986 年 8 月 14 日苏联共产党中央委员会和苏联部长会议法令的英文译本 ——《终止从北部河流和西伯利亚河流调流的计划》。该法令第 1 点规定:“ 终止与从北部河流调流至伏尔加河有关的计划及前期工作是合适的。苏联国家计划委员会、苏联国家农业生产委员会,苏联土壤改良和水文部将排除根据 1986 年至 1990 年期间执行上述工作而作出的计划任务。苏联国家农业生产委员会、苏联土壤改良和水文部和苏联部长会议将根据该法令的规定处理财产和物质资源,以提升苏联非黑土区域的土地质量,改善与伏尔加河盆地重建灌溉系统的工作。

6 里海的面积比波斯湾大。

7 根据同样的方法,格陵兰岛被认定为是地球上最大的岛屿。

8 G. Gidel, *Le droit international public de la mer*, 1st ed., Chateauroux: Etablissements Mellottee, 1932, p.40.

在得出结论前，吉德尔写到：

> 究竟国际法是否可以适用到里海水域，只能由沿岸国家通过明示或默示的协定确定，因为原则上只有他们可在此航行。[9]

正如下文将论述的，为了本文的目的，吉德尔这些公正的言词提供了一个极佳的出发点。因此，本文并不尝试提出进一步的主张以求得双方的平衡，这种做法可能并不会有太多的收效；[10] 而是从里海的特性出发，在一定范围内以条约法为基础，而未受条约法规制的部分则以直接利益相关方的共识为基础。

二、当今沿海国的实践

2001 年在土耳其伊斯坦布尔举行的“区域性海洋的问题”学术研讨会中，本文作者曾撰文《里海的划界问题》，而本文并非要对其中早已提及的内容进行详细复述。[11] 如果需要更多的信息，可以参考与会议过程有关的出版物。[12]

于本文而言特别重要的是，所有各方当前都在朝着相同的方向努力。一位作者在 2000 年对沿海各国国家实践概览作出更新后说到：

> 关于里海采矿权的争论已经基本结束了。当前，所有的沿海国都支持划分里海的海床区域。因此，现在争论已经从是否要划分海床转移到应当如何划分海床上。[13]

近期的媒体报道似乎证实了该结论。2002 年 1 月底，5 个相关国的官员会面并讨论了该问题。当时的俄罗斯首席谈判代表认为，该问题已经取得进展，且可能于

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9 G. Gidel, *Le droit international public de la mer*, 1st ed., Chateauroux: Etablissements Mellottee, 1932, p.48.

10 See for instance B. Oxman, Caspian Sea or Lake: What Difference Does It Make?, *Caspian Crossroads Magazine*, Winter 1996, p. 1, at http://ourworld.compuserve.com/homepages/usazerb/141.htm, 1 January 2002. 在该文，Oxman 写到：“以里海是海或是湖为基础展开演绎推理，进而确定利益相关国的权力和义务的尝试几乎是毫无意义的举动。”

11 这个学术研讨会于 2001 年 5 月 12 日至 14 日举行。

12 E. Franckx and A. Razavi, The Problem of Delimitation in the Caspian Sea, in B. Oztiirk and N. Alganeds, *Problems of the Regional Seas (Proceedings of the International Symposium on the Problems of Regional Seas 12—14 May 2001, Istanbul, Turkey)*, Istanbul: AnadoluOfset,2001, pp. 27~35.

13 K. Mehdiyoun, Ownership of Oil and Gas Resources in the Caspian Sea, *American Journal of International Law*, Vol. 94, 2000, p. 179.

2002 年 4 月在阿什哈巴德达成最终协议。[14] 尽管后来的新闻报道似乎对这种乐观态度有所怀疑，[15] 但事实是，实质上，至少在海床和底土方面，有关各方似乎仍在讨论海域划界问题。

三、某些相关原则

无论人们如何界定里海，对海床和底土而言，各沿海国都同意必须依赖于海洋划界;若基于上述前提，可得出这样的结论:存在一定的国际法体系为沿岸各国在该方面的努力提供指引。有人认为，即便各国在海洋划界方面不受国际法原则的规则，享有完全的自由，各国的行为有时不仅会受相关国际法原则的影响，甚至可能反过来影响到国际法原则的发展。

就该方面而言，美国各州和联邦当局就海洋领域的权力划分便是一个极好的例子。最初，美国法院在解决国内边界争端的时候适用了国际法规则。[16] 而这些法院的判决反过来又对该领域国际法原则的发展产生了深远影响。[17]

与本文目的有更多联系的是最近一个加拿大仲裁庭划分纽芬兰—拉布拉多省和新斯科舍省各自的近海岸区域所做出的裁决。[18] 其中，近海岸的开采权已经由联邦当局和上述 2 个省份分别于 1985 年 [19] 和 1986 年 [20] 达成协议确定。2 份协议所

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14 据报道，该首席谈判代表说:“我认为，今年 4 月份在阿什哈巴德举行的会议将可能是里海沿岸 5 国领导会晤前的最后一次会议。” See Reuters, Breaking News from Around the Globe, at http://www.renters.com/news_article.jhtml?type=search&storylD=540984, 24 January 2002.

15 土库曼总统在 2 月份访问俄罗斯莫斯科的时候说到，其认为达成协议的时机尚未成熟。See World OilMagazine, at http://www.Worldoil.com/news/newsstory.asp.../article-e.asp?energy24=24732,12 February 2002. 对里海问题的讨论将提上日程，但阿利耶夫总统对伊朗的访问延期。See INRA Europe, at http://www.irna.com/newshtm/eng/24231256.htm, 13 February 2002.

16 See for instance G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201, note 74.

17 了解这些美国法院的案件对于更好地理解与港湾有关的国际法的重要性，参见 D. O'Connell, *The International Law of the Sea*, Oxford: Clarendon Press, 1982, pp. 389~416.

18 Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of Their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and The Canada-Newfoundland Atlantic Accord Implementation Act, Award of the Tribunal in the Second Phase, Ottawa, at http://www.boundary-dispute.ca, 26 March 2002. Hereinafter cited as 2002 Arbitration.

19 The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing, 11 February 1985.

20 Canada-Nova Scotia Offshore Petroleum Resources Accord, 26 August 1986.

包含的原则之后反映在各省[21]和联邦[22]的立法中，联邦法包括了 2 个相同的争端解决条款，规定如下：

> 当根据该条之规定的争端解决程序涉及到仲裁时，仲裁员将适用与海洋划界有关的国际法原则，且若情况需要，可做相应的修改。[23]

与美国的情形相同，加拿大将国际法规则应用到具有排他性的其国内关系中：当新斯科舍省与纽芬兰—拉布拉多省之间的近海区域划分发生争议的时候，前述仲裁条款可适用，且由争议双方确定《权限范围》。[24] 尤为重要的一点是，第二阶段中为应对关于国际法规则适用问题的争辩。法庭特别指出：

> 正如在第一阶段，《权限范围》要求可类比加拿大境内省级政府主张资源利益的行为，进而适用国际法；由此，在第二阶段，《权限范围》要求同样适用与海洋划界有关的国际法原则，以确定 2 个省份之间的近海区域范围。在这 2 种情况下，国际法的适用是相似的；且都是恰当的、符合协议行为和《权限范围》的。[25]

因此，法庭认为，同样地，与海洋划界有关的国际法原则并没有不能通过类推而适用于某一领域的理由，尽管其在一开始并不旨在适用于这些领域。由于没有足以令人信服的理由以排除国际法框架的适用，该部分将首先尝试找到海洋划界的一般法律渊源；其次，该部分将特别考察波罗的海沿岸的国家实践。

（一）海洋划界的国际法渊源

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21 Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act (Statutes of Newfoundland, 1986, c. 37) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Statutes of Nova Scotia, 1987, c. 3).

22 Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada, 1988,c. 28).

23 Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) section 6(4), and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada, 1988, c. 28), section 48(4).

24 通过《权限范围》第 3（2）条之规定，争议双方请求仲裁庭分 2 阶段进行仲裁："（1）在第一阶段，法庭将确定纽芬兰—拉布拉多省与新斯科舍省之间近海岸的划分是否已经通过协议解决；（2）在第二阶段，仲裁庭将确定，当 2 个省份之间不存在任何协议的情况下，纽芬兰—拉布拉多省与新斯科舍省之间的近海岸区域将如何划分的问题。"下载于 http://www.boundary-dispute.ca/terms.html，2002 年 2 月 13 日。

25 2002 Arbitration, para. 2.35.

尽管该部分的指引并不像人们预想的那么严格，但确实存在。海洋划界的国际法渊源是《联合国海洋法公约》，[26] 该公约形成缓慢，但却是稳步前进，并逐渐取得起草者在启动该项目之初所想达到的目标，即创建一个“通用的、被普遍接受的国际条约”。[27] 实际上，由于有 137 个国家和欧共体的参加，可以说，这个协议的目标实现在即。[28] 然而，在本文所要解决的问题背景下，必须注意的一点是，在所有波罗的海的沿岸国中，只有俄罗斯受《联合国海洋法公约》的约束。[29]

然而，在本文中无需就该问题有不必要的担忧，因为，调整海洋划界的实体法在本质上不再局限于条约法的规定。[30] 正如特里尔所说的，1982 年《联合国海洋法公约》仅是对既有海洋法领域的编撰。[31] 如果 1958 年的公约体系仍然可为领海

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26 United Nations Convention on the Law of the Sea, U. N. Doc. A/Conf. 162/122, 12 December 1982, multilateral, as reprinted in United Nations, *The Law of the Sea:United Nations Convention on the Law of the Sea and the Agreement for the Implementation of Part XI of the Convention with Index and Excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea*, New York: United Nations, 1997, p. 294. This convention entered into force on 16November 1994. Hereinafter cited as 1982 Convention. Also to be found on the Internet, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS.pdf, 13 February 2002.

27 1970 年 12 月 19 日的联合国大会第 2749（XXV）号决议已经在国家管辖权之外的海床、海底及其底土有关的国际法原则框架内提出了构思和相应的要求。

28 截至 2002 年 2 月 25 日。

29 其他几个沿海国甚至都没有签署《联合国海洋法公约》。在俄罗斯之外，仅有伊朗是 1995 年《执行〈1982 年联合国海洋法公约〉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》（U.N. Doc. A/CONF. 164/37,8 September 1995, multilateral, as reprinted in *International Legal Materials*, Vol. 34, 1995, p. 1542.）的缔约国，该协定于 2001 年 12 月 11 日生效。下载于 http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/A_CONF.164_37_English.pdf，2002 年 2 月 13 日。

30 This part is based on E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 249.

31 T. Treves, Codification du droit international et pratique des etatsdans le droit de lamer, *Recueil des Cours*, Vol. 223, 1990, pp. 11, 104.

之外领域的法律问题提供指引，[32] 那么，通过强调需要实现的结果而非实现目标的方法，[33] 1982 年《联合国海洋法公约》第 74(1) 条和第 83(1) 条的特征都是缺乏任何实用的需要遵从的方法。[34]

实际上，根据第 74(1) 条和第 83(1) 条的规定，“为了公平解决”，应当根据国际法之规定达成协议。[35] 考虑到 1982 年《联合国海洋法公约》条款的特殊起草背景，[36] 正如本文作者已经在其他地方所提及的，可以说，这些条款代表着“（第三次联合国海洋法会议中的）参与国为将来可能的争议而做出的协议。”[37] 划界方法仍然存在着根本区别：一部分人支持中间线或等距离原则，允许特殊情况的例外；

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32 参见 1958 年 4 月 29 日《大陆架公约》第 6 条，该公约于 1964 年 6 月 10 日生效。该条规定：“1. 同一大陆架邻接两个以上海岸相向国家之领土时，其分属各该国部分之界线由有关各国以协议定之。倘无协议，除因情形特殊应另定界线外，以每一点均与测算每一国领海宽度之基线上最近各点距离相等之中央线为界线。2. 同一大陆架邻接两个毗邻国家之领土时，其界线由有关两国以协议定之。倘无协议，除因情形特殊应另定界线外，其界线应适用与测算每一国领海宽度之基线上最近各点距离相等之原则定之。3. 划定大陆架之界限时，凡依本条第一项及第二项所载原则划成之界线，应根据特定期日所有之海图及地理特征订明之，并应指明陆上固定，永久而可资辨认之处。”就该方面而言，领海应当被排除，因为其在 1958 年《日内瓦公约》体系和 1982 年《联合国海洋法公约》中均受到相似的对待，即“等距离—特殊情况原则”，该原则与 1958 年确定的与大陆架划界有关的方法相似。参见 1958 年 4 月 29 日《领海和毗连区公约》第 12 条，该公约于 1964 年 9 月 10 日生效；1982 年《联合国海洋法公约》第 15 条。即便 2 个公约的规定并非完全相似，但其中所包含的基本规则没有改变。在此只引用 1982 年《联合国海洋法公约》中的规定：“如果两国海岸彼此相向或相邻，两国中任何一国在彼此没有相反协议的情形下，均无权将其领海伸延至一条其每一点都同测算两国中每一国领海宽度的基线上最近各点距离相等的中间线以外。但如因历史性所有权或其他特殊情况而有必要按照与上述规定不同的方法划定两国领海的界限，则不适用上述规定。”考虑到领海范围的有限性，由其当与由 1982 年《联合国海洋法公约》新设立的专属经济区和大陆架相比，当今领海外的海域为何受到如此多的重视便不难理解了。

33 See Anon, Art. 74: Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts, in S. Nandan and S. Roseneeds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 796, 814. 在评论中，作者写到：“公平划界的要求强调的是划界目的，而非划界方法。”See Anon, Art. 74: Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts, in S. Nandan and S. Roseneeds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 948,983.

34 As stressed by I. Lucchim and M. Voelckel, *Droit de la Mer, Tome 2, Vol. 1*, Paris: Pedone, 1996, p. 89.

35 1982 年《联合国海洋法公约》第 74（1）条和第 83（1）条。

36 Anon, Art. 74: Delimitation of the Exclusive Economic Zone between States with Opposite or Adjacent Coasts, in S. Nandan and S. Roseneeds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 796~816; Anon, Art. 83: Delimitation of the Continental Shelf between States with Opposite or Adjacent Coasts, in S. Nandan and S. Roseneeds, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht: Martinus Nijhoff, 1993, pp. 948~985.

37 E. Franckx, Coastal State Jurisdiction with Respect to Marine Pollution-Some Recent Developments and Future Challenges, *International Journal of Marine and Coastal Law*, Vol. 10, 1995, p. 253.

另一部分人则更依赖于衡平原则。1982 年《联合国海洋法公约》中的相关条款通过强调划界要取得的最终目的，来规避关键问题——划界中适用的确切方法。由此导致的结果是，各国似乎可以根据第 74(1) 条和第 83(1) 条的规定自由选择划界方法，只要这种方法可以取得公平解决的结果。[38] 第 74(1) 条和第 83(1) 条所反映的目的论方法已经不止一次被国际法院所强调。[39]

如果不具有条约法性质，那么这一海洋法分支领域在当时是否属于习惯国际法？答案还是否定的。在海洋划界领域并没有太多的习惯法可以被认为是有直接关系的适用原则。[40] 正如国际法院所述：

> 在习惯国际法中找不到一系列的详细规定……因此，寻找一般国际法提供的一套现成规则来解决由此产生的划界问题，结果往往收效甚微，特别是在这么一个全新且仍松散的领域内，包括最近各国在原属于公海的领域内所提出的扩张主张。[41]

因此，关于海洋划界的国际法并没有办法在条约法中或是习惯国中获得；然而，却可以从司法判决中获得。[42] 这即构成了沙尔内所称的一种传统意义上的普通法判决，尽管遵循先例的规则并不适用于国际层面。[43] 就目前而言，这指的是国

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38 E. Manner, Settlement of Sea Boundary Delimitation Disputes According to the Provisions of the 1982 Law of the Sea Convention, in J. Makarczyk ed., *Essays in International Law in Honour of Judge Manfred Lachs*, Dordrecht: Martinus Nijhoff, 1984, p.641.

39 International Court of Justice, Continental Shelf Case (Libya/Tunisia), 24 February 1982, *I.C.J. Reports*, 1982, p. 49, para.50，在该案中，国际法院表明："在国与国之间为取得公平处理的过程中，任何可能给予指导的特定标准迹象均已被排除。这一过程中更强调的、且必须取得的是公平处理。" See also International Court of Justice, Continental Shelf Case(Libya/Malta), 3 June 1985, *I.C.J. Reports*, 1985, p. 30, para. 28，在该案中，国际法院在引用上述的论述之后补充到："公约设定了所要取得的目标，但其对于如何取得该目标并没有做任何规定。公约严格限定于确立一个标准，至于这个标准的内容，则由各国和法院决定。"

40 除去在该领域的各国实践容易获得以及对这些实践已有详细分析这 2 个事实外，要得出一般性的结论几乎是不可能的。See J. Charney, "Introduction", in J. Charney and I. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. xxiii, xlii (hereinafter cited as International Maritime Boundaries) and stressed by the same author in "International Law making in the Context of the Law of the Sea and the Global Environment", in M. Young and Y. Iwasawa eds., *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy, Irvington: Transnational Publishers*, 1986, pp. 13, 18.

41 International Court of Justice, Gulf of Maine Case (Canada/United States), 12 October1984, *I.C.J. Reports*, 1984, p. 299, para. 111. See also p. 300, para. 114, where this argument is repeated.

42 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, pp. 143~156.

43 J. Charney, Progress in International Maritime Boundary Delimitation, *American Journal of International Law*, Vol. 88, 1994, p. 227.

际法院的重要判决和仲裁庭的裁决。[44] 至于国际海洋法法庭的裁决是否会被加到这一行列中，仍待以后的实践考验。

然而，当前必须指出的一个根本问题是，相关国家在法庭外协商海洋划界问题的时候，是否受第三方解决机制的规则和原则约束？尽管法院一度暗示事实应当是这样的，韦伊指出，这种观点相当于“人为的平等”。[45] 或者正如这位作者最近的阐述：

> 尽管有法律规定制约着法院，但是在这一方面并不存在法律规定制约国家的契约自由。第三方划界是依照法律规定;但是，协商划界则不是，或者说至少不必然依照法律规定。[46]

正如上述最后一部分所说，即便是韦伊自己也承认，2 种得到最终解决方案的方法之间存在着一些交互作用。[47] 一些学者强调这两者之间存在着密切的实际联系，[48] 有些国家实践甚至限制了可以选择的范围。[49] 事实上，沙尔内认为国际法会对海洋划界谈判产生“高度相关的”影响，因为外交官员们十分清楚，如果诉诸第三方解决争端就必须考虑相关的标准。因此，在一种预防性措施中，在尝试自愿解决争端的过程中，谈判双方必须受到一定限制。[50]

这使得美国国际法学会发起的试图分析所有二战以来海洋划限的工作变得十

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44 See for instance G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201, note 74，国内法院的判决有时也会对国际法的发展产生影响。

45 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, pp. 105~114. 就该问题，在挪威扬马延岛的海洋划界问题上，国际法院在一定程度上拒绝了丹麦的优惠待遇，而这一待遇冰岛在早前其与挪威的协商中已取得。See International Court of Justice, Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway), 14 June 1993, *I.C.J. Reports*, 1993, p. 38, para. 86.

46 P. Weil, Geographic Considerations in Maritime Delimitation, in American Society of International Law ed., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 115, 121.

47 “没有人可以否认，司法判决中所体现的原则和规则对于海洋划界中各方的谈判立场具有重要的影响。尤其是通过司法判决产生的‘特别’、‘偶然’和‘特殊’地理特征的概念;这些地理特征过去常被忽略或者仅仅给予部分效力，现在却常见于国家实践中。”See P. Weil, Geographic Considerations in Maritime Delimitation, inAmerican Society of International Law ed., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 120~121.

48 J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xxxvii, 作者写道：“适用于第三方争端解决的法律将会影响到双方的谈判代表，就像划界争端解决的趋势会影响法庭一样。”

49 J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xliv.

50 J. Charney, Progress in International Maritime Boundary Delimitation, *American Journal of International Law*, Vol. 88, 1994, p. 228.

分的有价值。[51] 该项目一直延续至今，切从 1998 年该项目启动之初，本文作者便作为波罗的海地区专家被邀请参与其中。[52] 由此积累的经验奠定了本文最后且最实质的一部分的基础。

（二）波罗的海地区国家实践

本文该部分并不会将波罗的海地区的划界实践作为一个整体进行讨论。该部分将只讨论波罗的海海洋划界中的第四阶段，[53] 这一阶段在整个划界过程中相当突出；[54] 拿出来讨论的原因在于，其中所涉及的协议均与前苏联的解体有直接联

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51 See also J. Charney, Introduction, in J. Charney and L. Alexander eds., *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, p. xlii, 强调了这些趋势和实践的重要性。

52 A fourth volume, to which the present author contributed eight new reports relating to the so-called fourth period in the over-all delimitation effort of the Baltic Sea [see E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256; the same author, International Cooperation in Respect of the Baltic Sea, in R. Lefeber, M. Fitzmaurice and E. Vierdag eds., *The Changing Political Structure of Europe: Aspects of International Law*, Dordrecht: Martinus Nijhoff, 1991, pp. 245, 255~261, as later supplemented by the same author in Maritime Boundaries in the Baltic Sea: Past, Present and Future, *Maritime Briefing*, Vol. 2, 1996, p. 6 (International Boundaries Research Unit, University of Durham, United Kingdom), and Maritime Boundary Delimitation in the Baltic, in R. Platzoder and P. Verlaan eds., *The Baltic Sea: New Developments in National Policies and International Cooperation*, The Hague: Martinus Nijhoff, 1996, pp. 167, 169~173. See also the following French articles written by the same author Frontieres maritimes dans lamer Baltique: passe, present et futur, *Espaces et Ressources Maritimes*, Vol. 9, 1996, p. 92 and Les delimitations maritimes en mer Baltique, *Revue de l'Indemer*, Vol. 5, 1997, p. 37 (Institut dudroit economique de la mer, Monaco) and accompanying text], is at the publisher for the moment. See J. Charney and R. Smith eds., *International Maritime Boundaries*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

53 As distinguished in E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256. 这一阶段开始于 20 世纪 90 年代早期，并持续至今。

54 前面三个阶段分别是：1945 至 1972 年，1973 至 1985 年，以及 1985 年 1990 年初。See E. Franckx, International Cooperation in Respect of the Baltic Sea, in R. Lefeber, M. Fitzmaurice and E. Vierdag eds., *The Changing Political Structure of Europe: Aspects of International Law*, Dordrecht: Martinus Nijhoff, 1991, pp. 245, 255~261, as later supplemented by the same author in Maritime Boundaries in the Baltic Sea: Past, Present and Future, *Maritime Briefing*, Vol. 2, 1996, p. 6 (International Boundaries Research Unit, University of Durham, United Kingdom), and Maritime Boundary Delimitation in the Baltic, in R. Platzoder and P. Verlaan eds, *The Baltic Sea: New Developments in National Policies and International Cooperation*, The Hague: Martinus Nijhoff, 1996, pp. 167, 169~173. See also the following French articles written by the same author Frontieres maritimes dans la mer Baltique: passe, present et futur, *Espaceset Ressources Maritimes*, Vol. 9, 1996, p. 92 and Les delimitations maritimes en mer Baltique, *Revue de l'Indemer*, Vol. 5, 1997, p. 37 (Institut du droit economique de la met, Monaco).

系。

波罗的海和里海有着某些有趣的对应点。[55] 20 世纪 90 年代早期，作为苏联继承国的俄罗斯便失去了其在波罗的海和里海的大部分领土与海洋。在这 2 个区域，与国家延续或国家继承有关的问题，尤其是其对已经订立的海洋划界协议或者单边建立的海洋边界产生的影响，纷纷涌现出来，并成了一个热点讨论的话题。

没有任何的类推是绝对完美的，从海洋划界的角度出发，确实可以提出很多里海和波罗的海有所不同的理由。然而，正如上面所论及的，在 20 世纪 90 年代积累的波罗的海实践经验并非完全与里海无关，尤其是与前苏联间关系和涉及第三国对这些改变的态度的经验。

因此，在本文的下一部分，作者将主要介绍一系列具有相似性的地方。其中有 5 点值得注意：第一，对共同统治的处理问题；第二，在争议地区的勘探开发活动对争议双方的影响；第三，沿海国基于准确的司法性或海洋区域界限做出的单方行为所具有的附加价值；第四，将特定海域里的凸面海岸和凹面海岸结合可能产生的闭合效应；最后，通过第三方解决海洋划界争端的可能性。

1. 共同统治问题

很多提及里海的论文已就共同统治问题做出了讨论，多以伊朗和俄罗斯之间签订的条约或者各自的被继承国为基础。[56] 在波罗的海，爱沙尼亚和拉脱维亚之间关于里加湾法律地位的类似问题也是相关的。

国际法上并没有为历史性海湾的概念提供一个明确的定义。实际上，在条约法上仅仅以消极的方式提及该概念，即指出其中关于海湾的规定并不适用于历史性海湾。这种消极描述在《1958 年领海公约》中便有所体现，[57] 相同的条款也可

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55 See Circular Note of 13 January 1992 of the Ministry of Foreign Affairs of the Russian Federation, as referred to and stressed by the President of the Russian Association of International Law. See A. Kolodkin, Russia and International Law: New Approaches, *Revue Belge de Droit International*, Vol. 26, 1992/3, p. 552.

56 E. Franckx and A. Razavi, *The Problem of Delimitation in the Caspian Sea, in B. Ozturk and N. Algan eds, Problems of the Regional Seas (Proceedings of the International Symposium on the Problems of Regional Seas 12−14 May 2001, Istanbul, Turkey)*, Istanbul: Anadolu Ofset, 2001, pp. 28~29. It concerns the Treaty of Turkmenchai of 22February 1828, the Treaty of Friendship of Moscow of 26 February 1921, the Treaty of Establishment, Commerce and Navigation of 27 August 1935, and the Treaty of Commerce and Navigation of 25 March 1940. Together with the historic Treaty of Gulistan of 12 October 1813 (as reprinted in G. De Martens, *Nouveau recited de Traites d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange, et de plusieurs actesservant à la connaissance des relations étrangères des puissances et Etats de l'Europe*, Gotingen: Dietrich Library, 1808−1819, pp. 89~95, these treaties are hereinafter cited as historic treaties.

57 《1958 年领海公约》第 7(6) 条。

以在 1982 年《联合国海洋法公约》中找到。[58] 爱沙尼亚和拉脱维亚是否受这些条约规定的约束并不重要，正如国际法庭在其判决中所指出的一样，这些条款仅是“对一般习惯法的表达”。[59]

在本文，作者并不打算具体分析根据国际法之规定，要证实一个主张的一般法律要求。因为，这已经在相关的法律文件中得到解决了。[60] 本文所要讨论的是，将这一概念适用于加湾的可能性以及由此可能对当前形势造成的影响。

由于一系列的原因，里加湾并非条约法中所规定的海湾：首先，这一海湾现在由两个沿岸国环绕，而 1982 年《联合国海洋法公约》第 10 条则仅适用于“海岸属于一国的海湾”。[61] 其次，里加湾的封口线超过了 24 海里，[62] 不符合《联合国海洋法公约》第 10(4) 条的规定。关于 24 海里的要求这一点，1947 年苏联选择了历史性主张，[63] 以规避当时国际法规定的最大宽度要求；而在当时，国际法规定的宽度甚至少于现在的 24 海里。[64] 由此，要根据现在的条约法将里加湾确定为一个具有法律性质的海湾还面临着第三个障碍。[65]

西方评论家在分析沙俄和苏联有关该方面的文献时得出结论，认为沙俄和苏

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58 1982 年《联合国海洋法公约》第 10(6) 条。由于 1958 年公约和 1982 年公约中这 2 个条款具有相似性，因此，本文将只提及 1982 年公约中的规定。

59 International Court of Justice, Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening), 11 September 1992, *I.C.J. Reports*, 1992, p. 351, para.383. Hereinafter cited as Gulf of Fonseca judgment.

60 See for instance the following manuals on the topic: G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press,1987, pp. 176~178; L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 149~302; M. Strobl, *The International Law of Bays*, The Hague: MartinusNijhoff,1963, pp. 251~331.

61 1982 年《联合国海洋法公约》第 10(1) 条。

62 布歇提到，里加湾两岬之间的距离约有 28 海里。See L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, p. 219. 这个作者如何得到这个数据难以知道，因为拉脱维亚的可卡斯拉格与爱沙尼亚的 Vainu Point 之间的距离大于 56 海里。

63 Decree of 10 April 1947, On the Proclamation of Bays and Islands Located in the Northern Arctic Ocean and Baltic Sea as Territory of the U. S. S. R., as mentioned by A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 20, note 11. But see P. Solodovnikoff, *La navigation maritime dans ladoctrine et la pratique sovietiques*, Paris: Librairie Générale de Droit et de Jurisprudence, 1980, p. 299, 作者写道：“前苏联未就里加湾订立任何法律条文，但无论是沙皇时代还是前苏联的法学家都将里家加湾视作典型的历史性水域”See in this respect also F. Volkov ed., translated from Russian by K. Pilarski, *International Law*, Moscow: Rogress Publishers, 1990, p. 223 and accompanying text.

64 在 20 世纪上叶，存在着 6 海里，10 海里和 12 海里这样的宽度主张。See G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, pp. 37~74.

65 也即，既有的条约法框架下并没有对历史性海湾作出规定。参见《1958 年领海公约》第 7(6) 条，1982 年《联合国海洋法公约》第 10(6) 条，以及附随的文本。

联确实主张里加湾是一个历史性海湾。[66] 20 世纪 80 年代，在讨论历史性海湾的时候，苏联的文献已经不再明确提及里加湾。[67] 我们可以从 1990 年的一本国际法手册中看出，这种遗漏并非表明苏联不再主张里加湾是历史性海湾：

> 1957 年，苏联的立法将彼得大帝湾（最远至秋明—乌拉河河口与波沃罗特尼角的连接线）、亚速海和白海、里加湾、柯拉湾、伯朝拉湾和车什卡亚湾，以及维利基茨基和桑尼科夫海峡列为历史性水域。[68]

值得一提的是，1999 年俄罗斯一本国际法手册中甚至将里加湾列为拉脱维亚的历史海湾。[69]

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66 See for instanceE. Rauch, *Die Sowjetunion and die Entwicklung des Seevölkerrechts*, Berlin: Wissenschaftlicher Autoren-Verlag, 1982，p. 66 and P. Solodovnikoff, *Lanavigation maritime dans la doctrine et la pratique soviétiques*, Paris: Librairie Généralede Droit et de Jurisprudence, 1980, pp. 298~299. 关于苏联的观点，see also V. Sebek,*The Eastern European States and the Development of the Law of the Sea*, New York: Oceana Publications, Inc., 1979, p. 170（“大部分国际律师引述里加湾为苏联的内水。”）；W. Butler, *The Law of Soviet Territorial Waters*, New York: Praeger, 1967, pp. 13, 74; M. Strobl, *The International Law of Buys*, The Hague: Martinus Nijhoff, 1963, pp. 267, 274; F. de Hartingh, *Les conceptions soviétiques du droit de la mer*, Paris: Librairie Générale de Droit et de Jurisprudence, 1960, pp. 30~34; A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 32; W. Butler, The Legal Regime of Russian Territorial Waters, *American Journal of International Law*,Vol. 62, 1968, p. 51.

67 就海洋法教科书而言，see for instance I. Blishchenko ed., translated from Russian by D. Belyavsky, *The International Law of the Sea*, Moscow: Progress Publishers, 1988, p. 26, as based on I. Blishchenko ed., *The International Law of the Sea*, Izdatel’stvo: Universiteta Druzhby Narodov, 1988, p. 32 (in Russian) [Peter the Great Bay and Bay of Penzhinsk]; G. Gorshkov ed., *International Law of the Sea Manual*, Moscow: Voennoe Izdatel’stvo, 1985, p. 69 (in Russian) [Peter the Great Bay]; Iu. Barsegov ed., *International Law of the Sea Dictionary*, Moscow: Izdatel’stvo Mezhdunarodnye Otnosheniia, 1985, p. 75 (in Russian) [Peter the Great Bay]; I. Barinova ed., *Contemporary Law of the Sea and the Practice of Its Application*, Moscow: Izdatel’stvo Transport, 1985, p. 62 (in Russian) [Peter the Great Bay]; S. Molodtsov, *Legal Regime of the Waters of the Sea*, Moscow: Izdatel’stvo Mezhdunarodnye Otnosheniia, 1982, p. 51 (in Russian) [Peter the Great Bay and Bay of Cheshsk]. With respect to manuals on international law, see for instance N. Blatova ed., *International Law*, Moscow: Izdatel’stvo Iuridicheskaia Literatura, 1987, p. 374 (in Russian) [White Sea and Peter the Great Bay]; B. Klimenko ed., *Dictionary of International Law*, Moscow: lzdatel’stvo Mezhdunarodnye Otnosheniia, 1986, p. 107 (in Russian) [Peter the Great Bay, Bayof Cheshsk and Bay of Pechorska]. 这些列举都是没有办法穷尽的。除了苏联的例子，这些作品也提到了其他国家在该方面的实践，尤其经常提及的加拿大哈德逊湾。

68 F. Volkov ed., translated from Russian by K. Pilarski, *International Law*, Moscow: Rogress Publishers, 1990 , p. 223.

69 K. Bekiashev ed., *Public International Law Textbook*, Moscow: lzdatel’skaia Gruppa Prospekt, 1999, p. 417. (in Russian)

尽管相关的法律依据仍然具有不确定性,[70] 仍可以得出结论,苏联的确主张里加湾为历史性海湾。在这方面,苏联仅是继续沙俄时期确立的实践罢了。

至于苏联这种单方面的主张是否形成国际法的一部分,则当然是一个完全不同的问题。从 1947 年形势的角度出发,一个西方学者曾得出结论,认为苏联声称里加湾是历史性海湾的主张无法被证实,主要是由于缺乏远早期使用和持续的主权。[71] 这种情况在 1947 年是极有可能的,但是作者并没有充分回答 20 世纪 90 年代早期的情况是否仍基本保持不变。事实上,布歇在其关于该主题的著作中便强调,考虑到现在的交流方式,时间因素必须在新的背景下理解。[72] 在与历史性海湾有关的国家实践方面,布歇便以里加湾为例。[73] 不能否认的是,自 1947 年以来,苏联已经在持续地对这些水域行使完全的主权。早在 1982 年,劳赫便得出以下结论:

> 在现存的“历史性海湾”的说明中:一个由历史遗留的、他国已放弃,而本国又需作为自己水域而提出要求的,以及他国默认放弃的,特别是潜在涉及到最多邻国的,必须移交。适用于此标准而被承认的仅仅有前苏联遗留的里加湾、车什卡亚湾、亚速海和白海。[74]

正如上面所说,苏联学者通常喜欢把加拿大的哈德逊湾作为历史海湾的另一个例

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70 This is most probably the reason why the Gulf of Riga does not appear in G. Francalanci, D. Romano and T. Scovazzi eds., *Atlas of the Straight Baselines*, Milano: Dott. A.Giuffre Editore, 1986, p. 137. See especially the foreword (p. v) where the grounds are indicated on the bases of which selections were made for inclusion.

71 See A. Reynolds, Is Riga an Historic Bay?, *International Journal of Estuarine and Coastal Law*, Vol. 2, 1987, p. 32.

72 L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 256~257.

73 L. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, pp. 215, 219~220.

74 E. Rauch, *Die Sowjetunion und die Entwicklung des Seevölkerrechts*, Berlin: Wissenschaftlicher Autoren-Verlag,1982, p. 67.《单边谈判文本(修订)》第 9 条对应 1982 年《联合国海洋法公约》第 10 条。

子。[75] 尽管国外对这种主张的反对声似乎已经远远超过里加湾，20 世纪 90 年代初一个权威的美国学者在仔细审查所有的支持与反对意见后，却得出结论，认为今天的哈德逊湾是加拿大内水的一部分。[76]

适当评估这种说法的一个重要因素当然是苏联部长会议于 1985 年确定的地理坐标一览表，确定了在波罗的海用以测量领海、专属经济区和大陆架的领海基线的位置。[77] 在 1971 年，建立这样一个直线基线系统的可能性首次被引入苏联立法，[78] 随后，由新的《苏联国家边界法》加以巩固。[79] 在此处十分重要的是，《1985 年法令》的最后一段被加到坐标一览表中。坐标一览表规定，白海和位于巴伦支海的切沙湾，喀拉海的拜达拉茨湾和鄂霍次克海的品仁纳湾是“苏联的内水，从历史上便属于苏联”。此外，有一个特殊的条目被加到一览表中，规定了 1957 年部长会议法令中宣布的苏联内水彼得大帝湾“是一个历史性海湾。”[80] 对该有限列表

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75 See I. Blishchenko ed., translated from Russian by D. Belyavsky, *The International Law of the Sea*, Moscow: Progress Publishers, 1988, p. 26, as based on I. Blishchenko ed., *The International Law of the Sea*, Izdatel'stvo: Universiteta Druzhby Narodov, 1988, p. 32 (in Russian) [Peter the Great Bay and Bay of Penzhinsk]; G. Gorshkov ed., International Law of the Sea Manual, Moscow: Voennoe Izdatel'stvo, 1985, p. 69 (in Russian) [Peter the Great Bay]; Iu. Barsegov ed., *International Law of the Sea Dictionary*, Moscow: Izdatel'stvo Mezhdunarodnye Otnosheniia, 1985, p. 75 (in Russian) [Peter the Great Bay]; I. Barinova ed., *Contemporary Law of the Sea and the Practice of Its Application*, Moscow: Izdatel'stvo Transport, 1985, p. 62 (in Russian) [Peter the Great Bay]; S. Molodtsov, *Legal Regime of the Waters of the Sea*, Moscow: lzdatel'stvo Mezhdunarodnye Otnosheniia, 1982, p. 51 (in Russian) [Peter the Great Bay and Bay of Cheshsk]. With respect to manuals on international law, see for instance N. Blatova ed., International Law, Moscow: Izdatel'stvo Iuridicheskaia Literatura, 1987, p. 374 (in Russian) [White Sea and Peter the Great Bay]; B. Klimenko ed., *Dictionary of International Law*, Moscow: lzdatel'stvo Mezhdunarodnye Otnosheniia, 1986, p. 107 (in Russian) [Peter the Great Bay, Bay of Cheshsk and Bay of Pechorska] in fine.

76 J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 343. 美国直接包含其中，且长期抗议该种主张。

77 Decree of 15 January 1985, On the Confirmation of a List of Geographic Coordinates Determining the Position of the Baseline in the Arctic Ocean, the Baltic Sea and Black Sea from which the Width of the Territorial Waters, Economic Zone and Continental Shelf of the U. S. S. R. is Measured, (Annex), *Izveshcheniia Moreplavateliam*, Vol. 1, 1986, p. 22. Hereinafter cited as 1985 Decree.

78 Edict of 10 June 1971, On the Introduction of Modifications to the Statute on the Protection of the State Border of the U. S. S. R., *Vedomosti Verkhovnogo Soveta S.S.S.R. (Communications of the Supreme Soviet of the U. S. S. R.)*, Vol. 24, 1971, p. 254.

79 Law of 24 November 1982, On the State Boundary of the U. S. S. R., *Vedomosti Verkhovnogo Soveta S. S. S. R. (Communications of the Supreme Soviet of the U. S.S. R.)*, Vol. 48, 1982, p. 891 and *Svod Zakonov S. S. S. R. (Code of Laws of the U. S. S.R.)*, Vol. 9, 1986, p. 202. See Art. 5.

80 See 1985 Decree, p. 47.

的一个可能解读是，苏联只主张这 5 个海湾为历史性海湾。[81] 然而，还存在着另外一种解读，即只有这 5 个海湾被明确提及;这 5 个海湾都只有一段封口线，即两端都邻接正常基线。里加湾南起欧维西角，越过萨拉马岛和希乌马岛，至北部的帕克里角，由于完全包含在直线基线体系内，因此在其自然入口点的地方并没有线可封闭海湾，这种情况使得要在里加湾提出历史地位的主张显得不那么恰当。

至于可适用的法律制度，在由直线基线封闭的水域和历史海湾水域之间并没有太多的区别。二者都属于内水，也即，处于一国的完全主权之下。唯一可能的区别是，对由直线基线封闭的水域适用 1982 年《联合国海洋法公约》第 8(2) 条的规定。[82] 但是由于苏联从 1947 年起就持续对里加湾行使完全的主权，似乎适用内水法律制度是毫无疑问的。

还必须提出关于这些基线国际有效性的问题。对于该问题，并没有办法找到一个简单的答案。不能否认的是存在着对《1985 年法令》的正式抗议。[83] 然而，必须记住的是，波罗的海只是该法令所涉及的众多海域之一。实际上，在法令确立的 726 个基点中，波罗的海仅占 32 个。此外，从可获得的信息并没有办法清楚判断，这些抗议针对的是直线基线系统中的哪些部分。[84] 考虑到美国在北极地区的特殊利益，可以假设抗议的本质是针对苏联在北极地区的某些基线。[85] 这里考虑的直线基线，即从南方的欧维西角到北方的帕克里角的基线，大部分符合美国国务院海洋法律和政策办公司为建立直线基线而“根据当前国际法及实践”所发布的标准和指引。[86] 这里要考虑的基线超过该研究本身所称的“本研究中众多充满争议的指引之一”的要求，[87] 即 48 海里最大基线长度。最近新确立的爱沙尼亚的

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81 T. Scovazzi, New Developments Concerning Soviet Straight Baselines, *International Journal of Estuarine and Coastal Law*, Vol. 3, 1988, p. 37.

82 该条规定：“如果按照第七条所规定的方法确定直线基线的效果使原来并未认为是内水的区域被包围在内成为内水，则在此种水域内应有本公约所规定的无害通过权。”

83 See for instance United States Responses to Excessive National Maritime Claims, 112 Limits in the Seas 22 (1992). 在该列表公布了关于直线基线的主张，从该列表可以推断出，美国对《1985 年法令》有着很多抗议，见第 24 页。

84 For a more detailed analysis of this issue, see E. Franckx, *Martzme Claims in the Arctic: Canadian and Russian Perspectives*, Dordrecht: Martinus Nijhoff, 1993, pp. 224~225, note 471 and accompanying text.

85 尤其是那些位于北方群岛和亚欧大陆之间、闭合了北极海峡的基线。For more details and general background, see E. Franckx, *Martzme Claims in the Arctic: Canadian and Russian Perspectives*, Dordrecht: Martinus Nijhoff, 1993, pp. 145~195 with respect to the Soviet, and pp. 75~107 with respect to Canada.

86 Developing Standard Guidelines for Evaluating Straight Baselines, 106 Limits in the Seas37 (August 1987). See pp. 17~18 for the proposed criteria for fringing islands which have to be complied with.

87 Developing Standard Guidelines for Evaluating Straight Baselines,106 Limits in the Seas37 (August 1987). See p. 14.

直线基线，[88] 严格遵从了前苏联 1985 年建立的系统，其更是被认为“符合国际法建立直线基线的要求”，[89] 尤其是本处要考察的部分线段。[90]

由此，似乎有理由认为，里加湾具备所有被认定为历史海湾所需要的特征。当苏联于 1991 年解体，作为一个必然的结果，该权利被该区域的 2 个新沿海国所继承。正如国际法院在丰塞卡湾判决中所指出的：

> 国家继承是领土主权从一国过渡到另一个国家的方法之一；而且，在国家继承中，当一个单独的、未分割的海洋区域过渡 2 个或者更多的国家时，原则上似乎没有理由认为不可产生一个联合的主权。[91]

如果拉脱维亚和爱沙尼亚仍然愿意持续该种做法，可以认为，关于既存的历史海湾争论有强有力的主张支持。[92] 在苏联时期，里加湾上并没有界限，即便是行政性的划分都没有；海上活动，诸如航行和捕鱼，由双方的国民无差别地实施。由于在当今国际法中并不存在一个与历史性水域有关的单独制度，[93] 需要争议双方共同确定一个双方均可接受的具体制度。[94] 然而，爱沙尼亚明确表示，它并不接受这种理论。[95]

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88 Law on the Boundaries of the Maritime Tract, *Riigi Teatala*, Vol. 1, 1993, p. 14. As reprinted in *Law of the Sea Bulletin*, Vol. 25, June 1994, p. 55.

89 A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p. 235.

90 对于靠近俄罗斯海岸的那部分遭到了一些质疑，且在里加湾加入了一个特殊基点的做法在这方面也得到了强调。See A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p.237.

91 Gulf of Fonseca judgment, para. 399. 尽管波罗的海共和国不认为自己是前苏联的继承国，人们仍然认为，当前争论的实质内容是有效的。

92 或者正如一个拉脱维亚的学者所写：“似乎，里加湾可被拉脱维亚和爱沙尼亚主张为历史性海湾。” See I. Bergkhol’tsas, *Public Law of the Sea*, Riga: Jumi, 1997, p. 64. (in Russian) Our translation.

93 International Court of Justice, Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya), 24 February 1982, *I. C. J. Reports*, 1982, p. 18, para. 100. 在该判决中，国际法院明确指出：“尽管一般国际法并没有与‘历史性水域’或‘历史性海湾’有关的‘单独制度’，只为每一个明确的、被公认的‘历史性水域’或‘历史性海湾’提供了特殊的制度，但是本案所要讨论的问题仍然受到一般国际法的规制。”

94 对于各方之间分割历史性水域的行为并不存在任何的阻碍，如印度和斯里兰卡之间对保克海峡和保克海湾的划分。这些历史性水域是两个国家内水的一部分。有趣的是，为了划界目的，有个位于等距离线附近的争议岛屿被完全忽视了，而位于另外一个国家的传统捕鱼权由此得到了保护。See India-Sri Lanka (Historic Waters): Report Number 6~10(1), in *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1992, pp. 1409~1417. 考虑到当前在里加湾存在相同的利益及情形，这一国家实践可以成为很好的先例。

95 E. Franckx, Two New Maritime Boundary Delimitation Agreements in the Eastern Baltic Sea, *International Journal of Marine and Coastal Law*, Vol. 12, 1997, p. 365. 文中，该作者尝试为爱沙尼亚的拒绝做出解释。

实际上，这一体系的正常运作要求所有相关方的同意。[96] 然而，法院认为，一旦某一共同统治建立，其解体将需要相关各国的同意。[97] 这种要求是否适用到近海岸共同内水的转换尚不清楚。沙尔内曾尝试将该假设应用到国家继承情形下的哈德逊湾，该海湾有着连接世界大洋的自然出口;经过尝试，沙尔内认为存在以下2种可能的论证思路:第一，认为新的国家有权批准或者终止该水域的历史地位;第二，新的国家必须受此前已经存在的情况的约束。[98]

由此，可以从波罗的海的国家实践中学到许多可用于里海的经验。最重要的是，里加湾中缺乏各国同意的情况在里海的争端中同样存在，对于未被伊朗和俄罗斯历史条约规定的区域，双方将很难适用共同统治的理论。[99]

2.“先勘探、开采，再划界”理论

在里海，存在着勘探和开发并不会因为没有划界协议存在而受影响的论点;阿塞拜疆这一理论的坚定支持者。

类似的趋势也存在于波罗的海东南部;从矿产开发的角度出发，该部分是整个波罗的海东南部最有潜力的地方。立陶宛和俄罗斯之间的关系[100]的特点是，每一次俄罗斯联邦宣布打算开发、利用这一假定的近海岸油田，就会引发立陶宛的强烈反应。[101] 克拉夫措夫斯科耶（D-6）油田位于相当靠近海岸的地方，被认为是整个谈判过程中极难解决的问题。一直到1996年，谈判的举行被笼罩在俄罗斯与

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96 在丰塞卡湾判决第394段强调：“这个一致的结论，即丰塞卡湾是一个具有闭海性质的历史性海湾，在今天看来并没有任何的大问题。3个沿岸国至今仍持该态度……”在同一段，国际法院还引用了联合国秘书处的一个研究：“如果所有毗邻的国家联合主张某一海湾为历史性海湾，那么，原则上上述关于一个国家对历史性海湾主张的论述同样适用于这个国家团体。”See also J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 368. 沙尔内在文中写到：“然而，这种历史性水域的权利应当基于所有沿海国家的同意做出。”

97 Gulf of Fonseca judgment, para. 409.In this respect, reference can also be made to the judgment of the Central American Court of Justice, Gulf of Fonseca (El Salvador/Nicaragua), 9 March 1917, as translated and reprinted in *American Journal of International Law*, Vol. 11, 1917, p. 700. 在该案中，为了改变丰塞卡湾内的国家间法律关系，需要取得各国的同意

98 J. Charney, Maritime Jurisdiction and Secession of States: The Case of Quebec, *Vanderbilt Journal of Transnational Law*, Vol. 25, 1992, p. 368.

99 已经被历史性条约所覆盖的区域，确实可以提出似是而非的论点:由于历史性条约可以被认定为所谓的领土条约，那么这些条约可适用于当今存在于里海沿岸的新国家，即阿塞拜疆、哈萨克斯坦和土库曼斯坦。See for instance D. Allonsius, *Le regime juridique de la mer Caspzenne: Problemes actuels de droit international public*, Paris: Universite Pantheon-Assas (Paris II), L. G. D. J. , E. J. A., 1997, pp. 30~37.

100 This part is based on E. Franckx, Lithuania-Russia: Exclusive Economic Zone and Continental Shelf [Report Number 10~18(1)], and by the same author, Lithuania-Russia; Territorial Sea [Report Number 10~18(2)], both accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

101 See for instance Izvestiia, 1 March 1994, p. 3, cols 3~6 and Finansovye Izvestiia, 12 September 1995, p. 2, col. 1.

外国伙伴建立联盟，以便开始开发 D-6 油田的阴影中。[102] 但是，当卢克石油公司的负责人于 1996 年 4 月份宣布，卢克公司计划以自有资金为 D-6 油田的开发提供资金时，情况发生了改变，因为这意味着油田的开发进程不会再因为要获得外国资本的要求而延迟。[103] 媒体报道表明，立陶宛最后放弃其对“位于波罗的海大陆架上、距离奈达海滨度假村不远处、某一存油丰富但尚未划界区域”的主张。[104] 立陶宛放弃对该区域主张推动了双方谈判的结束。[105] 实际上，俄罗斯《消息报》从非官方渠道推断，立陶宛放弃主张的交换条件是获得波罗的海中间一个 1.1 海里的海上走廊。[106] 通过保护立陶宛与瑞典之间的一个海洋界限，使得拉脱维亚和俄罗斯的相邻海洋区域免受被包围的威胁。

非生物资源也是拉脱维亚和立陶宛在这一海域海洋边界争端中的关键问题。[107] 细看两国的谈判过程可以发现，在 1993 年至 1999 年期间，这两个国家之间的关系有着很多段的冷静期，而这些冷静期往往与拉脱维亚当局所采取的与这些资源有关的许可证授予行为有直接关系。[108] 一直到 1994 年为止，双方的谈判都是比较顺利的。但是，在 1994 年末，当拉脱维亚政府公开宣布其已选中一个美国企业（AMOCO）和瑞典企业（OPAB）进行拉脱维亚大陆架资源的开发，其中包括对双方均主张区域的资源开发，争端便发生了。一年后，拉脱维亚于 10 月与上

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102 For details of this period, see E. Franckx, Maritieme afbakening in de oostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the EasternBaltic Sea: Internet and Scientific Research), in P. De Meyere, E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid en verscheidenheid* [Huldeboek aangeboden aan Frits Gorlé], Brussels: VUB Press, 1996, pp. 275, 283~285.

103 For details of this period, see E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, pp. 275, 286~287.

104 See Baltic News Service, 17 September 1997, at http://gopher://namejs.latnet.lv, 15 December 1997.

105 E. Franckx and A. Pauwels, Lithuanian-Russian Boundary Agreement of October 1997: To Be or not To Be?, in V. Gotz, P. Selmer, and R. Wolfrum eds., *Liber Amicorum Gunther Jaenicke-Zum 85 Geburtstag*, Berlin: Springer, 1998, pp. 63,74~75.

106 Izvestiia, 24 October 1997, p. 3, col. 3. 这一消息并没有被立陶宛外交部部长确认或否定（Izvestiia, 24 October 1997, p. 3, col. 4）。

107 This part is based on E. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

108 对这些谈判过程的详细描述，see E. Franckx, Maritieme afbakening in de oostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the Eastern Baltic Sea:Internet and Scientific Research), in P. DeMeyere, E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid en verscheidenheid* [Huldeboek aangeboden aan Frits Gonlé], Brussels: VUB Press, 1996, pp. 275, 280~281 and 285~296, and by the same author, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, pp. 275, 283~286. 该段的最后部分是基于这些来源写出。

述 2 个企业签订合同，问题再次爆发。在第一次实践之后，有了一封抗议信。在第二次冷静期之后，立陶宛召回其大使，准备磋商。每当拉脱维亚当局在该方面有所举动，这个周期便循环一次。[109] 然而，这 2 家外国公司并没有操之过急，且现在可以肯定地说，在 1997 年 7 月 9 日双方签订海洋界限协议之前，该地区并没有发生任何的开采活动。

在里海，相同的“行动—反映”模式已经初见端倪。例如，伊朗已经就阿塞拜疆的挑衅态度提出正式抗议。在一封给联合国秘书长的信函里面提到，伊朗政府“保留采取任何未来行动的权利，以保护其不可被剥夺的对海洋的权利。”[110] 在 2001 年 7 月，对 2 艘由英国石油公司操作的在争议水域航行的阿塞拜疆调查船，伊朗派出 1 艘炮舰追赶。[111] 伊朗的基本立场在文献中被描述为受 2 个重要考虑因素的影响:首先，任何单方行动必须停止，直到一个全面的制度建立;其次，所有由沿海国单方与外国公司签订的合作合同在国际法下是无效的。[112]

对阿塞拜疆在边境油田的开发计划，土库曼斯坦也已正式提出了抗议，[113] 这导致俄罗斯总统取消了其为与阿塞拜疆共同开发这片区域而与卢克石油公司和俄罗斯石油公司签订的合同。[114] 同样的，土库曼战机在该区域的巡逻被证明足以导致所有勘探活动的进行。[115]

人们认为，如果里海沿岸国家想推动地区稳定和睦邻友好，就不应该通过授予石油公司在有争议地区的特许经营来确定其海洋边界;因为种种原因，油气田往

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109 例如，当拉脱维亚政府的经济与金融委员会决定通过石油开采权法案等待政府决定的时候，或者将法案递交给国会以获得批准，以允许外国企业在拉脱维亚大陆架上开采的时候。

110 Letter dated 30 March 1999 from the Permanent Representative of the Islamic Republic of Iran to the United Nations, addressed to the Secretary-General, UN. Doe. A/53/890。有趣的是，就在前一年，伊朗国家石油公司与一些外国石油公司签订了类似的协议，允许这些石油公司在阿塞拜疆主张的区域进行勘探调查，这在当时受到了来自阿塞拜疆的强烈反对。See F. Sanei, The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with its Geopolitical Realities, *Vanderbilt Journal of Transnational Law*, Vol. 34, 2001, p. 681.

111 *The Moscow Times*, 27 February 2002, p. 7, col. 1. 伊朗的这一行为被认为是自前苏联解体以来在该区域最严重的事件。See N. Sohbetqizi, Caspian Basin Nations Prepare Again to Tackle Territorial Conundrum, at http://www.eurasianet.org/departments/business/articles/eav032202.shtml, 22 March 2002.

112 F. Sanei, The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with its Geopolitical Realities, *Vanderbilt Journal of Transnational Law*, Vol. 34, 2001, p. 764.

113 Letter dated 23 July 1997 from the Permanent Representative of Turkmenistan to the United Nations, addressed to the Secretary-General, UN. Doc.A/52/259.

114 As mentioned inK. Mehdiyoun, Ownership of Oil and Gas Resources in the Caspian Sea, *American Journal of International Law*, Vol. 94, 2000, p. 185, note 59.

115 R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law(Moscow)*, Vol. 14, 2001, p. 84.

往落于各方有争议的区域！

3. 基于国内立法或法令的争辩

在这 2 个区域，有时为了证明其在国际层面的正确性，会基于国内立法提出相关的主张。

在波罗的海，爱沙尼亚于 1993 年在里加湾建立的直线基线系统是第一个例子，[116] 这个直线基线系统是之后爱沙尼亚与拉脱维亚海洋划界谈判中争论的焦点。[117] 尤其是里加湾前面的部分，双方对连接阿利岩岛、卢希努岛岛和基奴岛的基线存在严重分歧。拉脱维亚在这个区域并没有主张任何的基线，但其特别抗议到，这些特殊的基线并不是沿着海岸线的一般方向划出的。在对双方于 1996 年签订的边界协议进行详细分析之后发现，这种特殊的基线系统被完全忽视了。

爱沙尼亚与拉脱维亚就该区域单方作出的、确定海洋区域外部界限行为是第二个例子。1993 年，爱沙尼亚首先通过同样的法令沿着其海岸划定直线基线。[118] 在争议过程中，拉脱维亚发布公告，单方面宣布了其在里加湾的渔业控制水域外部界限。[119] 该渔业控制水域有 18 海里与爱沙尼亚主张的海域重叠。[120] 再次的，此举大大增加了双方之间的紧张关系，尽管这一主张的内容对最后的边界线并不会有任何实质的影响。

一个类似的例子可以在拉脱维亚和立陶宛之间的海洋边界争端中找到。[121] 在该争端中，立陶宛总统采取了较为特殊的举措，其发出了一项法令规定，在双方达成协议钱：

> 确定以下与拉脱维亚共和国谈判的原则：立陶宛在波罗的海的领海边界是一条直线，起于拉脱维亚和立陶宛在波罗的海海岸的国家边界最后一点，坐标北纬 56.04.10、东经 21.03.53；止于波罗的海距离海岸 12 海里的地方，

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116 Law on the Boundaries of the Maritime Tract, *Riigi Teataja*, Vol. 1, 1993, p. 14. As discussed in A. Elferink, Law on the Boundaries of the Maritime Tract, *International Journal of Marine and Coastal Law*, Vol. 9, 1994, p. 235.

117 This part is based on E. Franckx, Estonia-Latvia (Report Number 10~15), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

118 Law on the Boundaries of the Maritime Tract, *Riigi Teataja*, Vol. 1, 1993, p. 14.

119 Regulations on the Provisional Fishery Arrangements in the Gulf of Riga, 2 April 1996, Unofficial English translation kindly received from R. Stafeckis, Latvian Ministry of Foreign Affairs, 15 July 1996 (on file with the author).

120 E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 280.

121 This part is based onE. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

坐标为北纬 56.03.06、东经 20.42.37。[122]

该总统法令还讨论了专属经济区和大陆架问题:

> 立陶宛共和国在波罗的海的专属经济区和大陆架北部一条直线,起于波罗的海上坐标为北纬 56.03.06、东经 20.42.37 的点,止于北纬 56.07.35 地理平行线与第三国在波罗的海大陆架的边界交叉点。[123]

无论这个法令的目的是为了影响立陶宛谈判小组或拉脱维亚政府尚不清楚。事实是,最终双方同意划定的边界线并没有遵循这一单方面的声明。

本着同样的精神,在文献中有时会碰到的主张是,通过宪法规定或其他高级别的法令,将靠近某一个特定濒海国家的里海的一部分包括在该国的领海之内,这使得共享海域的问题变得没有实际意义。[124]

但是,从国际法的角度出发,这种试图以单边方式解决海洋边界问题的行为将导致严重的问题。正如韦伊所说:

> 划界不可能在不考虑到其他国家立场的情况下,由某一国家单方面实施,且这种划界与其他国家相对的,因此只可扩展到他们都可以接受的程度。[125]

国际法院曾在 1951 年给出十分明晰的解释:

> 海域的划界一直具有国际方面的问题;其不能仅仅依靠沿海国在其国内

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122 Decree of the President of the Republic of Lithuania, On the Northern Border of the Territorial Sea, Economic Zone and Continental Shelf o[f] the Republic of Lithuania, 13 November 1996, *State News*, No. 112~2537 (1996), Art. 1(1).

123 Decree of the President of the Republic of Lithuania, On the Northern Border of the Territorial Sea, Economic Zone and Continental Shelf o[f] the Republic of Lithuania, 13 November 1996, *State Nexus*, No. 112~2537 (1996), Art. 1(2).

124 See for instance Art. 11(2) of the 1995 Constitution of Azerbaijan, at http://www.constitutional-court-az.org/const-contents.htm, as provided by the Constitutional Court of Azerbaijan, 该条规定:“阿塞拜疆共和国内水,部分里海(湖)属于阿塞拜疆共和国,位于阿塞拜疆共和共国之上的空间部分是阿塞拜疆共和国领土的组成部分。”在总统网站可以找到一个措辞有些不同的表述(下载于 http://www.president.az/azerbaijan/const.htm)。See also the 1999 decree by Turkmenistan's President,在该法令中,总统确定,里海中属于土库曼斯坦的部分是“土库曼斯坦不可分割的一部分”。As mentioned in S. Vinogradov, The “Tug of War” in the Caspian: Legal Positions of the Coastal States, in W. Ascher and N. Mirovitskaya eds., *The Caspian Sea: A Quest for Environmental Security*, The Hague: Kluwer Academic Publishers, 2000, pp. 189,193.

125 P. Weil, *The Law of Maritime Delimitation: Reflections*, Cambridge: Grotius Publications, 1989, p. 110. On this point see also p. 107.

> 法所表达的意志而决定。尽管划界的行为确实是一种单方面的行为，因为只有沿海国有权采取该种行动，但该种划界对其他国家的有效性则要依照国际法决定。[126]

因为波罗的海的单边行为对最终的海洋边界并没有任何的影响，由此，在里海地区的类似尝试可能会有同样结果的这一结论似乎是合理的。理论上，没有什么可以阻止各国做出单方面主张，[127] 但是，归根结底这些主张对于其他国家的效力总是需要在国际层面上加以判断。

4. 应当考虑凸面海岸和凹面海岸相互作用可能产生的闭合效应

当前的国际法案例教科书仍然依赖于国际法院 1969 年的大陆架案 [128] 来说明公平如何成为现代国际法渊源的一部分。[129] 国际法院指出：

> 公平并不意味着平等……但是在目前的情况下，有 3 个国家的北海海岸线长度相当，且这些海岸线被赋予了大致平等的待遇，但存在以下问题：如果使用等距方法确定其中的一条海岸线，将会导致否定另外两个国家原本应受到的平等待遇。本案情况即是这样，在相同的顺序下给予平等将会创造出一个不平等的情况。[130]

在波罗的海东南部，这样的情况出现于拉脱维亚和俄罗斯联邦（加里宁格勒）的凸岸和立陶宛的凹岸之间。正如前面所提及的，当立陶宛和俄罗斯在谈判其海上界限时，有一部分的妥协是，俄罗斯允许立陶宛在波罗的海的中间有一个 1.1 海里

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126 International Court of Justice, Anglo-Norwegian Fisheries (United Kingdom/Norway), 18 December 1951, *I. C. J. Reports*, 1951, p. 116.

127 尽管这些行动的恰当性遭到了一些学者的质疑，由其是与里海有关的行动。See for instance B. Dubner, The Caspian: Is it a Lake, a Sea or an Ocean and Does it Matter? The Danger of Utilizing Unilateral Approaches to Resolving Regional/ International Issues, *Dickinson Journal of International Law*, Vol. 18, 2000, p. 253, 在该文中，作者总结："在该领域，根本就没有可以采取单方声明的空间。"

128 International Court of Justice, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969, *I. C. J. Reports*, 1969, p. 3.

129 See for instance M. Janis and J. Noyes, *International Law: Cases and Commentary*, St. Paul: West Group, 2001, pp. 155~172.

130 International Court of Justice, North Sea Continental Shelf Cases (Federal Republic ofGermany/Denmark; Federal Republic of Germany/Netherlands), 20 February 1969, *I. C. J. Reports*, 1969, p. 3, para. 91.

宽的海上走廊。[131] 由于拉脱维亚之后也采取了类似的做法，这 2 个行为共同作用的结果是，如今立陶宛的海域与瑞典海域发生重叠。[132] 并没有任何的第三方迫使拉脱维亚和俄罗斯在上述行为中考虑平等因素，[133] 与此相反，这 2 个国家完全是在各自与拉脱维亚谈判的过程中，出于它们自己的自由意愿而做出决定的。

在里海的南部存在类似的情况。从地图上描绘的假想等距线 [134] 便可发现，即使阿塞拜疆、伊朗和土库曼斯坦拥有大致相当的海岸线，因为这一区域海岸线的特殊情况，3 个国家最终将得到不平等的分配比例。

以波罗的海实践为基础可知，在划定阿塞拜疆和土库曼斯坦的凸岸与波罗的海南部伊朗的凹岸时，需要作出一些调整。

5. 第三方争端解决

最后一点评论基于波罗的海迄今为止的国家实践，对里海地区可能用以处理海洋边界纠纷的方法进行评估。

截至 20 世纪 90 年代，早期波罗的海地区所有海洋划界实践的一个典型特征是，没有任何一个海洋界限是通过第三方争端解决处理的。[135] 在所谓的第四阶段，[136] 在第三方争端解决方面有了一定的发展。爱沙尼亚，拉脱维亚和立陶宛均表示，在其为签订海洋边界协议而进行的谈判过程中，至少在解决方案尚无法达成的情

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131 See Izvestiia, 24 October 1997, p. 3, col. 3 and accompanying text. On this point, see E. Franckx and A.Pauwels, Lithuanian-Russian Boundary Agreement of October 1997: To Be or not To Be?, in V. Gotz, P. Selmer, and R. Wolfrum eds., *Liber Amicorum Gunther Jaenicke-Zum 85 Geburtstag*, Berlin: Springer, 1998, pp. 74~75, as well as E. Franckx, Lithuania-Russia: Exclusive Economic Zone and Continental Shelf [Report Number 10~18(1)], and by the same author, Lithuania-Russia: Territorial Sea [Report Number 10~18(2)], both accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

132 E. Franckx, Latvia-Lithuania (Report Number 10~20), accepted for publication in *International Maritime Boundaries, Vol. 4*, The Hague: Martinus Nijhoff, 2002. Forthcoming.

133 在北海，荷兰和丹麦已经签订了一个双边协议，在该协议中，双方同意完全闭合德国海域，由此，丹麦与英国的海洋区域便不会发生重叠。See Agreement Concerning the Delimitation of the Continental Shelf Between the Two Countries (Denmark/The Netherlands), 31 March 1960, 604 UNTS 209. This agreement entered into force on 1 August 1967.

134 See for instance the map reproduced in S. Vinogradov, The Legal Status of the Caspian Sea and its Hydrocarbon Resources, in G. Blake, M. Pratt, C. Schofieldand J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, pp. 137,144.

135 E. Franckx, Region X: Baltic Sea Maritime Boundaries, in *International Maritime Boundaries, Vol. 1*, Dordrecht: Martinus Nijhoff, 1992, pp. 345, 364.

136 As distinguished in E. Franckx, Maritime Boundaries in the Baltic Sea: Post-1991 Developments, *Georgia Journal of International and Comparative Law*, Vol. 28, 2000, p. 256 and accompanying text.

况下，他们愿意将争端提交给仲裁机构或者是第三方争端解决。[137]

然而，事实是，尽管这 3 个国家表达了其有将争端交个第三方解决的意向，他们之间最终签订的协议均是通过各方之间的直接协商完成的。最近一个涉及第三方参与到谈判中的例子是瑞典参与到爱沙尼亚和拉脱维亚之间的谈判，但其参与并不是对争议问题做出决定，而仅仅是起到了帮助作用。尽管在双方签订协议的时候，瑞典外交部部长对媒体说，瑞典为能在双方争端解决的过程中进行调停感到十分的自豪，实质上，人们认为，瑞典在这一过程中起的作用是斡旋。[138] 同时，有一点应当补充的是，同一时期在该区域的海洋划界争端中，相同的提议被争议双方拒绝。[139]

鉴于波罗的海的实践，似乎不太可能在里海的划界争端中通过第三方争端方式解决问题。如果波罗的海东南部的爱沙尼亚，拉脱维亚和立陶宛之间关系有可能改变的迹象，这也绝不是立陶宛和俄罗斯、爱沙尼亚和俄罗斯之间双边关系可能的情形。在里海地区，新独立国家相互之间的关系及其可能已经被提出。[140] 但是具体到本文涉及的这一个争端，无论是伊朗或者是俄罗斯都不愿将争端提交到国际法院，或者其他任何可以处理该问题的仲裁庭。而且，基于此前已经提及的历史性条约，这 2 个国家享有特殊利益，因此，双方也都不愿让对方将问题提交到第三方解决。

6. 结论

经过近十年的谈判，里海沿岸国显然已经到了一个阶段，即为了有序开发该区域的非生物资源，他们都同意水下海床可以被划分；本文试图辨别是否存在任何国际法，为各国实现该目标提供指引。本文发现，国际法提供的一般框架无法从

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137 For an overview of these different instances, see E. Franckx, Maritieme afbakemng in deoostelijke Baltische Zee: Internet en het wetenschappelijk onderzoek (Maritime Delimitation in the Eastern Baltic Sea: Internet and Scientific Research), in P. De Meyere and E. Franckx, J. Henckaerts and K. Malfliet eds., *Oost-Europa in Europa: Eenheid enverscheidenheid [Huldeboek aangeboden aan Frits Gorlé]*, Brussels: VUB Press, 1996, pp. 287, 289, 291, 293, 295, 297, 298, 300, 311 (especially Latvia favoured this approach) and by the same author, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 282.

138 As discussed in E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998,p. 283.

139 拉脱维亚和立陶宛拒绝了爱沙尼亚的提议；在爱沙尼亚和俄罗斯的陆地和海洋争端中，欧洲安全与合作委员会的参与也被拒绝了。See E. Franckx, Maritime Boundaries in the Baltic, in G. Blake, M. Pratt, C. Schofield and J. Allison eds., *Boundaries and Energy: Problems and Prospects*, London: Kluwer Law International, 1998, p. 288.

140 土库曼斯坦建议在与阿塞拜疆的争议中利用这种替代性方法。See R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law (Moscow)*, Vol. 14, 2001, p. 111.

条约法或者习惯国际法中找到，只能从司法判决中找到，而司法判决对各国实践的作用已经得到重视。

不管这些一般原则多么模糊或者与特定情形息息相关，随后的发现表明，这些原则是国家行为中某些趋势和实践的表现。为了找到一个公平的解决方法，各国往往愿意基于趋势或者国家实践而限制他们最初的主张。[141] 作为一个法律问题，在划分里海海床的时候，即便假设沿岸国没有义务要考虑一般原则，[142] 并不意味着这些趋势或者实践在争议方的谈判中不会起到一定的作用。如上所述，存在例子表明，尽管这种国际规则从严格意义上说没有法律约束力，但是国家还是会接受其指引。[143] 尤其是考虑到里海地区可能升级的紧张局势，这可能不是个坏主意，因为这些趋势和国家实践最终至少会给争议各国的主张设定一个上限。

基于这些假设，本文首先试图辨别前苏联实践中的经验教训，就像里海，在该区域俄罗斯联邦失去了其在苏联时期拥有的部分海域，即波罗的海东南部。这给相关各国带来了严重的困难，在争议各方可以最终确定各自的海洋界限之前，目前该区域仍然是里海相关沿海国之间争议的焦点。

本文所进行的比较产生了一些具体建议:首先，没有被历史协议解决的区域，

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141 本文作者有幸见证了在波罗的海东南部海洋边界的一系列谈判中形成的这一趋势。

142 也即，若里海要被认定为是国际界湖，那么其需要取得 5 个沿岸国的同意。其实，只有阿塞拜疆在其宪法典中正式承认这一水域是湖泊。As stressed by R. Mamedov, International Legal Delimitation of the Caspian Sea, *International Law (Moscow)*, Vol. 14, 2001, p. 126. 本文作者查阅了阿塞拜疆 1995 年宪法典第 11(2) 条发现，在其总统网站和宪法法院的英译本中，里海被表述为“ 里海（湖）”。

143 See G. Westerman, *The Juridical Bay*, Oxford: Clarendon Press, 1987, p. 201 note 74; D. O'Connell,*The International Law of the Sea*, Oxford: Clarendon Press, 1982, pp. 389~416; 2002 Arbitration; The Atlantic Accord: Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing, 11 February 1985; Canada-Nova Scotia Offshore Petroleum Resources Accord, 26 August 1986; Canada-Newfoundland Atlantic Accord Implementation Newfoundland Act (Statutes of Newfoundland, 1986,c.37) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation(Statutes of Nova Scotia, 1987, c. 3); Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c. 3) and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act（Statutes of Canada, 1988, c. 28); Canada-Newfoundland Atlantic Accord Implementation Act (Statutes of Canada, 1987, c.3) section 6(4), and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act (Statutes of Canada,1988,c.28),section 48(4);By means of Art. 3(2) of these Terms of Reference, the disputing parties requested the Tribunal to proceed in two phases:"(i) In the first phase, the Tribunal shall determine whether the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia has been resolved by agreement. (ii) In the second phase, the Tribunal shall determine how in the absence of any agreement the line dividing the respective offshore areas of the Province of Newfoundland and Labrador and the Province of Nova Scotia shall be determined."At http://www.boundary-dispute.ca/terms.html; 2002 Arbitration, para. 2.35 and accompanying text.

共同统治的可能性并不大，因为共同统治需要所有沿海国家的同意，而非里海。第二，在里海区域，未经过事先的海洋划界协议便进行勘探和开采并不是一个有吸引力的解决方案。除了勘探和开发可能带来的高风险之外，波罗的海的实践表明，如果争议的相关国家尚未成功解决划界问题，那么石油公司并不会实际开发争议区域。第三，单边立法行为，即便是以宪法的形式做出，并不可能影响划界协议；划界协议往往具有国际性。第四，如果波罗的海的沿岸国家愿意，在其各自的自由意志范围之外，考虑北海大陆架案判决，当各国有着相当长的海岸线时，避免理论上的不平等。在里海南部，应当建议各国适当考虑该问题。最后，以波罗的海的实践为考量，在里海各方之间通过第三方解决争端的方法并不可行。

不管这些比较性的意见有多不完善，仍希望其可以从一个完全不同的视角，在未来对该主题作进一步阐释的时候发挥作用。然而，正如作者已经指出的，很显然，没有任何类比是完美的。因此，里海的特殊性总应当被考虑在内。伊朗给联合国秘书长信函写于当前会议结束后的第二天，也即 2002 年 2 月 28 日，考虑到这封信函的时事性，本文总结至少一个可能的区分因素是恰当的。在可以开始对里海底土进行双边划界之前，可能需要的所有沿岸国家的一致同意。[144]

（中译：林洁）

144 Letter dated 28 February 2002 from the Charge d’affaires a. i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations, addressed to the Secretary-General, UN. Doc. A/56/850。该信函有效部分如下：“伊朗伊斯兰共和国在重申其在联合国大会文件（A/52/913，1998 年 5 月 21 日）所表明的对里海法律地位的态度，即 2001 年 11 月 29 日哈萨克斯坦共和国与阿塞拜疆共和国就划分里海签订的协议与当前已有的管辖里海法律地位的法律文件相抵触，因此，伊朗伊斯兰共和国并不认为上述两国签署的协议是有效的。显然，只要里海的法律制度没有经过所有沿岸国同意，对其采取的任何决定都是不可接受且无法律依据的。”

Diaoyu Islands and Their Status in Delimitation of East China Sea

WANG Keju *

Abstract: Diaoyu Island and its affiliated islands (hereinafter "Diaoyu Islands") have been the territory of China since ancient times. They were occupied by Japan at the end of the nineteenth century. Diaoyu Islands are located in the East China Sea near the middle line where maritime delimitation between China and Japan has not yet been done. The Diaoyu Islands dispute is a sensitive issue in Sino-Japanese relationship. The continued friendship and cooperation between the two nations is in the interest of both the Chinese and the Japanese people. It is expected that the issue can be resolved in an appropriate and timely manner.

Key Words: Diaoyu Islands; Territory; Delimitation of East China Sea; Status

I. Diaoyu Islands are the Inherent Territory of China

A. Diaoyu Islands have Belonged to China since Ancient Times

The Diaoyu Islands (named "the Senkaku Islands" by Japan) consists of 11 islets and rocks, including Diaoyu Island (named "Uotsuri-shima" by Japan), Huangwei Yu (named "Kuba-shima" by Japan), Chiwei Yu (named "Taishō-tō" by Japan), Bei Xiaodao (named "Kita-Kojima" by Japan), Nan Xiaodao (named "Minami-Kojima" by Japan), Da Bei Xiaodao (named "Oki-no-Kita-iwa" by Japan) and Da Nan Xiaodao (named "Oki-no-Minami-iwa" by Japan). The total area of these islands is 5.24 square kilometers, wherein Diaoyu Island alone covers an area of 3.8 square kilometers. The Islands are located on the southeastern edge of the East China Sea continental shelf and on the northwest of Okinawa trough with a water depth of 2,000 meters. 190 kilometers to the northeast of Keelung City, Tai-

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wan, China, Diaoyu Islands are situated about 420 kilometers from both Fuzhou City, Fujian Province, China, and Naha, Okinawa Island, Japan. The Islands are surrounded by excellent fishing grounds. Chinese fishermen, particularly those from China Taiwan and Fujian, have been engaged in fishery activities in these waters since the ancient times by taking advantage of the wind and currents in these parts. They often got fresh water, found shelters, captured birds, and collected birds' eggs and Chinese medicinal herbs on the islands.

Diaoyu Islands have been a part of the territory of China since the ancient times. It was the Chinese who first discovered the Islands, named them, and exploited them. Furthermore, the Chinese government had exercised its sovereignty over this area before the modern concept of territorial sovereignty came into being and at a time when no other country had claimed any right over these islands.

1. China was the first one to name Diaoyu Islands. The names of Diaoyu Island, Chiwei Yu, and Huangwei Yu had been found in many extant historical records of Ming Dynasty, such as the *Shun Feng Xiang Song* [*Voyage with a Tail Wind*] published in 1403. These islands were named as Diaoyu Yu, Chi Yu, and Huangmao Yu at that time.[1] Japanese scholars also agree that it is China that first named these Islands. Japanese scholars point out that the term "Yu" has never been used to name islands in Japan. On the other hand, many islands have been named as "Yu" in the Fujian Province, Pescadores, and China Taiwan, of which the number is up to twenty-nine. There have been more islands with the name of "Yu" in ancient Chinese maps than in the modern Chinese maps. Huangwei Yu and Chiwei Yu are named with "Yu". Moreover, the names "Huangwei Yu" and "Chiwei Yu" were used as such, without any changes, in the official documents of the Ryukyu government in the dominion of the United States.[2]

2. As early as the 14th century, in the early years of the Ming Dynasty, Diaoyu Islands has become an area where China exercised its right of self-defense at sea. Numerous historical texts and maps from that time demonstrate that the Ming court had placed Diaoyu Islands under its jurisdiction of coastal defense, such as the *Chou Hai Tu Bian* [*Illustrated Compendium on Maritime Security*] complied by Hu Zongxian, the governor responsible for combating Japanese invasion in Ming Dynasty, *Wu Bei Zhi* [*Treatise on Military Preparation*] edited by Mao Yuanyi,

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1 Zheng Hailin, *Research on History and Jurisprudence of Diaoyutai Islands*, Hong Kong: Ming Pao Publications, 1998, pp. 14~58. (in Chinese)

2 Takahashi Shōgorō, translated by Li Jie, *Records of Diaoyu Islands*, Beijing: Marine Geological Survey Bureau, 1983, p. 35. (in Chinese)

Wu Bei Mi Shu [*Record of Secret of Military Preparation*] edited by Shi Yongjiu.[3] These records show that China has exercised effective and exclusive sovereignty over these islands since the time of the Ming Dynasty.

3. Diaoyu Islands have been incorporated into the territory of China for a quite long time. During the Ming and Qing Dynasties, China had close connections with its vassal State, Ryukyu. Ryukyu paid annual tributes to China via ships. Every time a new king of Ryukyu ascended the throne, imperial envoys from the Ming or Qing court were sent to confer the title upon the Ryukyu king, which happened 23 times between 1372 and 1879. A number of historical records confirming the conferment of title on the Ryukyu king show that the border between China and Ryukyu was agreed to have been between Chiwei Yu and Kume Islands.[4] In other words, Diaoyu Islands have been integrated into China's territory since long.4. Diaoyu Islands were never depicted as part of its territory in Ryukyu's maps. In the maps and illustrations of the *Zhong Shan Shi Pu* [*Annals of Chong-shan*], submitted by Ryukyu's envoy Caize in 1701 (the tenth year of the reign of Emperor Kangxi of Qing Dynasty), thirty-six islands of Ryukyu were recorded without any mention of Diaoyu Islands. A series of the Ryukyu maps that has been published by Japan does

3 Map No. 8 among *Fujian Yan Hai Sha Tu* [*Maps of Fujian Coastal Mountains and Sands*] collected in *Chou Hai Tu Bian* [*Illustrated Compendium on Maritime Security*], complied by Hu Zongxian in 1562, lists Diaoyu Yu, Huangmao Shan, Chi Yu, etc.; *Fujian Yan Hai Sheng Tu* [*Fujian Province Coastal Map*] collected in Chapter Coastal Defense in *Wu Bei Zhi* [*Treatise on Military Preparation*] written by Mao Yuanyi in 1621, lists Diaoyu Shan, Huangmao Shan, Chi Yu, etc.; Fujian Coastal Defense Map in the volume II of *Wu Bei Mi Shu* [*Record of Secret of Military Preparation*] complied by Shi Yongjiu lists Diaoyu Shan, Huangmao Shan, Chi Yu, etc.

4 Such as *Shun Feng Xiang Song* [*Voyage with a Tail Wind*] written in 1403, the *Liu Qiu Ji* [*Record of the Ryukyu*] written in 1633, *Shi Liu Qiu Za Lu* [*Miscellaneous Records of a Mission to Ryukyu*] written in 1683, *Zhong Shan Chuan Xin Lu* [*Record of Sending Message of Chong-shan*] written in 1719, *Liu Qiu Guo Zhi Lue* [*History Records of the Ryukyu*] written in 1756, and *Xu Liu Qiu Guo Zhi Lue* [*History Records of the Ryukyu II*] written in 1866.

not include Diaoyu Islands.[5] It is obvious that there had been no dispute with regard to territorial sovereignty of Diaoyu Islands between China and Japan or China and Ryukyu during the Ming and Qing Dynasties.

5. The Dowager Empress of Qing Dynasty, Cixi, granted Diaoyu Islands to her minister as an award. In October, 1893 (the nineteenth year of the reign of Emperor Guangxu of Qing Dynasty), the Dowager Empress Cixi granted the Diaoyu, Huangwei Yu and Chiwei Yu islands to Sheng Xuanhuai as his property to facilitate his collection of Chinese medicinal herbs. Sheng Xuanhuai submitted very useful herbs which are said to have come from a small island outside of Taiwan named "Diaoyu Island". "It is said that Mr. Sheng's family has been running herbal medicine shop for generations, treating patients and prescribing medicines for them, helping the poor and poverty. I believe that he is worthy of this grant as an award." This grant was a reflection of the Chinese central government exercising its sovereignty over the Diaoyu Islands. A letter written by Sheng Xuanhuai's son, Sheng Enhe, to his daughter also mentioned that "the Emperor granted the three islands to your grandfather used to collect medical herbs. The manuscript proving the grant is still preserved at our house as our family's property. There is also drawing to illustrate…"[6]

B. Japan Illegally Occupied Diaoyu Islands upon Defeating China in the First Sino-Japanese War of 1894-1895

In 1868, the Japanese political group that was loyal to the Mikado (the Emperor of Japan) abolished the Tokugawa Shogunate and rebuilt the dominion of

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5 Take a Japanese literature as example, Hayashi Shihei ed., An Illustrated Description of Three Countries as well as its attached pictures (1785). In preamble, Hayashi Shihei emphasized that, these pictures concerning a number of countries, "are not made up by the author himself, but drawn based on authorities." In 1832, German scholar of oriental research Heinrich Klaproth interpreted the book with pictures and published it in French. As a result, the fact that Diaoyu Islands belong to China became known to the world. See Inoue Kiyoshi, *Issues on History and Sovereignty of Diaoyu Islands*, Shanghai: SDX Joint Publishing Company, 1973, pp. 43~49 (in Chinese). Also see, *Overall Map of Ryukyu and Its Affiliated Islands* included in *Chuzan Heishi Ryaku* (1832) by Saka Takuho, *Overall Map of Ryukyu Islands* (1873) drawn by *Ōtsuki Fumihiko*, *Overall Map of Grand Japan of Reformed Prefectures* (1875) by Sekiguchi Bisyo, etc.

6 The grant and the letter from Sheng Enhe to his daughter are reserved by Sheng Yuzhen (also named as Xu Yi). The English translation of the grant was published in the record of the First Conference of the United States Seventy-two Congress, 9 November 1971, Vol. 117, No. 169, p. 17967. See *Reference News* on 4 April 1972 and 6 April 1972.

the Japanese Mikado. After it abolished vassal towns in 1871, Japan reformed itself into a highly centralized and unified country with the Mikado as the only supreme despot. By this time, the Mikado government had already developed the ambition of incorporating Korea, Taiwan and Ryukyu into the territory of Japan. In 1872, the Japanese Mikado gave the Ryukyu king the title of *seignior*, stipulating that the diplomacy of Ryukyu was in the dominion of Japan afterwards. In 1874, Japan invaded the island of Formosa (historical name for present day "Taiwan"). In 1875, Japan issued a stern order commanding Ryukyu to end its tributary relationship with the Qing court and directing it to abandon its custom of waiting upon the Qing court for conferment of titles on the Ryukyu king, and suppressed the opposition from Ryukyu using armed forces. In 1875, Japan invaded Korea. In 1876, Japan forced Korea to sign an unequal treaty with it under which Korea was made to undertake several obligations, such as to open its ports, build a Japanese resident community, to give Japan the right of extraterritoriality, unhindered trade and exemption from import and export duties, to allow the Japanese to use Japanese currency for business, and to declare itself to be "an independent State enjoying the same sovereign rights as does Japan", which in turn was an attempt to detach Korea once and for all from its traditional tributary relationship with China. In 1879, Japan abolished vassal towns in Ryukyu. Instead, Ryukyu was renamed as "Okinawa Prefecture", and by this move Ryukyu was completely incorporated into the territory of Japan. In 1876, Japan declared its ownership over the Ogasawara Islands. In July, 1894, Japan went to war with China without prior declaration, attacking the troops of the Qing court stationed in Korea and also raided the Qing navy at sea. After the end of the war, as per Article 2 of the Treaty of Shimonoseki of April 1895, Japan occupied the island of Formosa (Taiwan) and all other islands appertaining or belonging to the island of Formosa as well as the Pescadores Islands off the west coast of Taiwan.[7]

After Japan had annexed the whole of the Ryukyu Islands into the territory of Japan, the Diaoyu Islands situated close to Ryukyu began to draw its attention. It took nine years for the Japanese Mikado government to seize the Diaoyu Islands.[8]

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7 Inoue Kiyoshi, *Issues on History and Sovereignty of Diaoyu Islands*, Shanghai: SDX Joint Publishing Company, 1973, pp. 71~84 (in Chinese); Wang Tieya, *Compilation of China and Foreign Treaties and the Chapters (Vol. I)*, Shanghai: SDX Joint Publishing Company, 1957, p. 614. (in Chinese)

8 Inoue Kiyoshi, *Issues on History and Sovereignty of Diaoyu Islands*, Shanghai: SDX Joint Publishing Company, 1973, pp. 84~102. (in Chinese)

It happened as below:

1. Chen Koga Shiro from Fukuoka Prefecture of Japan landed on Huangwei Yu in 1885. Later, he submitted an application for lease of the islet to the Governor of Okinawa Prefecture. However, the Ministry of Internal Affairs and the Foreign Affairs declined the approval due to concerns that the Chinese government would definitely and seriously protest against such exercise of authority by Japan. But the Ministry of Internal Affairs gave a secret order to the Okinawa government, instructing the local government to conduct a secret survey of the islet as well as the surrounding islands. After the secret survey, the governor of Okinawa Prefecture reported that these islands "were well known" and "were named respectively" by the Qing court, and that "it would be an inappropriate move if a sovereignty marker was built immediately after the survey". Moreover, the Minister of Foreign Affairs replied to the Minister of the Internal Affairs in a letter, saying that "it would certainly raise alertness of the Qing court if a sovereignty marker was built suddenly without well considerations."

2. The governor of Okinawa Prefecture requested the Minister of Internal Affairs for permission to construct national territorial markers on the islands in 1890 and then again in 1893, but did not receive any response.

3. At the end of 1894, when it became certain that the Japanese army would defeat the Qing court in the Sino-Japanese War, the Japanese government believed that the golden opportunity for it to occupy the Diaoyu Islands came. In December 1894, the Minister of Internal Affairs wrote to the Minister of Foreign Affairs to discuss on the erection of national territorial markers on the Diaoyu Islands. In January 1895, the Minister of Foreign Affairs replied with no objection to such erection. Their decision to territorialize the islands and erect national territorial markers was adopted at a cabinet meeting on January 14, 1895. On January 21, the Minister of Internal Affairs instructed the governor of Okinawa to go ahead and erect national territorial markers. At that time, Treaty of Shimonoseki was not concluded. During the negotiations of the treaty, the Japanese delegation kept the resolution adopted at their cabinet meeting about the Diaoyu Islands a secret the whole time.

Between 1885 and 1895, Japan never published any information about its series of moves towards incorporating Diaoyu Islands into its territory. The information as such was first published in Japan Diplomatic Documents, Volume 23, in March 1952. Moreover, Okinawa Prefecture did not establish the national territorial marker on Diaoyu Island until 5 May 1969. In 1970, the Okinawa

government stated in a document that Diaoyu Islands became the territory of Japan in accordance with the No. 13 edict issued in the 29th year of the reign of Mikado Meiji. However, there are no such records in the No. 13 edict.[9]

Moreover, Japan did not use the name "Senkaku Islands" to describe Diaoyu Islands until 1900 (the 33rd year of the reign of Mikado Meiji) when Tsune Kuroiwa, a teacher in the Okinawa Prefecture Normal School, translated the English name "Pinnacle Islands" (name given to the rocks adjacent to Diaoyu Island by the British) to "Senkaku". It was never "officially named by the Japanese government, nor recognized later by the Japanese government." The names of all islands belonging to "the Senkaku Islands" were based on the order issued by the mayor of Ishigaki while building national territorial markers on the Islands in the dominion of the United States in May, 1969. At that time, the Islands were named as Uotsuri-shima, Kuba-shima, Taishō-tō, Minami-Kojima, Kita-Kojima, Oki-no-Kita-iwa, Oki-no-Minami-iwa, and Tobise. Not only were these names not officially based on the edict, but the Japanese government also never put forth the names of these islands when the sovereignty issue arose. The Japanese government merely listed the names of these islands in a brochure of *The Senkaku Islands* published by the Public Information and Cultural Affairs Bureau of the Ministry of Foreign Affairs.[10]

C. Japan Remains in Illegal Occupation of Diaoyu Islands of China

1. Japan Did not Return Diaoyu Islands after WW-II

On 1 December, 1943, the Cairo Declaration issued by China, the US and UK explicitly stated that "…all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China."[11] On 26 July, 1945, China, the US and UK issued the Potsdam Proclamation which stated in Article 8 that "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of

9 Inoue Kiyoshi, *Issues on History and Sovereignty of Diaoyu Islands*, Shanghai: SDX Joint Publishing Company, 1973, p. 101. (in Chinese)

10 Syougorou Takahashi, *Record of Diaoyu Islands*, Beijing: Ocean Geological Survey Bureau, 1983, pp. 32~35 (in Chinese); Ryuusuke Uechi, *Diaoyu Island and Takeshima*, Beijing: State Oceanic Administration, Institute for Ocean Development Strategy, 1988, p. 9. (in Chinese)

11 *Treaty Series (1934−1944)*, Beijing: World Knowledge Press, 1961, p. 407. (in Chinese)

Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."[12]

Upon surrender, Japan returned Taiwan and the Pescadores to China, but the Diaoyu Islands came under the United States' occupation. On 8 September, 1951, the United States and a number of other countries signed the Treaty of Peace with Japan (commonly known as the "Treaty of San Francisco") with China excluded from it.[13] Art. 3 of this treaty placed the Nansei Islands south of 29° north latitude under United Nations' trusteeship, with the United States as the sole administering authority. Then the United States declared that Diaoyu Islands were within its jurisdiction. On 17 June, 1971, the United States and Japan signed the Okinawa Reversion Agreement, under which the United States returned all powers of administration over Diaoyu Islands and Okinawa Islands to Japan. The agreement came into effect on 15 May, 1972.

The Chinese government gave prompt responses to the Treaty of San Francisco and Okinawa Reversion Agreement, stating that these agreements were not legally binding on China. The then Chinese Foreign Minister Zhou Enlai issued a statement on 15 August, saying that the Chinese government holds a firm belief that the treaties are invalid and not legally binding, no matter what the treaties contained or their conclusions, since the People's Republic of China did not participate in the preparation, formulation, and signing of the treaties."[14] On September 18, 1951, Zhou Enlai, made a solemn statement on behalf of the Chinese government that the Treaty of Peace with Japan signed in San Francisco was illegal and invalid and could under no circumstances be recognized by the Chinese government since China had been excluded from its preparation, formulation and signing [15] On 30 December, 1971, the Chinese Ministry of Foreign Affairs made a statement that the agreement between the United States and Japan as per the Okinawa Reversion Agreement to draw Diaoyu Island and its affiliated islands into 'reversion areas' was illegal and won't have any effect of changing the territorial sovereignty of the People's Republic of China over Diaoyu Island and its affiliated islands.[16]

It is worth pointing out that the United States did not support the claim of Japan over Diaoyu Islands due to the great pressure from the Diaoyutai Movement,

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12 *Treaty Series (1945−1947)*, Beijing: World Knowledge Press, 1959, p. 77. (in Chinese)
13 *Historical Materials of Issues on Treaties of Peace with Japan*, Beijing: People's Press, 1951, p. 80. (in Chinese)
14 *Xinhua Monthly Report*, Beijing: People's Press, September 1951, p. 1027. (in Chinese)
15 *Xinhua Monthly Report*, Beijing: People's Press, October 1951, p. 1233. (in Chinese)
16 *Xinhua Monthly Report*, Beijing: People's Press, December 1971, p. 8. (in Chinese)

a social movement in China, Hong Kong and Taiwan that asserted Chinese sovereignty over the Diaoyu Islands. Before signing the Agreement, the United States State Council speaker stated that the "administrative rights" over the Okinawa and Senkaku Islands would be returned to Japan. However, the United States took a neutral position on the issue of sovereignty over the Senkaku Islands. On 17 June 1971, when the United States and Japan concluded the Okinawa Reversion Agreement, the United States State Council made a public statement, declaring that the United States only took the power of administration of related islands in accordance with Treaty of San Francisco. Therefore, it was only the administrative rights over Senkaku Islands that were returned along with the return of Okinawa Islands. "Sovereignty" is different from the "administrative rights". The United States merely returned the administrative rights to Japan. As for sovereignty, it was not related to the United States.[17]

2. Japan Has Constantly Sought to Reinforce "Actual Control" over the Islands in Order to Create an Illusion of "*Fait Accompli*" of Its Sovereignty over the Islands

In 1968, the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP) of the United Nations Economic Commission for Asia and the Far East (ECAFE) conducted a wide survey of East China Sea and Yellow Sea, discovering that the areas surrounding Diaoyu Islands were "one of the top ten giant oilfields in the world". After that, Japan began to speed up its actions to occupy Diaoyu Islands. In 1969, Japan began building territorial markers with names for places on Diaoyu Islands. In 1970, Japan erected warning signs on five islands that declared: "No boarding the lands or entering the territorial seas surrounding the islands without permission". In the same year, the Okinawa Council passed a Resolution on Territorial Defense of Senkaku Islands. On 15 May, 1972, when the Okinawa Reversion Agreement took effect, Japan Coast Guard established its 11th district on the Naha of Okinawa, and dispatched vessels to patrol the sea area surrounding the Diaoyu Islands. Thereafter, Japanese air and navy forces also conducted special tracking and supervision activities in addition to routine patrols. In their operations, they drove Chinese fishermen and survey vessels near the said sea area. Moreover, they send personnel to carry out

17 Ryuusuke Uechi, *Diaoyu Island and Takeshima*, Beijing: State Oceanic Administration, Institute for Ocean Development Strategy, 1988, p. 33 (in Chinese); Syougorou Takahashi, *Record of Diaoyu Islands*, Beijing: Ocean Geological Survey Bureau, 1983, p. 24. (in Chinese)

meteorological and geological surveys as well as resource explorations on these islands, and also enhanced facilities construction there. In the meanwhile, they rejected joint development by China and Japan, denying that both States had reached understanding on the shelving of the Diaoyu Islands dispute.

Currently, it seems that Japan is intensifying its efforts to reinforce the illusion of actual control. Japanese Defense Agency formulated strategies as per a policy of strengthening the defense of Japan's southwestern islands. In February, 2005, the Japanese government declared that it would take over the structure and maintenance of a light tower on the Diaoyu Island built by the Japanese Youth Association (the "Nihon Seinensha"). Consequently, Chinese diplomats made a solemn statement pointing out that Diaoyu Islands have been Chinese inherent territories since ancient times and China has sovereignty over the islands. Japan's move was said to be a severe violation and challenge to China's sovereignty. The Chinese government and people would absolutely not accept any of such unilateral action by Japan and such actions were illegal and had no effect. On 29 March, 2006, Ministry of Education, Culture, Sports, Science and Technology of Japan released a report of the approval of a new revised high school textbook which clearly stated that Diaoyu Islands were a territory of Japan. The spokesperson for the Chinese Ministry of Foreign Affairs announced promptly that Diaoyu Islands have belonged to China since ancient times, and China had an indisputable legal basis for its claim.

Japan firmly maintains that it has sovereign rights over Senkaku Islands, and at the same time it intensifies its efforts to establish "actual control" over these islands with an intention of creating an illusion of *fait accompli* of Diaoyu Islands becoming Japanese territory. The Chinese government has constantly opposed Japan's actions. In other words, China has never implicitly consented to Japanese actions As a result, Japan's efforts in this regard are in vain and it could not have the sovereignty over Diaoyu Islands based on occupation.

D. Territorial Sovereignty Could not Be Obtained through Dispossession

Territory of a State is a special part of earth's surface that is subject to the sovereignty of a State.[18] Territory refers to the object that the State exercises its

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18 Oppenheimer, translated by Wang Tieya et al., *Oppenheimer's International Law*, Vol. 1 (2), Beijing: Encyclopedia of China Publishing House, 1998, p. 1. (in Chinese)

sovereignty over.[19] The right and power that a State has over its territory is known as territorial sovereignty.[20] Territorial sovereignty is the supreme power that a State has to govern all people and objects within its territory. Illegal dispossession does not create territorial sovereignty.

Japan made a pretense that Diaoyu Islands were *terra nullius* to justify its covert takeover. On 14 May, 1972, the Ministry of Foreign Affairs of Japan released a formal opinion on the territory of Senkaku Islands again. The main ideas were: (1) On the basis of occupation in international law, the Japanese government had conducted field surveys on Senkaku Islands repeatedly since 1885 (the 18th year of the reign of Mikado Meiji) and confirmed that they were uninhabited islands and showed no signs of being governed by the Qing court. Then, it was decided at the cabinet meeting to build a territorial marker on the islands in January, 1895 (the 28th year of the reign of Mikado Meiji), incorporating the islands into the territory of Japan. (2) These islands have never been included among the islands that were ceded to Japan under Art. 2 of the Treaty of Shimonoseki that came into effect in May, 1895. (3). The Chinese government did not raise objection when the administrative rights over Diaoyu Islands were handed over to the United States under Art. 3 of the Treaty of San Francisco.[21]

Traditionally, international law holds that territory can be taken by original acquisition or acquisition by transfer. The former includes occupation, while the latter includes cession. Occupation is established on the basis of the rule of occupation of *terra nullius* under Roman law by analogy which played an important role in plundering colony among European powers. The concept of occupation has certain practical value in solving territorial disputes in the international community. The primary consideration when judging whether or not a State has sovereignty over the territory in dispute is the international law at the time of acquisition of the territory (rule of intertemporal law) and has been accepted in international cases concerning territorial dispute.

In the view of international law, a State is allowed to acquire only the territory of *terra nullius* by occupation. In the Advisory Opinion on Western Sahara, the

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19 Zhou Gengsheng, *International Law (Vol. 1)*, Beijing: Commercial Press, 1981, p. 320. (in Chinese)

20 *Dictionary of International Law*, Beijing: World Knowledge Press, 1985, p. 797. (in Chinese)

21 The author has already noted above that the Minister of Foreign Affairs Zhou Enlai of P.R.C had made a statement in response to this treaty.

International Court of Justice stated that it was by reference to the law in force at that period that the legal concept of *terra nullius* must be interpreted. As a matter of law, one basic element to constitute effective occupation is that the land must be *terra nullius*.[22] Oppenheimer's *International Law* points out that the object of occupation is merely limited to the land that does not belong to any State … Territory of any State obviously extends beyond the scope of occupation.[23] British Ian Brownlie believes that *terra nullius* refers to a part of land that allows any State to acquire but has not been placed in any territorial sovereignty, as a matter of law.[24]

However, the Diaoyu Islands were not *terra nullius* at the time when the Japanese forces occupied them. The Japanese government intentionally confused "uninhabited islands" with "*terra nullius*", which is a disguised replacement of the concept.

As stated before, the Chinese government during the Ming and Qing Dynasties had constantly exercised its sovereignty over Diaoyu Islands and exercised its power peacefully for a long time. Meanwhile, Japan and Ryukyu had never raised any objections. It is also to be noted that international cases concerning territorial dispute show that whether or not a State exercises its sovereignty over a territory is determined on the basis of its actual situation. Take the *Clipperton Island Arbitration case* (France v. Mexico) in 1931 as an example, the arbitrator had the holding concerning the land that cannot sustain human habitation.[25] In the *Palmas Island Arbitration case* (U.S. v. Netherlands) of 1928, the arbitrator recognized the Netherlands' sovereignty over the Island.[26] The Permanent Court of International Justice held, in the *Eastern Greenland Case* (Denmark v. Norway) of 1933, that as for land that was hardly exploited, not to speak of occupation, and being isolated from the rest of the world for a long time, the requirements of effective control should be lower than that in normal situations. The rationale behind it was that it

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22 China University of Political Science and Law International Law Teaching and Researching Section ed., *Cases Study on Public International Law*, Beijing: China University of Political Science and Law, 1995, p. 186. (in Chinese)

23 Oppenheimer, translated by Wang Tieya et al., *Oppenheimer's International Law*, Vol. 1(2), Beijing: Encyclopedia of China Publishing House, 1998, p. 74. (in Chinese)

24 Ian Brownlie, translated by Zeng Lingliang, Yu Minyou et al., *Jurisprudence of Public International Law*, Beijing: Law Press China, 2003, p. 121. (in Chinese)

25 R. Bernhardt ed., *Encyclopedia of Public International Law*, Vol. 2, Amsterdam: North-Holland Publishing Company, 1981, pp. 53~54.

26 R. Bernhardt ed., *Encyclopedia of Public International Law*, Vol. 2, Amsterdam: North-Holland Publishing Company, 1981, pp. 223~224.

was not easy to enter such islands.[27]

Japanese scholar Inoue Kiyoshi, in his article "Issues on History and Sovereignty of Diaoyu Islands", points out that even judging on the basis of the "jurisprudence" of original acquisition of territory by western countries in the sixteenth and seventeenth centuries, by which that a State which "discovered" any new land became the owner of that land, Diaoyu Islands can only be the territory of China and of no other State because it is the Chinese who first discovered them. The Chinese people named these islands. Furthermore, these Chinese names of the islands were repeatedly used in the records of the Chinese envoys' who visited Ryukyu. Inoue Kiyoshi also points out that it was impossible and also unnecessary to set up any "administration" on these small, uninhabited islands during Ming and Qing Dynasties. He also cited the analysis of noted Japanese international jurist Yokota Kisaburō stating that the principle of effective control could not be or was not necessary to be mechanically applied sometimes, according to situations of the land originally occupied. In case of an uninhabited island, for example, it is not necessary to establish administrative offices or to fortify it with police and armed forces. Operations for effective control cannot be conducted in an environment that cannot sustain human habitation. In contrast, the Ming court made more efforts than necessary, such as mapping the islands into its jurisdiction of defense area at sea and illustrated the location and the subjection relationship in the *Chou Hai Tu Bian* [*Illustrated Compendium on Maritime Security*] that systemically described the measures to fight against Japanese piracy.[28]

Japan occupied Diaoyu Islands on the legal basis of occupation of *terra nullius*, leaving an impression of no other choice of making the argument. Japanese scholar Syougorou Takahashi pointed out that in international law, acquisition of territory by way of State action can be through cession, annexation, conquest, occupation, apposition, etc. As long as Japan admitted the Sino-Japanese War and Potsdam Declaration, then Japan could only build its legal ground of having Senkaku Islands on occupation without any other option. There was no option of taking conquest or annexation as legal ground. Therefore, Professor Okuhara said that, "I could not find out or prove that Senkaku Islands were Chinese territory before Japan incorporated them into its territory, after the research I have done

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27 R. Bernhardt ed., *Encyclopedia of Public International Law*, Vol. 2, Amsterdam: North-Holland Publishing Company, 1981, pp. 81~84.

28 Inoue Kiyoshi, *Issues on History and Sovereignty of Diaoyu Islands*, Shanghai: SDX Joint Publishing Company, 1973, pp. 51~53. (in Chinese)

on this issue from all perspectives, which means that this area was *terra nullius* under international law (Toshio Okuhara, Basis of Sovereignty of Senkaku Islands, *Central Review*, July 1978)."[29]

In summary, whether as a matter of fact or as a matter of law, it is erroneous to claim that Diaoyu Islands were *terra nullius* at the end of the nineteenth century. Territorial sovereignty cannot be obtained merely through forceful occupation of the territory of another State. Likewise, Japan's illegal occupation of the Diaoyu Islands of China does not give it territorial sovereignty over the Islands.

II. Diaoyu Islands' Status in Marine Delimitation

Maritime delimitation includes delimitations of territorial seas, exclusive economic zones and continental shelves. Continental shelves and exclusive economic zones are regulated under different regimes with entirely different basis for right. Continental shelves are delimited based on natural prolongation and distance principles, while the exclusive economic zones are only delimitated based on the distance principle. However, the provisions under the United Nations Convention on the Law of the Sea 1982 ("UNCLOS") concerning the delimitation of exclusive economic zones between States with opposite or adjacent coasts and those concerning the delimitation of continental shelves between such States are identical. UNCLOS, Art. 74(1) stipulates that, "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." And its Art. 83(1) states that "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." "International law" mentioned in Article 38 of the Statute of the International Court of Justice refers to: (1) international conventions expressly recognized by the contesting party; (2) international customs, as evidence of a general practice accepted as law; (3) general principles of law recognized by civilized nations; (4) Judicial decisions and the teachings of the most highly qualified publicists of the

29 Syougorou Takahashi, *Record of Diaoyu Islands*, Beijing: Ocean Geological Survey Bureau, 1983, p. 83. (in Chinese)

various nations, as subsidiary means for the determination of rules of law. Brownlie contends that the purpose of the provisions of UNCLOS is to settle disputes of delimitation in the catalogs of general principles of law and international custom.[30] The UNCLOS also requires that the concerned States shall determine the criteria and terms of delimitation by mutual agreement in order to reach an equitable solution. For decades, the equitable principle has been applied in disputes concerning boundary delimitations to facilitate a fair and reasonable solution. When the equitable principle is applied, relevant circumstances shall be taken into account depending on different cases.[31]

There are two issues concerning maritime delimitation with respect to the status of Diaoyu Islands. One is what type of the sea area the islands can have. The other is what role they may play in maritime delimitation.

A. The Sea Areas that Diaoyu Islands Should Have

According to Art. 121 of UNCLOS (Regime of Islands), the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island (a naturally formed area of land, surrounded by water, which is above water at high tide) are determined in accordance with the provisions of the UNCLOS applicable to other land territory. UNCLOS also mentions exceptions to this stipulation. Unlike the Continental Shelf Convention, 1958, UNCLOS created a new regime in Art. 121 (3), stipulating that, "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

Though there is no definition of "rock" in Art. 121 (3), rocks that are denied an exclusive economic zone or a continental shelf must have two prescribed features − that they "cannot sustain human habitation" and that they "cannot sustain economic life of their own". To "sustain human habitation" means the ability to sustain the

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30 Ian Brownlie, translated by Zeng Lingliang, Yu Minyou et al., *Jurisprudence of Public International Law*, Beijing: Law Press China, 2003, p. 243. (in Chinese)

31 Kuen-chen Fu, *International Law of the Ocean − Theory on Equitable Delimitation*, Taipei: Three People's Publishing House, 1992, pp. 117~157 (in Chinese); Kuen-chen Fu, Equitable Consideration in International Law of the Ocean Delimitation Practice, in Kuen-chen Fu ed., *Monographic Research on the Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 160~180 (in Chinese); Yuan Kujie, *Theory and Practice of International Maritime Delimitation*, Beijing: Law Press China, 2001, pp. 138~168 (in Chinese); Gao Jianjun, *Theory on International Maritime Delimitation*, Beijing: Peking University Press, 2005, pp. 52~133. (in Chinese)

most basic, normal, longest-term residential living. To "sustain economic life of their own", means resources exploited in the rock or on the rock should be enough to sustain economic life of the people living there. It is obvious to be unfair and not in conformity with the intention of convention makers, if reconstructing rocks into a semi-artificial island that is able to sustain human habitation or economic life of their own in order to have exclusive economic zone or continental shelf of 200 nautical miles.[32]

Diaoyu Islands cannot sustain human habitation or economic life of their own due to their natural environment and lack of resources. They are not suitable for residential living, though they have sweet water. Around 1900, Japanese entrepreneur Koga Tatsushirō and his son operated some business on the islands. During that time, they hired employees on a seasonal basis and brought food from places outside of the islands. *Record of Diaoyu Islands* states that Izawa Mihitoo, along with other fishermen, came to Uotsuri-shima and Kuba-shima from Ishigaki Island in 1891. There he found two bodies wearing Chinese costumes in a cave. Kuroiwa Hisashi wrote in *Record of Events on Exploring Senkaku Islands* in 1990 that someone in the group saw human bones in the mountain.[33] It is also written in *Diaoyu Island and Takeshima* that a group of nationalist young people of so called "Territory of Senkaku Suicide Squad" landed on Uotsuri-shima on May 12 of the 53th year of the reign of Mikadao Zhaohe. They brought food with them and lived there in tents. They had made up their minds to live there until the Japanese government took effective control over the Island. However, after around 20 days, members including Team II could not hold on another day. It is said that the reason for withdrawal was "malnutrition".[34] In addition, as detailed before, people once

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32 Ma Ying-jeou, *Discussion on Diaoyutai Islands and East China Sea Delimitation from New Law of the Sea*, Taipei: Cheng Chung Book Co., Ltd., 1986, pp. 126~132 (in Chinese). The author believes that, "the main purpose of Art. 121(3) obviously lies in the denial of rights of numerous rocks having exclusive economic zones and continental shelf, in order to limit the application of Art. 121(2). Accordingly, interpretation of Art. 121(3) must be made strictly, in order to maintain the effectiveness of the clause. Based on acknowledgement as such, Art. 121(3) can be interpreted as: a. rocks must be used to sustain human inhabitation for a quite long period of time; b. resources that are used for sustaining economic life of their own must be limited to those produced by rocks themselves, not including resources imported from territorial seas or other places outside of rocks; c. exploitation of resources of rocks has to be done in accordance with economic principle, of which the standard shall be recognized according to local situations."

33 Syougorou Takahashi, *Record of Diaoyu Islands*, Beijing: Ocean Geological Survey Bureau, 1983, p. 116 (in Chinese).

34 Ryuusuke Uechi, *Diaoyu Island and Takeshima*, Beijing: State Oceanic Administration, Institute for Ocean Development Strategy, 1988, p. 49. (in Chinese)

conducted some economic activities on the islands, like capturing birds, such as the albatross, collection of bird droppings, feathers, specimens, medicinal herbs, etc. However, resources became scarce in later days and the business ended. After the outbreak of the Pacific War, the islands remained uninhabited for decades.[35]

It can be concluded that the Diaoyu Islands are not entitled to exclusive economic zones or continental shelves.

B. The Role of Diaoyu Islands in Maritime Delimitation

In numerous maritime delimitation cases, an island may have full effect, partial effect or zero effect on drawing lines in different situations.

Diaoyu Islands are 420 kilometers both from Fuzhou City of Fujian Province, and from Naha of Okinawa Island, and are around 90 nautical miles from the nearest Chinese territory Pengjia Yu and Sakishima Islands of Japan. That is to say, the Diaoyu Islands are located right in the middle between China and Japan. There are three international practices concerning islands near the middle line between neighboring States that are used for maritime delimitation. Firstly, if the island is a large island with much population, then the island may have full effect in maritime delimitation, such as the Shetland Islands in the UK-Norway continental shelf delimitation dispute in 1965 and Tsushima Island in Japan-South Korea continental shelf delimitation dispute in 1974. Secondly, in case of islands having partial effect, typical examples are the Lampedusa Island of 3 square mile, Linosa Island of 2 square mile, Pantelleria Island of 32 square mile, and Lampione Island of less than 1 square mile, four islands of Italy that are on the middle line or cross the middle line between Italy and Tunisia and were the subject of the Italy-Tunisia Delimitation Agreement in 1971. In this case, the former three islands got 13 nautical miles while the latter island got 12 nautical miles. At the time Italy claimed 6 nautical miles of territorial seas, thus the continental shelf was included. Thirdly, there are two situations in which islands have no effect at all. One is that the island only has territorial sea while the other is that it does not even have territorial sea. In the Iran-Saudi Arabia continental shelf delimitation dispute in 1968, Farsi Island and Arabi Island near the middle line between Iran and Saudi Arabia only had territorial seas of 12 nautical miles. In the Iran-UAE Delimitation Agreement

35 Ryuusuke Uechi, *Diaoyu Island and Takeshima*, Beijing: State Oceanic Administration, Institute for Ocean Development Strategy, 1988, p. 26. (in Chinese)

in 1974, the Abu Musa Island in Persian Gulf was not taken into account for delimitation because its sovereignty was in dispute between Iran and UAE at that time.[36] In 1974, the delimitation between Japan and South Korea was fixed south of the Liancourt Rocks ("Takeshima" in Japanese) of which the sovereignty was in dispute at the time. In other words, Liancourt Rocks were taken into account for delimitation.[37]

In conclusion, Diaoyu Islands are located in a small area near the middle line between China and Japan and their sovereignty is in dispute. Thus, Diaoyu Islands should have no effect on the delimitation of exclusive economic zone and the continental shelf between China and Japan.

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36 Yuan Kujie, *Theory and Practice of International Maritime Delimitation*, Beijing: Law Press China, 2001, pp. 35~40 (in Chinese); Ma Ying-jeou, *Discussion on Diaoyutai Islands and East China Sea Delimitation from New Law of the Sea*, Taipei: Cheng Chung Book Co., Ltd., 1986, pp. 133~142. (in Chinese)

37 Choon-ho Park ed., *International Marine Boundaries − the Central Pacific and East Asia*, Beijing: Law Press China, 1994, pp. 158~162. (in Chinese)

Methods of Settling the Sino-Japanese Dispute over the Diaoyu Islands

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Abstract: In international law, procedural and substantial problems of international dispute settlement are equally important. From a procedural perspective, use of force and peaceful means (including political means and legal means) are two basic methods of international dispute settlement. In the Sino-Japanese dispute over the Diaoyu Islands, since the use of force is strictly limited, peaceful means take center stage. For China, considering various aspects, political settlement is "relatively feasible but not desirable" while legal settlement is "relatively desirable but not feasible". If the dispute over the Diaoyu Islands is to be settled under the current situation, the result would probably be that China and Japan will segment the Islands. From the perspective of international law, this article intends to preliminarily explore the procedural problems of the Sino-Japanese dispute settlement over the Diaoyu Islands.

Key Words: Diaoyu Islands; Method of Dispute Settlement

I. Introduction

From ancient times, at latest since the Ming Dynasty, the Diaoyu Islands have been discovered and preoccupied by Chinese ancestors. According to the view that "all the territory belongs to the Emperor" of *Pax Sinica*, the Diaoyu Islands are inherently Chinese territory. Due to various historic reasons, the Islands were unjustly occupied by Japan. Japan obtained occupation of the Diaoyu Islands after the Treaty of Shimonoseki and occupied the Islands until now, which causes serious territorial disputes with China. This aggression hurts the feelings of the Chinese people, who are closely intertwined with political, economic, and national defense

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factors. For this reason it has become one of the most complicated and difficult territorial disputes in the world.

From an international law perspective, the Sino-Japanese Diaoyu Islands dispute touches upon substantial and procedural problems. With regard to sovereignty of the Islands, both China and Japan, including authorities and scholars, stick to their own argument, making an utmost effort to prove that sovereignty of the Islands belongs to its own country. Japan tends to make a demonstration based on international law while China relies on historic rights by textual research of historical facts and evidence. However, there have been few scholars who performed research on how this dispute can be settled and its feasibility. For dispute settlement, proper method or procedure is as important as reasonable arguments – reasonable arguments are not always feasible.

In consequence, this article focuses neither on historic research of the dispute nor on the substantial problems in international law of the problem, but on discussing settlement methods of the dispute and their feasibility, i.e. procedure problems. Towards this goal, the author has made an in-depth comparison of different dispute settlement mechanisms, including use of force and peaceful means represented by diplomatic method and legal method, with special consideration given to China Taiwan's involvement, and has explored the best and feasible method for China to adopt.

With respect to research methods applied, this article makes use of comparative research method and correlation method. The former finds its expression in comparison among various methods of international dispute settlement and the pursuit of relatively desirable and feasible methods for China; the latter is embodied in the comprehensive consideration of the Sino-Japanese Diaoyu Islands dispute and the dispute of the continental shelf in the East China Sea. The conclusion of the present article leads towards a "paradox" for China that is determined by the overall situation of Sino-Japanese political and economic relations, which concerns not only the Diaoyu Islands dispute itself – an isolated research method would probably lead to a "utopian" conclusion.

II. Comparative Research on Settlement Methods for the Sino-Japanese Diaoyu Islands Dispute

A. Use of Force

Traditionally, international dispute settlement methods can be classified as use of force and peaceful means. "Traditional international law recognizes war is the instrument to implement State policies and is a legal means of settling international disputes. '*Jus ad bellum*' is a legal right of sovereign States."[1] Such right is inherent and self-evident, just like basic human rights in human rights law which define human beings. Hugo Grotius, the father of modern international law, values natural law and argues that "so far from any thing in the principles of nature being repugnant to war, every part of them indeed rather favours it", "for the preservation of our lives and persons, which is the end of war, and the possession or acquirement of things necessary and useful to life is most suitable to those principles of nature".[2]

However, after World War I, and especially after World War II, *jus ad bellum* was gradually subject to limitation and finally prohibited. The 1928 Pact of Paris[3] was first to limit the *jus ad bellum* of States.[4] The Covenant of the League of Nations further imposed restrictions.[5] The current regulation on the use of force is provided by the Charter of the United Nations. Article 2 of the Charter explicitly states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations", and "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". This has prohibited both *jus ad bellum* and the use of force in any other manner, except under two conditions: self-defence and actions taken or

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1 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 236. (in Chinese)

2 Hugo Grotius, translated to English by Campbell, translated to Chinese by He Qinhua et al., *The Rights of War and Peace*, Shanghai: Shanghai People Press, 2005, p. 50. (in Chinese)

3 The full name is General Treaty for the Renunciation of War as an Instrument of National Policy, or the Kellogg–Briand Pact.

4 Article 1 of the Pact of Paris stipulates that: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Article 2 stipulates that: "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

5 Article 12 of the Covenant of the League of Nations stipulates that: "in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council."

authorized by the Security Council.[6]

Recent international law has put strict limitations on the use of force by States and China is no exception in its disputes. Resorting to use of force to settle the Diaoyu dispute would have to meet these two exceptional conditions provided by the Charter of the United Nations. It is unlikely that the Security Council would authorize China to use force or directly take actions against Japan and thus whether or not China is entitled to use of force depends on whether the condition of "self-defence" is met in the Diaoyu Islands dispute.

The present author believes that China still enjoys the inherent right of self-defence for the Diaoyu Islands. Considering the exercise of the right to self-defence, the International Court of Justice has pointed out in the judgment of the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* case that, "whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence".[7] The criteria of "necessity" and "proportionality" are two indispensable conditions for the exercise of self-defence. The former means self-defence can only be exercised when the State is under "an armed attack", which is a precondition for invoking the right of self-defence; the latter is a principle that should be complied with in the process of defensive attack. It requires that the right of self-defence exercised in response to the armed attack should be proportionate to damages suffered and is aimed at returning to the status quo that existed prior to the attack. Since the 1970s, when Japan began to exercise its military control over the Diaoyu Islands and the surrounding sea area, it drove away or even shelled fishermen from China Taiwan and the civil Diaoyu Islands defending activists, resulting in injuries and deaths.[8] Such military control and blockade is obviously

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6 Article 51 of the Charter of the United Nations stipulates: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." Article 42 stipulates: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

7 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, pp. 124~125. (in Chinese)

8 Records of the Diaoyu Islands Preservation Movement over the Years, at http://www.diaoyuislands.org/fwl/1.html, 22 May 2006. (in Chinese)

a form of armed attack. Although promptness is an important content of necessity, Japanese military control and blockade of the islands are continuous, meaning that China has always been under an armed attack. As stated by Hans Kelsen, "as long as the status of the territory is that of belligerent occupation, and that means as long as there is a state of war between the occupied State and the occupying State."[9] Since the state of war continues, exercise of self-defence is unobjectionable. Therefore, if the state of armed attack continues, under the situation that other measures cannot solve the Diaoyu Islands dispute, self-defence is not contrary to the requirement of promptness, i.e. necessary. Professor Wang Tieya has stated in commenting the Gulf War, "the occupation of all Kuwait territory by Iraq in 1990 constitutes a continuing armed attack, making the exercise of the right of self-defence legalized".[10] Such a "continuing armed attack" is exactly the same as Japanese military control and blockade over the Diaoyu Islands and China certainly has the right to self-defence.

Even if Japan has occupied the Diaoyu Islands illegally, its scholars advocate the use of force to settle the dispute. They strongly argue that the Diaoyu Islands fall into the scope of the Treaty of Mutual Cooperation and Security between the United States and Japan, hoping to protect its actual control over the Diaoyu Islands through force with the help of America. It even threatens the U.S. with war to contain the opposing views of the latter: "for the behavior of yelling conflicts in theories while remaining calm and changing attitudes randomly, we cannot help but think of the inconsistent behavior of President Wilson in the Versailles Peaceful Conference, which has caused mistrust of Japanese on the United States and will further lead to the war against the United States".[11] This type of straight forward behavior of advocating war has exposed Japan's attitude of not obeying international law, which serves as a foil to the importance for China of exercising the right to self-defence.

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9 Hans Kelsen, translated by Wang Tieya, *Principles of International Law*, Beijing: Huaxia Publishing House, p. 243. (in Chinese)

10 Hans Kelsen, translated by Wang Tieya, *Principles of International Law*, Beijing: Huaxia Publishing House, p. 125. Emphasis added by the original author. (in Chinese)

11 Katsunori Nakamura, The Treaty of Mutual Cooperation and Security between the United States and Japan and the Senkaku Islands, in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 79. "The behavior" refers to the fact that the United States remained neutral on the Sino-Japanese Diaoyu Islands dispute and excluded the Islands from the application scope of the Treaty of Mutual Cooperation and Security between the United States and Japan.

B. Peaceful Means

1. Political Means

Peaceful settlement of international disputes refers to settlements by means other than the use of force, i.e. settling international disputes through political means (diplomatic means) or legal means.[12] Political means, sometimes also referred to as diplomatic means, is the method of settling international disputes between the two interested parties through peaceful means other than legal method. It can involve a third party besides the two parties concerned, and generally includes: negotiation, consultation, investigation, mediation, intervention and reconciliation.[13] Whatever the name or the form it carries, its essence is that the disputing parties enjoy dominant status for dispute settlement and the binding force of the final result completely depends on the consent of the disputing parties; even if a third party is involved, its decision is of no binding force on the disputing parties, unless consent from the parties is given.

In choosing peaceful means of international dispute settlement, "States tend to believe in and be accustomed to the diplomatic methods and the wisdom of negotiations outside a court".[14] This is especially true with powerful States. Different from the ultimate purpose of judicature which is to pursue fairness, diplomatic method is based on power. Powerful States often do not need to resort to judicial process. They can obtain more national interest by settling disputes through diplomatic efforts based on power rather than through judicial processes. Consequently, powerful States are inclined to settle disputes through political means and explicitly reject international arbitration or judicature and limit or refuse intervention of a third party. As a matter of fact, legal method is the dispute settlement method which less powerful States prefer; to some extent, legal method is of assistance to less powerful States. "Under the condition that national power is not sufficient to contend against powerful States, resorting to international organizations and international judicial mechanisms is an opportunity for less powerful States to realize their own interest demand and find international

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12 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 569. (in Chinese)
13 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 569. (in Chinese)
14 Su Xiaohong, Why Powerful States Dislike International Judicature, *Law Science*, No. 11, 2003. (in Chinese)

justice". [15] Both China and Japan are States with significant and equivalent national power. Since powerful States are confident in solving disputes through diplomatic negotiations, they are obviously in favor of the diplomatic method.

However, the result of any diplomatic settlement, especially when it is based on negotiation between States of equivalent national power, is always a give-and-take compromise and neither a complete win nor a complete loss. This is because under the condition that neither party can suppress the other party with its power, a complete loss is not acceptable for disputing parties. If a compromise of interest is not reached, it means negotiations have failed. Consequently, settling the Diaoyu Islands dispute through diplomatic means would probably result in the segmentation of the Islands between China and Japan. If China or Japan obtains the full sovereignty of the Islands they would at the same time pay compensation of interest in other aspects to the other party.

As for the result of segmenting the Diaoyu Islands by negotiation, although there still leaves much to be desired for both China and Japan, the result is grudgingly acceptable compared to a complete loss.

2. Legal Means – International Arbitration and International Judicial Settlement

Legal means of international dispute settlement mainly refers to settlements through arbitration and judicial judgment,[16] namely legal means mainly includes arbitration and judicature. Its fundamental character is that the consent of the disputing States is required prior to arbitration or judicature. Once consent is given, the dominant power of settling the dispute is controlled by a third party, and its adjudication or judgment has legally binding force on the disputing parties even without the consent of them.

Compared to the diplomatic method, settlement by legal method is based on legal rules, including substantial rules and procedural rules, rather than power or negotiation skills. It is usually relatively fair to disputing parties and the result is relatively fair. In addition, international courts and arbitral tribunals have comprehensive experience in dealing with cases of territorial disputes and

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15 Su Xiaohong, Why Powerful States Dislike International Judicature, *Law Science*, No. 11, 2003. (in Chinese)

16 Traditional international law has divided methods of international dispute settlement into two categories: compulsory and non-compulsory. Non-compulsory ones are further classified as political ones and legal ones, the latter including arbitration and judicature. See Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 453. (in Chinese)

delimitation of continental shelves. Their judgment or adjudication is comparatively convincing and generally will be executed effectively. Furthermore, legal decisions are usually definite, final and permanent. The dispute will be completely solved and once it is solved, there would be no controversy in the future. From the perspective of the overall situation of Sino-Japanese relations, solving the Diaoyu Islands disputes in a final and permanent way by submitting it to an international arbitration or judicature benefits the reduction of frictions and conflicts and helps the positive development of relations between the two States.

Despite all of the above, adoption of legal means is not realistic or feasible because of the particular circumstances of the Sino-Japanese Diaoyu Islands dispute. Under the situation of "international anarchy", both the adoption of arbitration and judicature require the consent of the disputing States. Without the States' consent, even the International Court of Justice cannot exercise its jurisdiction. According to Article 36 of the Statute of the International Court of Justice, there are three categories of jurisdiction of the International Court of Justice: (1) any cases submitted by the disputing States which are not limited to those of legal nature, i.e. voluntary jurisdiction; (2) matters or disputes specially provided for in the Charter of the United Nations or in treaties and conventions in force, i.e. conventional jurisdiction; (3) all legal disputes declared by States in advance over which they recognize the jurisdiction of the International Court of Justice as compulsory *ipso facto*, i.e. optional compulsory jurisdiction.[17] However, the author believes it is hardly possible for both China and Japan to give consent to submit the disputes to arbitration or judicature for various reasons, mainly including:

a. Common Reasons for China and Japan

The special character of the Diaoyu Islands dispute is its close link to politics. In fact, it is political matters rather than legal matters that make the dispute difficult to solve.

In modern history, China's territorial borders were affected by Japanese aggression, and therefore any territorial disputes are increasingly sensitive. China

17 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 590 (in Chinese). Article 36 of the Statute of the International Court of Justice provides: (1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. (2) The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes.

perceives Japan's territorial claim over the Diaoyu Islands as the resurgence of the Japanese militarism that harmed China in the past. This is deeply engraved in Chinese peoples' minds. A scholar has expressly pointed out that national feelings of the Islands is an issue for relevant parties, especially for Chinese people (including Mainland and Taiwan) who directly suffered from this aggression in modern history.[18] Japan also regards China's territorial claim as the resurgence of its nationalism and is sometimes afraid of China's revenge for its own aggression. In consequence, both parties have been vigilant about territorial problems.

More sensitively, the Diaoyu Islands dispute is closely related to the continental shelf delimitation in the East China See and directly determines the ownership of oil and gas resources in the area. The continental shelf surrounding the Diaoyu Islands has abundant oil and gas resources.[19] The United Nations Economic Commission for Asia and the Far East (ECAFE) conducted a geophysical investigation in the East China Sea area with a United States investigating ship during 12 October 1968 and 29 November of the same year. The report was published in May the next year and concluded that the continental shelf between China Taiwan and Japan is probably one of the most abundant deep-sea oil fields in the world. The continental shelf of the Taiwan Strait Basin which is approximately 200 thousand kilometers, contains abundant oil resources that at least match those in the Persian Gulf. The most conservative estimation would be of 80 billion barrels.[20] The Diaoyu Islands are located exactly at the edge of the basin that is rich in oil and gas. With the establishment of the legal system regarding continental shelf in the law of the sea after World War II, the importance of the Diaoyu Islands in delimiting continental shelf in East China Sea began to emerge. The sovereignty of the Islands directly involves the ownership of oil and gas resources in the East China Sea. The significance of these oil and gas resources is self-evident for Japan,

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18 Phil Deans, The Diaoyutai/Senkaku Dispute: The Unwanted Controversy, at http://www.kent.ac.uk/politics/research/kentpapers/deans.html, 20 March 2006.

19 Ozaki Shigeyoshi, Sovereignty of the Senkaku Islands (Part I), in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 228. See also Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands before the Sino-Japanese War of 1894-1895: Also a Queryto Professor Okuhara Toshio and Others*, Beijing: Social Sciences Academic Press, 1994, pp. 7~8. (in Chinese)

20 Ozaki Shigeyoshi, Sovereignty of the Senkaku Islands (Part I), in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 228. See also Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands before the Sino-Japanese War of 1894-1895: Also a Queryto Professor Okuhara Toshio and Others*, Beijing: Social Sciences Academic Press, 1994, pp. 7~8. (in Chinese)

a State with limited territory and even more limited resources; for China, with the rapid development of its national economy, the demand for oil and gas resources grows with each year. Since becoming a net importer of oil products in 1993 and a net importer of crude oil in 1996,[21] China has imported 120 million tons of crude oil in 2004. In 2010, the demand for oil in China would reach 350~380 million tons and the degree of dependence on import would be as high as 51.4%~52.6%,[22] which will create a great shortage of oil and gas resources. For these reasons, having ownership of the Diaoyu area resources can directly influence both China and Japan's future economic development. However, due to its fundamental importance, this issue traverses into the political realm.

Traditionally, disputes involving fundamental political and economic interests of a State, for instance, dispute of honor, are "non-justiciable disputes". As claimed by a scholar, "[a]ccording to a widespread opinion, existing international law is not applicable to all possible disputes between States, since there are disputes which, by their very nature, cannot be settled by the decision of an international tribunal applying existing international law to the dispute. Such disputes, frequently excluded in treaties of arbitration from the jurisdiction of international tribunals established by these treaties, are disputes which affect vital interests, or the independence, or the honor of a party to the dispute."[23] The Sino-Japanese Diaoyu Islands dispute is highly non-justiciable due to national feelings, political and economic factors. Moreover, "sovereignty disputes of offshore islands in modern Northeast Asia are not likely to be solved by judicature or intervention of a third party,"[24] China and Japan are of no exception.

As far as the Sino-Japanese Diaoyu Islands dispute is concerned, applying a legal method would always result in either a complete win or a complete loss. If submitting to international arbitration or judicature, China or Japan, whichever wins the case, will obtain full sovereignty over the Diaoyu Islands. Namely, either

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21 Xuan Xiaowei, Solving the Difficulties of Importing Oil for China, at http://www.china.org.cn/chinese/OP-c/727528.htm, 23 April 2006.(in Chinese)

22 National Development and Reform Commission, The Degree of Dependence on Imported Oil Will Exceed 50% in 2010, at http://news.xinhuanet.com/fortune/2005-02/16/content_2583742.htm, 23 April 2006. (in Chinese)

23 Hans Kelsen, translated by Wang Tieya, *Principles of International Law*, Beijing: Huaxia Publishing House, p. 318. (in Chinese)

24 Choon Ho Park, Some Negative Factors in Solving Territorial Disputes in Northeast Asia, in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 74.

China or Japan will possess the Islands as a whole and segmentation will not take place. This is because evidences of China and Japan all support the result of a complete win or a complete loss: if Chinese evidence is effective and admitted by the court or arbitral tribunal, the Diaoyu Islands will be considered *terra nullius* before 14 January 1895 and sovereignty of all the Islands will be obtained by China; in contrary, if Chinese evidence is declared invalid by the court or arbitral tribunal and Japan's evidence is effective, the Diaoyu Islands before that date had already been obtained by Japan through its preoccupation and they were not *terra nullius* any more, then Japan will acquire all of the Islands. However, a complete loss is unacceptable for both China and Japan. It will be a political disaster for the authorities in power. Therefore, both parties would be more cautious in submitting the dispute to judicature or arbitration and in fact, both parties have explicitly refused to solve the dispute by arbitration or judicature: Japan issued a press release on 19 July 1996, in which it stated that the Japanese government does not believe there is any reason for resorting to a regional court to solve the dispute, since there is no territorial dispute at all as a matter of fact. China also warned the United States not to intervene in the current dispute in October 1996. The spokesman of Ministry of Foreign Affairs of China once expressed: "the dispute involves China and Japan, a third party is not allowed to intervene".[25]

b. Respective Reasons for China and Japan

(a) Japan's Particular Reasons for Refusing Judicature or Arbitration

Japan is currently exercising control over the Diaoyu Islands and occupies a better position in the Sino-Japanese Diaoyu Islands dispute. In international law, the act of "*de facto* control" results in certain legal effect. To some extent, facts generate rights and "control is half of the law".[26] Japan intends to consolidate the established fact of its "*de facto* control" with the lapse of time, and offset the illegitimacy of its aggression by exercising long-time "*de facto* control". It is definitely not in favor of submitting to judicature or arbitration. Furthermore, Japan even refuses to solve the Diaoyu Islands dispute in any other manner, since it believes that there is no dispute at all with regard to sovereignty over the

25 Jr. William Schachte, My View on Diaoyu/Senkaku Islands Dispute, in Taiwan Law Society (TLS) and Taiwan Institute of International Law (TIIL) eds., *The Seminar on International Law of the Diaoyu Islands: Records of Discussion and Essays*, 1997, p. 62. (in Chinese)

26 Choon Ho Park, Some Negative Factors in Solving Territorial Disputes in Northeast Asia, in Cheng Chia-Jui ed., *Legal Status of the Diaoyu Islands*, Taipei: Law School of Soochow University, 1997, p. 73.

Diaoyu Islands and claims its "legitimate" sovereignty groundlessly by taking the advantage of being in control of the Islands.

(b) China's Particular Reasons for Refusing Judicature or Arbitration

In solving the Diaoyu Islands dispute, China's refusal to submit to judicature or arbitration is based on its historic experiences, differences between Chinese and western culture and the current situation of separate governance of China Mainland and China Taiwan.

Firstly, modern international law has caused immense harm to China, leaving permanent historic scars. Since being forced into the modern international law system in the middle of the 19th century, international law has almost never sought justice for China; on the contrary, it helped western powers invade China. The customary legal system exercised by China over thousands of years is *Pax Sinica*, which has been implemented effectively and successfully. Since the Opium War in 1840, the invasion of western powers gradually ruined this customary order and thoughts of modern international law were introduced. However, after the collapse of *Pax Sinica*, "it was not substituted by the modern international order based on sovereign States system, but the order of unequal treaties. It is the unequal treaties, rather than rules and principles of international law, that have been applied in China's foreign relations."[27] Western powers declined to apply modern international law order to China, but applied one of its basic principles – "*pacta sunt servanda*" to China, in order to force it to observe the unequal treaties, which resulted in serious violations of Chinese sovereignty in politics, economy, national defence, culture and other various fields. This caused significant losses of territory in northeast, northwest and southwest areas of China. After World War I, China attended the Paris Peace Conference as a victorious State and invoked the famous principle of "fundamental change of circumstances" to recover Shandong and abolish unequal treaties, but it only faced resistance from the United Kingdom, France, the United States and other powerful States. The Conference finally refused China's legitimate request to abolish unequal treaties and transferred Germany's rights in Shandong, China to Japan.

Secondly, China has its own cultural tradition that is different from western cultures. Such cultural traditions have a unique mode of thinking and expression of language, namely it adopts image thinking and substantial logic, rather than the

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27 Wang Tieya, Introduction of International Law, Beijing: Peking University Press, 1998, p. 391.

rigorous formal logic that is present in western culture. "The dividing line of legal culture in China and western States has generated different manifestations and characteristics in value idea, political organizations, power operations, political logical thinking and other fields... The international rule of law which is centered on international judicature, originates from a western cultural background and its basic principles and operation methods are full of western characteristics, which are incompatible with Chinese local cultural tradition and intrinsic thinking method."[28]

Such mode of thinking and expression of language leads to a situation where western scholars cannot fully and reasonably understand China's real intentions of the evidence it provides for its claims. Ancient Chinese evidence regarding the Diaoyu Islands which is definite and sufficient then will become uncertain and even distorted. The work report written by the officer sent to the Ryukyu Islands in the Ming Dynasty and Qing Dynasty concerning "Heigou" or "Jiao" as the territorial boundary between China and foreign States, except for the intentional distortion by some hired Japanese scholars, could only be interpreted as the boundary between *terra nullius* and foreign territory by modern international law that originated from western cultural tradition.[29]

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28 Su Xiaohong, An Analysis of Difficulties and Measures for China to Engage in International Judicial Proceedings, *Journal of East China Normal University (Philosophy and Social Sciences)*, No. 3, 2004. (in Chinese)

29 Kangxi 23th year in Qing Dynasty (1683), The Record of the Mission to the Ryukyu Kingdom, the work report by Wang Ji, the officer sent to the Ryukyu Islands stated: "(24th day) passed Pengjia Hill during the period from 7 a.m. to 9 a.m. and passed the Diaoyu Islands during the period from 5 p.m. to 7 p.m. ... Saw the hill on the 25th day, first Huangwei, then Chi Yu, shortly reached Chi Yu and no longer saw Huangwei Yu. Passed the Jiao (or Gou) at dusk... What does the Jiao mean? Answer: Boundary between China and foreign land. How to determine the boundary? Answer: Guess. However, the slope is right there and the guess is not ungrounded." The work report of Zhang Xueli had similar records in Kangxi 2nd year in Qing Dynasty (1663). However, for the statements, Japanese hired scholars, for instance Okuhara Toshio, interpreted the above content as: "since the work report was written by Chinese, if Chi Yu were Chinese territory with Kumejima Island as the boundary, everyone would undoubtedly record this, for example, Chi Yu is the boundary hill of China and the Ryukyu Islands. However, the logic of Mr. Yang (referring to Yang Chongkui, a Taiwanese scholar) ignored that before determining whether the island belongs to China or the Ryukyu Islands, there may be a situation where the island belongs to neither China nor the Ryukyu Islands. That's where the problem lies." Quoted from Wu Tianying, *A Textual Research on the Ownership of the Diaoyu Islands before the Sino-Japanese War of 1894-1895: Also a Queryto Professor Okuhara Toshio and Others*, Beijing: Social Sciences Academic Press, 1994, p. 52 (in Chinese). He means that measuring Chinese traditional customary order in ancient times by modern international law, if Chinese government did not label Chiwei Yu as "Chinese Chi Yu", the Island becomes *res nullius* in international law. However, according to the territory view of "all the territory belongs to the Emperor", there is no *res nullius* as such in *Pax Sinica*.

The historic harm modern international law has inflicted upon China and the differences of Chinese and western cultural tradition resulted in a lack of Chinese trust in modern international law. An example is the withdrawal by the government of the People's Republic of China in 1972 of the declaration made by the government of the Republic of China in 1946 on accepting compulsory jurisdiction of the International Court of Justice. Western international law scholars had an explicit statement on this problem: "Among the political factors which affect the effectiveness especially of the ICJ, the most prominent ones are doubts concerning the impartiality of the bench, fears connected with the lack of clarity of international law and finally a growing tendency to demonstrate overt disregard for the pronouncements of the Court... Judges from the Third World represent a cultural background which tends to favor a drastic change in the substance of traditional rules to bring them into line with present-day needs of less-developed countries. Therefore, countries which uphold the more legalistic approach feel hesitant about bringing a dispute before the Court…"[30] Until now, China has never submitted any Sino-foreign political or territorial disputes to judicature or arbitration. Such a trust crisis seriously hinders China from submitting the Diaoyu Islands dispute to judicature or arbitration.

Lastly, the current situation of separate governance of China Mainland and China Taiwan determines that the Diaoyu Islands dispute will not be likely to be submitted to arbitration or judicature.

For historic reasons, the situation is that two separate administration across the strait have been formed: one in China Mainland and the other in China Taiwan. The China Taiwan area enjoys a *de facto* high degree of self-autonomy. A legitimate national government – the government of the People's Republic of China exists in China Mainland, which is also recognized by most States in the world. The situation of separate governance causes severe internal friction of power on the Chinese side in solving the Diaoyu Islands dispute.

For China Taiwan, avoiding China Mainland and unilaterally resorting to arbitration or judicature with Japan may result in a legal recognition of China Taiwan's "independent" status. This is possible, since, through either international arbitration or judicature, the parties involved in a territorial dispute must be

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30 Max Planck Institute for Comparative Public Law and International Law ed., translated by Chen Zhizhong and Li Feinan, *Encyclopedia of Public International Law*, Guangzhou: Sun Yat-Sen University Press, 1998, pp. 110~111. (in Chinese)

States or similar entities. Such entities that are entitled to initiate litigations in the International Court of Justice are limited to "States".[31] Arbitration also provides high-level legal support for the "independence" of China Taiwan. In consequence, if China Taiwan unilaterally decides to solve the dispute with Japan by arbitration or judicature, it will certainly move towards "independence".[32]In such a case it would definitely face strong opposition from China Mainland. Furthermore, if Japan cannot solve this dispute through consultations with China Mainland, and if China Taiwan follows the above mentioned course of action, it means that Japan will probably intervene in China's internal affairs and efforts towards unification. If China Mainland cannot secure its interests in other disputes, Japan is likely to use China Taiwan's desire for "independence" to coerce China Mainland and further suppress China in its international relations and strategy. China Mainland will definitely not acquire sovereignty over the Diaoyu Islands at the price of China Taiwan's independence, not to mention that it is still uncertain if China will acquire sovereignty over the Islands by legal means.

For China Mainland, it is the only legitimate government that is recognized by Japan. Therefore, if cases were submitted for arbitration or judicature, only the China Mainland and Japanese governments would be able to engage in such a process. If China Taiwan wants to participate in arbitration or judicature proceedings, it can only participate as the Chinese side, namely they together constitute one party of the dispute. Any other manner that treats China Taiwan as an independent party or an intervening third party will not be accepted. However, if treating the government of China Mainland and Taiwan authorities together as one entity, it will not be accepted by China Taiwan since, to some extent, it signifies its consent for Chinese unification. But China Taiwan currently has no strong intention to unify with China Mainland. Yet, if the course of action excludes China Taiwan, it will aggravate the already tense relations between China Mainland

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31 Article 34(1) of the Statute of the International Court of Justice stipulates: "The Court shall be open to the States parties to the present Statute".

32 In the Conference of International Law Regulating the Diaoyu Islands, Yilan, Taiwan, 1997 held by Taiwan Law Society (TLS) and Taiwan Institute of International Law (TIIL), many scholars made suggestions on resorting to the International Court of Justice avoiding China Mainland. Yu Shyi-kun, the then Yilan Magistrate, advocated to "preserve sovereignty of Taiwan" and "improve international status of Taiwan in the future" by solving the Diaoyu Islands disputes. For details see Taiwan Law Society (TLS) and Taiwan Institute of International Law (TIIL) eds., *The Seminar on International Law of the Diaoyu Islands: Records of Discussion and Essays*, 1997. (in Chinese)

and China Taiwan. It will also increase Taiwanese citizens' resentment and will provide excuses for China Taiwan's "pro-independence" tendencies, although it is an entitlement for China Mainland, as the legitimate national government, to adopt such methods.

On the other hand, an important aspect of China Mainland's consistent claim of sovereignty over the Diaoyu Islands is that they constitute an indispensable part of China Taiwan. If China wins in the adjudication or judgment, from a theoretical law perspective, although a central government has the authority to determine administrative divisions, it is more reasonable to incorporate the Diaoyu Islands to China Taiwan's local governments' jurisdiction, which is also more acceptable for Taiwanese. If the current situation persists, in which China Mainland and China Taiwan are not unified and the trend of Taiwan's "independence" continues to develop, such a method will not be acceptable by the government of China Mainland.

In conclusion, in a situation of "international anarchy", since compulsory jurisdiction in domestic law does not exist in the international society, submitting to arbitration or judicature is based on the mutual trust between disputing parties and the trust of international courts and international law as applicable rules in the judgment. China and Japan have both accumulated rancor and strong defensive feelings against each other and China has always been skeptical about international arbitration, judicature and international law. There is no practice or precedent that China has ever submitted a dispute to international arbitration or judicature. In addition, the Diaoyu Islands dispute significantly influences State territory and political and economic interests. The traditional Chinese order, logic of language and thinking mode are far from modern international law. The legal method does not favor China, neither. Moreover, on the Chinese side, the situation of separate governance of China Mainland and China Taiwan causes internal friction in efforts aimed at solving the Diaoyu Islands dispute. Solving the dispute at a time when China Mainland and China Taiwan are not unified will inevitably affect the political status across the strait. In consequence, the possibility that China submits to international arbitration or judicature is reduced. Adopting legal methods is relatively desirable, but not feasible for China.

C. Possible Outcomes of Sino-Japanese Diaoyu Islands Dispute

With respect to solving the Sino-Japanese Diaoyu Islands dispute, several

results may occur due to a combination of relevant evidence and different methods of settlement.

Firstly, "all or nothing", i.e. the Diaoyu Islands will be obtained by either China or Japan as a whole.

This is a result of settling by legal means, arbitration or judicature, since evidences of China and Japan all support a result of "all or nothing". As stated above, if Chinese evidence is valid and admitted by the court or arbitral tribunal, the Diaoyu Islands will obviously be regarded as "*terra nullius*" before 14 January 1895 and they will be obtained by China as a whole; on the contrary, if Chinese evidence is declared ineffective by the court or arbitral tribunal and Japanese evidence is valid, Japan would have already preoccupied the Diaoyu Islands before that crucial date and the Islands will not be "*terra nullius*". Japan will obtain the Islands as a whole.

Diplomatic means will obviously not lead to a similar result. Since settling the dispute by diplomatic means, "nothing" will not be accepted by the two involving parties. Negotiation would have broken down before reaching such a result.

Secondly, "partly got and partly lost", i.e. the Diaoyu Islands will be segmented between China and Japan.

This is usually a result of a diplomatic settlement. A diplomatic solution is always a compromise of interests of the parties involved. If the Diaoyu Islands dispute is solved by diplomatic means, taking into account the characteristics of negotiation and both parties' power, it is highly likely that the Diaoyu Islands will be segmented between China and Japan. Based on the geographic distribution and size of the Islands, China will probably acquire the Diaoyu Island while Huangwei Yu, other small surrounding islands and Chiwei Yu will probably go to Japan. Even if the Islands are obtained by one party as a whole, it has to make interest compensation in other fields.

Thirdly, China and Japan "shelve differences and seek joint development" of the Diaoyu Islands and the surrounding sea area.

This is China's consistent policy in recent years in dealing with maritime delimitation and offshore islands issues. For instance, in the issue regarding the islands in the South China Sea, China has always maintained this position, which helps reduce international resistance to Chinese national macroscopic strategy. However, the proposal of "shelving differences and seeking joint development" has not been recognized and implemented by other relevant States, and it seems to be China's own wishful thinking. In its implementation, the proposal is always only

claimed by China and only China has unilaterally put aside disputes, which in the end encourages other States to further nibble away at China's interests.

Fourthly, China and Japan waive sovereignty claim over the Diaoyu Islands permanently, but not *vis-à-vis* a third State, and jointly exclude possession from a third party.

This result has three characteristics. First, waiver is mutual; second, waiver is permanent; third, waiver is not *vis-à-vis* a third party. This means that for a third party, the Islands are not abandoned and thus cannot be obtained by occupation.

This result is relatively more acceptable for both China and Japan, which also helps reduce resistance of delimitation of the continental shelf in the East China Sea and promotes resource exploitation. However, there has been no similar State practice so far. Although this method avoids determining sovereignty over the Diaoyu Islands, use of the Islands will still be controversial. The possibility of this result is rather reduced.

Fifthly, eliminate the disputed object, namely, destroy the Diaoyu Islands with nuclear weapons.

This method and result is only an extreme position held by non-governmental figures.[33] Since the disputed object is eliminated, China, Japan and their nationals will not be able to take advantage of it. This is a malicious damage to the property of human beings given by nature and is immoral. Hence, this result is also solely a theoretical assumption, which will only come true under the most extreme circumstances.

III. The Relationship between the Diaoyu Islands Dispute and the Delimitation of the Continental Shelf in the East China Sea

A. Settling in One Bundle

In the East China Sea, two serious disputes exist between China and Japan, namely the Diaoyu Islands dispute and the delimitation of the continental shelf and

33 China Should Flatly Respond to Military Provocation of Japan, at http://www.ren-jian.com/index.asp?act=ViewEachArticle&ArticlelD= 69, 22 April 2006. (in Chinese)

the exclusive economic zone.[34] The former relates to islands sovereignty; the latter relates to ownership of seabed, water and resources. The two issues are closely related in international law.

With regard to the relationship between the two disputes, there are two methods, either settling in one bundle or settling each matter independently. Which method should be adopted by China in solving the two issues? The present author argues that settling both issues as one package is of significant disadvantage to China. Settling them separately may lead to a result that favors China more.

Land territory is the fundamental basis of claiming continental shelf.[35] If solving the two issues together, sovereignty over the Diaoyu Islands has to be the precondition for delimitation of continental shelf in the East China Sea. Since Japan is currently at the dominant position in the Diaoyu Islands dispute, if the Diaoyu Islands belong to Japan, Japan would probably further claim the continental shelf in the East China Sea by using the Diaoyu Islands as a springboard.

Although the 1982 United National Convention on the Law of the Sea provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf",[36] the Convention does not explicitly define terms of "human habitation", "economic life of their own" and "rocks". This will easily cause ambiguity: (1) Does "human habitation" refer to temporary habitation or permanent habitation? Can exploiting natural resources of their own or surrounding resources in exchange of what is needed for human habitation be understood as sufficient to "sustain human habitation"? If so, any island with certain area can be inhabited by human beings after exploitation. (2) How to understand "economic life of their own"? Should it be understood as "human life"? The Diaoyu Islands have vegetation, birds of a large amount and fresh water. Is the existence of these organisms sufficient to sustain "economic life of their own"? (3) Can the Diaoyu Islands be classified as "rocks"? The Diaoyu Islands are full of vegetation, which means the existence of thick soil. Can it still be classified

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34 Considering delimitation of the continental shelf in the East China Sea is even more complicated and more representative, the present article only deals with the relationship between the dispute of the Diaoyu Islands and the dispute of delimitation of the continental shelf in the East China Sea.

35 Article 76(1) of the United Nations Convention on the Law of Sea provides: "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin".

36 Article 121(3) of the United Nations Convention on the Law of the Sea.

as rocks? Apparently, from a perspective of common meaning, defining the Diaoyu Islands, especially the Diaoyu Island itself as "rocks which cannot sustain human habitation or economic life of their own" is not satisfactory.

Although some scholars from China Taiwan propose that "as far as international law (mainly the new law of the sea), in delimitation of the continental shelf in the East China Sea, the Diaoyu Islands, which are of small area, no human habitation, long distance from land and disputed sovereignty, shall have no effect on any delimitation".[37] However, whether this conclusion will be admitted by the arbitral tribunal or international court is uncertain. It is only an analysis in theory. In international arbitration and judicial practice, "islands far from land and close to the assumed middle line of the delimitating States, (in delimitation) are often granted partial effect".[38] In negotiating delimitation of the continental shelf between China and Japan in the East China Sea, Japan apparently based its claim of continental shelf on the Diaoyu Islands.[39] If the Diaoyu Islands are declared to be under Japanese sovereignty, it is most likely that this claim will be taken into account by international arbitral tribunals or courts.

In conclusion, settling the disputes as one is not advisable for China.

B. Settling Separately

Settling separately means that the Sino-Japanese Diaoyu Islands dispute and delimitation of continental shelf in the East China Sea dispute are settled independently. The present author argues this method is more advisable for China. The reasons are as followed:

Firstly, the Diaoyu Islands dispute only involves two parties, China and Japan while the dispute of continental shelf in the East China Sea concerns third parties, for instance, South Korea. Due to the existence of new parties, settling the disputes in one bundle would increase the complexity of the disputes, which is also rather inconvenient for South Korea.

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37 Ma Ying Jeou, *Analyzing the Diaoyu Islands and Delimitation of East China Sea from the Perspective of the New Law of the Sea*, Taipei: Cheng Chung Book, 1986, p. 156. (in Chinese)

38 Kuen-chen FU, *Equitable Ocean Boundary Delimitation*, Taipei: 123 Information Co., 1989, p. 252.

39 Oil and Gas Resources Battle Exposing Its Territorial Ambition, Japan Demands an Outrageous Price in East Sea Negotiation, at http://military.china.com/zh_cn/head/83/20051008/12718181.html, 24 April 2006. (in Chinese)

Secondly, the main basis for China's claim over the continental shelf in the East China Sea is the principle of natural prolongation and the principle of equity. Even not considering the effect of Chinese territory – the Diaoyu Islands in the delimitation of the continental shelf, China could still argue that the continental shelf is the natural prolongation of its land which ends at Okinawa Trough. At the same time, since the Diaoyu Islands dispute is not settled and sovereignty over the Islands is still in controversy, the Islands cannot be the basis of Japan's claim to the continental shelf in international arbitration or judicial practice and will hardly be taken into account by the arbitral tribunal or court – since the sovereignty of territory itself is disputed, it is certain that any right derived from the territory is disputed as well. Without the authority to determine sovereignty of the islands, the arbitral tribunal or court will hardly determine those derivative rights.

In addition, settling the disputes independently also concerns the order of solving the disputes, namely whether to solve the Diaoyu Islands dispute first or solve the dispute of delimitating the continental shelf in the East China Sea first. For China, it seems more desirable to solve the dispute of delimitating the continental shelf in the East China Sea before the Diaoyu Islands dispute. The reasons have been discussed above, i.e. the main basis of China's claim over the continental shelf in the East China Sea is "the principle of natural prolongation", which does not need to consider the Diaoyu Islands. However, if the Diaoyu Islands dispute is solved first and Japan obtains the Islands, the Islands will probably be a basis for Japan's claim over the continental shelf in the East China Sea, which will do harm to China's dominant position in the dispute of the continental shelf.

IV. Conclusion

With respect to the procedure or method of settling the Diaoyu Islands dispute, for China, based on its cultural tradition, experiences in modern history, current political situation and reality of its national power, diplomatic settlement is "relatively feasible but not desirable" while legal settlement is "relatively desirable but not feasible". If the dispute over the Diaoyu Islands has to be settled under the current situation, the result would probably be that China and Japan divide the Diaoyu Islands through diplomatic means. As for whether China will decide to solve the dispute and which method will be chosen, it depends on the Chinese government's willingness to accept certain results, i.e. can the Chinese government only accept a complete win, or a segmentation of the Diaoyu Islands, or even a

complete loss?

It is notable that despite the Diaoyu Islands dispute is a severe territorial dispute between China and Japan, it does not represent all of the relations between the two countries, and it is not even their most significant aspect. Considering other circumstances, it is predictable that in the near future, this dispute will probably not influence the overall political and economic relations between China and Japan. Once the dispute influences the overall relations between the two States, the dispute may be put aside – as a matter of fact, "shelving differences and seeking joint development" is an important Chinese policy for dealing with territorial and sea area delimitation issues, even though this policy is not very favorable for China and the Diaoyu Islands dispute cannot be protracted.

In the Diaoyu Islands dispute, the Chinese side faces great internal friction due to separate governance of China Mainland and China Taiwan, of which Japan takes advantage. Both sides should be concerned more about the overall national interest and not focus on its own rights. This will lead to a result favoring China and is also necessary for the national rejuvenation.

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A Preliminary Study on Legal Problems in Relation to the Continental Shelf beyond 200 Nautical Miles in the East China Sea

JIA Yu*

Located between mainland China and the Ryukyu Islands, the East China Sea is a semi-closed sea. Bounded on the north by the Korean Peninsula, and on the south by the south Taiwan Strait; it covers an area of roughly 770,000 square kilometers. The East China Sea is less than 400 nautical miles across at its widest point.[1] However, it has a wide continental shelf: its continental shelf and continental slope amount approximately to 550,000 square kilometers, accounting for about 80% of the total sea area.

The continental slope in the East China Sea is wide on the north and narrow on the south side, which is 70 kilometers at its widest point, and less than 30 kilometers at its narrowest point. The Okinawa Trough, a significant geographical unit of the East China Sea, is 1,200 kilometers long from north to south and 90 to 125 kilometers wide from east to west. In the northern part of the trough, the water depths range from 600 to 800 meters, while in the southern part, the water depths exceed more than 2,000 meters;[2] with a maximum depth of 2,719 meters.[3]

I. Issues Concerning Maritime Delimitation in the East China Sea between China and Japan

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1 International Hydrographic Organization, *Limits of Oceans and Sea* (Special Publication No. 23), 3rd ed., p. 1953.

2 Institute of Marine Development Strategy, *The Exclusive Economic Zone and the Continental Shelf*, Beijing: China Ocean Press, 2002, p. 10. (in Chinese)

3 Guan Bingxian, *China Encyclopedia: Atmospheric Science, Marine Science and Hydrological Science*, Beijing: Encyclopedia of China Publishing House, 1987, p.169. (in Chinese)

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) divides the ocean, which is an integral whole from the perspective of natural sciences, into areas of different legal status. Such areas include: the territorial sea, the exclusive economic zone, and the continental shelf, etc. According to the UNCLOS, when the claims of coastal States relating to their rights in the exclusive economic zone and the continental shelf overlap, it is necessary to delimit the maritime boundaries. The maritime delimitation in the East China Sea between China and Japan involves the delimitation of the exclusive economic zone and of the continental shelf.

According to the UNCLOS, coastal States enjoy rights in the exclusive economic zones and the continental shelves, which are special sea areas beyond and adjacent to the territorial seas. According to Article 55 and Article 57 of the UNCLOS, the breadth of the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Under Article 76 of the UNCLOS, the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin. If the outer edge of the continental margin does not extend up to that distance, the continental shelf extends to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

A coastal State has the right to claim an exclusive economic zone beyond its territorial sea, and a continental shelf which constitutes the natural prolongation of its land territory or a maximum distance of 200 nautical miles from the baselines. In their domestic legislation, both China and Japan put forward their claims of rights in respect of their respective exclusive economic zone and continental shelf. Article 2 of the 1988 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China states that "the exclusive economic zone of the People's Republic of China covers the area beyond and adjacent to the territorial sea of the People's Republic of China, extending 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The continental shelf of the People's Republic of China comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does

not extend to that distance".[4]

On June 14, 1996, Japan issued the Law on the Exclusive Economic Zone and Continental Shelf. Under this law, the exclusive economic zone of Japan refers to the sea areas extending 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Where any part of the boundary lies beyond the median line as measured from the baseline of Japan, the median line shall be substituted for that part of the boundary. If Japan and a related State have agreed upon a line as a substitute for the median line, this line shall prevail. Article 2 of this Law confirms that Japan is entitled to exercise sovereign rights and other rights over the continental shelf in accordance with the UNCLOS. Article 2(1) of this Law provides that the continental shelf comprises the seabed and its subsoil subjacent to the areas of the sea extending from the baseline of Japan to the line every point of which is 200 nautical miles from the nearest point on the baseline of Japan. Where any part of that line lies beyond the median line as measured from the baseline of Japan, the median line (or the line which may be agreed upon between Japan and a foreign country as a substitute for the median line) shall be substituted for that part of the line. Article 2(2) of this Law stipulates that the continental shelf of Japan also includes the seabed and its subsoil subjacent to the areas of the sea adjacent seaward to the 200 nautical miles areas referred to in the preceding subparagraph, as prescribed by Cabinet Order in accordance with Article 76 of the UNCLOS.[5]

Because the width of the East China Sea is less than 400 nautical miles, China and Japan have conflicting claims with regard to the rights in the exclusive economic zone and the continental shelf. There is a conflict between Japan and China concerning maritime delimitation in the East China Sea of both the exclusive economic zone and the continental shelf. China insists that under the principle of natural prolongation its continental shelf extends to the Okinawa Trough; Japan, however, unilaterally proposed a "median line". By using a single boundary line, a median line, delimiting both the exclusive economic zone and the continental shelf, Japan has purposefully confused the differences between two area.

The exclusive economic zone and the continental shelf are different legal

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4 Policy and Regulation Office of the State Oceanic Administration ed., *Collections of the Sea Laws and Regulations of the People's Republic of China*, Beijing: China Ocean Press, 2001, p. 11. (in Chinese)

5 Institute of Marine Development Strategy, *The Exclusive Economic Zone and the Continental Shelf*, Beijing: China Ocean Press, 2002, pp. 424~425. (in Chinese)

regimes and have different legal status, which is provided in Part V Exclusive Economic Zone of the UNCLOS (Articles 55 to 75) and Part VI Continental Shelf of the UNCLOS (Articles 76 to 85), respectively.

According to Article 55 and Article 57 of the UNCLOS, the exclusive economic zone is an area beyond and adjacent to the territorial sea, the breadth of which shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The rights of coastal States in their exclusive economic zone are not innate. Both China and Japan have taken measures, such as promulgating domestic laws, to claim their rights. The delimitation of the exclusive economic zone should be carried out by way of negotiations, thereby reaching a mutually agreed boundary. In this regard, Japan has proposed to use a median line to delimit the relevant sea areas, and it further proposed a so-called "median line" unilaterally. China, however, has not come up with any official proposal in relation to the delimitation of exclusive economic zones in the East China Sea.

According to the definition of the continental shelf in Article 76 of the UNCLOS, the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin. The UNCLOS also provides the standard of 200 nautical miles from the baseline to compensate the interests of States with narrow continental shelves, which enables coastal States without natural prolongation of its land territory to claim legal continental shelves up to 200 nautical miles. It is precisely because such provision is a compromise of interests, that China and Japan have opposing arguments with regard to the delimitation of the continental shelf in the East China Sea.

II. The Continental Shelf and the Outer Continental Shelf

According to the natural sciences, the underwater part of the natural prolongation of land territory involves the continental shelf, the continental slope, and the continental rise, which together are called the continental margin. The continental shelf is an underwater landmass which extends from a continent. The continental shelf extends from the low-tide line with gentle slope to the shelf slope breaks, where the bottom sharply drops off into a steep slope, or the shelf edge. The continental slope is a worldwide steep descent that separates continents and oceans. The upper limit of the continental shelf is the shelf edge (shelf break),

while the lower edge varies because of different water depths. The continental rise, which is located in water depths of two to five kilometers, is a submarine fan that begins from the foot of the continental shelf to the ocean bottom. The continental rise crosses the continental slope and the ocean bottom, and is a sedimentary body formed by the accumulation of sediments.[6] As we can see, in the field of natural sciences, there is no difference between the continental shelf and the outer continental shelf.

As a legal concept, the continental shelf has a clearer boundary and scope than before through legislative progress from the 1958 Convention on the Continental Shelf to the 1982 UNCLOS. Its scope in the field of law is different from its scope in the field of geology. With regard to the scope of the continental shelf under law, Article 76 of the UNCLOS has systematic stipulations as follows:

> *1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend out to that distance.*
>
> *2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.*
>
> *3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope, and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.*
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> *4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:*
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> *(i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or*

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6 Feng Shizuo, Li Fengqi and Li Shaojing eds., *Introduction to the Marine Science*, Beijing: Higher Education Press, 1999. (in Chinese)

(ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.

(b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 meter isobath, which is a line connecting the depth of 2,500 meters.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks, and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

It is clear that the continental shelf has a broader scope in the field of law than it does in the field of geology; as a matter of fact, its scope under law involves the whole continental margin under natural sciences.

The provisions in Article 76 of the UNCLOS relating to the continental shelf regime are an integral whole. Originally, there was no division of internal and outer continental shelf. Nevertheless, with regard to the determination of the outer limit of the continental shelf and the content of coastal States' rights over the continental shelf, there are some differences between the continental shelves within and beyond 200 nautical miles.

Coastal States may determine the outer limits of their continental shelves in two ways: first, with regards to the continental shelf within 200 nautical miles, if the coastal States have adjacent coasts or opposite coasts and their claims over the continental shelf overlap, the outer limits shall be determined after delimitation; second, with regards to the continental shelf beyond 200 nautical miles, the UNCLOS provides a series of formula lines and restricting lines which together restrict States with broad continental shelves from expanding their continental shelves unlimitedly. The UNCLOS further requires the coastal States to submit their delimitations to the United Nations Commission on the Limits of the Continental Shelf (hereinafter referred to as "the Commission") for review. Only if the limits of the continental shelf are established by a coastal State on the basis of the recommendations of the Commission, should they be final and binding.

Coastal States' rights over continental shelf within 200 nautical miles are different from their rights over the continental shelf beyond 200 nautical miles. In the continental shelf within 200 nautical miles, the coastal State enjoys full sovereign rights over natural resources. In the continental shelf beyond 200 nautical miles, however, the coastal State shall make payments or contributions in kind in respect of the exploitation of the resources. The payments and contributions shall be made at certain proportion within a time limit to the International Seabed Authority and will be shared by the international community.[7]

The distance standard embodied in Article 76 of the UNCLOS means that a coastal State can expand its continental shelf to 200 nautical miles. If the width of sea areas connecting States with opposite coasts is less than 400 nautical miles, the distance standard will cause the claims of both parties overlap, which may result

7 See Article 82 of the UNCLOS.

in neither party being able to have continental shelf beyond 200 nautical miles. In this situation, States should determine the specific limit of the continental shelf by consultations and negotiations or judicial proceedings.

After examining the history of Article 76 of the UNCLOS, it can be found that its provisions relating to the outer limits of the continental shelf beyond 200 nautical miles set some restrictions on the ocean-oriented States with broad continental shelf.[8] Nevertheless, the natural prolongation of land territory exists not only in ocean-oriented States; States with opposite coasts can also claim a continental shelf exceeding 200 nautical miles on the basis of natural prolongation. Any State, as long as the evidence of natural prolongation is in its favor, can require a consideration of natural prolongation when determining the limits of the seabed beyond 200 nautical miles.[9]

Under this circumstance, especially when States with opposite coasts have not reached an agreement on the delimitation of the continental shelf, if one State puts forward some propositions on the basis of natural prolongation, it is worth considering whether the part which is beyond 200 nautical miles belongs to the outer continental shelf.

The provisions of the UNCLOS which are relevant to the outer limits of the continental shelf are universal requirements. States, whether ocean-oriented or not, shall be subject to the requirements. In cases where States with opposite coasts have claims over the continental shelf beyond 200 nautical miles, the problems of continental shelf are also involved.

III. China's Problems Regarding the Outer Continental Shelf in the East China Sea

In accordance with the principle of natural prolongation, China argues that the outer limit of its continental shelf in the East China Sea lies in the center line of the Okinawa Trough, which is more than 200 nautical miles away from its baseline. The excessive part is the so-called "outer continental shelf", and it is also a component of China's continental shelf in the East China Sea. Professor Kuen-

8 See the *Official Record of the Third United Nations Conference on the Law of the Sea*, Vol. 10. (in Chinese)

9 Victor Prescott, Resources of the Continental Margin and International Law, in Peter J. Cook and Chris M. Carleton eds., *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford: Oxford University Press, 2000.

chen Fu, a scholar from China Taiwan, contends that even if the Ryukyu Islands is given full effect in delimitation, it only affects the continental shelf of the Ryukyu Islands, which is located in the east of the Okinawa Trough. Therefore, Japan can only claim its rights over the continental shelf from the Ryukyu Islands, which will make the width of the continental shelf which the coasts of the Ryukyu Islands face rather narrow. Nevertheless, what Japan obtains in the delimitation of the continental shelf in the East China Sea is limited and only centers on the eastern part of the East China Sea.[10]

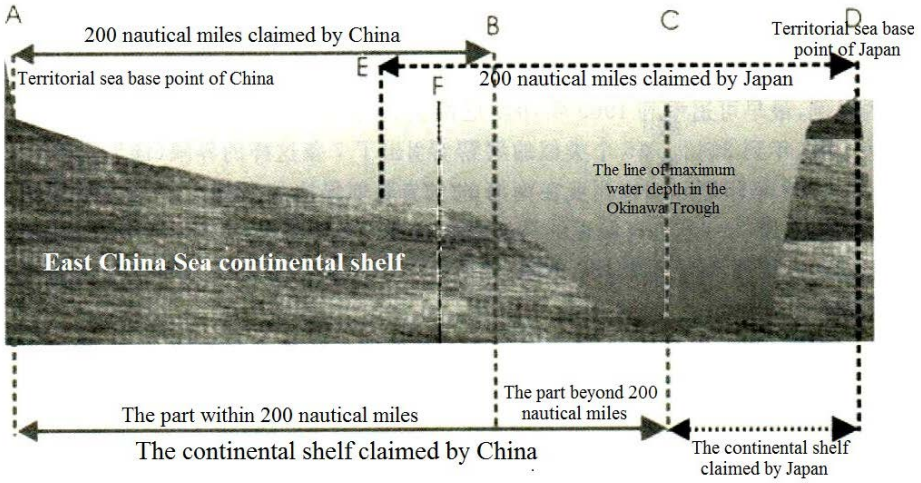
Considering the claims of right of both parties over the East China Sea, it can be found that the continental shelf advocated by China consists of the following parts under law (see Fig. 1 below):

1. The sea area (AB) which starts from China's baseline of territorial sea to the outer limits of the 200-nautical-mile exclusive economic zone involves:

(1) The sea area (AE) that starts from China's baseline of territorial sea to the outer limits of the 200-nautical-mile continental shelf claimed by Japan belongs to the continental shelf of China, and it overlaps with China's claim over exclusive economic zones.

(2) The overlapping area (EB) where the claims of both parties over exclusive economic zones and continental shelves conflict. Wherein, the sea area (EF) which begins from the outer limit of 200-nautical-mile area claimed by Japan eastward to its unilaterally proposed "median line" is an area with conflicting claims of both States; the sea area (FB) ranging from the so-called "median line" which is proposed by Japan unilaterally to the outer limits of China's 200 nautical mile exclusive economic zone is an area with overlapping claims of rights, and it is also the area where Japan and China have conflicting claims with regard to delimitation.

10 Myron H. Nordquist, John Norton Moore and Tomas H. Heidar eds., *Legal and Scientific Aspects of Continental Shelf Limits*, Leiden/Boston: Martinus Nijhoff Publishers, 2004.



Claimed by Japan and China

2. The sea area (BC) starting from the outer limits of China's 200 nautical mile exclusive economic zone to the line of maximum water depth in the Okinawa Trough is part of China's claimed continental shelf which is more than 200 nautical miles away from the baseline; China and Japan have overlapping claims to rights and delimitation therein.

China and Japan have not delimited the boundaries of sea areas yet, and their claims to rights stay in the stage of advocating for rights. Therefore, it is necessary to analyze and improve China's claim in the East China Sea from a jurisprudential perspective.

(1) The continental shelf claimed by China on the basis of the principle of natural prolongation exceeds 200 nautical miles. In accordance with the provisions in the UNCLOS, China should submit details of the outer limits of the continental shelf beyond 200 nautical miles and relevant scientific and technical materials to the Commission for review.

(2) China should file its submission for review to the Commission before May 2009.[11]

China should file its submission for the part of continental shelf which is beyond 200 nautical miles from its baseline in the East China Sea to the Commission directly. By doing so, China can completely express the scope of its

11 Report of the Eleventh Meeting of States Parties of the UN Convention on the Law of the Sea, New York, pp. 14~18, May 2001, SPLOS/73/Corr.1.

naturally extending continental shelf in this sea area, although this submission may not obtain any recognition from the Commission because of the objection from Japan. Meanwhile, according to Article 4 of Annex II of the UNCLOS and relevant provisions of Annex I of the Rules of Procedures of the United Nations Commission on the Limits of the Continental Shelf, a State may file its submission for a part of the outer limits of its outer continental shelf beyond 200 nautical miles. As a result, procedurally, China may well file its submission on the delimitation of the outer limits of the outer continental shelf in the East China Sea to the Commission.

VI. Lessons from Relevant Cases

The continental shelf delimitation cases, in which the agreements concluded by States with adjacent or opposite coasts in the Asia-Pacific region defined boundary lines beyond 200 nautical miles, can be traced back to the 1969 Agreement between the Government of Malaysia and the Government of Indonesia on the delimitation of the continental shelves between the two countries (hereinafter referred to as the "1969 Agreement").[12] From 1982 to 2003, there were five other similar delimitation cases that draw seven boundary lines.

The 25th point on the boundary line as determined in the 1969 Agreement is 228 nautical miles away from the nearest territory of Malaysia, which is more than 200 nautical miles from the baseline of Malaysia. The 25th point is also about 132 nautical miles from the nearest territory of Indonesia,[13] which is less than 200 nautical miles from the baseline of Indonesia. In this sea area, Indonesia and Malaysia have adjacent coasts.

According to the Treaty between the Government of Australia and the Republic of Indonesia on the Delimitation of Continental Shelf signed on 14 May 1997, the boundary line is more than 200 nautical miles away from the Scott Reef, which is the nearest point of Australia. The boundary line is also less than 200

12 Policy Research Center of the State Oceanic Administration: *Treaty Series of International Maritime Delimitation*, Beijing: China Ocean Press, 1989. (in Chinese)

13 Data source: calculation by Li Mingjie using the software CARIS LOTS.

nautical miles from the Indonesian archipelagic baselines.[14]

In terms of the continental shelves which are beyond 200 nautical miles from the baseline, none of the five contracting States which are mentioned above had ever filed submissions to the Commission. Further, no other States or international organizations, including the Commission and the International Seabed Authority, ever raised any question. The reasons are as follow: first, when some of the agreements were signed or came into force, the UNCLOS had not been concluded or entered into force, and the relevant international organizations had not been established then; second, the areas which were delimitated belonged to the continental shelf claimed by the relevant coastal States, no matter how the continental shelves were delimitated between the interested parties, it will not infringe on the international seabed that belongs to all mankind. In other words, one contracting State obtained rights over the continental shelf from the other contracting State, which originally belonged to but given up by the latter State; therefore, there was no need to get approval from the Commission.

The disputes, however, between China and Japan in the East China Sea are different from the earlier cases in the following ways: first, China bases its claim on the principle of natural prolongation; as a result, in theory, the part which is beyond 200 nautical miles from the baseline belongs to the outer continental shelf beyond 200 nautical miles; second, although China and Japan have conflicting claims over the continental shelf, there is no delimitation yet, which means the final limits is still uncertain.

In the Sea of Okhotsk, after Russia defined its exclusive economic zone and the continental shelf, there was still a donut-shape area that belonged to the high seas and the international seabed.[15] One of the characteristics of this sea area is that it is under sole jurisdiction of one State, and thus only Russia is able to claim right over the outer continental shelf beyond 200 nautical miles. This is different from the East China Sea, which is surrounded by China, South Korea, and Japan.

The limits of the continental shelves of the U.S. and Russia in the Bering Sea

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14 See the United Nations Intergovernmental Oceanographic Commission and the International Hydrographic Organization eds., translated by the International Cooperation Department of the State Oceanic Administration, *Continental Shelf Limits: The Scientific and Legal Interface*.

15 See the United Nations Intergovernmental Oceanographic Commission and the International Hydrographic Organization eds., translated by the International Cooperation Department of the State Oceanic Administration, *Continental Shelf Limits: The Scientific and Legal Interface*.

also exceed 200 nautical miles from the baseline of both States, but their claims over the continental shelves of 200 nautical miles have been met.[16] Further, there is no similar situation to the disputes between China and Japan in the East China Sea. For the part of continental shelf that exceeds 200 nautical miles, both the U.S. and Russia should submit relevant information to the Commission for review.

On November 15, 2004, Australia filed its submission through the United Nations Secretary-General to the Commission on the outer limits of the continental shelf beyond 200 nautical miles from the baselines. In its submission, Australia claimed a 686,821 square kilometer continental shelf appurtenant to Antarctica in accordance with its territory in this area. In a note delivered to the Secretary-General of the United Nations, Australia said that it had regard to the circumstances of the areas south of 60 degrees South latitude and the special legal and political status of Antarctica under the provisions of the Antarctic Treaty, and it requested the Commission in accordance with its rules not to take any action for the time being with regard to the application relating to continental shelf appurtenant to Antarctica.[17] As a matter of fact, by way of submitting this note to the Commission, Australia achieved its purpose of "killing many birds with one stone." First, it reiterated its territorial claims over Antarctica as well as the maritime rights and rights arising therefrom. Meanwhile, it also did not incur any opposition from the international community, which is worth further study.

V. Conclusions and Problems

China and Japan have not delimited the boundaries of sea areas yet, and their claims of rights stay in the stage of advocating for rights. Therefore, it is necessary to analyze and improve China's claim in the East China Sea from a jurisprudential perspective.

1. The continental shelf claimed by China reaches the center line of the Okinawa Trough, which exceeds 200 nautical miles from China's baseline.

2. The continental shelf of China, delimited by this ideal boundary, consists of

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16 See the United Nations Intergovernmental Oceanographic Commission and the International Hydrographic Organization eds., translated by the International Cooperation Department of the State Oceanic Administration, *Continental Shelf Limits: The Scientific and Legal Interface*.

17 At http://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm, 19 August 2006. (in Chinese)

three areas with different legal characters:

(1) The sea area (AE) starting from China's territorial baseline eastward to the outer limits of the 200-nautical-mile continental shelf claimed by Japan falls under the scope of China's exclusive economic zone and continental shelf, which is out of dispute.

(2) The sea area (AB) which begins from China's territorial baseline eastward to China's outer limits of 200-nautical-mile exclusive economic zone falls under the scope of the exclusive economic zone and continental shelf claimed by China. The sea area (AB) involves an overlapping area (EB) where the rights of China and Japan conflict, which belongs to the continental shelf (and exclusive economic zone) claimed by China.

(3) The sea area (BC) ranging from the outer limits of China's 200-nautical-mile exclusive economic zone to the line of maximum water depth in the Okinawa Trough is part of the continental shelf beyond 200 nautical miles from the baselines claimed by China.

3. Take procedural measures to realize the right: in accordance with relevant legal procedures, China should submit relevant evidence and information relating to the area (BC) to the Commission for review.

4. Implement the legal procedures in a timely manner: China should submit all the relevant evidence and information before May 13, 2009,[18] in which China should clearly express its claims to rights over the continental shelf in the East China Sea and make these claims more perfect under law.

It is still necessary to clarify the problem of how China can claim its continental shelf in the East China Sea from a jurisprudential perspective, although Japan, by way of domestic legislation and other measures, had made its claims to the rights and delimitation of the exclusive economic zone and the continental shelf in the East China Sea, which led to the overlapping claims of these two States and made it difficult for China to obtain the whole continental shelf based on the natural prolongation of its land territory. If the element of natural prolongation is beneficial to a State, then it is worth preparing arguments for this element.[19] Therefore, China's claim of its continental shelf in the East China Sea naturally extending to

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18 At http://www.un.org/Depts/Ios/clcs-new/continental-shelf-description.htm#defini-tion, 20 August 2006. (in Chinese)

19 Victor Prescott, Resources of the Continental Margin and International Law, in Peter J. Cook and Chris M. Carleton eds., *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford: Oxford University Press, 2000.

the Okinawa Trough should be a full-fledged concept, and needs to be supported by and improved with legal and scientific bases.

For years, China has insisted on extending its continental shelf in the East China Sea to the line of maximum water depth in the Okinawa Trough. Nevertheless, it is not enough for China to stay in the stage of advocating for rights, China needs more legal and scientific authorities to support and improve its arguments. Accordingly, the outer limits of the continental shelf beyond 200 nautical miles should be submitted to the Commission for review. China can also declare and reiterate its rights and claims over the continental shelf in the East China Sea by filing its submission to the Commission.

Translator: LIN Jie
Editor (English): Robert Davis

Legal Principles of and Application Conditions for Relevant Provisions on the Continental Shelf under the UNCLOS

FANG Yinxia* ZHOU Jianping**

Abstract: Apart from affirming the sovereign rights of coastal States over its exclusive economic zone, which stretches from the baseline to 200 nautical miles into the sea, Article 76 of the United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention") also provides that the continental shelf of a coastal State can be extended for a certain distance beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in consideration of its topographical and geological conditions, as specified under Article 76. Since the definition of the "continental shelf" is provided as a legal concept under Article 76 of the Convention, therefore it is not only an outcome of the combination of legal factors and political elements, but is also a compromise reached among various political interest groups. However, the complexity lies in the application of the provisions of Article 76, especially those regarding the "ridge", which can be divided into three categories (i.e., ocean ridges, submarine ridges, and submarine elevations) in accordance with Article 76 of the Convention. In the current context where various island States are making attempts to extend their outer continental shelf through tactful interpretation and application of relevant provisions regarding "ridge" under the Convention, it becomes imperative for China to master and correctly apply the provisions of the Convention to safeguard its legal rights and interests. Moreover, in order to be in a favorable position to make corresponding delimitation principles and policies, China must have clarity

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on the delimitation claims of interested island States and their basis of claims to achieve desired delimitation results.

Key Words: Article 76 of the United Nations Convention on the Law of the Sea; Continental shelf; Ridge

According to relevant provisions under Article 76 of the United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention"), the outer limits of the continental shelf of coastal States may, in light of different topographical and geological conditions of such States, be extend to 350 nautical miles or a longer distance from the baselines from which the breadth of the territorial sea is measured. Such provisions include: "the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance"; "the continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6" (i.e. two formula lines and two constraint lines defining the continental shelf beyond 200 nautical miles); and "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."[1]

Moreover, Article 77 and Article 82 of the Convention have provided for the exclusive sovereign rights of a coastal State over its continental shelf for the purpose of exploring it and exploiting its natural resources.[2] However, as deep water area of the outer continental shelf is abundant with mineral resources, such as cobalt-rich crusts, polymetallic nodules, gas hydrates, seafloor hydrothermal sulfide deposits, and associated deep-sea genetic resources on such deposits, great importance has been attached to the submission on the delimitation of the outer continental shelf by coastal States. Following the footsteps of Russia, who was the first coastal State to make its partial submission on the information on the limits of the continental shelf beyond 200 nautical miles from the baselines to the

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1 *United Nations Convention on the Law of the Sea*, Beijing: China Ocean Press, 1992, pp. 39~41.

2 *United Nations Convention on the Law of the Sea*, Beijing: China Ocean Press, 1992, pp. 39~41.

Secretary-General of the United Nations and the Commission on the Limits of the Continental Shelf (CLCS), Brazil, Australia, and Ireland have also officially made their respective submissions.[3] Moreover, in line with Article 4, Annex II of the Convention, such submission should be made within 10 years of the entry into force of the Convention for the State making such submission. As such, both developed and developing States like, Pakistan, Sri Lanka, New Zealand, India, Nigeria, Tonga, the United Kingdom, Myanmar, Guyana and other States have declared that they would make such partial submission on the information on the limits of the continental shelf beyond 200 nautical miles from the baselines before the end of 2009.

Since the definition of "continental shelf" is provided as a legal concept under Article 76 of the Convention, it is not only an outcome resulting from the combination of legal and political factors, but is also a compromise reached among various political interest groups. However, there lies a certain degree of complexity in the actual application of Article 76, especially the provisions relating to "ridge" which also includes its definition, these are the most controversial provisions and consequently the most difficult to implement.[4] In accordance with Article 76 of the Convention, there are four corresponding standards on the establishment of the outer limits of the continental shelf on the three categories of "ridges", which are, ocean ridges, submarine ridges, and submarine elevations. An instance of tactful implementation of the provisions regarding "ridge" can be seen in the partial submission made by Russia on the information on the limits of the continental shelf beyond 200 nautical miles from the baselines in the Arctic Ocean, wherein they attempted to extend their outer continental shelf all the way to the North Pole and if this partial submission were approved, the whole Arctic Ocean would be carved up between States present in such geographical area. Another instance can be seen in the report of June 6, 2003 by Asahi Shimbun where, Japan attempted to, by means of extending the outer limits of its continental shelf and taking advantage of the relevant provisions on the "ridge", acquire sovereignty over several sea areas in the Pacific, including Okinotori Islands (or the "Okinotorishima"), the Kita-Daito Islands (or the "Kitadaitōjima"), the Minami Daitō (or the "Minamidaitōjima"), the Oki Daitō Island (or the "Okidaitōjima"), the Bonin Islands (or the "Ogasawara

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3 Partial Submissions to the Commission by Russia Brazil, Australia, and Ireland, at http://www.un.org/depts/los/clcs_new/clcs_home.htm, 15 July 2005.

4 *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf* (the Chinese-English Edition) (For Internal Use Only), 2000, pp. 51~53. (in Chinese)

Islands"), the Marcus Island (or the "Minami-Tori-shima"), and the Hachijō-jima, which added to a total area of 650,000 square kilometers, that is 1.7 times the total territorial area of Japan.

In addition, Australia, Iceland, New Zealand and other island States are all actively trying to extend their outer continental shelf using the relevant provisions on the "ridge". Therefore, it becomes imperative for China to master and correctly apply the provisions of the Convention to safeguard its legal rights and interests. In an effort to meet this urgent need of China, this article makes a detailed discussion of the principles on and approaches to the resolution of relevant issues relating to the "ridge" through the mindful application of Article 76 and relevant provisions of the Scientific and Technical Guidelines of the CLCS.

I. The Definition of the Continental Shelf

Relevant provisions elaborating the definition of the continental shelf under Article 76 of the Convention include:

Paragraph 1: "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

Paragraph 2: "The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.", i.e., the two formula lines and two constraint lines defining the outer limits of the continental shelf provided for under paragraph 4. i

Paragraph 3 (the constitution of the continental margin): "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. "

It should be noted that continental shelf is defined as a juridical concept and not as a scientific concept under the Convention, Article 76. The continental shelf under the Convention is equivalent to the concept of continental margin (or edge), which comprises of the continental shelf, slope, and rise, in the scientific sense (See Fig. 1).

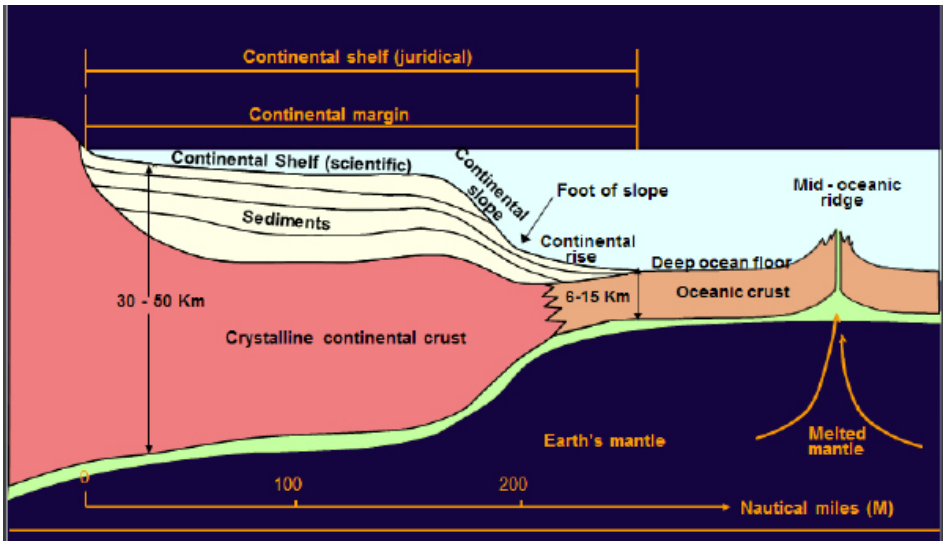

Fig. 1 The Continental Shelf - Juridical vs Scientific Concept
(Harald Brekke, CLCS member)

Paragraph 4 (formula lines):

(a) the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either (see Figure 2): (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope (the Gardiner formula or Irish formula) or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope (the Hedberg formula).

(b) (the definition of the foot of the continental slope): In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base." The definition of the foot of the continental slope provided for under Article 76 (4)(b) has put forward the second set of standards for the determination of the foot of the continental slope, i.e., the topographical and structural standards, in compliance of which the foot of the continental slope shall be determined at the point of maximum change in the gradient at its base.

Paragraph 5 (constraint lines): "The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with

paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres."

Paragraph 6 (issues relating to the ridge): "Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs."

Paragraph 7 (the rule on the delineation of outer limits): "The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude." (See Fig. 2)

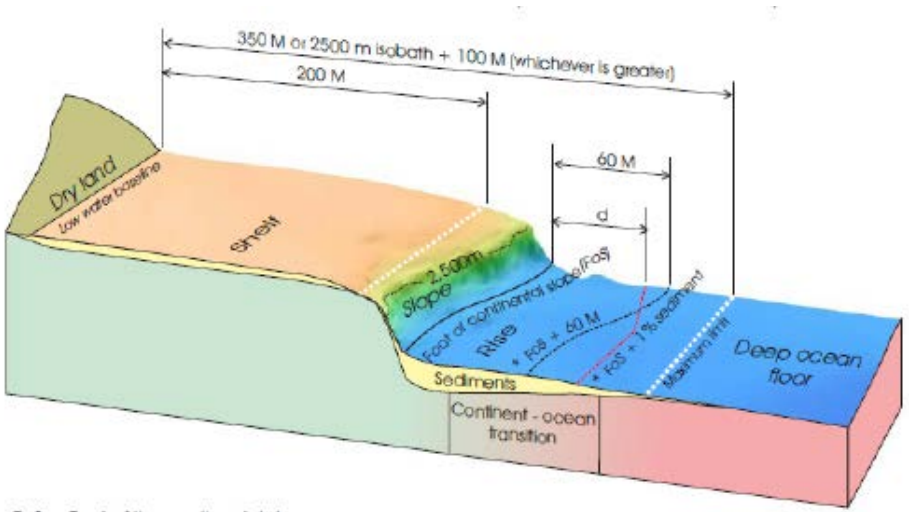

Fig. 2 Extended Continental Shelf (UNCLOS Article 76)[5]

Paragraph 8 (the rule on the application for outer limits): "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal

5 New Zealand Continental Shelf Project Scientific Advisory Group, New Zealand's Continental Shelf and UNCLOS Article 76, 2003, p. 7.

State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

II. The Role of Relevant Provisions on the "Ridge" in the Delimitation of the Outer Limits of the Continental Shelf beyond 200 Nautical Miles from Baselines

A. Relevant Provisions under Article 76 of Convention Relating to the Ridge

Paragraph 3: "The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

Paragraph 6: "Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured."

In accordance with Article 76 of Convention, ridges can be divided into three categories, namely, ocean ridges, submarine ridges, and submarine elevations. An oceanic ridge is "a long elevation of the deep ocean floor with either irregular or smooth topography and steep sides"; a submarine ridge is "an elongated elevation of the sea floor, with either irregular or relatively smooth topography and steep sides.";[6] submarine elevations include all submarine geomorphies located on a continental margin over which the depth of water is relatively shallow but excludes submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

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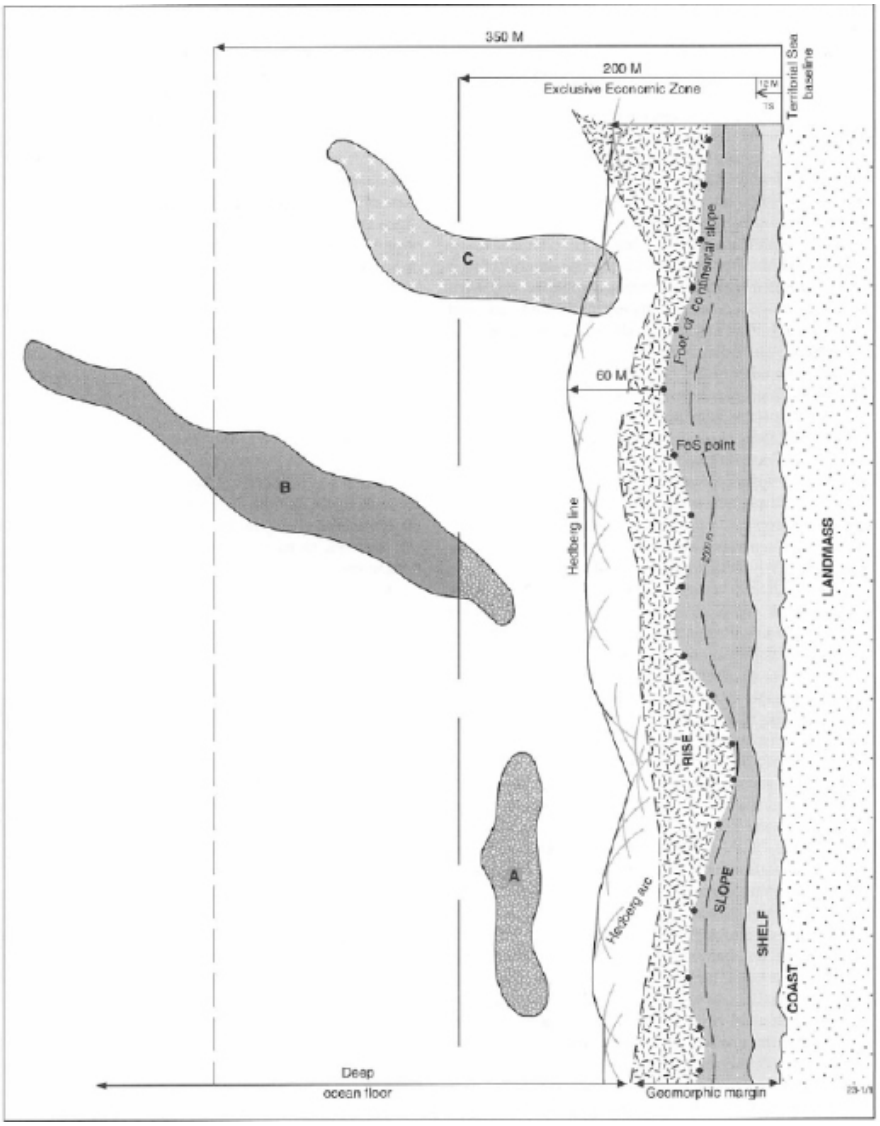
6 International Hydrographic Organization, A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea - 1982, at http://www.iho.int/iho_pubs/CB/C-51_Ed4-EN.pdf, 15 July 2005.


350 M
200 M
Exclusive Economic Zone
Territorial Sea baseline
C
Foot of Continental slope
60 M
B
FoS point
Hedberg line
LANDMASS
RISE
A
Hedberg arc
SLOPE
SHELF
COAST
Deep
ocean floor
Geomorphic margin

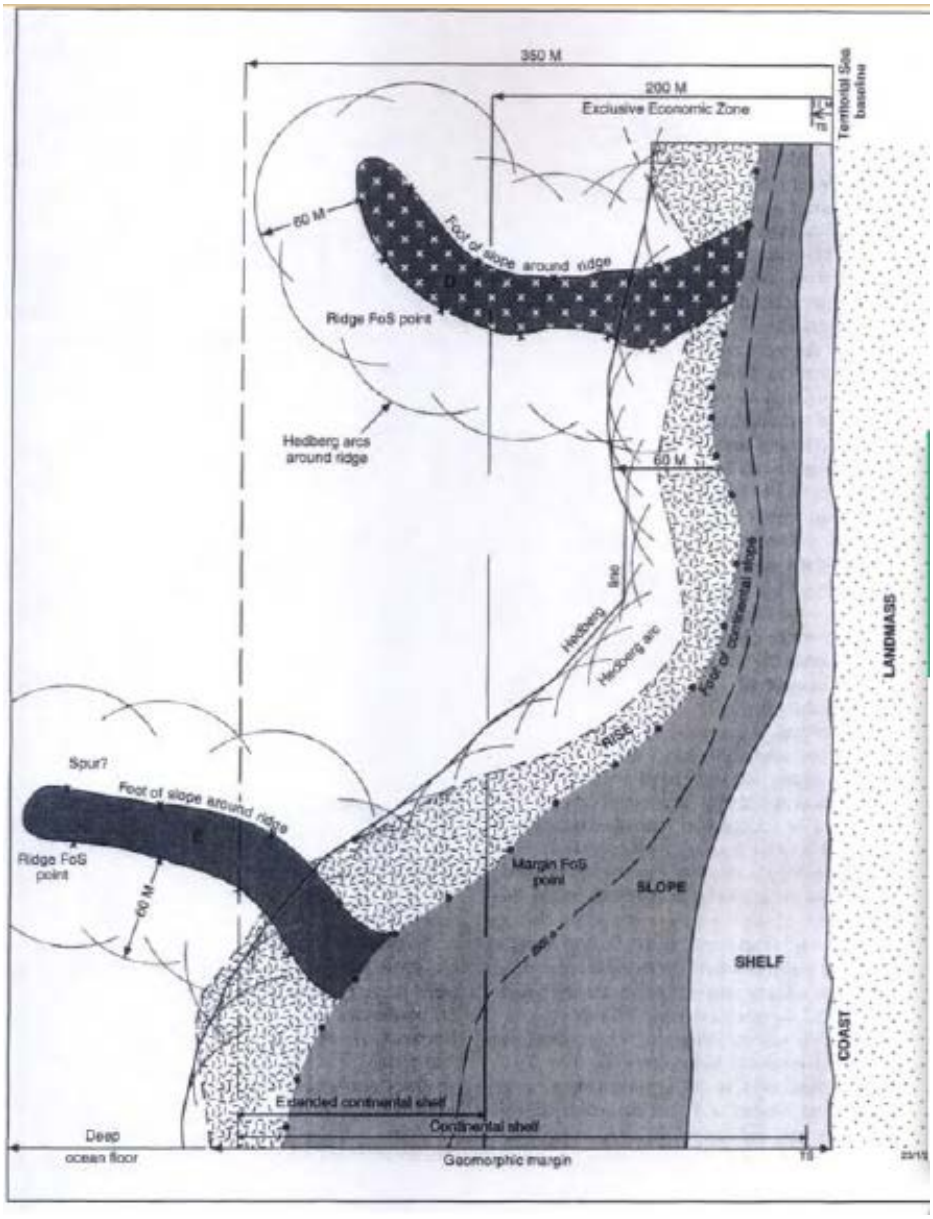


Fig. 3 Conceptual Diagram Showing the Article 76 Interpretation of Various Types of Submarine Ridges and Elevations with Respect to the Legal and Geomorphic Margin[7]

7 P. J. Cook & Chris Carleton eds., translated by International Cooperation Department under the State Oceanic Administration of P.R.C, *Continental Shelf Limits: The Scientific and Legal Interface (For Internal Use Only)*, 2003, p. 317. (in Chinese)

In line with Article 76, paragraph 3 of the Convention, the continental margin does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. Besides this, paragraph 6 provides for the establishment of the outermost limits of the continental shelf on each of the three categories of ridges, namely, ocean ridges, submarine ridges, and submarine elevations:

a. on oceanic ridges, the outer limit of the continental shelf shall not exceed 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Article 76, paragraph 3);

b. on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured (Article 76, paragraph 6);

c. on submarine elevations, the outer limit of the continental shelf shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres (Article 76, paragraph 6).

In line with Article 76(1) and Article 77 of the Convention, a coastal State has sovereignty over the seabed and subsoil of the submarine areas which may include the deep ocean floor, any oceanic ridges, or ridges within 200 nautical miles from the territorial baseline, the same has been illustrated by Oceanic Ridge A and B in Figure 3. In accordance with Article 76(4)(a)(ii) of the Convention, though the two ridges in this example are located outside the edge of the continental rise and the outer edge of the continental margin, and both extend to the deep ocean floor, a part of ridge A and B which is lying within 200 nautical miles from the baseline constitutes a portion of the continental shelf of its adjacent coastal State.

Article 76, paragraph 3 of the Convention, defines the term “continental margin” as, the outer limits of the continental shelf on oceanic ridges which, are restricted within 200 nautical miles from the territorial baselines, and has topographical features of the ocean but cannot be included as part of the continental margin. In the view of marine scientists, the mid-oceanic ridges (such as the Atlantic mid-oceanic ridges) located usually close to the center of the ocean basins, can be easily distinguished in general from the shelf, the slope and the rise, which have distinct features of the continental margin.

As pointed out by the Division for Ocean Affairs and the Law of the Sea

(DOALOS) of the United Nations Office of Legal Affairs,[8] the ridge provisions were introduced into Article 76 in part to limit the extension of their continental shelf claims along rides to the middle of the ocean. For example, if ridges are not part of the natural prolongation, restrictions can also be imposed on coastal States' claims to extend their continental shelf substantially from the continental margin to ridges beyond 200 nautical miles from their territorial baseline. However, as per Article 76, paragraph 4(a) of the Convention (the sediment thickness formula, also called the Gardiner formula or Irish formula), when a ridge is located at the outer edge of the natural prolongation, a controversy may arise with regard to the ridge being a part of the continental margin "in the legal sense". An interesting case can be seen with regard to ridge C in Figure 3, which is located outside the continental rise, but within the outer edge of the continental margin established in compliance with the Hedberg formula. Therefore, in such a case, supporters can raise an objection that this ridge can be deemed to be a part of the continental margin in the legal sense and that, the continental margin can be extended to the constraint lines beyond 200 nautical miles in line with paragraph 5 of Article 76. However, such extensions have been disapproved in accordance with Article 76, paragraph 3 of the Convention, which excludes oceanic ridges from the natural prolongation due to the fact that deep ocean floor does not constitute a part of the continental margin. It therefore appears that oceanic ridges beyond 200 nautical miles cannot be deemed as a constitutive part of the continental shelf.

Relevant provisions regarding ocean ridge are most likely to cause controversies: the ocean ridge is a unique topography on the deep ocean floor while submarine ridge is one of the constitutive parts of the continental margin. In the topographical perspective, there will be no such controversy. However, the controversy that exists is, whether the continental margin "in the scientific sense" is related to the continental margin "in the legal sense"? For instance, there may be a controversy in theory as to whether the prominent part of submarine elevation D in Figure 3 be deemed as a constitutive part of the continental margin. As per the optional practice, topographies which have genetic relationship with the ocean, such as mid-oceanic ridges, are deemed to be a constitutive part of the continental margin or the natural prolongation of the land mass of the coastal State. If it has no

8 Division of Ocean Affairs and Law of the Sea, The Law of the Sea, Definition of the Continental Shelf, An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, United Nations Publication Sales No. E. 93.V. 16, United Nations, New York, 1993, pp. 280~284.

topographical basis, then the controversy may exist with respect to that part of the ridge which is a constitutive part of the continental margin "in the scientific sense". According to some experts, the mid-oceanic ridges underneath island land masses can be deemed as the natural prolongation of the island only if they share similar rock formation and are formed by the same geological processes. In other words, these experts propose that mid-oceanic ridges can be deemed as submarine ridges and therefore the continental shelf can be extended to a maximum distance of 350 nautical miles in line with Article 76, paragraph 6 of the Convention. However, there is another group who fiercely defends their view that mid-oceanic ridges should not be confused with continental shelf. Is a claim a reasonable addition to an area of existing extended continental shelf (e.g., feature E in Figure 3), or is it an excessive extension beyond 200 nautical miles (feature D in Figure 3). According to the current basic geological interpretation, an oceanic ridge is composed of oceanic crusts. However, McKelvey in his interpretation of the UNCLOS Article 76 has emphasized on the proposition that, an oceanic ridge is with a continental rather than oceanic crustal composition.[9] When referring to the relevant discussion on ridges, the DOALOS supported the view by adding that "geologists consider that, although not specified in the Convention, the continental margin is composed of continental crust and overlying sediments, primarily of terrestrial origin, and does not include oceanic crust".[10]

In line with the Scientific and Technical Guidelines of the CLCS, ridges under the sea may be formed by several geological processes, including: (a) ridges formed by the seafloor-spreading and associated volcanic-magmatic processes (mid-oceanic ridges); (b) ridges formed along transform faults and created as an inherent part of the seafloor-spreading process; (c) ridges formed by later tectonic activity resulting in uplift of oceanic crust; (d) ridges formed by volcanic activity related to the movements of crust over a hot spot. These ridges are commonly composed of coalescing volcanic features or seamounts and generally occur on oceanic crust; (e) ridges formed by interaction of oceanic crustal plates; (f) ridges formed by regional

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9 Vincent E. McKelvey, Interpretation of UNCLOS III Definition of the Continental Shelf, In D. M. Johnston and N. G. Letalik eds., *The Law of the Sea and Ocean Industry, New Opportunities and Restraints*, *Proceedings of the 16th Convention of the Law of the Sea Institute*, Honolulu, 1982, pp. 465~472.

10 Division of Ocean Affairs and Law of the Sea, The Law of the Sea, Definition of the Continental Shelf, An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea, United Nations Publication Sales No. E. 93.V. 16, United Nations, New York, 1993, pp. 465~472.

excessive volcanism related to plumes of anomalously hot mantle; (g) ridges associated with active plate boundaries and the formation of island arc system; (h) ridges formed by rifting (extensions and thinning) of continental crust. It is generally believed that, ridges formed by the first five geological processes fall into the category of oceanic ridges while the last three into the category of submarine ridges.[11]

B. Historical Review of the Formation of Relevant Provisions on Ridges

One of the important tasks of the Third United Nations Conference on the Law of the Sea was to seek to coordinate the various interests of the coastal States and also define "continental shelf" in the legal sense. In defining the term "continental shelf", due consideration should be given to the relationship between submarine elevations (including ridges) and the shelf area. Due to various reasons, some issues relating to submarine ridges and oceanic ridges caused great controversies. These issues were as follows:

1. Whether States located above the ridges be excluded from the ownership of the right to extend the continental shelf to a distance beyond 200 nautical miles in a bid to interpret Article 76;

2. Whether more, less, or equal weight should be given to isobaths (which reflect the geomorphology), as compared to geology, when considering the issues relating to the rights over the continental shelf beyond 200 nautical miles, including issues with respect to the extension of the continental shelf along ridges;

3. Whether it is possible to apply the quoted definition of continental shelf as a natural prolongation of the natural territory to the outer edge of the continental margin under Article 76 to islands sitting on top of oceanic ridges;

4. whether Article 76 can be construed as the approval of coastal States' claims that, the continental shelf can leapfrog the outer edge of the continental margin and be extended all the way to adjacent mid-oceanic ridges;

5. Whether restrictions should be imposed under Article 76 on the application of provisions regarding ridges, so that it becomes impossible for coastal States to extend the outer limits of their continental shelves for no reason.

Therefore, at the 8th Session of the Third United Nations Conference on the

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11 *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf* (the Chinese-English Edition) (For Internal Use Only), 2000, pp. 51~53.

Law of the Sea, "submarine ridge" became an important topic, and a Negotiating Group 6 (NG6) was setup for its careful consideration. In opposition to the provision that continental margin does not include the "its oceanic ridges or the subsoil thereof", the former Soviet Union put forward its question: what should be the outermost limits of the continental shelf on submarine ridges in cases where submarine ridges were deemed as part of the natural prolongation of the land territories of coastal States? They also proposed that the outer limit of the continental shelf on underwater ridges should not exceed 350 nautical miles from the territorial baselines.[12] In other proposals, an attempt was made to define "submarine ridge" as "long and narrow submarine elevations". Japan proposed that the continental margin should "exclude the deep ocean floor and ridges composed of oceanic crusts". As for States with broad continental shelves, they proposed that the continental margin should include submarine elevations but exclude ridges on the deep ocean floor. As proposed by Australia, plateaux, rises, caps, banks and spurs, as examples of submarine elevations, should be included as a component of the continental margin. An even more peculiar proposal was raised by the former Soviet Union that the continental margin should exclude the deep ocean floor and ridges on it, seamounts, flat-topped seamounts, and any other submarine elevations which were not located on the continental margin. Denmark had made a supplement to the concept of natural prolongation by sharing its view that, due to the "same geological structure of land territory, submarine elevations are a natural component of the continental margin". Iceland proposed that, the outer limits of the continental shelf on ridges relating to the natural prolongation of land mass of a coastal State "shall not exceed 350 nautical miles from its territorial baseline either". The United States showed its support over the comprehensive proposal and was of the view that "Plateau Chukchi located in northern Alaska and its constitutive submarine elevations cannot be deemed as ridges", the contents of which have been incorporated into the last sentence of Article 76, paragraph 6 of the Convention: "This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps,

12 Satya N. Nandan and Shabtai Rosenne eds., *United Nations Convention on the Law of the Sea Commentary*, Vol. 2., Dordrecht/ Boston/London: Martinus Nijhoff Publishers, 1995, pp. 852~864.

banks and spurs."[13] As regards to relevant issues relating to submarine ridges, Article 76, paragraph 3 and 6 of the Convention had been drafted on the basis of a holistic incorporation of views of all interested parties made before the Chairman of the NG6.

From a historical review of the formation of relevant conceptions on the "ridge" under Article 76, we can come to the following conclusions: (a) Distinctions have been made between the concepts of "oceanic ridge", "submarine ridge", and "submarine elevation" under Article 76. In line with Article 76, paragraph 3, an "oceanic ridge", which is formed by the interaction of oceanic crustal plates, is not a constitutive part of the continental margin in the legal sense and that, the outer limit of the continental shelf on oceanic ridges shall not exceed 200 nautical miles from the territorial baseline. (b) No reference has been made to the concept of "oceanic crust" or that of "continental crust" under Article 76 of the Convention.

As can be seen from the historical review of their formation in earlier paragraphs, relevant provisions on the "ridge" are an outcome of a political compromise between the efforts of geological and legal experts from those coastal States who had a vital interest to extend their respective continental shelf to the utmost distance. The real intention behind these complex provisions on the "ridge" is reflected in the submissions of Russia, Brazil, and Australia to the United Nations and the CLCS on the information on the limits of the continental shelf beyond 200 nautical miles from the baselines. And one would be surprised to learn about the enormous role of relevant provisions on "ridge" in the determination of the outer limits of the continental shelf beyond 200 nautical miles from the territorial baseline.

C. The Complexity in the Practice of Extending the Outer Limit of the Continental Shelf by Applying Relevant Provisions on the "Ridge"

Relevant issues relating to the "ridge" should be considered in compliance of not only Article 76 but also Article 121 of the Convention concerning island. The issues that arise are: Is there any difference between the legal status of island States and that of island land masses under the Convention? Are island territories

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13 Satya N. Nandan and Shabtai Rosenne eds., *United Nations Convention on the Law of the Sea Commentary*, Vol. 2., Dordrecht/ Boston/London: Martinus Nijhoff Publishers, 1995, pp. 852~864.

treated in the same way as land territories in the determination of the outer limits of the continental shelf beyond 200 nautical miles? The crux to all such issues is the question, whether there is legal basis for the extension of the outer limits of the continental shelf of an island? Article 121 ("Regime of islands") of the Convention is an article specifically designed to define the legal status of islands:

Article 121(1): "An island is a naturally formed area of land, surrounded by water, which is above water at high tide."

Article 121(2): "Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory."

Article 121(3): "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

As provided by the above provisions, excepting those rocks which cannot sustain human habitation or economic life, an island shall enjoy the same rights and be subject to the same restriction as other land territory. Therefore, when the relevant requirements provided under Article 76 of the Convention are said to have been met, the outer limits of the continental shelf of an island or an island State can also be extended beyond 200 nautical miles from the territorial baseline. However, the restrictions on the extension of the outer limits of the continental shelf of an island should be more than that of a land territory due to the different geographic and geomorphic conditions of an island. Moreover, extending the continental shelves of coastal States would mean that more and more seabed resources would be subject to the sovereign rights of coastal States, and consequently the international seabed area, i.e. "the common heritage of mankind", would become smaller.

As most islands and island States on deep-sea basins are lying on the emerging part of bathybic ridges above the sea level, its submerged part tends to stretch far into the sea, the best example of this is Iceland - an island State lying on the mid-Atlantic ridge, which stretches northward all the way to the Arctic Ocean while stretching southward to the South Pole. If there were no restriction on the right of island States or islands concerning the extension of the outer limits of the continental shelf, there would be unimaginable consequences. Therefore, extremely complicated provisions and restrictions have been created under the Convention regarding the "ridge", which are nonetheless very difficult to apply in actual practice.

The most discussed but still controversial case of the Walvis Ridge in the southern Atlantic Ocean off the coast of Namibia in southwest Africa needs specific attention here.

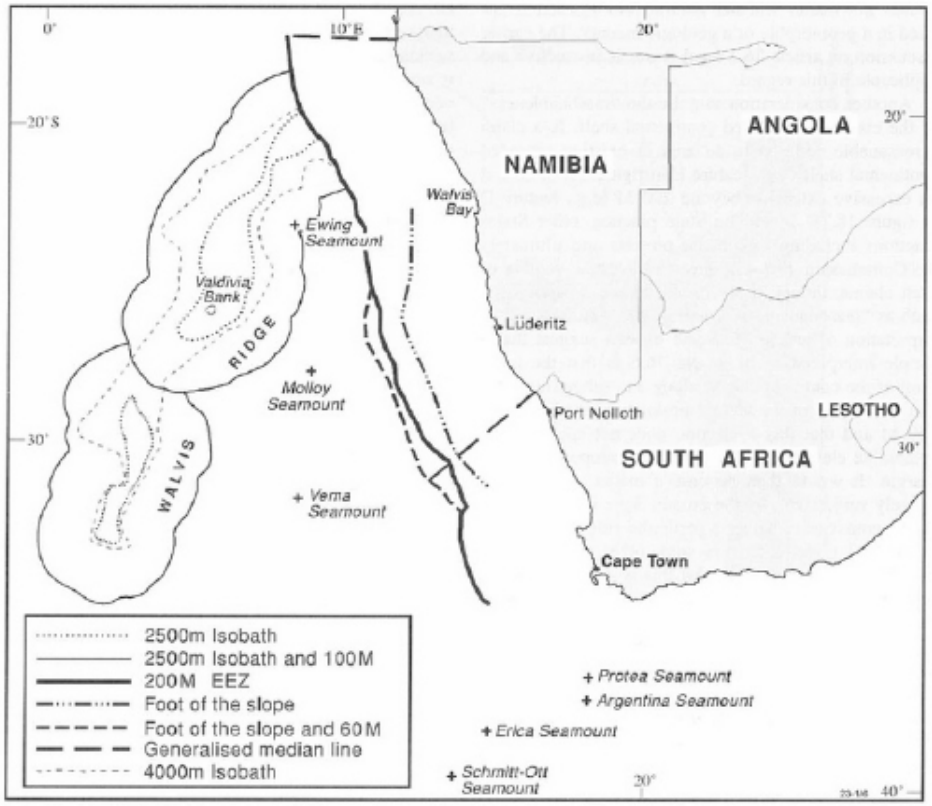

Fig. 4 The Bathymetry and Seabed Boundary Situation in the Walvis Ridge Area

The Walvis Ridge was formed during a period of active hot spot magmatism during the early opening of the South Atlantic about 80~100 million years ago (mid-to late Cretaceous). The ridges broke apart and separated from the continental margin of Brazil during the later stage of sea floor spreading. The Walvis Ridge stretches from a continental flood basalt province on the adjacent African continent to a hot spot ridge composed of alkali basalt suites typical of oceanic volcanic islands in the ocean basin.[14] What adds to the complexity and difficulty in the determination of the nature of the ridge and the outermost limit of the continental

14 James P. Kennett, *Marine Geology*, Englewood Cliffs, New Jersey: Prentice Hall, Inc., 1982, pp. 157~159, 168~170, 192~193, 669~674.

shelf on the ridge are the tectonic movements and evolution in its geological history, i.e., the oceanic ridges which were originally located in the middle of the ocean were then either pushed to the continental margin or subsided beneath the continental crust. Geomorphologically, the ridge has become a protrusion of the natural prolongation which extends about 780 nautical miles beyond the 200 nautical miles exclusive economic zone off Namibia. To make matters worse, the Walvis Ridge is outlined by the 2500 metre isobath and is composed of several closures of such isobaths. In accordance with Article 76, if the Walvis Ridge is deemed as a submarine ridge, the outer limits of the continental shelf on the ridge shall not exceed 350 nautical miles from the territorial baseline; whereas if it is deemed as spurs or other natural component of the continental margin,[15] the outer limits of the continental shelf on the ridge shall not exceed 100 nautical miles from the 2,500 metre isobath and can be extended along the ridge to the constraint line beyond the outer limits of its exclusive economic zone; however, if it is deemed as an oceanic ridge, which is not a constitutive part of the continental margin, the outer limits of the continental shelf on the ridge shall not exceed 200 nautical miles from the territorial baseline.

The application of Article 76 of the Convention and the determination of the outer limits of the continental shelf beyond 200 nautical miles are the most complex and controversial issues. A typical example in this regard is Russia's partial submission on the information on the limits of the continental shelf beyond 200 nautical miles from the baseline in the Arctic Ocean, in which Russia attempted to extend its continental shelf in the Arctic Ocean all the way to the North Pole by tactful application of relevant provisions on the "ridge". In other words, Russia attempted to extend its continental shelf in the Arctic Ocean to the maximum degree in the hope that, the ridge can be deemed as a submarine elevation and the same being a natural component of the continental margin would mean that the provisions with respect to submarine elevations under Article 76 would not apply. To this end, Russia has been giving scientific evidences that the two major ridges (the Lomonosov Ridge and the Mendeleyev Ridge) in the Arctic Ocean comprise of continental crusts, which affirms that the two ridges should be deemed as natural component of the continental margin. Therefore the outer limit of the continental

15 Victor Prescott, National Rights to Hydrocarbon Resources of the Continental Margin beyond 200 Nautical Miles, In Gerald H. Blake, Martin A. Pratt, and Clive H. Schofield eds., *Boundaries and Energy: Problems and Prospects*, The Hague: Kluwer Law International, 1998, pp. 51~82.

shelf can be extended, in line with relevant provisions, all the way to the North Pole. Apart from Russia, Japan, the United States, Australia, New Zealand, Iceland and other island States are also seeking to establish the outer limits of their respective continental shelf beyond 200 nautical miles through flexible and mindful application of the relevant provisions concerning the "ridge".

III. Conclusion

Since the concept of "continental shelf" is provided in the legal sense under Article 76 of the Convention, it is not only an outcome of a combination of legal factors and political elements, but also a compromise among various political interest groups. It is therefore inevitable for controversies to exist in the actual implementation of the definition of and relevant provisions on the "ridge". In a bid to help in the delineation of the outer limits of China's continental shelf beyond 200 nautical miles from its baseline, and help China secure its due share in the upcoming round of international "blue enclosure movement", the academic community of the law of the sea in China should master and strengthen its studies on the legal basis, principles, conditions and application of Article 76 of the Convention. In order to achieve the most desirable delimitation results, a close eye needs to be kept on the claims of interested island States and regions concerning the delineation of the outer limits of the continental shelf, so that China can be aware of the delimitation principles being adopted and the basis of these claims. Such knowledge will keep China more prepared about the corresponding principles and policies and help to avoid political issues such as sovereignty disputes arising out of insufficient information.

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On Common Ownership of Continental Shelves

DONG Yupeng*

Abstract: This paper starts with an analysis of the problems concerning disputes between various States over the delimitation of the continental shelf since the last century. Based on an analysis of the convergences between public law and private law as well as those between international law and domestic law and with reference to the regime of common ownership in the field of domestic civil law, this paper has put forward a brand new approach on the settlement of disputes over the continental shelf completely different from the principle of "shelving sovereignty and seeking joint development". Specifically, for disputes arising from the exploitation of resources on the continental shelf, this paper subsequently proposes that, on the premise that the interests between different States and international interests are taken into full account, first, the regime of common ownership should be introduced to resolve issues relating to the sovereign rights over the continental shelf, and then joint exploitation of resources should be carried out in the compulsory form of joint venture. Of course, this new principle may be affected by historical factors, national policies, international relations, etc. Therefore, different approaches should be flexibly taken so as to resolve disputes in different areas.

Key Words: Delimitation of the continental shelf; National sovereignty; Regime of common ownership; Joint development

I. Introduction

Rather than as part of the territory of the coastal State, the high seas, or international seabed area, the Continental shelf is a special sea area in which the

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coastal State may exercise its sovereign right over natural resources.[1] As one of its remarkable features, the regime of the continental shelf has made a distinction between the seabed and superjacent waters so that the coastal State can only exercise jurisdiction over the resources on the seabed and subsoil of the superjacent waters of its continental shelf.[2] With the gradual exploration and exploitation of resources in shallow seas since the middle of last century, growing attention has been paid to issues related to the ownership of continental shelves by coastal States who, based on the theory of the extension of State sovereignty, made claims on the ownership of continental shelves in coastal areas, resulting in a variety of disputes, some of which have been submitted to the ruling of the International Court of Justice and other international judiciary bodies. Up to now, such issues as the ownership of or those relating to the delimitation of continental shelves remain to be troubling many States. Although some States have temporarily settled its disputes with other States over continental shelves by signing treaties or other means, the achieved results are still far from ideal with a lot of remaining issues. Though some States managed to conduct joint exploration and exploration of resources on the continental shelves, to a great extent their disputes could be shelved temporarily only on the premise that neither of them had the capacity to maintain free reign over submarine resource without the collaboration of the other side owing to their current technological conditions. As the economic development of coastal States are increasingly dependent on submarine resources, all such existing interim measures will be confronted with various challenges under the new circumstances, and such disputes may become all the more severe with respect to the delimitation of continental shelves, and the rational allocation of resources, etc.

II. Solutions to and Existing Problems concerning Disputes over the Delimitation of the Continental Shelf

A. The Introduction of the Concept of the Continental Shelf into International Law

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1 Zeng Lingliang and Rao Geping, *International Law*, Beijing: Law Press China, 2005, p. 351. (in Chinese)

2 Deng Yongjun, A Comparative Study of the Legal Status and the Legal Regime of the Continental Shelf and Exclusive Economic Zone, *Sun Yatsen University Forum*, No. 5, 2004. (in Chinese)

The term "Continental shelf" first appeared as an official legal concept in the US Truman Proclamation in 1945.[3] The concept was then defined under Article 1 of the Convention on Continental Shelf, formulated on the United Nations Conference on the Law of the Sea in 1958, which provides that, "the term 'continental shelf' is used as referring: (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands."

At the third United Nations Conference on the Law of the Sea in 1973, the continental shelf became a key content under review. The legal concept of the continental shelf defined at this Conference became the main content of Article 76 of the United Nations Convention on the Law of the Sea (hereinafter referred to as the "UNCLOS") of 1982,[4] which stipulates, "the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

It follows that there is no substantive difference between relevant provisions with regard to the legal regime of the continental shelf under the UNCLOS of 1982 and those under the Convention on the Continental Shelf of 1958. However, compared with the latter, the former, when defining the concept of the continental shelf, has made new provisions on the outer edge of the continental shelf, which have pointed out clearly two specific circumstances: (1) where the outer edge of the continental margin does not extend up to 200 nautical miles from the territorial baseline, the continental shelf shall be extended up to that distance; (2) where the outer edge of the continental margin extends to more than 200 nautical miles from

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3 It was proclaimed in the statement on the continental shelf, which was published by President Truman on 28 September 1945, that "the natural resources on the subsoil and seabed of the continental shelves of high seas adjacent to the coast of the United States shall belong to the United States and be under the jurisdiction and control of the United States." This is the first legal document asserting jurisdiction of a coastal State over the continental shelf. Although it did not provide a precise legal definition of the continental shelf, it put forward a new legal concept with regard to the "continental shelf".

4 The UNCLOS was adopted on the 11th Session of the third United Nations Conference on the Law of the Sea held on 30 April 1982 and came into effect on 16 November 1994.

the territorial baseline, the outer limits of the continental shelf shall not exceed 350 nautical miles from the territorial baselines or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres. By providing for the second circumstance, not only has the interests of the States with continental shelves been protected, but also the interests and demands of other States has been properly considered and respected. Furthermore, it has also been stipulated under the UNCLOS that the coastal State shall share its incomes arising from the exploitation of the petroleum and other natural resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured with the international community, that is, the coastal State shall make payments or contributions in kind to the International Seabed Authority when it is involved in such exploitation.[5]

B. The Current Basic Principles for the Settlement of Disputes over the Delimitation of the Continental Shelf

As the disputes among the coastal States over the delimitation and ownership of continental shelves are major issues concerning the sovereignty and economic interests of States, there were serious disagreements on applicable principles even at the very beginning of the discussion on the delimitation of the continental shelves at the third Conference on the Law of the Sea held in 1973. While some States advocated to define the boundary of the continental shelf by agreement in accordance with the principle of equity and when appropriate the principle of the median line or equidistance line after various special circumstances has been taken into account, some other States proposed that the principle of the median line or

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5 According to Article 82 of the 1982 UNCLOS, the coastal State shall make payments or contributions in kind to the International Seabed Authority when it exploits the petroleum and other natural resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The payments or contributions shall be distributed to States parties to the UNCLOS, on the basis of the criteria of equitable sharing, taking into account the interests and needs of developing States. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 percent of the value or volume of production at the site. The rate shall increase by 1 percent for each subsequent year until the twelfth year and shall remain at 7 percent thereafter.

the equidistance line be deemed as the only reasonable delimitation principle.[6] However, it should be noted that any unilateral delimitation decision or any kind of international delimitation arrangement made in the absence of any interested State is neither conductive to the resolution of the dispute nor legal or invalid. From previous disputes concerning the delimitation of the continental shelf, it can be concluded that certain principles concerning the delimitation of the continental shelf have gradually taken shape:

1. The principle of "agreement & equidistance/special circumstance". This principle was stipulated under Article 6 of the 1958 Convention on the Continental Shelf: "Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line." In practice, a considerable number of continental shelves were delimitated by making certain adjustments to the equidistance line in consideration of relevant specific circumstances, rather than through simple or through compliance with the equidistance line.[7]

2. The principle of equity. Generally speaking, the principle of equity refers to the equitable and reasonable adjustment of the delimitation methods in actual continental shelf delimitation, in line with which for the purpose of equity equitable delimitation results should be achieved by adopting any equitable delimitation method.[8] This principle is of great significance in the actual delimitation of the continental shelf. As the principle of equity does not negate the principle of the median/equidistance line, the principle of the equidistance line can also be adopted in the delimitation of the continental shelf in order to achieve an equitable solution.

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6 Zhang Yaoguang and et al, Study on Delimitation of Continental Shelf in the National Jurisdictional Seas, *Geography and Geo-Information Science*, No. 3, 2004. (in Chinese)

7 Zhou Zhonghai, *International Law of the Sea*, Beijing: China University of Political Science and Law Press, 1987, p. 108. (in Chinese)

8 The concept of equity was first introduced in the ruling of the *North Sea Continental Shelf Cases* in 1969. The ICJ's ruling denied the proposition of the Netherlands and Denmark that Article 6 of the Convention on the Continental Shelf should belong to customary international law, pointing out that the continental shelf should be delimitated in accordance with the principle of equity in consideration of all relevant circumstances, so that each party concerned may obtain as many parts of the natural prolongation of its land territory as possible. Since 1969, the principle of equity had been applied widely to actual delimitation of the continental shelf, such as the 1984 *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. V. U.S.)*, the 1986 *Case Concerning Disputes over Delimitation of the Maritime Boundary (Guinea V. Guinea-Bissau)* and etc.

The provisions under the UNCLOS concerning the definition of and the delimitation of the continental shelf has provided certain legal bases for the delimitation of the continental shelf between various States in.[9] As stipulated in Article 84 of UNCLOS, "1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. 2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV." In other words, the principle of equity shall be deemed as the most fundamental principle for the delimitation of the continental shelf, for only when no agreement can be reached between interested States can interested States resort to the procedures under the UNCLOS.

C. The Problems for Traditional Solutions to Disputes over the Continental Shelf

Currently, the potential solutions to disputes over the resources on the continental shelf mainly include:

1. Delimitation by agreements. It is a common practice for States with opposite or adjacent coasts to settle disputes over sea areas on which they have made overlapping claim. As the most direct and thorough solution, it can provide stable and clear maritime boundaries and create a safe investment environment for the exploitation of maritime resource and. However, as the delimitation negotiations often take quite a long time and thus it is impossible to achieve the aim in a short time, this solution, though as the ideal solution, is not conductive to the timely and effective settlement of actual disputes.

2. Interim measures and arrangements. Before successful delimitation can be made, the following interim arrangements can be taken forms: first, stop all activities relating to the survey, exploration, and development of resource. Within the term of the agreement for interim arrangements between parties to

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9 After the Convention on the Continental Shelf was adopted in 1958, various States had signed a number of special agreements on the delimitation of the continental shelf, such as the 1974 Agreement on the Delimitation of the Continental Shelf between Japan and South Korea, the 1971 Agreement on the Delimitation of the Continental Shelf among Thailand, Malaysia and Indonesia, the 1971 Agreement on the Delimitation of the Continental Shelf between Iran and Qatar and so on.

the dispute, no activities relating to the seabed resources in the overlapping area can be carried out by any party to the dispute. By taking this solution, though peace can be maintained temporarily in the overlapping sea area, it is not conductive to the development of the resources on the continental shelf either. Second, carry out cooperation in the interim-measure area until joint development can be achieved. This kind of temporary arrangement is adopted in many an agreement on delimitation or resource management, in line with which, natural resources in the overlapping sea area can be explored and exploited under certain cooperative mechanism in the "interim measure zone" designated in a certain range of the overlapping area through agreement between interested States who temporarily shelve their dispute over sovereignty or sovereign rights as.[10] Such joint development shall not constitute the basis for supporting or denying any of the involved party's right or claim with regard to the disputed region and the resources thereon, nor create any new right or expand any existing right.[11] Since the above arrangements are only temporary, they cannot bring a though and effective solution to the dispute. After the concerned States have reached an agreement for interim arrangement, their attitudes may change with the implementation of further cooperation. In such a case, the cooperation between the involved States, which is based on the foregoing agreement, cannot be effectively bound by relevant international law. In case of a breach of the foregoing agreement by one State or any other circumstance where the foregoing cooperation cannot be continued, the dispute, even if submitted to an international resolution authority, can only be settled on the basis of principled provisions under relevant international legal instruments. Therefore, the predictability and enforceability of law cannot be guaranteed through taking this solution.

3. International litigation. At present, the method of lodging international litigations is widely applied by many States for the settlement of the dispute

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10 This institutional arrangement is consistent with the requirements of Article 74 and Article 83 of the UNCLOS. Generally speaking, the joint development of the sea area under dispute is an interim arrangement before the delimitation. It will not affect the conclusion of the final agreement or the final delimitation, nor does it mean a waiver by any party of its rights or claim for rights, nor can it be deemed as the recognition of the other party's claim for rights.

11 It was pointed out in the judgment of the *North Sea Continental Shelf Cases* that the dispute over the overlapping sea area may be settled through an agreement on joint development. The method of joint development was also affirmed in the *Continental Shelf Case (Tunisia V. Libya)*. Judge ad hoc Evensen said in his dissent: "Joint development is a fair alternative method to settle the dispute over the maritime boundary."

over the continental shelf. The States concerned have been respecting most of the judgments made by the International Court of Justice (ICJ) and have signed relevant delimitation agreements in compliance with such judgments or rulings. However, judgments made by the ICJ, which is not a supranational organization above sovereign States, are not directly binding on States. Moreover, the legal basis for these judgments is questionable, for in many cases where there are no relevant legal provisions or relevant provisions are ambiguous, such judgments are made by referring to principles applied in the settlement of the previous dispute, which is equally unpredictable and unstable. As for China, it is also reluctant to resort to international arbitration and litigation in consideration of its absolute sovereignty as well as the various situations for its disputes with its coastal neighbors. In other words, it fails to conform to China's overall interests and long-term development: to start with, the standard applied in the judgment on the previous dispute over the delimitation of the continental shelf of a certain area, which may be favorable to both parties to the dispute, might become unfavorable to China if the same standard were to be referred to in ICJ's judgment on China's disputes with other States; what's worse, the judgment on one such dispute between China and a State will case domino effect on the settlement of other disputes between China and other States.

Due to the foregoing problems with traditional solutions, disputes over the delimitation of and sovereignty over the continental shelf have been trapped in a stalemate. Various States has been always arguing for their own delimitation claim by gathering evidences that are favorable to their side and conducting a series of tentative acts such as unilateral delimitation and resource exploration, which resulted in States' protracted inability to realize effective utilization of natural resources in the disputed sea areas. In response to the stalemate, we need to change our traditional mode of thinking and take a new perspective: can we find a more reasonable solution from the relevant regimes under domestic laws? The author believes that as the classification of international law and domestic law as well as public law and private law is just based on factitious assumptions, certain content and regimes under private law can be introduced into public law and vice versa, which is especially true with the relatively new regime of the continental shelf. Specifically, though it had been the case for quite a long time in history that the legal regime of a State is dominated either by public law (e.g., the culture of public law in feudal China) or by private law (e.g., the culture of private law since the ancient Rome) since the early stage of human society, both public law

and private law have undergone healthy and complete development in the long course of history of all societies, so it is feasible that the framework of the regime of common ownership provided for under the domestic private law of China be adjusted and introduced into the regime of the continental shelf provided for under the international public law. The author of this paper holds it necessary to conduct a further analysis of relevant issues on this proposal in the preceding section.

III. The Feasibility for the Regime of Common Ownership under Civil Law to be Applied into the Settlement of Disputes over the Continental Shelf

A. Can Concepts under Private Law be Extended to the Field of Public Law?

The division of public law and private law is deeply associated with the development of human society. Roman jurists noted that as the relationship between persons was quite different from that between States, the laws governing them were different from each other in nature, on the basis of which they further divided laws into public law and private law. According to the explanation of Ulpian, "public law is the law associated with national organizations" while "private law is the law relating to personal interests"; those norms that protect national interests are "public law" and those norms that protect private interests are "private law".[12] Public law focuses on provisions on those aspects of social life where centralization and administration are necessary, such as the relationship between citizens and the State as well as the rights and obligations of the government and officials while private law focuses on provisions on those aspects of social life which should be free from the arbitrary interference of State power and where people engaged in social relations can make independent decisions in their own interests under all social circumstance according to pre-designed and typified legal norms. The goal of the public law is to maintain social order and social justice through top-down regulation of the redistribution of social resources so as to achieve distributive justice while the goal of the private law is to realize freedom and efficiency and correct the downsides of justice through bottom-up regulation of the primary

12 Pan Ping and Xu Qiangsheng, On the Outline of the Relationship between Public Law and Private Law, *Hebei Law Science*, No. 4, 2003. (in Chinese)

distribution of social resources. In essence, the relationship between public law and private law is the relationship between two different scopes and methods for the regulation of State over social members in social, economic, cultural, and other aspects, reflecting the relationship between political State and civil society.[13]

Prior to the 20th century, as the socio-economic relations were relatively simple, the differences between public law and private law were relatively distinct. However, since the beginning of the 20th century, profound changes in various social aspects have had a major impact on legislation and the concept of law, bringing about the trend of mutual transformation of public law and private law, which was started to meet higher requirement placed by the development of the society for laws to better regulate and protect the society. This trend is a reflection of the interactions between rights and interests as well as the starting point for the well-coordinated operation of private interests and public interests through their mutual transformation. The goal of this trend is neither to deny private interests, nor to expand public interests by misappropriating private interests, but rather to achieve the actual realization and expansion of private interests and to achieve those private interests which have been otherwise difficult to achieve or even unachievable in a legal regime purely compose of private law. Thus, although public interests and private interests are different in nature, they are not diametrically opposite to each other.

As stipulated in Article 4 of the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, "The People's Republic of China exercises sovereign rights over its continental shelf for the purpose of exploring the continental shelf and exploiting natural resources in the continental shelf. The People's Republic of China exercises jurisdiction in relation to construction and exploitation of artificial islands, installations and structures as well as maritime scientific research, protection and conservation of maritime environment in the continental shelf. The People's Republic of China possesses the exclusive right to authorize and manage drilling operations in its continental shelf for any purpose." It is noteworthy that the term "sovereign rights" rather than "sovereignty" is used in this article. The term "right", as one of the basic concepts under civil law which implies the distribution of benefits among equal subjects, can be deemed as the integration and mutual penetration of basic concepts under both

13 Sun Guohua and Yang Sibin, Division of Public Law and Private Law and Internal Structure of Law, *Law and Social Development*, No. 4, 2004. (in Chinese)

public law and private law.

B. Can the Regime under Domestic Law be Extended to the Field of International Law?

With their own definite objects and subjects of regulation as well as their distinctive method of formulation and implementation, international law and domestic law are clearly distinctive from each other, each forming a relatively independent and mutually exclusive legal regime on the whole. However, the two legal regimes are not isolated from each other, but in fact closely related with each other.

First, States are the bonds connecting international law and domestic law. As States not only formulate domestic law and but also participate in the formulation of international law, coupled with the consistency and coherence between domestic policies and foreign policies of a State, it is inevitable that there are certain necessary relations between international law and domestic law. In general, the foreign policies of a State are bound to influence its attitude towards and position on international law always but at the same time be influenced by its domestic law.

Second, the international society and the domestic society are the bases for the interrelations between international law and domestic law. Though international law is mainly rooted in and applied to the international society while domestic law the domestic society, the international society and the domestic society are not isolated from each other, and international matters and domestic matters regulated respectively by international law and domestic law interact with and depend on each other.[14]

Third, international law and domestic law are interrelated to each other out of the need to achieve their respective functions. In terms of international law, the principles and regimes of domestic law are constantly drawn upon and referred to during the formation and development of its principles and rules. For example, the "principle of fault" concerning State responsibility is derived from the Roman principle that "Essentially, the people who have no fault shall not be subject to any

14 Taking protection of human rights as an example, for quite a long time in the past, a State's treatment of human rights of its citizens and protection of human rights had been deemed as an issue relating to domestic law. However, nowadays, international protection of human rights has become a recognized frontier in international law.

restraint".[15]

With the development of international law, more and more individuals become subjects of international law, provisions under domestic law are included in various treaties, and there appears such legal order as that of the European Community. As a result, the distinction between international law and domestic law is not as clear as what it used to be but instead becomes more complicated.[16] As many regimes that used to be purely part of domestic law have already been applied into the field of international law, it is also likely that the regime of common ownership under civil law will be introduced into international law.

C. Is the Regime of Common Ownership Bound by the Tradition of Domestic Civil Law?

The regime of common ownership is a very complex regime. In primitive societies, the application scope of the regime covered almost all means of production and consumption. Later, personal means of production and consumption gradually got owned by families or individuals; with the development of society, land and other means of production also got owned by families or individuals in some societies.[17] However, during the process of privatization, not all property can be privatized. Even in a world where property is privatized and belongings may be used by their obligees at their own discretion, people also need to cooperate with each other in order to achieve economies of scale and advantages of cooperation. For the purpose of cooperation, property need to be merged to form jointly owned property. People establish a relationship of common ownership either because they are willing to merge their property for a common purpose or because of the need to maintain other legal relations. In human history, not all of the legislation is based on individuals. In a society where individual ownership has not yet been developed, common ownership is not based on clear individual ownership and the contents jointly owned often include public property, jointly owned property and

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15 Zeng Lingliang and Rao Geping ed., *International Law*, Beijing: Law Press China, 2005, p. 99. (in Chinese)

16 Jennings Watts ed., translated by Wang Tieya, Chen Gongchuo, Tang Zongshun and Zhou Ren, *Oppenheim's International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 32. (in Chinese)

17 For example, based on Roman regime of family ownership of real estate, parents may enjoy absolute control over real estate. However, real estate was not owned exclusively by an individual parent.

other concepts of right.

In history, the two most typical regimes of common ownership are the regime of common ownership in Roman law and that in Germanic law. The regime of common ownership in Roman law reflects individualism characterizing Roman law. It can also be said that the reason why the transformable regime of common ownership was established in Roman law is that the Roman law was based on individuals. In contrast, a unique regime of general ownership[18] was created in Germanic society based on a unique social organization called "Mark", which was established on fixed social relations. In nature, it was completely different from the regime of common ownership in Roman law, in accordance with which personal property may be merged to be commonly owned or be divided to be owned by individuals. The underlying reasons for the formation of these two completely different regimes of common ownership are as follows: distinctions had been made since early times in Roman legal regime between private property and public property as well as trading items and non-trading items which made it unnecessary for Roman society to use the indefinite concept of collective ownership or group ownership to include private property and public property. In contrast, in Germanic law, all moveable property was owned by individuals while all real estates were commonly owned by the community. Both the property that belonged to all the members and the property that belonged to individuals were included into the concept of "common ownership". In other words, the common ownership herein includes the joint ownership and individual ownership in Roman law and is the community of people rather than the community of property. Therefore, the prototype of the legal concept of common ownership has different historical backgrounds.

The common property or common ownership established under the French Civil Code referred to the existing state of property owned by individuals, or a certain state where property owned by different individuals was merged. In French Civil Code, common ownership was not deemed as an independent type

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18 Under the regime of general ownership, ownership belongs nominally to all the members, while the subject of ownership has been actually abstracted as group without personality which is independent of the members. The members may own some shares, but such shares can never be converted to individual ownership. Such shares may only be demonstrated by usufruct but cannot be divided or converted to individual ownership. Essentially speaking, the regime of general ownership is a summary of the situation of Mark community system where arable land is owned by group but used in a scattered matter, and the usufruct belongs to the members.

of ownership, but a kind of ownership shared and jointly exercised by two or more people.[19] Common ownership was also explicitly stipulated in the 1907 Swiss Civil Code. It mainly referred to a type of common ownership conditioned by the dissolution of the property-based community which was established by several people in accordance with the law or a contract, that is, if such people intended to divide the property, the community shall be dissolved. Such commonly owned property was independent of every common will and served the needs of a particular community, reflecting the idea of a certain group-based or community-based common ownership. The Swiss Civil Code had achieved the transition from to individual-based common ownership to social-based common ownership.[20]

In short, legal provisions concerning the regime of common ownership are subject to the constraints by domestic civil law regime. Therefore, if the regime of the common ownership is introduced into the settlement of disputes over the delimitation of the shared continental shelf, relevant provisions in this regard under domestic civil laws of different States are likely to conflict with each other. However, due to the integration of legal culture as well as the mutual reference to and convergence of methods for lawmaking around the world at present, it is possible that regimes in the relatively new field of international law may be innovated. The differences between traditions of civil laws of different States will not constitute a fundamental obstacle to the introduction of the regime of common ownership into the delimitation of adjacent continental shelf between neighboring States.

D. Common Ownership of the Continental Shelf and the Theory of National Sovereignty

Based on the above analyses, we can see that there is a quite close relationship between public law and private law as well as between international law and domestic law. The regimes and principles thereof can penetrate into each other and be mutually referred to. Though the regime of common ownership in civil law cannot be used directly to settle the dispute over the ownership of the continental shelf, the author believes that it is completely feasible to refer to the basic

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19 Gao Fuping, *Principles of Property Law: Research on Basic Problems of Property Legislation in China*, Beijing: China Legal Publishing House, 2001, p. 232. (in Chinese)

20 Gao Fuping, *Principles of Property Law: Research on Basic Problems of Property Legislation in China*, Beijing: China Legal Publishing House, 2001, p. 237. (in Chinese)

principles thereof. In the late 1940s, the USA put forward concepts, filed claims related to the continental shelf, and believed that it was reasonable for a coastal State to exercise jurisdiction over the natural resources on the seabed and subsoil of the continental shelf. The reasons for these are mainly as follows: "The continental shelf, which should be deemed as the natural prolongation of the land of a coastal State, should the natural component thereof." The resources on the continental shelf are "often seaward prolongation of the oil fields and mineral deposits reserved in the land territory". Due to such reasons, the "principle of adjacency" in geography becomes legitimate and the coastal States have theoretical basis to make a claim on the seabed and subsoil of the continental shelf.[21] In 1955, during the process of preparing the draft of relevant provisions on the continental shelf, the International Law Commission interpreted the sovereign rights of a coastal State over the continental shelf as "all the rights that are necessary for development and utilization of the resources on the continental shelf of the coastal State, including the jurisdiction and the right to prevent and punish illegal acts". Therefore, such sovereign rights mean the right of a coastal State to possess, to occupy and to dispose of the natural resources on the continental shelf and the related jurisdiction. Such rights are different from the rights entitled to by a coastal State within its enclosed seas and territorial waters and are owned by a coastal State only for the purpose of exploring and developing natural resources.[22] It had been determined in the 1958 Geneva Convention on the Continental Shelf that the right of a coastal State to explore and develop natural resources on its continental shelf is exclusive and exists naturally ipso facto. Such rights do not depend on notional occupation, or on any express proclamation. This legal principle had been fully confirmed in the judgment of the *North Sea Continental Shelf Cases*. The judgment held that "the most fundamental of all the rules of law relating to the continental shelf, namely, that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right."

The interpenetration of basic concepts of public law and private law has been

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21 Zhou Zhonghai, *International Law of the Sea*, Beijing: China University of Political Science and Law Press China, 1987, p. 95. (in Chinese)

22 Lu Shouben, *Legal Regime of the Sea*, Beijing: Guangming Daily Press, 1992, p. 123. (in Chinese)

mentioned above. Due to the following reasons, the rights a State is entitled to over its coastal continental shelf are "sovereign rights" rather than "sovereignty": although these rights are inherent in territorial sovereignty and have the features of sovereignty, they may be exercised only for the purpose of exploring and exploiting the resources on the continental shelf; therefore, they have not been deemed as part of the overall territorial sovereignty.[23] The principle that "the land shall dominate the sea", recognized both in the UNCLOS and in international common law, allows the coastal State to designate internal waters along a normal baseline or a straight baseline and to own territorial waters no more than 12 nautical miles from the baselines from which the breadth of the territorial sea is measured, exclusive economic zone no more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and (in principle) continental shelf no more than 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. In other words, the sea area over which the coastal State owns territorial sovereignty or sovereign rights may be extended towards previous high seas. However, such extension of sovereignty will undermine the absoluteness of sovereignty at the same time. For example, according to one of the compromise solution in the 1982 UNCLOS, if one coastal State intends to develop the non-living resources on the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, it shall pay to the established authority expenses or in kind in accordance with UNCLOS which should be distributed based on the "standards of equitable sharing".[24] This is obviously different from the unilateral sovereignty a State may enjoy. It is required to make concessions of State power and to assign rights. In addition, in order to utilize transboundary natural resources jointly, some related States have reached agreement on a lot of international arrangements,[25] while other States have concluded many bilateral or regional treaties on equitable sharing of transboundary

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23 Jennings Watts ed., translated by Wang Tieya, Chen Gongchuo, Tang Zongshun and Zhou Ren, *Oppenheim's International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 195. (in Chinese)

24 Jennings Watts ed., translated by Wang Tieya, Chen Gongchuo, Tang Zongshun and Zhou Ren, *Oppenheim's International Law*, Beijing: Encyclopedia of China Publishing House, 1995, p. 197 (in Chinese); please refer to the contribution proportion in the previous note, too.

25 For example, it was stipulated in the Charter of Economic Rights and Duties of States that "in the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others."

natural resources. Gradually, the concept of absolute sovereignty is being replaced by the concept of "equal utilization".[26]

Therefore, at present, if the regime of common ownership in theories on domestic civil law is introduced in to the settlement of the dispute over the delimitation of the continental shelf, there will be such obstacle pertaining to the absolute sovereignty as may be encountered in territorial delimitation. As early as the 17th century, the Dutch jurist Hugo Grotius had elaborated on the idea of freedom of the seas in many of his works. In modern time, his theory has been implemented in the legal fields concerning high seas. To a great extent, his idea of freedom of the seas may be said to be based on the theory that the seas connecting various States should be commonly owned by all human beings (commonly owned objects) and no State may have sovereignty over such commonly owned objects. However, from another perspective, his point of view may be understood as follows: every State may enjoy inalienable sovereignty over the high seas and interests in free navigation and free trade shall be equitably shared by all sovereign States. Thus, all sovereignty over the high seas has become the sovereign rights that are in the same nature as the private rights in the field of civil law. The inviolability of sovereignty remains unchanged, but the tendency towards equality and compromise becomes a new element involving the issue of sovereignty. Admittedly, the continental shelf is different from the high seas. It was impossible for Hugo Grotius to elaborate on the distribution of benefits gained from relevant activities on the continental shelf due to the historical and technical background of his time. Due to such restrictions as geographical conditions,[27] in terms of the distribution of benefits gained from relevant activities on the continental shelf, the continental shelf is between high seas and land territory in nature. The continental shelf is

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26 For example, it was pointed out in the 1957 *Lake Lanoux Arbitration* that when French planned to carry out certain watercourse splitting work in a part of Lake Lanoux which was under the control of French, it was obliged to notify the Spanish Government of the matter and solicit the opinions of the Spanish Government because in accordance with the provisions of a related treaty, such matter could not be simply deemed as a matter within the French territory, otherwise France shall be liable for breach of the treaty. See Yang Zewei, On the Permanent Sovereignty over Natural Resources in International Law and Its Development Tendency, *Studies in Law and Business*, No. 4, 2003. (in Chinese)

27 In Section III hereof, various factors affecting the delimitation of and the ownership of benefits of the continental shelf in the past are further analyzed. The characteristics of the continental shelf determine that the disputes over the delimitation of the continental shelf are complex and flexible. Such characteristics also make it quite possible for us to be flexible in settling new disputes over the continental shelf.

not shared by all human beings, nor is it absolutely and exclusively controlled by any State. In addition to the vague non-legal concept of "shelving sovereignty and seeking joint development", common ownership of the continental shelf by certain States is also one of the compromise solutions that are not restricted by the principle of sovereignty.[28]

IV. Coordination between Traditional Methods for and the Application of the Regime of Common Ownership into the Settlement of Disputes over the Delimitation of the Continental Shelf

A. Traditional Factors Affecting the Delimitation of the Continental Shelf

From the existing judgments and rulings, the relevant factors that should be considered during the delimitation of the continental shelf include geographical, geological, and geomorphological factors, acts of interested States, the interests of the third State, protection of the uniformity of resources and equal utilization of natural resources, among which geographical factors are of particular importance. In international judicial and arbitral practices, the following relevant circumstances are often taken into account: 1. Geographical factors. For example, the shape of the

28 It should be noted that China's positions on the issues concerning the delimitation of the South China Sea are different from China's positions on the issues concerning the delimitation of the East China Sea. There are many islands in the South China Sea and such islands are surrounded by the territorial waters of China. Therefore, the issues concerning the delimitation of the South China Sea belong to sovereignty-related issues, including the issues concerning the delimitation of the continental shelf; in contrast, in terms of the issues concerning the delimitation of the South China Sea, there are no disputes over the territorial waters of China; the issues focus on the delimitation of the continental shelf and the distribution of seabed resources.

coast[29] and proportionality[30] among which proportionality is one of the important geographical factors, which refers to the relationship between the length of the related coastline of the State parties adjacent to the sea area to be delimitated and the related sea area obtained by the State parties through delimitation.[31] 2. Geological and geomorphological factors. In light of the development of international judicial and arbitral practices, although the role of geological and geomorphological factors in maritime delimitation is being gradually downplayed, they should be taken into account in delimitating the continental shelf beyond 200 nautical miles from the territorial sea baselines of the State parties.[32] 3. Previous

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29 It was recognized in the 1969 *North Sea Continental Shelf Cases* that "the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features" should be the factors to be taken into account during the delimitation of the continental shelf. In 1971, the five agreements on the delimitation of the continental shelves in the North Sea region were signed in accordance with the judgment results of the 1969 *North Sea Continental Shelf Cases.* In the 1982 *Case Concerning the Delimitation of the Continental Shelf (Tunisia v. Libya)*, the ICJ held that "the change to the direction of the coast is a fact that must be considered". In the 1985 *Maritime Delimitation Case (Guinea V. Guinea-Bissau)*, the arbitral tribunal considered the "general trend of the coastline" and "the general shape of the coast".

30 In the 1969 *North Sea Continental Shelf Cases*, the ICJ confirmed that "the factor that should be taken into account in the end is the element of a reasonable degree of proportionality between the extent of the continental shelf areas appertaining to each State and the length of its coast in the delimitation completed based on the principle of equity". In the 1985 *Case Concerning the Delimitation of the Continental Shelf (Libya v. Malta)*, the ICJ considered proportionality as a factor that shall be taken into account when adjusting the median line between States with opposite coasts. In the 1993 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, the Court held that when the equidistance line approach was applied in the circumstances of the case, the relationship between the length of the relevant coasts and the maritime areas generated by them would be disproportionate, so it is necessary to consider the disparity between the respective coastal lengths of the State parties in case of maritime delimitation.

31 Yuan Gujie, Reflections on Issues Concerning the Delimitation of the Continental Shelf, *Peking University Law Journal*, No. 5, 1998. (in Chinese)

32 In the 1969 *North Sea Continental Shelf Cases*, the ICJ pointed out that "delimitation was to be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constituted a natural prolongation of its land territory, without encroachment on the natural prolongation of the land territory of the other." In the *1977 United Kingdom-France Continental Shelf Arbitration*, the arbitral tribunal endorsed the foregoing conclusions of the ICJ in the *North Sea Continental Shelf Case*s. In the 1985 *Case Concerning the Delimitation of the Continental Shelf (Libya v. Malta)*, the ICJ held that "since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 nautical miles from its coast, whatever the geological characteristics of the corresponding seabed and subsoil, there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims."

acts of the State parties.[33] 4. Equal use of natural resources.[34]

In the settlement of contemporary delimitation disputes, in addition to traditional factors, we should also consider factors relating to international relations and historical factors. In theory, when the boundary defined in the delimitation is too close to the coast of a State, safety factors should be listed among potential relevant factors. However, from the current international judicial and arbitral practices, safety factors have not been asserted as one of the factors relating to delimitation.[35] With regard to historical factors, there also exists the problem of uncertainty. In the 1982 *Case Concerning the Delimitation of the Continental Shelf (Tunisia v. Libya)*, the ICJ noted that "the question of Tunisia's historic rights may be relevant for the decision in the present case in a number of ways". However, after reviewing the case, the Court "thus does not find it necessary to pass on the question of historic rights as justification for the baselines. It is only if the method of delimitation which the Court finds to be appropriate is such that it will or may encroach upon the historic rights area that the Court will have to determine the validity and scope of those rights, and their opposability to Libya, in the context of a delimitation of the continental shelf". However, in the 1998 *Arbitration (Eritrea v. Yemeni)*, when concluding the arbitration agreement, the two State parties made a special request that the arbitral tribunal should make judgment on all issues concerning territorial sovereignty based on historical ownership. Thus,

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33 In the 1982 *Case Concerning the Delimitation of the Continental Shelf (Tunisia v. Libya)*, the ICJ held that it must consider the boundaries the two State parties might believe to be equitable, or believed to be equitable and acted based thereon, as long as these boundaries had been temporary solutions, even if these boundaries had affected only a part of the area to be delimitated.

34 In the 1993 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, equal use of natural resources was listed for the first time as one of the related factors to be taken into account during delimitation. The Court held that both the State parties had emphasized the importance of the maritime resources in the area to their respective interests.

35 In the 1977 *United Kingdom-France Continental Shelf Arbitration*, the Court believed that these factors would not play a decisive role in the delimitation in the case. They could support and strengthen, but could not oppose the conclusions demonstrated by the geographical, political and legal conditions of the area that had already been verified by the Court. In the 1993 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*, the ICJ insisted that safety factors should not be independent of the concept of sea area. However, the boundary determined in this case was not close enough to the coast of one State party to enable safety issues to become a factor in need of special consideration.

great importance was attached to historical ownership in the judgment of the case.[36] With regard to the issues concerning the delimitation of the continental shelf of China, many scholars in China laid particular emphasis on the role of historical factors as evidences which can be used in the settlement of disputes concerning the delimitation of the continental shelf in order to safeguard the national interests of China.[37] However, in their virtual defense, they unilaterally emphasized the factors favorable to China, used different rhetoric for disputes in different sea areas, and even deemed historical factors as the main reason for the ownership of rights and interests. Therefore, such opinions can only be their own wishful thinking.

Substantially speaking, the foregoing factors will not conflict with common ownership of the continental shelf. By introducing the concept "common ownership", which is vague in the delimitation of actually owned rights and interests but clear in terms of legal definition, the parties can turn the "black or white" delimitation disputes into negotiations on the sharing of acquired rights recognized by both parties. If the dispute really arose out of State parties' consideration of economic interests which can be gained from the development of resources, the introduction of the regime of common ownership can maximize the economic interests of both State parties by preventing the adverse effects of all of the foregoing factors.

B. Coordination of and Conflicts between the Regime of Common Ownership of the Continental Shelf and Accompanying Rights and Obligations Relating to the Continental Shelf

According to Article 77 to Article 81 of the UNCLOS, the rights of coastal States over their continental shelves include: 1. exploitation of natural resources, including the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species; 2. exclusive rights to authorize and manage drilling of the continental shelf for all purposes; 3. rights to construct and to authorize construction of, to operate, use and manage artificial

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36 In the *Arbitration (Eritrea v. Yemeni)*, the arbitral tribunal believed that "there is no doubt that the concept of historical ownership has a special impact on all possible circumstances in the current world."

37 For example, some people believed that "historical ownership is an acquired right clearly recognized and protected by the UNCLOS and international common law". Please refer to Zhao Jianwen, The UNCLOS and China's Acquired Rights in the South China Sea, *Chinese Journal of Law*, No. 2, 2003. (in Chinese)

islands, installations and structures; exclusive jurisdiction over such artificial islands, installations and structures.[38] It should be noted that a coastal State's exercise of its sovereign rights over its continental shelf, shall not affect the legal status of the superjacent waters or of the air space above those waters as well as the legal rights of the other State over the continental shelf,[39] for the rights of non-specific States over the continental shelf of a State are also stipulated in Article 78 and Article 79 in the UNCLOS, in compliance with which: 1. the superjacent waters of the continental shelf or the air space above those waters shall be open to all States; the ships and aircrafts of any State may navigate through or fly over those waters or the air space above those waters; 2. all States are entitled to lay submarine cables and pipelines on the continental shelf; subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.

Just like the dual character of ownership in the field of private law, the rights of a State over the continental shelf are neither absolute nor unconditional. In addition to the right to develop resources and obtain benefits, there are also a series of accompanying rights and obligations for other States.[40]After common ownership of the continental shelf is finally realized, there will exist mutual rights and obligations between the two States as well as accompanying rights and obligations

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38 The foregoing rights of the coastal State are the rights over the continental shelf within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Please refer to the provisions of Article 82 of the UNCLOS.

39 As regards the legal status of the superjacent waters or of the air space above those waters, it was stipulated in Article 78(1) of the UNCLOS that "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters." For the continental shelf within 200 nautical miles from the baselines, the provisions in the UNCLOS concerning the exclusive economic zone shall be applicable to the superjacent waters or the air space above those waters; for the continental shelf beyond 200 nautical miles from the baselines, the regimes of high seas shall be applicable to the superjacent waters or of the air space above those waters.

40 The "accompanying rights" herein do not mean that these rights are unimportant, but that these rights are accompanying compared with the main purpose, i.e., the development of the resources on the continental shelf.

between such States and a third State.[41] Whether there is one owner or more of the continental shelf, the owner(s) is/are entitled to the same rights and under the same obligations toward the third State. The distribution of rights and obligations between the co-owners in their joint management of the continental shelf may be determined with reference to relevant provisions on the regime of common ownership under traditional civil law, demonstrated mainly by the management of the commonly owned by them.

The principle under civil law on the management of commonly owned property is that the commonly owned property shall be handled in accordance with the original treaty if there is one, otherwise it shall be managed jointly by the parties concerned. Whatever be the type of the common ownership, all acts relating to the preservation the commonly owned property, the purpose of which are to maintain the current status of such property and prevent any loss or damage to such property, or any loss of or restriction on any right to such property, can be conducted alone by any of the co-owners without soliciting the opinions of the other co-owners. All acts relating to the improvement of the commonly owned property, the purpose of which is to increase the effectiveness or value of the commonly owned property without changing its nature, shall be conducted upon joint decision, for such acts are not so urgent as the foregoing acts and may involve high expenses but not necessarily increase the effectiveness or value of the commonly owned property.[42] With regard to the continental shelf, the accompanying rights and obligations arising from common ownership are more complex and may at the same time be often affected by diplomatic relations and the overall international environment, the influence of which are next to zero in the current situation. As for specific details on the joint management, they may be negotiated again and again between co-owners.

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41 In the 1969 *North Sea Continental Shelf Cases*, the ICJ attached importance to the interests of the third State. According to the judgment, one of the relevant factors in the delimitation of the continental shelf is "to take account of the effects, actual or prospective, of any other continental shelf delimitations in the same region". In the 1982 *Case Concerning the Delimitation of the Continental Shelf (Tunisia v. Libya)*, the ICJ emphasized "reservation of the rights of a third State". Gu Yuanjie, Reflections on Issues Concerning the Delimitation of the Continental Shelf, *Peking University Law Journal*, No. 5, 1998. (in Chinese)

42 Yang Lixin, *Study on Common Ownership*, Beijing: Higher Education Press, 2003, p. 58. (in Chinese)

C. Delimitation of the Continental Shelf between Multiple States and Applicable Standards for the Regime of Common Ownership: a Case Study of the Delimitation of the Continental Shelf in the East China Sea

At the 3rd Meeting of the Standing Committee of the Ninth National People's Congress of China On June 26, 1998, the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China was adopted, in which were established the basic regime of the exclusive economic zone and that of the continental shelf. In accordance with the Law, China may claim the exclusive economic zone extending to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and the continental shelf which is part of all the natural prolongation of China's land territory. According to a preliminary estimate, China may claim jurisdiction over a sea area of about 3 million square kilometers. However, there are four seas on the east of the continental shelf of China. Among them, there are disputes between China and other States concerning the delimitation of the continental shelf in the Yellow Sea, the East China Sea, and the South China Sea. However, up till now, except the agreement between China and Vietnam on the delimitation of the sea area of the Beibu Gulf,[43] no other agreement has been concluded between China and other States on the delimitation of the sea area under jurisdiction. Given China's special geographical position, China is faced with far more complicated disputes concerning the delimitation of the continental shelf than those faced by any other States or regions in the world.

The dispute between China and Japan over the resources on the continental shelf in the East China Sea stems from Japan's escalating reaction to China's development of Chunxiao Oil and Gas Field in the sea area on China's side of the "median line" in the East China Sea since May 2004. In 2004, China's foreign

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43 It was stipulated in Article 6 of the Agreement between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of the Territorial Sea, the Exclusive Economic Zone and the Continental Shelf of the Beibu Gulf which was concluded on December 25, 2000 in Beijing that "both parties shall respect the sovereignty, sovereign rights and jurisdiction of the other party over their respective territorial seas, exclusive economic zones and continental shelves in the Beidu Gulf determined in accordance with this Agreement." It was stipulated in Article 7 of the foregoing Agreement that "if any petroleum, natural gas single geological structure or other mineral deposit straddles the boundary stipulated in Article 2 of this Agreement, through friendly consultations, both parties shall reach an agreement concerning the most efficient development of such structure or mineral deposit as well as equitable sharing of the development benefits thereof".

minister made the appeal that China and Japan should shelve the differences and conduct joint development of the resources in the East China Sea and expressed his hoped that Japan would carry out a research on his proposal, to which, however, Japan did not respond actively. As each coastal State is entitled to certain rights in its offshore areas in line with the UNCLOS, a considerable part of China's scope of rights overlaps with that of Japan relating to the continental shelf in the East China Sea.[44] It is both lawful and undisputable for both China and Japan to make their respective claim on the continental shelf either in compliance with the principle of natural prolongation or Article 76 of the UNCLOS which provides that the outer limits of the continental shelf can be extended to up to 200 nautical miles from the territorial baseline. However, when such unilateral claims of both States result in conflicts over rights in the East China Sea, there is no doubt that the principle of natural prolongation shall be predominant over the provision on the outer limits of the continental shelf under Article 76 of the UNCLOS. As China's continental shelf in the East China Sea is consistent with the land of China therein in terms of topography, geomorphology, sedimentary characteristics, and geology, is the

44 Article 1 and Article 2 of the 1996 Law of Japan on the Exclusive Economic Zone and the Continental Shelf stipulate that Japan's exclusive economic zone and continental shelf shall cover the area measured from the baselines of its territorial sea and extending outward to the line every point of which is at a distance from the nearest point of the baseline equal to 200 nautical miles. Where any part of the outer edge of the margin of the exclusive economic zone and the continental shelf goes beyond the median line, the median line (or other line agreed upon between Japan and other States) will replace that part of line. Please refer to Yu Mincai, Analysis of the Dispute between China and Japan over the Oil and Gas in the East China Sea from the Perspective of International Law, *Studies in Law and Business*, No. 1, 2005 (in Chinese). Article 2 of the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China,1998, states that China's exclusive economic zone shall cover the area extending to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured and China's continental shelf shall be the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured under certain conditions.

natural prolongation of China's land territory underwater.[45] Therefore, China has inalienable sovereign rights over the continental shelf in the East China Sea which extends all the way to the Okinawa Trough. If the continental shelf of any other State overlaps with that of China in the East China Sea, the overlapping part shall be delimitated between China and the State through friendly consultations. Any unilateral attempt to change the status quo is legally groundless.[46]

It has been China's consistent stance that such disputes shall be settled peacefully and equitably through friendly consultations between the parties concerned in accordance with the UNCLOS and international customary law and in consideration of a variety of factors and circumstances. Due to the diplomatic estrangement and protracted historical hostilities between China and Japan, it will be very difficult to apply the regime of common ownership into the delimitation of the continental shelf between China and Japan. Thus, it is clear that in addition to the obstacles caused by the theory of national sovereignty, international relations will also play an important role in the application of the regime of common ownership. As China has a number of neighboring coastal States, it is an inflexible approach to apply a uniform standard. Therefore, the author of this paper is in the opinion that different standards should be applied for the realization of common ownership of the continental shelf between China and different countries.

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45 The Okinawa Trough constitutes a natural boundary between the continental shelf of the East China Sea and the island shelf of the Ryukyu Islands of Japan because the geological structure on the eastern side of the trough is entirely different from that on the western side of the trough in nature. On the western side of the trough is stable continental crust while on the eastern side of the trough is Ryukyu Island Arc with very active crustal movements and frequent earthquakes. The sediments on the eastern and western side of the trough belong respectively to two source areas, island shelf of the Ryukyu Islands and the continental shelf of the East China Sea. The sediments on the edge of the continental shelf of the East China Sea and the western slope of the trough are similar to the substances in the Yangtze River in nature while the sediments on the eastern slope of the trough are closely associated with the Ryukyu Islands in nature. The trough itself belongs to a zone in transition from a continental crust to an oceanic crust. Its topography is different from that of both a flat continental shelf of the type of accumulation and deposition and oceanic ridges and basins of the type of oceanic crust. It is a unique topographical unit. The continental shelf of the East China Sea extends to the foot of the western slope of the Okinawa Trough, while the island shelf of the Ryukyu Islands extends to the foot of the eastern slope of the Okinawa Trough. Please refer to Yu Mincai, Analysis of the Dispute between China and Japan over the Oil and Gas in the East China Sea from the Perspective of International Law, *Studies in Law and Business*, No. 1, 2005. (in Chinese)

46 Li Guangyi, The International Legal Basis on the Delimitation of the Continental Shelf of East China Sea, *Contemporary Law Review*, No. 3, 2005. (in Chinese)

V. Joint Development Based on Common Ownership of the Continental Shelf: Autonomy of Will and Conflict of Laws between States

A. Why Joint Development Based on the Regime of Common Ownership Is the Ideal Method for the Development of the Resources on the Continental Shelf?

The concept of joint development can be interpreted either in the narrow sense or in the broad sense. In the narrow sense, it refers to joint development of resources within a certain area, mainly oil and gas resources, by the States concerned based on an agreement. In the broad sense, it refers to joint development of resources within a certain area, including oil and gas resources, fishery resources and so on, by the States concerned based on an agreement.[47] Joint development should be conducted in two differentiated forms, namely, cross-border joint development in the case where maritime boundaries has been established[48] and joint development in a disputed area in the case where the maritime boundary has not

47 Chen Degong, Principles of International Law and International Practices of Joint Development, *Tsinghua Law Review*, No. 4, 2002. (in Chinese)

48 There are 8 cases of cross-border joint development: (1) the 1958 Agreement on Joint Development of the Continental Shelf of the Persian Gulf between Bahrain and Saudi Arabia; (2) the 1969 Agreement on Joint Development between Qatar and Abu Dhabi; (3) the 1974 Agreement on Delimitation and Joint Development between France and Spain; (4) the 1974 Agreement between Sudan and Saudi Arabia; (5) the 1976 Agreement on Joint Development of Frigg Oil Field between Britain and Norway; (6) the 1981 Agreement on Joint Development between Iceland and Norway (Jan Mayen); (7) the 1988 Agreement on Joint Development of the Continental Shelf between Libya and Tunisia; (8) the 1993 Agreement on Management and Cooperation between Senegal and Guinea-Bissau.

yet been defined.[49] It has been accepted by the vast majority of scholars that joint development can be classified in accordance with whether maritime boundaries have been established or not. The different functions of joint development have been also taken account of in such classification. Specifically, the major importance is attached to economic interests in cross-border joint development while political gains, such as the mitigation of disputes and the improvement of relations, have also been taken account of in addition to economic interests in joint development in a disputed area.[50]

However, it is inevitable that the foregoing categories of joint development in the traditional sense can only be conducted in a temporary basis. Generally speaking, cross-border joint development will come to an end with the termination of the commercial production of cross-border petroleum while joint development in disputed sea areas, which is not a permanent arrangement for delimitation dispute, will be generally terminated when it's no longer necessary after the final delimitation of maritime boundaries or the establishment of a joint development zone. As stipulated in Article 74 and Article 83 of the UNCLOS, which were formulated for the purpose of delimitating the exclusive economic zone and the continental shelf, pending agreement on the delimitation of the continental shelf, the States concerned, in a spirit of understanding and cooperation, shall make every

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49 There are 13 cases of joint development in disputed sea areas: (1) the 1962 Agreement on Joint Development of the Resources in the Ems Estuary between Netherlands and the Federal Republic of Germany; (2) the 1965 Agreement on Joint Development between Kuwait and Saudi Arabia; (3) the 1967 Agreement on Joint Development between Iran and Iraq; (4) the 1971 Agreement on Joint Development between Iran and Sharjah; (5) the 1974 Agreement on Joint Development of the Continental of the East Sea between Japan and South Korea; (6) the 1979 Memorandum of Understanding on Joint Development between Thailand and Malaysia; (7) the 1988 Agreement on Joint Development between South Yemen and North Yemen; (8) the 1989 Agreement on Joint Development of the Timor Sea between Australia and Indonesia; (9) the 1992 Agreement on Joint Development between Malaysia and Vietnam; (10) the 1993 Agreement on Maritime Delimitation and Joint Development between Columbia and Jamaica; (11) the Argentina-U.K. Joint Declaration on Cooperation over Offshore Activities in the Southwest Atlantic, 1995; (12) the Protocol of February 2001 between Nigeria and Sao Tome and Principe concerning Joint Development of Petroleum and other Resources in the Exclusive Economic Zones of both States in the Gulf of Guinea; (13) the Memorandum of July 2001 between Australia and the Temporary Regime of East Timor Concerning Cooperative Arrangements on the East Timor Sea.

50 In the case concerning the delimitation of the continental shelf in the Aegean Sea, the ICJ pointed out that when unilateral development of the continental shelf would cause irreparable damage to the related rights, or was most likely to cause actual damage to related seabed or subsoil, international law would support the obligation to prohibit such unilateral development.

effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. However, what on earth does the "final agreement" stipulated in the UNCLOS refer to, an agreement on the delimitation of the continental shelf or any further and formal agreement on joint development of resources? It remains unclear - joint development of the resources on the continental shelf on a temporary basis is very likely to be closely associated with domestic interests and accompanied with short-term acts that are not conducive to sustainable development. In addition, such temporary cooperation between States is unstable. The author believes that distribution of interests may be better realized during the development of resources only when joint development of the resources on the continental shelf is conducted based on common ownership of the continental shelf. In this way, as both parties have settled the disputes over the ownership and better clarified their respective rights and obligations, the marine environmental of the sea area on the continental shelf can also be better protected, and there will be no such short-term acts as joint development conducted only for economic interests, predatory development for which no party will assume any risk and responsibility.

B. Issues Concerning the Composition and Operation of Development Consortium in the Fields of Conflict of Laws

In the opinion some people, subjects of joint development in the broad sense include sovereign States, transnational or non-multinational enterprises, and enterprise groups while in the narrow sense two or more States conducting exploration and development of natural resources in disputed sea areas on the basis of an agreement achieved through negotiations and in compliance with international law. As can be seen from previous cases in respect of the composition of subjects for joint development, there are three main models:[51] 1. agency management model, namely, a State party manages the joint development zone on behalf of both parties and the laws of the agency State are applied to the joint development zone;[52] 2. forced joint venture model, namely, both States divide the

51 Xiao Jianguo, The Concept of Joint Development and Its Characteristics in International Law, *Foreign Affairs Review*, No. 2, 2003. (in Chinese)

52 The 1958 Protocol, after having delimitated the boundary between Bahrain and Saudi Arabia in the Persian Gulf, further provided that Saudi Arabia had the right to manage and exploit the oil fields within its territory but half of net income shall be paid to Bahrain.

joint development zone into several parts based on a protocol and establish the lessee operating system; the laws of the operator authorizing State are applied to the related exploration and development activities conducted in each sub-region;[53] and 3. supranational management model, namely, the related States authorize the joint authority to be fully responsible for the joint development zone; within the joint development zone, there is only one work plan, one tax system, one budget and one legal system.[54]

The author believes that it is rather easy to establish and manage the agency management model because it involves the use of the management mechanisms of only one State and does not involve coordination of the related legal regimes of two States. However, this model is not feasible because when one party exercises the sovereign rights over the resources as proxy for the other party, the other party is likely to have the worry that the two parties are not in an equal status and may even think that its sovereign rights over the resources are damaged or lost. If the supranational management model is applied, administrative costs may be reduced significantly and the working efficiency can be improved. However, this development model also has some shortcomings. For example, when two States agree to establish a supranational institution, they must coordinate with each other and reach a consensus on their respective duties, personnel composition, working procedures, system for development, applicable laws and other key issues. Such coordination is very difficult between two States with different legal systems and it

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53 In the 1974 Protocol between Japan and South Korea on Joint Development of the Continental Shelf in the East China Sea, this model concerning the subjects of joint development was put into practice for the first time. The 1974 Protocol set a joint development zone with an area of 84,000 square kilometers, located between the "median line" of the continental shelf in the East China Sea claimed by Japan and the natural prolongation claimed by South Korea. The 1974 Protocol intended to shelve the 50-year dispute between both parties over the delimitation and facilitate joint development of the resources on the continental shelf. However, from the perspective of international law and national sovereignty, the 1974 Protocol between Japan and South Korea was a serious encroachment on China's sovereign rights over the continental shelf in the East China Sea.

54 A typical example for this management model is the one stipulated in the 1989 East Timor Gap Treaty between Australia and Indonesia. The treaty designated the sea area in East Timor Sea under the dispute between both parties as the cooperation zone which was further divided into three regions based on their distances from the coastlines of both States. Different exploration and development regimes were applied to each different region. The joint authority established by both States was fully responsible for all exploration and development activities conducted in the area in the middle of the continental shelves of both States. The joint authority has a legal personality and the necessary legal capacity for performing its functions as required by the laws of both States, such as licensing, signing contracts, acquiring and disposing of movable and immovable property, etc.

is necessary for both States to make concessions to varying degrees. Therefore, the consortium for joint development based on common ownership of the continental shelf shall be in the broad sense and shall not be limited to States. After both States have reached a consensus over the ownership of the continental shelf, the continental shelf under dispute will have a legal status as agreed upon by common opinions (interests) of both States. Both States can withdraw completely from the subsequent commercial operations such as development of resources and only undertake matters relating to ordinary management of the continental shelf. The model of forced joint venture makes it unnecessary to coordinate the laws of both States, showcasing high efficiency, equality, and simplicity, which characterizes commercial activities.

VI. Conclusions

Based on an analysis of the problems with disputes between the relevant States over the delimitation of the continental shelf since the last century, this paper puts forward a possible new solution to disputes over the continental shelf which is different from the previous solution of "shelving sovereignty and seeking joint development" by referring to and introducing the regime of common ownership in the field of domestic civil law. Such reference and introduction is based on the convergence of public law and private law as well as that of international law and domestic law, which has been also elaborated in this paper. However, this proposed solution can only be deemed as an assumption. It is inevitable that the proposed attempt to settle disputes concerning the sovereign rights over the continental shelf through common ownership will be hindered in actual practice by obstacles caused by the complicated distribution of interests among States. Adjustments will be made to the regime of common ownership originated from the field of private law in consideration of historical factors, national policies, international relations and other factors, which will more or less change the original regime. In the end, the introduced regime of common ownership may even become completely different from the original regime. Even if the concept of common ownership is accepted in the field of the continental shelf, the ideal situation, where joint development of resources is conducted through the model of forced joint venture by a legal consortium backed by States on the basis of common ownership of the continental shelf, will remain to be bound by a variety of special regimes under both domestic and foreign economic laws. In addition, there are also many difficulties and gaps

in terms of applicable laws. However, the author believes that under the current situations, pilots on common ownership of the continental shelf can be gradually conducted between States whose continental shelves are adjacent to each other and who have sound diplomatic relations but relatively few conflicts of interests with each other.

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Comments on the Convention on the Protection of the Underwater Cultural Heritage

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Abstract: The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage is the first international convention on the protection of underwater cultural heritage. The international protection of underwater cultural heritage faces many challenges including disputes of jurisdiction between coastal and flag States, conflicts of interest between the archaeological community and the salvage industry and issues on national sovereign immunities. These varying interests caused many disputes during the preparation of the Convention. Although the final Convention did not receive support from the USA, the UK and other sea powers, it did manage to coordinate the interests of all parties in a manner that was consistent with the United Nations Convention on the Law of the Sea. Most importantly, the Convention provides a basic legal framework for the international protection of underwater cultural heritage.

Key Words: Underwater cultural heritage; Jurisdiction of a coastal State; Salvage law; Convention on the Protection of the Underwater Cultural Heritage

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has led the formulation of three conventions on the protection of cultural heritage, labelled as an "arsenal" for the protection of international cultural heritage: the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 and

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the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972. On the 2 November 2001 this arsenal added a new weapon – the Convention on the Protection of the Underwater Cultural Heritage (hereafter "the Convention"), which established the basic legal framework for the international protection of underwater cultural heritage. This paper will provide a comprehensive comment on the Convention with a focus on its preparation.[1]

I. Background

The feats of human beings challenging the oceans have always come along with cruel shipwrecks, leaving countless ships, lives and property on the sea floor. These artifacts reveal historical knowledge unavailable, or no longer available, from sites on land (for example, information regarding the ancient shipbuilding industry, life on board and trading routes). More importantly, deep-sea chemicals and the biological environment preserve the status of underwater sites ensuring

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1 In recent years, many treasure hunters have become interested in the shipwrecks along China's coastline, making the effective protection of underwater cultural heritage an urgent issue. During the National People's Congress and the Chinese Political Consultative Conference in 2005, many representatives proposed motions which coincidently included representative Shan Jixiang's motion for the enhancement of efforts to protect underwater cultural heritage and representative Chen Yuyi's proposal on strengthening the protection of underwater cultural heritage in the South China Sea. Various representatives have suggested that China join the Convention as soon as possible, which would not only facilitate the protection of underwater cultural heritage, but also give China a greater ability to protect its national interests and marine rights at the international level and to stop the piracy of ancient Chinese shipwrecks and historical relics through international cooperation. (in *China Culture Daily*, 12 March 2005 (in Chinese)). Little research has been done on the Convention in China, except Professor Kuen-chen FU's column on "Underwater Cultural Heritage" in *Essays on International Law of the Sea* (Xiamen: Xiamen University Press, No. 1, 2004 (in Chinese)) which introduced the Convention and existing cross-strait systems; and Professor Guo Yujun's discussion on the legal issues of underwater cultural heritage in relation to the legal characterization, legal ownership, protection, management, and typical cases in Research on Several Legal Issues of International Underwater Cultural Heritage (in *China Legal Science*, No. 3, 2004 (in Chinese)). See the Chinese version of the Convention, at www.unesco.org/culture/legalprotection/water/images/chinconv.doc.

that these shipwrecks act as time capsules of unique archaeological value.[2] On the other hand, shipwrecks sometimes contain economic treasures. In 1986, Christie's auction house raised US$16 million from the sale of Chinese porcelain and gold ingots recovered from the *Geldermalsem*.[3] The widespread use of self-contained underwater breathing apparatus (SCUBA) after World War II was followed by an increase in the looting of shipwrecks. Without regard for proper methodologies of archaeological excavation, commercial salvage can seriously damage shipwreck sites, scattering finds amongst private collectors making them unavailable for scientific research and public exhibition.[4] In addition, threats from offshore oil exploration, pipelines, marine pollution and other factors, have caused underwater cultural heritage protection to be described as "the last major issue of a global nature that needs to be resolved in the law of the sea".[5] This issue originates not only from the convenience brought by the technical development of human beings, but more from the lacuna of an effective legal regime for the protection of underwater cultural heritage. In a traditional legal framework, salvage law and the law of finds are applicable to the historical shipwreck salvage dispute. Due to inconsistencies between the legislative spirits of these traditional legal regimes and underwater cultural heritage protection, their application encourages commercial

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2 For example, the *Wasa*, a wooden Swedish warship from the 17th century, sank in the cold salt water and was thus protected from the corrosion of shipworm, providing people in modern times the opportunity to understand the original status of naval life in the 17th century. Similarly, the 18th century finds in Tahiti salvaged from the wrecked *HMS Pandora* enriched our understanding of Polynesian history. See Robyn Frost, Underwater Cultural Heritage Protection, *Australia Yearbook of International Law*, Vol. 23, 2004, p. 26. For the importance of underwater cultural heritage, see the UNESCO Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, paras. 7~9, http://unesdoc.unesco.org/images/0010/001026/102628cb.pdf. (in Chinese)

3 There are two cases to be mentioned individually. See Craig Forrest, A New International Regime for the Protection of Underwater Culture Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, footnote 10.

4 A UNESCO Regional Seminar on the Protection of Movable Cultural Property held in Brisbane, Australia, 2-5 December 1986, issued a statement of principle concerning underwater cultural heritage which stated that, "if positive steps are not taken immediately it is anticipated that the recent advances that have been made by treasure hunters internationally but particularly in South-East Asia will result in a tragic loss of essential and important heritage". See the UNESCO Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, para. 6, http://unesdoc.unesco.org/images/0010/001026/102628cb.pdf. (in Chinese)

5 A. Couper, Editorial: The Principal Issues in Underwater Cultural Heritage, *Marine Policy*, Vol. 20, 1996, p. 285.

salvage.[6]

Many States have published special legislation regarding the protection of underwater cultural heritage, however this legislation typically applies to the territorial waters of one Sate.[7] International concern over the protection of underwater cultural heritage began in 1978 when the Council of Europe issued Recommendation 848,[8] urging member States to revise their national legislations where necessary in order to meet the minimum legal requirements determined in the Annex and recommending that the Committee of Ministers create a European convention on underwater cultural heritage. The minimum legal requirements determined in the Recommendation include: the protection of all objects that have been beneath the water's surface for more than 100 years; that salvage law will not apply to these items and instead a standard system of fixed finder's monetary reward should be established; and that national jurisdiction concerning underwater cultural heritage should be extended up to the full 200-mile limit, i.e. the "cultural heritage zone". This issue was also raised during negotiations for the United Nations Convention on the Law of the Sea (UNCLOS), however since it was not dealt with until the final days of the negotiations, relatively little time was spent on it. UNCLOS includes only two articles, Articles 149 and 303, which make reference to underwater cultural heritage.[9] Although these provisions are ambiguous

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6 See below for the discussion on traditional legal regimes.

7 See Robyn Frost, Underwater Cultural Heritage Protection, *Australia Yearbook of International Law*, Vol. 23, 2004, pp. 27~28. For example, the USA published the Abandoned Shipwreck Act of 1987 to provide special regulations for underwater cultural heritage, however traditional maritime law still applies to underwater cultural heritage beyond the baseline of the US territorial sea.

8 Doc 4200, Strasbourg. It is noteworthy that the Council of Europe issued Recommendation 1486 on maritime and fluvial cultural heritage in 2000, which reflected the development of the Convention.

9 Art. 149, Archaeological and historical objects: all objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin. Art. 303 Archaeological and historical objects found at sea: (1) States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose; (2) in order to control traffic in such objects, the coastal State may, in applying Article 33 (stipulation on the contiguous zone), presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article; (3) nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges; and (4) this article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

and brief,[10] they have created room for the development of a special convention on the protection of underwater cultural heritage,[11] included the only regulations of international law applicable to underwater cultural heritage, limiting the jurisdiction of coastal states concerning underwater cultural heritage within the extension of the contiguous zone[12] and establishing the general principles. These general principles include: that States have a duty to protect underwater cultural heritage in various maritime zones beyond coastal State jurisdiction, that this duty is undertaken for the benefit of humankind,[13] and that States are bound to cooperate in the fulfilment of these duties.

Based on Recommendation 848 of the Council of Europe, the Draft European Convention on the Protection of the Underwater Cultural Heritage was released in 1985, acknowledging the negligence of UNCLOS regarding the protection of underwater cultural heritage and proposing that the definition of underwater cultural heritage conform to the legislation of land heritage protection to ensure the internal integration of protection regimes, including all objects that have been beneath the water's surface for more than 100 years; that the national jurisdiction concerning underwater cultural heritage shall extend to a 200 mile limit; and that the existing salvage law shall not apply to underwater cultural heritage. The draft revealed the disparity between salvage law and cultural heritage law in the Mediterranean and introduced the principle of non-economic utilization of underwater cultural heritage, however the draft was unsuccessful due to territorial disputes between

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10 Two articles of UNCLOS have been the subject of criticism, including L. Caflisch, Submarine Antiquities and International Law of the Sea, *Netherlands Yearbook of International Law*, Vol. 13, 1982, p. 3; A. Arend, Archaeological and Historical Objects: The International Legal Implications of LOSC Ⅲ, *Virginia Journal of International Law*, Vol. 22, 1982, p. 777; A. Strati, Deep Seabed Cultural Property and the Common Heritage of Mankind, *International and Comparative Law Quarterly*, Vol. 40, 1991, p. 859; P. O'Keefe and J. Nafziger, Report: The Draft Convention on the Protection of the Underwater Cultural Heritage, *Ocean Development and International Law*, Vol. 25, 1994, p. 391.

11 Art. 303, para. 4.

12 Art. 303, para. 2.

13 Arend views Article 149 as an application of the concept of the common heritage of mankind to underwater cultural heritage (see A. Arend, Archaeological and Historical Objects: Implications of UNCLOS III, *Virginia Journal of International Law*, Vol. 22, 1982, p. 800); Caflisch, however, regards Article 149 as having abandoned the principle of common heritage by failing to designate an authority to control the recovery of objects of an archaeological and historical nature. (see L. Caflisch, Sub-marine Antiquities and the International Law of the Sea, *Netherlands Yearbook of International Law*, Vol. 13, 1982, p. 31.).

Greece and Turkey.[14]

In 1988 the International Law Association (ILA) formed the Cultural Heritage Law Committee, whose top priority was to create an international convention for the protection of underwater cultural heritage. The ILA finally adopted a draft in 1994 and forwarded it to UNESCO for consideration.[15] The draft reflected the spirit of the Draft Convention of the Council of Europe in three ways: first, the protection of underwater cultural heritage only refers to those whose ownership has been abandoned by their owners so as to avoid issues concerning private property rights; second, the protection regime was based on coastal State jurisdiction, which was extended up to 200 nautical miles from the baseline of the territorial sea by the creation of a cultural heritage zone; and third, traditional admiralty salvage law, which has since been applied to underwater cultural heritage in international waters, was to be excluded. Annexed to the draft was the Charter on the Protection and Management of Underwater Cultural Heritage produced by the International Council on Monuments and Sites (ICOMOS)[16] that sets out benchmark standards for underwater archaeology.

UNESCO commenced a feasibility study for the drafting of a convention on underwater cultural heritage protection in 1993.[17] The study showed that, in spite of the regulations on underwater cultural heritage in international waters provided in the 1982 UNCLOS, it was necessary to establish a more specific legal protection framework and resolve many complicated disputes, including the jurisdiction

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14 For details of the Draft Convention of the Council of Europe, see J. Blake, The Protection of the Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 45, 1996, pp. 819~843.

15 During 1990-1991, the International Law Commission (ILC) consulted the United Nations Law of the Sea Committee without success. The International Maritime Organization (IMO) indicated that it was not interested in the proposal since its primary interest was in the removal of wrecks which were a danger to shipping. The Comité Maritime International (CMI) also indicated that it was not directly interested in the matter. The plenary session of the 64th conference of the ILA adopted the ILC's draft and recommended that the ILA Secretariat transmit it to UNESCO for further action, since it considered UNESCO to be an appropriate organization to take action in this matter. For details of the draft, see P. O'Keefe and J. Nafziger, Report: The Draft Convention on the Protection of the Underwater Cultural Heritage, *Ocean Development and International Law*, Vol. 25, 1994, p. 393.

16 Established in 1964, ICOMOS is a non-governmental organization with special observer status at UNESCO, and its primary function is to advise intergovernmental organizations of the steps necessary to conserve the monuments and sites of the world.

17 At its 141st session in 1993, the UNESCO Executive Board adopted a resolution (Doc. 141 EX/18 Paris, 23 Mar 1993, Resolution 5.5.1, para. 20) requesting that the Director-General undertake this feasibility study. The study report was submitted to the 146th session of the Executive Board on 23 March 1995 (Doc. 146 EX/27).

of coastal States, statuses of salvage law and ownership, warship and sovereign immunity and the balance between archaeological and commercial interests. The necessity of such a convention was unanimously acknowledged at the meeting of experts[18] held in May, 1996. In 1998, UNESCO created a preliminary draft text based on the ILA draft.[19] The preliminary draft was further discussed at two meetings of governmental experts, in June-July 1998 and April 1999. Although no formal revision was made to the preliminary draft at the second meeting of experts, a revised draft was produced which laid the foundation for the third meeting of experts in July 2000. At the fourth meeting held in March-April 2001, the Director-General made it clear that this would be the last meeting, culminating in a final draft.[20] Under such pressure, the meeting was extended to June. The fourth meeting focused on a Single Negotiating Text drafted by the Chairman, Mr. Carsten Lund. Eventually, based on revisions to the negotiating text, the Convention was adopted at the 31st General Conference of UNESCO on 2 November 2001 by 87 votes in favor, 4 against and 15 abstentions.[21] The Convention consists of 35 articles and an Annex with 36 rules.

II. Objectives and General Principles of the Convention

The preamble[22] and Article 2 established the objectives and general principles of the Convention, shaping the basis for the protection regime. The starting point was the principle provisions of Articles 149 and 303 of UNCLOS which stated

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18 CLT-96/CONF.605/6 Paris, 22-24 May 1996.

19 Doc. CLT-96/Conf.202/5, April 1998. For detailed discussion on the draft, see S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1999, p. 171.

20 P. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, London: Institute of Art and Law, 2002, p. 30.

21 The UNESCO conventions are approved by the plenary conference through consensus or voting instead of a signature procedure. The abstaining States included UK, Brazil, Czechoslovakia, Columbia, France, Germany, Greece, Ireland, Israel, Guinea-Bissau, the Netherlands, Paraguay, Sweden, Switzerland and Uruguay. The opposing States included Russia, Norway, Turkey and Venezuela. For the reasons of objection and abstention, see T. Scovazzi, Convention on the Protection of Underwater Cultural Heritage, *Environmental Policy and Law*, Vol. 32, 2002, pp. 152~157.

22 The preamble received very few changes from the ILA draft, which had been based, to a large extent, on the 1998 Draft of the Council of Europe. Although the preamble did not constitute the substantive regulations of the Convention, it provided the context for the purpose of the interpretation of the Convention as in other international conventions (1969 Vienna Convention on the Law of Treaties, Art. 31(2)).

that States have the duty to protect underwater cultural heritage for the benefit of mankind as a whole and that they ought to cooperate for this purpose. In consideration of the inadequacies of UNCLOS, the Convention clearly states in Article 2(1) that its aim is to "ensure and strengthen the protection of underwater cultural heritage". In order to achieve this legislative objective, the Convention established the following principles: preservation of underwater cultural heritage for the benefit of humanity, preservation in situ, no commercial exploitation of underwater cultural heritage and international cooperation.

Article 2(3) of the Convention provides that "States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention".[23] The preamble of the Convention acknowledges "the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage". Since underwater cultural heritage faces global threats, its protection shall be for "the benefit of humanity". However, it provides no legal basis but only lofty goals stipulations similar to Article 149 of UNCLOS. The Convention prescribes that the seizure of underwater cultural heritage shall be "for the public benefit", to raise public awareness, and that "competent authorities" shall be established and reinforced, but only one archaeological principle is reiterated: public access to cultural heritage shall be allowed except where such access is incompatible with its protection. The Convention fails to provide specific stipulations on the use of public funds, museum construction and channels of museum collection. In addition, the Convention fails to resolve the relation between the benefit of humanity and its other interests including property ownership and special national interests.[24]

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23 Article 149 of the UNCLOS provides that "all objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin." The UNESCO Convention differs from Article 149 in three aspects. First, the term "preservation" is used instead of "preservation or disposal", which means disposal is no longer regarded as an alternative to preservation (CLT-99/WS/8, Paris, Apr. 1999, 24). Second, no reference is made to the preferential rights of relevant states. The wording of Article 149 results in many difficulties during interpretation, and therefore the Convention abandoned this provision and reflects the historical or cultural interests of states in other provisions, such as the terms concerning cooperation, notification and information sharing. Third, the Convention is applicable to all maritime waters it deals with.

24 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 68.

The Convention uses the term "preservation" while determining the "protection" measures for underwater cultural heritage. Taking into account the preamble of the Convention, then the term "preservation" can be more precisely defined. The preamble highlights the dangers that underwater cultural heritage can face through the use of unscientific excavation methods and commercial exploitation, thus by using the term "preservation" the Convention refers to the general concept of safeguarding and conserving the physical integrity and archaeological value of underwater cultural heritage. The highest risk of danger for underwater cultural heritage is that it will be discovered and excavated by those who lack the required expertise, that they will remove the artifact to a strange environment, and ultimately destroy the connection between underwater cultural heritage and its native environment. This not only damages the physical relationship between the cultural heritage piece and its point of discovery and compromises its archaeological value, but also damages the recovered objects.[25] The Convention aims to rectify this by introducing the principle of preservation in situ.[26] This demonstrates the basic principle in archaeology that excavation of

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25 As early as 1974 a study conducted for Turkish authorities stated that there was no classical age wreck examined off the coasts of Turkey which has not been interfered with. In other countries divers have used explosives to break up wrecks and make bullion readily accessible. In other cases, holes have been blasted in the wreck area by using "prop-wash" without regard for proper survey and mapping techniques, thus destroying information which could have been retrieved by scientific excavation and also destroying artifacts, such as ships' timbers which are of great importance to archaeological records. In many cases the desire to control severe damage of this kind has been the reason for states to extend their jurisdiction beyond their territorial sea. UNESCO Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, para. 4, at http://unesdoc.unesco.org/images/0010/001026/102628cb.pdf (in Chinese).

26 Article 2(5) of the Convention provides that "the preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage." This is reiterated in Rule 1 of the Annex: "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." The preamble recognizes the principle of preservation in situ, stating it is "committed to improving the effectiveness of measures at international, regional and national levels for the preservation in situ or, if necessary for scientific or protective purposes, the careful recovery of underwater cultural heritage." For the establishment of preservation in situ in cultural heritage law, see Luigi Migliorino, In Situ Protection of the Underwater Cultural Heritage under International Treaties and National Legislation, *International Journal of Maritime and Coastal Law*, Vol. 10, 1995, p. 483.

an artifact is only permitted in two circumstances: when the site of the artifact is threatened or when the excavation is for legitimate research purposes. The Convention anticipates excavation and salvage in specific situations. Rule 1 of the Annex provides that "activities … may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage." Rule 4 indicates that "excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage." These activities must observe basic archaeological codes stipulated in the rules of the Annex to the Convention. Some scholars doubt that the principle of preservation in situ fails to consider the interests of other users of underwater cultural heritage.[27] In fact, excavation is not necessary for appreciation by the general public and study of underwater cultural heritage, since the public can gain knowledge of such heritage through sources of media such as books, film, television and the Internet.[28]

The commercial salvage by treasure hunters without regard for the proper archaeological methods has been a major concern. Such concern is expressed in the preamble of the Convention which recognizes "the availability of advanced technology that enhances discovery of and access to underwater cultural heritage" and expresses a deep concern for "the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage". These all reflect the archaeological ethos that commercial recovery of underwater cultural heritage is incompatible with its preservation. While the preamble does not, however, make this explicit, Article 2(7) of the Convention declares that "underwater cultural heritage shall not be commercially exploited." Rule 2 of the Annex clearly provides that "the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods." In addition, Article 4 of the Convention excludes in principle the application of salvage law and the law of finds in cases of underwater cultural heritage.

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27 David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-proposal, *Journal of Maritime Law and Commerce*, Vol. 30, No. 2, 1999, pp. 341~342.

28 See Ole Varmer, The Case against the "Salvage" of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1998, p. 292.

Therefore, the Convention is not simply concerned with the preservation of the archaeological value or physical integrity of underwater cultural heritage, but also wishes to remove or limit the economic value of underwater cultural heritage. This raises complex issues regarding the manner in which various values attributable to underwater cultural heritage can be realized, and whether it is possible for economic and archaeological values to coexist, or whether, as the preamble and substantive provisions of the Convention suggest, that these values are antithetical to one another. Whether the Convention achieves this is, however, is in doubt.[29]

The Convention also elaborates upon the principle of cooperation, derived from Article 303 of UNCLOS. Any international protection regime will only be effective if there is sufficient cooperation between States. The preamble realizes "the importance of protecting and preserving the underwater cultural heritage and that responsibility therefore rests with all States." Article 2(2) of the Convention provides that "States Parties shall cooperate in the protection of underwater cultural heritage." Article 2(4) also states that, "States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities." Therefore, the Convention obligates State parties to actively cooperate.

The development of the Convention is a result of the development of both UNCLOS and regional initiatives including the 1985 Draft European Convention. To this end, it not only reiterates standing principles, but also introduces new principles, seeking to form a new international preservation regime. The preamble of the Convention realizes the need to codify existing rules and indicates its intention to further develop these rules. Such development, however, must be conducted in conformity with international law and practice, including the regime applicable to underwater cultural heritage in international waters and UNCLOS. The preservation mechanism will be based upon the jurisdiction of individual states, requiring each state to preserve underwater cultural heritage within its jurisdiction for the benefit of humanity. In addition, each state is obligated to provide educational and national services, create a punishment system for breaches of the obligation, ensure adherence to the benchmarking standards and prohibit the application of laws which promote an economic incentive to recover underwater

29 See Section IV of this paper for detailed discussion.

cultural heritage.

III. Scope of the Convention

The Convention applies to its applicable object (for the purpose of the Convention, "underwater cultural heritage"), its regulated activities and its geological scope. The scope of the Convention greatly differs from that of the ILA draft. On one hand the scope is widened by eliminating abandonment criteria and including state-owned vessels, however, on the other hand, the scope is narrowed by limiting the activities directed at underwater cultural heritage.

A. Defining "Underwater Cultural Heritage"[30]

"Underwater cultural heritage" is defined in Article 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 such as: (i) sites, structures, buildings, artifacts 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. (b) Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage. (c) Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage."

Compared with other UNESCO conventions, this definition adopts physical objects for description, not limited to abstract explanation; the definition is broader than many other conventions concerning terrestrial cultural heritage and is primarily concerned with the native environment of cultural heritage rather than the composition thereof.[31] "All traces of human existence" would include all objects that provide evidence of human history and those objects listed in the Convention

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30 For issues concerning the definitions of "cultural property" and "underwater cultural heritage", see Lauren W. Blatt, SOS (Save Our Ship)! Can the UNESCO 1999 Draft Convention on the Treatment of Underwater Cultural Heritage Do Any Better?, *Emory International Law Review*, Vol. 14, 2000, pp. 1587~1591.

31 See CLT-99/WS/8, Paris, Apr. 1999, 15. The definition is derived from the ILA draft definition, which itself was based on the 1985 Draft European Convention.

serve only as the types of underwater cultural heritage that are most likely to be found underwater.[32]

The 100 years' time limit, based upon administrative pragmatism rather than archaeological, cultural or historical significance, is common within domestic legislation and international conventions, but a little arbitrary.[33] In this way, the Convention currently cannot be applied to the wreck of the Titanic and sites related to the two World Wars, however it will be applicable in the near future. It is notable that the 1998 Draft also adopted a 100 year limit, but allowed state parties to include sites which have been underwater for less than 100 years into the regulatory scope of the Convention at their discretion.[34] The flexibility of this clause would benefit the protection of more recent underwater cultural heritage, but granted too much autonomy to state parties, allowing States to compromise the 100 years general rule. As such, the same provision was not adopted in the Convention.[35] In addition, the time limit is not clearly defined. As one of the aims of the Convention is to promote in situ preservation, it may be presumed that this should be calculated based on the time that any activity directed at the underwater cultural heritage is contemplated, and not merely from the time of discovery.[36]

A "value" criteria was embodied in the definition by which it only regulates traces of human existence having "a cultural, historical or archaeological

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32 An earlier unsuccessful proposal included non-human resources, such as paleontological objects and natural features of cultural significance to indigenous peoples who have a spiritual association with oceans (CLT-2000/CONF.201/3, Paris, Apr. 2000, 3). The Archaeological Institute of America also called for an expanded definition to include non-human archaeological objects, such as Paleo-Indian sites, see Anon., Comments of the Archaeological Institute of America on the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Cultural Property*, Vol. 7, No. 2, 1998, pp. 538~544.

33 A number of States have used time periods as a criteria for protection, including the Netherlands (50 years, Monuments and Historic Buildings Act 1988), Denmark (100 years, Protection of Nature Act 1992), Norway (100 years, Cultural Heritage Act 1979), Sweden (100 years, Act Concerning Ancient Monuments and Finds 1988) and Greece (all underwater cultural heritage dated as prior to 1453, and those from 1453 to 1830 on the advice of the Archaeological Council). The time limit of 100 years is adopted in many international conventions and recommendations, including 1970 UNESCO Convention and 1985 European Convention on Offences relating to Cultural Property.

34 1998 Draft, Art. 1(b). For the discussion on this clause, see S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1999, p. 174.

35 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *IJMCL*, Vol. 18, 2003, p. 63.

36 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 524.

character".[37] Fierce debates have taken place regarding whether or not the value criteria should be included in the Convention. States took their standpoints depending on their national laws. Generally, States with common law systems held that only specific underwater cultural heritage sites having special value shall be protected, while States with a civil law system tended to provide blanket protection to all sites identified as "historical sites" or "cultural heritage" sites within a certain historical period. The inclusion of value criteria indicated that states with a common law system had the upper hand during negotiations. In fact, the wording of the criteria failed to limit the scope of the Convention and a number of States held that all objects over 100 years will have "a cultural, historical or archaeological character". As a matter of fact, having such character does not necessarily imply the existence of any cultural or archaeological value. Therefore, this was superficial and failed to meet the requirement imposed by those in favor of limiting the scope of the Convention.[38] For example, the UK expressed strong reservations on this issue.

B. Private Law Issues of Ownership and Abandonment

A great deal of litigation with regard to underwater cultural heritage concerns private law issues of ownership and abandonment.[39] Each State has jurisdiction to determine title to and disposition of underwater cultural heritage found in its territory and their courts will, in accordance with its rules, determine ownership

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37 This criteria was not included in the draft. Many scholars criticized the definition for being too broad and for its use of the period standard in replacement of the historical value standard. See e.g. David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-proposal, *Journal of Maritime Law and Commerce*, Vol. 30, No. 2, 1999, pp. 332~334.

38 Bederman suggested that the US national registration system be mirrored, each state party formulating a catalogue of "significant" vessels to limit the scope of the Convention. Other scholars thought there was no compromise on this matter since in-depth archaeological work is commonly needed in order to determine the cultural significance of a site. Thus, the significance criteria built on these characters violates the fundamental principle of the Convention - the underwater cultural heritage shall be disturbed to the minimum extent and preserved in situ. See S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 64.

39 See, eg, Columbus-America Discovery Group v. Atlantic Mutual Insurance,742 Fsupp.1327 (EDVa. 1990)；974 F. 2d 450 (4th Cir., 1992); Treasure Salvors, Inc v. Unidentified, Wrecked and Abandoned Sailing Vessel, 569 F. 2d 330, 340 (5th Cir., 1978); Pierce v. Beamis (The Lusitania) [1986] 1 QB 384, [1986] Lloyd's Rep. 132.

to underwater cultural heritage. According to comparative law, these national laws differ dramatically from State to State and there appears to be little consistency.[40] In addition, "ownership disputes are rarely limited to laws of two antagonistic States, and generally, the cultural heritage has been transferred to a number of States before it becomes dusty."[41] For underwater cultural heritage found in international waters, ownership is typically regulated by salvage law and the law of finds. Generally speaking, any individual can recover sunken properties on the high seas at will and ask the owner for reward.[42] The salvor can exercise maritime lien to the finds before the receipt of rewards. If the owner is unknown or has abandoned their right, then the finder can take ownership according to the law of finds. If the owner can be determined and has not abandoned their right, then ownership will not be lost as time goes on. In this regard, the method for the determination of "abandonment" becomes crucial.[43]

Drafters of the Convention faced difficulties when trying to determine how to deal with the relations amongst these private rights. They realized that it might be unconstitutional for State Parties if the Convention were to deprive the rights of the original owners. For this reason, the ILA and early UNESCO drafts had proposed that the Convention be applicable only to abandoned underwater cultural heritage. However, the abandonment criteria set therein was highly controversial and not

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40 CLT-99/WS/8, Paris, Apr. 1999, 17. For an overview of the national laws of a number of States, see S. Dromgoole ed., *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague: Kluwer Law International, 1999; ILA Sixty-Fourth Conference, Report of the International Committee on Cultural Heritage Law, Queensland, Australia, 1990, pp. 3~6.

41 Evangelos I. Gegas, Note & Comment, International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property, 13 Ohio St. J. on Disp. Resol. 155 (1997), quoted from George Koumantos, Introductory Report, The International Protection of Cultural Property from the Standpoint of Private International Law, *International Colloquy on European Law*, 1983.

42 S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1999, p. 184.

43 Regarding the application conditions of the salvage law and law of finds, American scholars have completed research based on their rich case resources. See e. g., Charles A. Cerise, Treasure Salvage: The Admiralty Court "Finds" Old Law, *Loyola Law Review*, Vol. 28, 1992, p. 1126.

accepted by many States.[44] As a result, the abandonment criteria was deleted from the Convention,[45] meaning that issues of ownership were not discussed. This appeared to be the simplest solution and it seemed that the unresolved issue of ownership and abandonment would not affect the preservation of wrecks. But this solution would not last forever, and the issue of ownership and the basic principles of the Convention would eventually conflict. For example, when preservation in situ is considered to be a priority, is the owner prohibited from recovering their own property? Should the owner observe the rules of the Annex to the Convention for recovery? If yes, the owner's rights would be violated. In fact, a number of clauses in the Convention have potential effects on the ownership issue.[46]

C. Warships and Other State-Owned Vessels

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44 The draft held that "underwater cultural heritage shall be deemed to have been abandoned: (a) whenever technology would make exploration for research or recovery feasible but exploration for research or recovery has not been pursued by the owner of such underwater cultural heritage within 25 years after discovery of the technology; or (b) whenever no technology would reasonably permit exploration for research or recovery and at least 50 years have elapsed since the last assertion of interest by the owner in such underwater cultural heritage." For the discussion on this provision, see S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1998, pp. 179~183; David J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-proposal, *Journal of Maritime Law and Commerce*, Vol. 30, No. 2, 1999, pp. 332~334 (Bederman held the view that the draft's stipulation went against general maritime law as followed by many maritime States and was in fact the "indirect expropriation" of private property). If the abandonment criteria were to be provided, the most difficult thing would be the application to State owned vessels, which had been controversial at the national law level. The typical cases included the US *Sea Hunt, Inc v. Unidentified, Shipwrecked and Abandoned Vessels or Vessels* case, 47 F. Supp.2d 678; for the discussion, see 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, 1999-2000, p. 311.

45 UNESCO noted that no other international or regional convention aimed at the preservation of cultural heritage addresses the issue of ownership of cultural heritage. For example, the 1907 International Peace Conference included provisions for the protection of cultural property in the event that armed conflict was not confined to public property, but included private property. Similarly, the 1954 Convention concerns the protection of cultural heritage "irrespective of origin or ownership." See G. Reichelt, International Protection of Cultural Property, *Uniform Law Review*, Vol. 1, 1985, pp. 79~147; S. A. Williams, Recent Developments in Restitution and Return of Cultural Property, *International Journal of Museum Management and Curators*, Vol. 3, 1984, pp. 117~129.

46 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 70.

Since warship-related international laws are complex, obscure and politically sensitive, the drafters of the Convention did not, at first, plan to apply the Convention to warships and other State-owned vessels.[47] If this is the case, then a considerable part of underwater cultural heritage would be unregulated by the Convention. This approach had been criticized.[48] It is notable that, to a large extent, it was the abandonment issue that caused drafters to exclude State-owned vessels. A number of States found it difficult to accept the application of abandonment criteria within the draft Convention. They held that States do not abandon their property without express declaration.[49] The exclusion of abandonment criteria in the Convention cleared obstacles allowing for the inclusion of State-owned vessels. Therefore, State-owned vessels were finally included in the Convention, which is recognized as one of the major achievements of the Convention.[50]

With the regulation of the Convention on State-owned vessels, a question arose as to whether the national sovereign immunity applied to sunken warships. Articles 95 and 96 of UNCLOS govern the immunity from jurisdiction granted to State-owned vessels.[51] This immunity is extended to the salvage of such vessels.[52] A number of scholars have suggested that sunken vessels cease to be ships and

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47 As Article 2(2) of the negotiating draft stated, the Convention "shall not apply to the remains and contents of any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, at the time of its sinking, only for government non-commercial purposes". (CLT-96/CONF.202/5 Rev. 2, Paris, July 1999)

48 See, e.g., S. Dromgoole and N. Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Marine and Coastal Law*, Vol. 14, 1999, pp. 186~187. This article points out that the majority of wrecks designated as being of historical or archaeological importance in UK territorial waters between 1973 and 1995 are warships.

49 D. J. Bederman, Rethinking the Legal Status of Sunken Warships, *Ocean Development and International Law*, Vol. 31, 2000, pp. 97~125.

50 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 73.

51 Article 95 states that "warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State". Article 96 states that, "ships owned or operated by a State and used only on governmental non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the Flag State".

52 State-owned vessels are exempt from the 1910 and 1989 Conventions on Salvage.

are therefore no longer under the exclusive jurisdiction of the flag State.[53] If this is the case, then Articles 95 and 96 will no longer apply, and State-owned vessels will be subject to the same jurisdictional regime as other wrecks.[54] The majority of maritime nations opposed this notion and held that sunken vessels remained under the exclusive jurisdiction of the flag State and interference by other States would only be allowed with the expressed permission from the flag State. In an attempt to reach a compromise between flag States and coastal States, Article 2(8) of the Convention states that "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." Afterwards, the Convention made particular provisions according to the maritime zone in which the State vessel lies. Within the territorial waters of another State, jurisdictional conflict would arise. In fact, such conflict had occurred and had been eventually resolved by agreement between States.[55] According to Article 7(3) of the Convention, in this case, the coastal State is required to inform the flag State in order to cooperate for the protection of the wreck. However, according to Article 8(2), the flag State's existing rights in international law would not be altered accordingly. Article 10(7) provides that no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State if the ship lies within the continental shelf or the exclusive economic zone. There are two exceptions to this rule: First, Article 10(4) states that the coastal State is granted the power to undertake emergency measures without the flag State's consent in order to "prevent immediate danger to underwater cultural heritage, whether arising from human activities or any other cause, including looting". Second, Article 10(2) provides that, according to

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53 Dromgoole and Gaskell, Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998, *International Journal of Maritime and Coastal Law*, Vol. 14, No. 2, 1999, p. 233; Caflisch, Submarine Antiquities and the International Law of the Sea, *Netherlands Law Book of International Law*, Vol. 13, 1982, p. 25; W. Riphagen, Some Reflections on "Functional Sovereignty", *Netherlands Yearbook of International Law*, Vol. 6, 1975, p. 128.

54 At the 2000 meeting Malta declared that "the immunity afforded by the UNCLOS to warships and other government ships operated for non-commercial purposes applies only as long as they remain in operation. If wrecked, they do not continue to enjoy this immunity."

55 For example, France and the USA entered into a formal agreement to settle disputes concerning the *CSS Alabama*; and for the *HMS Birkenhead*, UK and South Africa reached an agreement in the Exchange of Notes.

international law, a coastal State "in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction". If the underwater cultural heritage lies in the international sea bed area (the Area),[56] Article 12(7) declares that: "no State shall undertake or authorise activities directed as State vessels and aircraft in the Area without the consent of the flag State."[57]

The failure to provide a satisfactory and effective compromise in terms of sovereign immunity constituted one of the major hindrances for the adoption of the Convention by some States.[58] Given the aim of the Convention, State vessels that fall within the definition of underwater cultural heritage shall not be excluded from the Convention; in fact, the application of State immunity to vessels of antiquity has encountered many difficulties in practice.[59]

D. Activities to Be Regulated by the Convention

The initial draft used the term "activities affecting" underwater cultural heritage to delineate the scope of activities which would be subject to the Convention. This included a number of activities, such as the exploration of natural resources, construction, including the construction of artificial islands, installations and structures, the laying of cables and pipelines as well as the increasing commercialization of efforts to recover underwater cultural heritage. This wide definition of underwater cultural heritage would inevitably result in

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56 The Area is defined in Art. 1(4) of the Convention as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

57 Some scholars point out that this means that state parties are not required to prohibit their citizens or vessels from conducting these activities. See P. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, London: Institute of Art and Law, 2002, p. 100.

58 S. Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 74. One of the reasons for the UK's abstention included that the provisions in the Convention upset the balance between coastal States and flag States created in UNCLOS.

59 See C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, pp. 527~528. According to the author, this is not only because the definition of "warships" in Article 29 of UNCLOS is inappropriate for warships of earlier centuries, but also because it may be difficult to determine whether a particular historic wreck was in fact a "State owned vessel" (such as privateers or pirate ships).

an excessively broad scope of the Convention. The Canadian delegation stated that "the main thrust of the proposed convention should be to deal with treasure hunters or dive expeditions which focus on underwater cultural heritage, and not such activities as commercial fishing or cable-laying which only incidentally affect it". They therefore proposed that the term "directed at" should replace with the term "affecting". Only activities that had interaction with the underwater cultural heritage as their aim would be subject to the mandatory provisions of the Convention. As such, an important alteration in the scope of the Convention was made at the 1999 meeting. The term "activities directed at" underwater cultural heritage is defined in Article 1(6) of the final Convention text as any "activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage".[60]

Activities such as commercial fishing and cable laying may have an adverse effect on underwater cultural heritage. However, in most cases these effects are caused inadvertently. These industries are reluctant to acknowledge the danger which their activities pose to underwater cultural heritage, and States conscious of the economic importance of these industries are similarly eager to downplay their potentially destructive role. The Convention defines "activities which, despite not having under water cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage" as "activities incidentally affecting underwater cultural heritage". States are then required to "use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage".[61] However, this Article is substantially weaker than that originally proposed by the Canadian delegation as it leaves the

60 An alternative was proposed to widen the scope by including not only activities which had underwater cultural heritage as its primary object, but also those which had underwater cultural heritage as "its object or as one of its objects" (WG.1/WP.12, Paris, 4 July 2000). According to the proposal, this was a preferable definition as it would incorporate marine scientific research operations that have investigations of marine life on underwater cultural heritage as its object.

61 Art. 5.

determination of "best practicable means at its disposal" to each individual state.[62]

E. Geographical Scope of the Convention

The Convention is applicable within six areas: internal waters, territorial sea, exclusive economic zone, the continental shelf and the Area. It is notable that "internal waters" mentioned in the Convention refers to that within the context of law of the sea, namely "waters on the landward side of the baseline of the territorial sea",[63] and therefore has an exclusive maritime character. Geographical "internal waters", which include rivers, lakes and dams, are therefore not considered "internal waters" in this context. During the negotiations of the Convention, a number of delegates argued that the applicable standards for underwater cultural heritage covered by the Convention should also apply to underwater cultural heritage in geographical internal waters.[64] Given the fact that a state has absolute sovereignty within its territory, any State may, if it so wished, apply the provision of the Convention to underwater cultural heritage in its internal waters. It has, however, been proposed that the Convention might acknowledge such a power within international law.[65] As such, Article 28 was introduced which declares that: "when ratifying, accepting, approving or acceding to this Convention or at any time thereafter, any State or territory may declare that the Rules shall apply to inland waters not of a maritime character."

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62 The Canadian delegation proposed the inclusion of the following Article: "Activities incidentally affecting underwater cultural heritage. 1. Each State Party shall take reasonable measures to ensure that activities are avoided that adversely affect known underwater cultural heritage in its internal waters, archipelagic waters, territorial sea, exclusive economic zone or on its continental shelf. 2. Where a State party designates as requiring special protection underwater cultural heritage in internal waters, archipelagic waters, territorial sea, exclusive economic zone or on its continental shelf, it shall take all necessary measures to ensure that activities do not adversely affect such underwater cultural heritage. 3. Where UNESCO designates as requiring special protection underwater cultural heritage in the Area, each State Party shall take all necessary measures to ensure that vessel flying its flag do not undertake activities that adversely affect such underwater cultural heritage." CLT-96/CONF.202/5 Rev. 2, Paris, July 1999.

63 UNCLOS, Art. 8.

64 The following states proposed the application of the Convention to both maritime zones and internal waters: Hungary, Tunisia, Belgium, France, Australia, Argentina, Canada, Mexico, India and Venezuela. Similarly, Syria, Austria, Netherlands, Poland and Spain indicated their preference for the application of the convention to the internal waters of the state.

65 WG.1/WP 29, Paris, 6 July 2000.

IV. The Convention and Salvage Law

In addition to archaeological importance, underwater cultural heritage may have many other uses, such as recreational use for divers or as breeding grounds for fish stocks. The users of underwater cultural heritage include researchers, educators, sport divers, fishermen, boaters, museums, commercial salvors and their investors, owners and insurers of the wreck, journalists, tourist companies, and the family and descendants of those who lost their lives.[66] All stakeholders desire a share of the benefits of underwater cultural heritage and realize the attributed values of underwater cultural heritage. Archaeologists value shipwrecks as a means to study past cultures, sports divers value shipwrecks for their potential as recreational sites and treasure salvors value shipwrecks for economic profit. It is these different attributable values which can be conflicting and, at times, mutually exclusive.[67] Among these, the most difficult to manage conflict is between archaeological and economic value. In order to combat this, the Convention has established principles of preservation in situ, does not permit commercial exploitation of underwater cultural heritage, and attempts to protect the archaeological value of underwater cultural heritage by removing its economic value. As a consequence, the place of salvage law as a mechanism for the realization of an economic value was a crucial issue during negotiations.

A. Conflict 1: Can Salvage Law Be Applied to Underwater Cultural Heritage?

The aim of salvage law is to encourage individuals to voluntarily save lives and property at sea and to return the saved property to its owner for reintroduction into the stream of commerce. Before salvage law may be applied, four criteria must be satisfied:[68] (a) property must be in peril on navigable waters; (b) the rescue effort must be voluntary; (c) the rescue operation must be partially or entirely successful; and (d) the rescue operation must be conducted in the interest of the owners. However, whether these criteria apply to underwater cultural heritage, primarily

66 Ole Varmer, The Case against the "Salvage" of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1998, p. 291.

67 E. Herscher, Hearings Held on Historic Shipwreck Legislation, *Journal of Field Archaeology*, Vol. 11, 1984, p. 79.

68 The Blackwall, 77 U. S. 1（10 Wall.1 19L. Ed. 870 (1869)); The Sabine 101 US 384 (1880).

whether or not underwater cultural heritage is in marine peril, has been questioned.

There are many differences in the judicial practices of States.[69] Most courts held that the chemical reactions of the natural environment can erode underwater cultural heritage placing it in peril, therefore permitting underwater cultural heritage to be salvaged.[70] However, some courts have expressed clear disagreement.[71] Commentators have also had various opinions: some have suggested that "even though chemical elements or natural decay didn't threaten the property, looting, theft or destructive recovery would also inevitably cause danger."[72] Meanwhile, other scholars, taking archaeological perspectives into consideration, suggest that underwater cultural heritage that has rested on the sea floor for a long period of time has formed a stage of equilibrium with its environment, with lesser substance

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69 For the discussion, see Anastasia Strati, *The Protection of Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, London: Kluwer Law International, 1995, pp. 48~49.

70 US: Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 695 F. 2d 893, 901 n. 9 (5th Cir., 1983); Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 614 F. 2d 1051, 1055 (5th Cir., 1980); Treasure Salvors, 569 F. 2d at 337 ("Marine peril includes more than the threat of storm, fire, or piracy"); Bemis v. RMS Lusitania, 884 F.Supp. 1042, 1050 (E.D. Va. 1995) ("Courts will usually find that underwater shipwrecks are in marine peril, because sunken vessels and their cargoes are in danger of being lost forever."), aff'd, 99 F. 3d 1129 (4th Cir., 1996), cert. denied, 523 U.S. 1093 (1998); Lathrop v. Unidentified, Wrecked & Abandoned Vessel, 817 F.Supp. 953, 962 (M.D. Fla. 1993); Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 556 F.Supp. 1319, 1340 (S.D. Fla. 1983); Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 549 F.Supp. 540, 557 (S.D. Fla. 1982); see also Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F. 2d 1511, 1516 (11th Cir., 1985) (Kravitch, C. J., specially concurring and dissenting in part) (arguing that the Eleventh Circuit should adopt the reasoning of the Fifth Circuit). Australia: Robinson v. Western Australia Museum, 16 A.L.R. 623 (1977) (Mason stated that "Salvage is not limited to recovery of property in or from a ship which is actually in distress; it extends to recovery of property in or from a ship which has lain at the bottom of the sea for a long time." Stephen further pointed out that even though there is no marine peril, effective salvage reward can be established and that salvage is not limited to destructive threat or physical damage of vessels and effective salvage can be established in cases of pure vessel stillness and loss of the use of the owner.)

71 US: Klein, 758 F. 2d at 1515; Lathrop, 817 F.Supp. at 962; Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F.Supp. 597, 611 (D. Md. 1983), aff'd, 765 F. 2d 139 (4th Cir., 1985); Singapore: Simon v. Taylor, [1975] 2 Lloyd's Rep. 338 (Sing.); Canada: Ontario v. Mar-Dive Corp., [1996] 141 D. L. R. 4ti577 (Steven R. Yormak, Canadian Treasure Law and Lore, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 229) ("salvage operations would destroy the environmental balance of underwater historical sites formed through a long time and placement of these objects to a new environment would accelerate their decay.").

72 Bruce E. Alexander, Treasure Salvage beyond the Territorial Sea: An Assessment and Recommendations, *Journal of Maritime Law and Commerce*, Vol. 20, 1989, p. 16. See also David R. Owen, Some Legal Troubles with Treasure: Jurisdiction and Salvage, *Journal of Maritime Law and Commence*, Vol. 16, 1985, pp. 172~176.

decomposition and rare occurrences of deterioration, thus no longer in marine peril.[73] The UNESCO feasibility report agreed with the latter opinion, stating that "far from recovering heritage items, therefore, their removal from the sea-bed will almost certainly ensure their loss, unless they are immediately treated by relatively sophisticated techniques at the hands of specialist conservations."[74]

The occurrence of these disputes may be a result not only of regional variations in the development of salvage law, but also of the failure to provide a definition of marine peril in the 1989 International Convention On Salvage and to clearly stipulate its application to the recovery of historic wrecks.[75] More importantly is that through these arguments a value judgment is implied: should salvage law apply to underwater cultural heritage?

B. Conflict 2: Should Salvage Law Be Applied to Underwater Cultural Heritage?

As mentioned above, the archaeologists viewed the historical wreck salvage

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73 See Terence P. McQuown, An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks, *William Mitchell Law Review-James*, Vol. 26, 2000, p. 316, who quoted the statement of M. Parrent: "Objects that come to rest on the sea floor initially start to deteriorate while at the same time becoming covered with concretions consisting of corrosion products and marine organisms. Eventually the concretion forms a protective barrier greatly reducing further deterioration. After the artifacts have acclimated to their underwater environment they are impervious to currents, tides and storms. Any wooden sailing vessel that has lain on the sea bed for a few hundred years has long since reached a stage of equilibrium with its environment and it has the potential to remain preserved for hundreds if not thousands of years."

74 UNESCO Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage, para. 31, at http://unesdoc.unesco.org/images/0010/001026/102628cb.pdf. (in Chinese)

75 Art. 30.1(d) of the Convention on Salvage allows a state to reserve the right not to apply the provisions of the Convention on Salvage when "the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed", meaning that if reservations are not made by the state party, the Convention on Salvage will be applied to the recovery of historic wrecks. It is noteworthy that during UNESCO's discussion on the Convention, some experts from the IMO pointed out that "due to the legal nature of private law and non-compulsion, even if some State Parties make no reservations, the right to exclude the application of the Convention on Salvage might exist." For related discussion, see David J. Bederman, Historic Salvage and the Law of the Sea, *University of Miami Inter-American Law Review*, Vol. 30, 1998, pp. 110~111.

industry as "looters" and "history destroyers".[76] They believed that salvage conducted for economic gain was inconsistent with the aim of cultural heritage protection. The economic motives of the salvor inevitably made them pursue expansive artifacts and ignore the protection and preservation of heritage, which went against the main principles of underwater cultural heritage protection, including preservation in situ. Moreover, reward for salvage was normally paid from the profit made through the sale of the recovered property, thus provoking heritage trading. When extended to the law, these views were represented as criticisms of salvage law. The aim of salvage law is to encourage commercial recovery, which promotes illicit exploitation rather than prevent it. Therefore, the problem of underwater cultural heritage protection has not been resolved.[77] Article 4 of the ILA draft declared that "underwater cultural heritage ..., shall not be subject to the law of salvage". This represented an extreme approach which advocated for the replacement of traditional maritime law with complete governmental regulation.[78] A moderate view developed stating that the exploitation of underwater cultural heritage by the private sector should be permitted so long as it is consistent with the underlying scientific purposes of historic preservation, however, since salvage law and the admiralty courts are ill-prepared to manage underwater cultural sites, this compromise should be reached within the limitations of environmental and historic preservation laws.[79]

Treasure salvors, however, maintain that they have less impact than any other

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76 From the perspective of the "purist" sector of the archaeological community, the economic value and archaeological value of underwater cultural heritage are incompatible, and commercial recovery is a major threat to underwater cultural heritage and should be eliminated as a proper user group. E Clement, Current Developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, No. 4, 1996, p. 309; R. J. Elia, US Protection of Underwater Cultural Heritage beyond the Territorial Sea: Problems and Prospects, *International Journal of Nautical Archaeology*, Vol. 29, No. 1, 2000, pp. 43~56) (Elia asserted that these interest groups "fundamentally disobey the core values, objectives, methods and interests" and "commercial recovery operations are radically against preservation").

77 Ole Varmer, The Case Against the "Salvage" of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, p. 279.

78 This extreme view held that to ensure the preservation of cultural heritage, only non-commercial entities such as historians and governments with objects of historical and cultural value can properly regulate historic salvage. See D. K. Abbass, A Marine Archaeologist Looks at Treasure Salvage, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, pp. 266~267.

79 Ole Varmer, The Case Against the "Salvage" of the Cultural Heritage, *Journal of Maritime Law and Commerce*, Vol. 30, 1999, pp. 301~302.

user, which is primarily due to the fact that a number of factors exist that significantly affect the number of underwater cultural sites;[80] and with technical development, their recovery activities follow archaeological standards. For example, an entire collection could be sold as a single entity.[81] Increasingly, profits are generated through media rights, such as films, documentaries,[82] books[83] and exhibitions of recovered artifacts as well as through the sale of replicas.[84] More recently, treasure salvors have been raising funds by allowing tourists to accompany their expeditions.[85] Some of these archaeological views may be debated. For example, it is unnecessary that all items recovered from an underwater cultural heritage site form part of the artifact collection;[86] the collection of redundant artifacts[87] and data

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80 One commercial treasure salvage company estimates that there are at most ten to twenty shipwrecks that are economically viable to excavate. See G. Stemm, Protection of Our Underwater Cultural Heritage: Thoughts on the Future of Historic Shipwrecks，paper presented at the Thirty-First Annual Conference of the Law of the Sea Institute, University of Miami, 30-31 March 1998, p. 7. Another figure is 100~200, which would yield a salvage value of more than US$10 million. CLT-96/CONF.605/6, Paris, 22-24 May 1996, 12.

81 RMST Inc., the salvors of the Titanic, have stipulated that no artifacts from the collection would be sold individually, and that the company would only sell the collection as a single unit.

82 See, e.g., the BBC documentary series which aired in March and April 2000 covering the wrecks of the *Queens Anne's Revenge* in US territorial waters, the *HMS Pandora* in Australian territorial waters, and the submarine *M2* and vessel *Swan* in UK territorial waters.

83 A number of books on the discoveries and recoveries of shipwrecks have recently been published, including a number of publications on the Titanic, such as RD. Ballard, *The Discovery of the Titanic*, London: Guild Publishing, 1987; T. McCluskie, M. Sharpe and L. Marriott, *Titanic and Her Sisters Olympic and Britannic*, London: Parkgate Books, 1999; and S. Wels, *Titanic: Legacy of the Worlds Greatest Ocean Liner*, Delmar, California: Tehabi Books and Time Life Books, 1997. Others include C. Cussler, *The Sea Hunters*, London; Simon & Schuster, 1996; CM. Robinson, *Shark of the Confederacy: The Story of the CSS Alabama*, London: Leo Cooper, 1995; N. Pickford, *The Atlas of Shipwrecks and Treasure*, London: Dorling Kindersley, 1994; K. Jessop, *Goldfinder London: Simon & Schuster*, 1998; J. Beasant, *Stalin's Silver*, London: Bloomsbury, 1995; and G. Kinder, *Ship of Gold in the Deep Blue Sea*, New York: The Atlantic Monthly Press, 1998.

84 The success of the Titanic exhibition in Greenwich, UK bears testimony to the possible success of a salvage operation that does not rely on the sale of recovered artifacts.

85 St. Petersberg Times, "Hunt for treasure, but it'll cost a pretty doubloon", 1 Sept. 2000.

86 For example, coal recovered from the Titanic is not regarded as forming a part of the cultural collection.

87 The excavation of the Tudor warship the Mary Rose, resulted in the recovery of authentic items of archery which had been extremely scarce before the excavation. Included were thousands of arrows, "so many that they represent a real storage problem". See A. McKee, *How We Found the Mary Rose*, London: Souvenir Press, 1982, p. 121.

is "neither good science nor a cost effective use of funds and resources".[88]

Notably, salvage law itself has been reformed in an active manner, at least in the US. US courts have injected the value of historic preservation into traditional salvage law, requiring that salvors be equipped with archaeological techniques and respect archaeological standards and if they do not, then they will not receive their reward.[89] Thus, many scholars have considered it to be more feasible to promote the establishment of an effective protection regime by incorporating the concept of underwater cultural heritage protection into salvage law. Commercial recovery can help wrecks that have been forgotten or could not be recovered earlier. The commercial motives of the salvors to maintain the artifact and their occupational skills can contribute to heritage protection, and therefore their request for a reward will eventually be realized with the objectives of museums and archaeologists.[90]

A total rejection of salvage law is an extreme approach designed to eliminate the potential for underwater cultural heritage to enter into the market. Although intentions may be well placed, the result may be the opposite through the creation

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88 J. A. Roach, Shipwrecks: Reconciling Salvage and Underwater Archaeology, paper presented at the Proceedings of the Thirty-First Annual Law of the Sea Institute, University of Miami, 30-31 March 1998, p. 8.

89 In the *MDM* case, the court rejected the recovery requests from two groups of commercial salvors, stating that "Archaeological preservation, on-site photography, and the marking of sites are particularly important ... as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought." 631 F.Supp. 308, 310~311 (S.D. Fla. 1986); see also *Cobb Coin Co v. Unidentified Wrecked and Abandoned Sailing Vessel*, 525 F.Supp. 186, 218 (S.D. Fla. 1981) ("If salvage on an ancient shipwreck is conducted without proper regard for this essential information, both the historic and market value of the artifacts are substantially diminished.") For the development of US salvage law, see Justin S. Stern, Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks, *Ford ham Law Review*, Vol. 68, 1999-2000, p. 2489.

90 See David J. Bederman, Historic Salvage and the Law of the Sea, *University of Miami Inter-American Law Review*, Vol. 30, 1998, pp. 128~129; Lauren W. Blatt, SOS (Save Our Ship)! Can the UNESCO 1999 Draft Convention on the Treatment of Underwater Cultural Heritage Do Any Better?, *Emory International Law Review*, Vol. 14, 2000, pp. 1635~1638. This is not scholarly imagination, but has been proved by example. On 27 Sept 2002, the UK government entered into a cooperative agreement for the recovery of the HMS Sussex with a US company, which created a new model for deep-sea archaeology through cooperation. The wreck recovery would follow recognized archaeological methods and involve the participation of professional observers. It is said that the vessel had 10 tons of gold bullion on board and the profit would be shared among recovery partners.

of a black market.[91] Indeed, when underwater cultural heritage is in danger of being destroyed and the State is unable to undertake an emergency excavation, why should the State be unable to contract a recovery company to recover underwater cultural heritage?[92] The choice is between balancing the historical and economic valve of underwater cultural heritage and between balancing modern cultural heritage protection law and traditional salvage law. A task which is easier said than done.

C. The Convention Provisions

The application of salvage law was excluded in Article 4 of 1994 ILA draft, which was then deleted in the 1998 UNESCO draft and replaced with Article 12(2): "non-application of any internal law or regulation having the effect of providing commercial incentives for the excavation and removal of underwater cultural heritage." This article includes salvage law. The final text of the Convention provides special stipulation on salvage law and the law of finds in Article 4: "Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorised by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection."

This "principles + exceptions" legislative model illustrates the good intentions of the drafters to reach a balance between the archaeological community and the commercial recovery industry. From the point view of the archaeological community, however, the result was a retrogression from the ILA draft: if exceptions are accepted, the private sector will have the right to gain the ownership of or to possess the artifact no matter if either salvage law or the law of finds applies. Since this is the case then how can trades of heritage be prevented? How can heritage that is part of a private collection serve the "benefit of mankind"?[93]

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91 JAR Nafziger, International Penal Aspects of Protecting Cultural Property, *International Lawyer*, Vol. 16, 1985, p. 835; id, Comments on the Relevance of Law and Culture to Cultural Property Law, *Syracuse Journal of International Law*, Vol. 10, 1983, p. 325.

92 Sherri J. Braunstein, Shipwrecks Lost and Found at Sea: The Abandoned Shipwreck Act of Is Still Causing Confusion and Conflict Rather than Preserving Historic Shipwrecks, *Widener Law Symposium Journal*, 2000, pp. 321~322.

93 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Maritime Law and Commerce*, Vol. 18, 2003, p. 71.

Moreover, exceptions negate not only the clarity of these principles but also their essence, allowing States to interpret the Rules in the Annex to the Convention so as to allow for the continuation of the application of a modified salvage law to underwater cultural heritage.[94] But the Convention is a definite comfort for the recovery industry. The importance of salvage law and the law of finds will remain, and the discreet recovery operations and normal practice of salvage law have not been seriously impacted by the absorption of the principles and rules of international law to which underwater cultural heritage is subject.[95]

Rule 2 of the Annex, which relates to Article 4, states that "The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods." This rule attempts to ensure that artifacts from underwater cultural heritage are not regarded as commercial goods, which, in fact limits the benefits that the recovery industry can receive from Article 4; in addition, the "value" criteria in the definition of "underwater cultural heritage" failed to take effect, making the recovery industry unable to benefit from selling artifacts with little cultural value but high economic value. Again, the balance of benefits are in favour of the archaeological community. Drafters lost the opportunity to develop a new regime which may allow for commercial operations to promote the maximization of both archaeological value and the economic value of underwater cultural heritage.[96]

It is notable that the second half of Rule 2 states that, "This Rule cannot be interpreted as preventing: (a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorisation of the competent authorities; (b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance

94 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 541.

95 James A. R. Nafziger, The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck, *Harvard International Law Review*, Vol. 44, 2003, p. 269.

96 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Maritime Law and Commerce*, Vol. 18, 2003, p. 67.

with the provisions of Rules 33 and 34; and is subject to the authorisation of the competent authorities." Rule 2(a) was introduced to "make specific provisions to ensure that it was clear that professional archaeological services consistent with the Convention were not being referred to in this Rule"[97] Professional archaeologists are paid to undertake scientific investigations, thus making their activity economic in nature. Rule 2(b) is strange since it fails to define what is meant by "deposition" and does not identify the place of "deposition". Some scholars have suggested that within the context of prohibiting the commercialization of underwater cultural heritage, Rule 2(b) could be seen as an exception so that underwater cultural heritage, excavated according to the Rules in the Annex and, with appropriate State authority, could be sold to a private or public museum for a profit.[98]

The Convention fails to resolve the dispute on the application of salvage law. The non-commercialization principle established by the Convention attempts to preserve the archaeological value of underwater cultural heritage at the expense of its economic value. This strategy is both politically unacceptable to a number of states and impractical given the difficulties of policing the oceans and restricting the flow of illicit excavation.[99] It is therefore not surprising that States, including the US and UK, abstained from voting in favor of the Convention.

V. Jurisdictional Regime of the Convention

International cooperation is essential for the development of a preservation regime for underwater cultural heritage. This cooperation requires the delineation of responsibilities between States and international organizations, such as UNESCO, as well as the reconsideration of jurisdictional questions that have been determined within the context of the law of the sea.[100] This politically sensitive matter, which

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97 CLT-2000/CONF.201/10, Paris, 7 July 2000, 2.

98 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 540.

99 Policing underwater sites is extremely difficult, and even more so in international waters. A number of instances have been reported which relate to the theft of underwater cultural heritage from sites protected by national laws. See, e.g., the theft of a cannon from the fifteenth-century historic shipwreck protected under the Protection of Wrecks Act 1973 in the UK. K. McDonald, Breech of the Law, *Diver*, December 1999, p. 75. See also Wreck plunderers find way through law on war graves: Battleship Royal Oak, *The Times*, 4 April 1994 and Divers Looting Sunken D-Day War Graves, *Independent*, 31 October 2000.

100 BH Oxman, Marine Archaeology and the International Law of the Sea, *Columbia VLA Journal of Law and the Arts*, Vol. 12, No. 3, 1988, p. 355.

caused an uproar at the UNCLOS Conference and which caused stagnation in the European Convention, now became a major barrier in the development of the Convention. Negotiations have been embroiled with questions of the jurisdictional competencies of States in international waters rather than on the structuring of a preservation regime for underwater cultural heritage.[101] Negotiations were hampered by the fact that States have polarized views in regards to jurisdiction, and irreconcilable interpretations of UNCLOS.[102] In particular, debate concerned the extent to which the proposed extension of coastal State jurisdiction was compatible with the provisions of UNCLOS.

A. UNCLOS and Unilateral Statement of Coastal States

The two articles concerning underwater cultural heritage in UNCLOS fail to provide special stipulations regarding jurisdiction, however the following understanding can be drawn from these general jurisdiction clauses.[103] There is no doubt that coastal States have broad jurisdictional competence to protect underwater cultural heritage within their territorial waters. Within the contiguous zones, coastal States have the right to control acts in violation of its laws of customs, finance, immigration or health. Although this seems unrelated to underwater cultural heritage, Article 303(2) of UNCLOS states that, in order to control traffic in underwater cultural heritage, "the coastal State may, in applying article 33 (stipulation on the contiguous zone), presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article." Therefore, coastal States have the right to control the

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101 ILA Sixty-Fourth Conference, Report of the International Committee on Cultural Heritage Law, Queensland, Australia (1990), 1~17; CLT-99/CONF.204, Paris, Aug. 1999, 5~8. In fact, Norway stated at the beginning of the negotiations that UNESCO is not an appropriate forum for the negotiation of matters on the law of the sea. Israel, Iraq, Greece, and Turkey suggested the agreement for the protection of underwater cultural heritage be an agreement to implement articles of UNCLOS instead of an independent convention under UNESCO. Based on these arguments, the negotiators from most states were experts in the field of the law of the sea.

102 For a more detailed discussion, see P. Fletcher- Tomenius and C. Forrest, The Protection of the Under-water Cultural Heritage and the Challenge to UNCLOS, *Art, Antiquity and Law*, Vol. 5, No. 5, 2000, pp. 125~158.

103 For the discussion, see P. J. O'Keefe and J Nafziger, The Draft Convention on the Protection of the Underwater Cultural Heritage, *Ocean Development and International Law*, Vol. 25, 1994, p. 177.

removal of wrecks or their cargo from the seabed. However, it is doubtful whether this right of coastal States can be extended to the continental shelf since underwater cultural heritage does not belong to "natural resources" within the continental shelf regime. It is also doubtful whether the rights of coastal States within their exclusive economic zone, which relates to economic development, applies to underwater cultural heritage. Although clear application of the freedom of the high seas to underwater cultural heritage is not provided, there is no reason to the contrary.

Despite the fact that UNCLOS limits the jurisdiction of coastal States over historic wrecks within the contiguous zone, a few States act in the opposite manner,[104] beginning with Article 28 of the Historic Shipwrecks Act 1976 of Australia. Since then, China, Cyprus, Ireland, Portugal, Spain and the Republic of Seychelles also claimed sovereignty over historic wrecks on their respective continental shelves. Norway and Thailand required that individuals authorized to exploit oil on the continental shelf should follow the national legislation of coastal States when they accidentally discover archaeological property. Morocco and Jamaica claim sovereignty over archaeological research activities within their exclusive economic zones, while Denmark claims sovereignty over heritage found within its 200-mile fishing area. In addition, the legislation of 13 States extend their jurisdiction to research activities within the exclusive economic zones or have claimed sovereignty over all resources, structures or other facilities within their exclusive economic zones, which can be extended to archaeological research through the interpretation of laws. Another 11 states claim a 200-mile territorial sea, and cultural property found within this area should be under the jurisdiction of these States. Accordingly, some scholars held that a rule of international customary law has been formed allowing States to extend jurisdiction over underwater cultural heritage to the continental shelf or to their exclusive economic zone.[105] There existed opposing opinions, though.[106] Many States, including the US and UK opposed the actions of these States. Therefore, the legal position of cultural

104 For the discussion, see Robyn Frost, Underwater Cultural Heritage Protection, *Australia Yearbook of International Law*, Vol. 23, 2004, pp. 36~40.

105 See, e.g., Janet Blake, The Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 45, 1996, p. 819.

106 Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, London: Kluwer Law International, 1995, p. 269.

property beyond territorial seas has not been determined.[107]

B. Disputes Arising during Negotiations of the Convention

Although Article 303(4) of UNCLOS has anticipated the appearance of an international convention on underwater cultural heritage, can the new convention extend the jurisdiction of coastal States beyond the boundaries it created? Different States will give different answers, and because of this the Convention takes a reconciliatory approach as provided in Article 3 of the final text of the Convention: "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea." This article is flexible[108] since it can be understood as allowing the Convention to strengthen the protection of underwater cultural heritage through the development of international law or requiring the Convention to observe the provisions concerning jurisdiction found within UNCLOS.[109] This flexibility has foreshadowed the disputes.

By following the Convention of the Council of Europe, the ILA draft proposed in 1994 that a new zone, the "cultural heritage zone", be set beyond the given jurisdictional area of international law so as to extend the jurisdiction of coastal States to an extension of the continental shelf. Within that zone coastal States can exercise jurisdiction over activities impacting underwater cultural heritage. This extension of jurisdiction was strongly opposed by the world's maritime powers, arguing that this would threaten the balance created by UNCLOS with respect to the delimitation of the rights and duties of coastal States and the freedom of the high seas, which is, in essence, "creeping jurisdiction".[110] Those States that advocated for extended coastal State jurisdiction argued that the extension was

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107 P. J. O'Keefe and James A. R. Nafziger, Report: The Draft Convention on the Underwater Cultural Heritage, *Ocean Dev. & Int'l L.*, Vol. 25, 1994, p. 394.

108 P. J. O'Keefe, 2001 UNESCO Convention on the Protection of the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 75.

109 For this reason, the US opposed this article.

110 For detailed discussion, see Jean Allain, Maritime Wrecks: Where the Lex Ferenda of Underwater Cultural Heritage Collides with the Lex Lata of the Law of the Sea Convention, *Virginia Journal of International Law*, Vol. 38, 1997-1998, pp. 767~769.

in full conformity with UNCLOS as it did not detract from existing rights and duties.[111] Being highly controversial, the 1998 UNESCO draft did not adopt the concept of "cultural heritage zone"; instead, the jurisdiction of coastal states is delimited on the basis of the continental shelf and exclusive economic zone. Article 5(2) states that, "States Parties may regulate and authorize all activities affecting underwater cultural heritage in the exclusive economic zone and on the continental shelf, in accordance with this Convention and other rules of international law." In fact, this draft borrowed the content from an ILA draft and extended the jurisdiction of coastal states by another means, which was also criticized.[112]

After the second meeting of experts in 1999, it was clear that it was unlikely that consensus would be reached on issues of jurisdiction. A proposal was made at the third meeting in 2000 that concentrated on the areas of cooperation, notification, and collaboration to form the foundation on which a shared structure of jurisdiction could be built. Article 303 of UNCLOS requires States to cooperate in the protection of underwater cultural heritage, which is one of the basic principles of the Convention, and provides that the balance among States could be more easily realized by constructing jurisdiction based on this principle.

C. Coordinated Jurisdiction Regime

The jurisdictional regime of the Convention relies on the principles of nationality and flag State jurisdiction rather than on the extension of coastal State jurisdiction over maritime zones beyond the contiguous zone.[113] The regime is divided into two parts, the first deals with reporting and notification in the exclusive economic zone and on the continental shelf,[114] and the second deals with the implementation of the protection regime for underwater cultural heritage in these

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111 CLT-2000/CONF.201/3, Paris, Apr. 2000, 9.

112 For detailed discussion, see D. J. Bederman, The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal, *Journal of Maritime and Commerce*, Vol. 30, 1999, pp. 338~341.

113 The rights and duties of a state in regard to underwater cultural heritage in the contiguous zone follow from Art. 303 of UNCLOS. Art. 8 of the Convention states: "Without prejudice to and in addition to Arts 9 and 10, and in accordance with Art 303 para 2 of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorise activities directed at underwater cultural heritage within their contiguous zone. In doing so, they shall require that the Rules be applied."

114 Art. 9.

areas.[115]

The complex system of notification and reporting ensures that all interested States are notified of the discovery of, or plans to undertake any activities directed at, underwater cultural heritage in these maritime areas. Coastal States are required to ensure that their nationals or vessels flying their flag report finds or intended activities to it.[116] Other States whose nationals or flagged vessels find or intend to undertake activities directed at underwater cultural heritage within the continental shelf or exclusive economic zone of another State are required to report to that State. Alternatively, other States may only require that a report be made to it and that the coastal State is informed.[117] States are then bound to inform the Director-General of UNESCO of any finds or reports of intended activities directed at underwater cultural heritage, who in turn informs all other States of any reports they have received.[118] Any State with a verifiable link, especially a cultural, historical or archaeological link, with the underwater cultural heritage in question may then declare its interest in being consulted on how the underwater cultural heritage may be protected.[119]

In providing for a preservation regime in conformity with the Convention for underwater cultural heritage on a coastal States continental shelf or exclusive economic zone, the coastal State is not granted exclusive jurisdiction, but is designated as the "coordinating State" in the preservation regime.[120] As such it is responsible for coordinating with all other States interested in the protection regime, and may implement agreed upon measures of protection, including conducting preliminary research and all subsequent authorization of activities directed at the site.[121] Furthermore, the Convention allows the coastal State to take all practical measures to prevent immediate danger to underwater cultural heritage, include looting, before consultation with interested States take place.[122] These practical measures are, however, limited since they must conform to the existing powers of coastal States in international law. This may only apply to its nationals, flag vessels and to any other national or vessels with the agreement of their State.

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115 Art. 10.
116 Art. 9(1)(a).
117 Art. 9(1)(b).
118 Art. 9(3) & (4).
119 Art. 9(5).
120 Art. 10(3).
121 Art. 10(5).
122 Art. 10(4).

The coastal State also has the power to prevent or authorize activities directed at underwater cultural heritage on its continental shelf or exclusive economic zone in order to prevent interference with its sovereign rights and jurisdictions as provided for by international law, including UNCLOS.[123] With regard to underwater cultural heritage found in the Area, which is defined as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction", the system for reporting, notification and implementation is substantially similar to that applicable to the continental shelf and exclusive economic zone, except that no costal State will assume the coordinating role. In these instances all States which have expressed an interest in being a party to a preservation regime will elect a State to act as the coordinating State.[124]

While this system of coordinated jurisdiction coordinates national interests, it can be overly bureaucratic and time consuming. Given the international nature of seafaring, it is possible for a number of States to have a link to a particular piece of underwater cultural heritage. The necessity to reach consensus amongst these states may act as a barrier for the implementation of a timely and effective protection regime, not to mention the uncertain basis for determining which States are connected to underwater cultural heritage.[125] Furthermore, there are still abundant discussions about the relation between the Convention and existing jurisdictional regimes, including UNCLOS.[126]

VI. The Heritage Preservation Regime of the Convention

In 1990 the ILA stated that the "establishment of a global regulatory body seems unrealistic at this time. The best alternative may be to allocate control of underwater cultural heritage to States, subject to clear international standards".[127] It is based on this concept that a dual-mechanism protection regime was established in the Convention centering on the determination of the duties States would undertake. The primary mechanism is the elimination of any commercial incentive

123 Art. 10(2).
124 Arts. 12 and 13 provide for the protection of underwater cultural heritage in the Area.
125 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 544.
126 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, pp. 77~87.
127 ILA Sixty-Fourth Conference, Report of the International Committee on Cultural Heritage Law (Queensland, Australia, 1990), 13.

to recover underwater cultural heritage and the determination of the historic value of underwater cultural heritage by imposing a set of technical standards of archaeology. The secondary mechanism is derived from international cultural heritage law relating to the trafficking of illegally recovered cultural heritage. When the primary mechanism is violated, States may seize such illegally excavated artifacts imported into its territory and impose sanctions for their importation.

A. Archaeological Standards: Rules of the Annex

The preservation of underwater cultural heritage can only be achieved if appropriate technical standards are followed, a lesson that the ILA learned early on. As a response to the ILA's request, ICOMOS drafted the Charter on the Protection and Management of Underwater Cultural Heritage as attached to the draft. During the negotiations of the Convention, delegates discussed the position and content of this charter. States questioned whether or not the Charter should serve as an integral part of the Convention or if it should be referred to but not incorporated into the Convention. If the Charter were independent then the Convention would benefit from the revision of the Charter, which, as a benchmark for archaeological practice, is meant to progress over time. However, the inability to determine an acceptable revision process during negotiations ensured that the Charter was incorporated as a part of the Convention. Article 33 of the Convention states that "The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules." The wording of the ICOMOS Charter has been altered so that the rules could not only be suitable for incorporation into the Convention but also politically acceptable.[128] The rules provide a benchmark for underwater archaeological excavation and provide rules for project design, standards of preliminary investigation, project methodology and techniques, project time-tabling, competence and qualifications of personnel, material conservation, site management, project documentation, duration of project archives, and the dissemination of results. These are technical standards of good archaeological practice and were considered acceptable to the majority of States, with one exception.

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128 Such as wording on non-commercialization.

B. Authorization, Sanctions, and Seizure

The Convention aims to ensure that preservation in situ is the first action taken, and that recovery, if deemed appropriate and necessary, follows the standards found within the Rules. It is strange that the Convention does not explicitly require that permits are issued prior to any activity directed at underwater cultural heritage. Based on the objectives and basic principles of the Convention, the use of a permit system is a must; otherwise, preservation in situ will prove to be difficult.[129] Furthermore, the national jurisdiction provided by the Convention allows for the use of permits so long as a project design has been established prior to any activity directed at underwater cultural heritage, as established in the Rules. In fact, permits, either import or excavation permits, are utilized by a number of states in order to regulate the recovery of both terrestrial and underwater cultural heritage[130] as has been agreed upon in conventional international law.[131] The use of permits facilitates the task of ensuring that activities directed at underwater cultural heritage are undertaken in accordance with the Rules of the Annex and therefore benefit the preservation regime.[132]

The Convention provides that authorization for activities directed at underwater cultural heritage is required in order to comply with the Rules of the Annex.[133] In areas beyond the jurisdiction of coastal States, this authorization will be granted by the "coordinating State", which, in the case of underwater cultural heritage on the continental shelf, will typically be the coastal state. Only when this authorization has been granted will the activities directed at underwater cultural heritage take place. In order to prevent an excavator from circumventing the laws of the state in which they are a national or in which the underwater cultural heritage

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129 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, pp. 76~77.

130 See generally Prott and O'Keefe, *Law and the Cultural Heritage: Volume 1, Discovery and Excavation*, Abingdon: Professional Book Ltd., 1984, p. 98; B. Burnham, *The Protection of Cultural Property: A Handbook of National Legislation*, Paris: The International Council of Museums, 1974; Anon, *The Protection of Movable Cultural Properties II Compendium of Legislative texts, Vols. I and II*, Paris: UNESCO Publishing, 1984.

131 For example, in the 1970 UNESCO Convention.

132 For further reading on the use of permits, see McLaughlin, Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987, *Columbia-VLA Journal of Law and the Arts*, Vol. 19, 1995, pp. 149~198, and A. Croome, The United States Abandoned Shipwreck Act Goes into Action: A Report, *International Journal of Nautical Archaeology*, Vol. 21, No. 1, 1992, pp. 39~53.

133 Rule 1.

is excavated, Article 14 requires States to implement a system preventing the entry of underwater cultural heritage not recovered in accordance with the Rules of the Annex into its territory. With this in mind a second authorization may be necessary which would solely relate to the entry into the territory of the coastal state. [134] This kind of authorization may be necessary in instances where the recovery of underwater cultural heritage is authorized by the coordinating State in conjunction with other interested States, but later landed in a third State. As such, the third State, if a party to the Convention, would require authorization for the artifact to enter its territory. It is expected that most States will make use of such authorization.[135]

In order to create an effective regime of disincentives, sanctions are necessary. The enforcement of international cultural heritage laws largely relies upon non-criminal sanctions such as the return, restitution and forfeiture of stolen goods.[136] The nature of sanctions was discussed at length during negotiations.[137] It was concluded that the nature of the sanction should be determined by each State, and that they "shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit occurring from their illegal activities."[138] It should be noted that Article 18 of the Convention clearly requires State Parties to take measures in order to seize underwater cultural heritage recovered within its territory in a manner

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134 The ILA draft convention contained Art 9, which reads, "[a] State Party to this Convention may provide for the issuance of permits, allowing entry into its territory of underwater cultural heritage excavated or retrieved after the effective date of this Convention so long as the State has determined that the excavation and retrieval activities have complied or will comply with the Charter." This was amended in the UNESCO negotiating draft to read, "A State Party may [issue][provide for the issuance of] permits, subject to the compliance with [the Rules of the Annex], allowing entry into its territory of underwater cultural heritage." CLT-96/CONF.202/5 Rev. 2 1999, 2.

135 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 546.

136 Nafziger, International Penal Aspects of Protecting Cultural Property, *International Lawyer*, Vol. 16, 1985, pp. 835~852; C. Bassiouni, Reflections on Criminal Jurisdiction in International Protection of Cultural Property, *Syracuse Journal of International Law and Commerce*, Vol. 10, 1983, pp. 281~322. During the 1970 UNESCO Convention negotiations, proposals for the imposition of tougher criminal sanctions on those importing illicit cultural heritage were deleted in favour of a commitment from importing states to cooperate in the recovery and return of cultural heritage.

137 CLT-2000/CONF.201/8, Paris, 5 July 2000. The original draft of the article read, "Each State Party shall impose criminal, administrative [or civil] sanctions for importation of underwater cultural heritage which is subject to seizure under Art 9." CLT-96/CONF.202/5 Rev. 2, Paris, July 1999.

138 Art. 17(2).

which does not conform to the Convention.[139] It has been shown through practice that, if properly conducted, seizure can be an effective way to create disincentives.

When exercising the right to seize artifacts, a State Party is obligated to "record, protect and take all reasonable measures to stabilise" pieces of underwater cultural heritage.[140] Original drafts had used the term "conserve" rather than "stabilise". Conservation of marine artifacts can be a costly and time-consuming activity, and thus requiring all State Parties to "conserve" would be overly burdensome. The stabilisation of recovered artifacts may imply a less onerous duty than to "conserve", since stabilisation is a short-term solution to mitigate deterioration rather than long-term conservation. This Article also does not impose a mandatory duty, but rather requires a coastal State to take all "reasonable" measures to stabilise artifacts. What is included within "reasonable measures" is dependent upon the infrastructure, technical expertise, facilities, etc. of the coastal State. Developing States without these resources may request the expertise of UNESCO and other interested States. Thus, Article 18(3) requires the seizing state to notify all other States that might have an interest in the seized underwater cultural heritage.[141]

The seizing State must decide on the ultimate disposition of the artifacts. Article 18(4) provides that: "a State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit taking into account the needs of conservation and research; the need for re-assembly of a dispersed collection, the need for public access, exhibition and education and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, to the heritage concerned." The approach to deposition in this article fails to consider the benefits of the owner or a bona fide third party, which causes issues relating to the deprivation and compensation of private rights. In addition, should that heritage belong to the seizing state, interested State, the mankind or no one? The Convention does not cover issues of property rights, so it is unable to provide an answer to this.[142]

Article 18(4) attempts to ensure that that underwater cultural heritage should be preserved for the benefit of humanity. Unfortunately in Article 2(3) the term

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139 Art. 18(1).

140 Art. 18(2).

141 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 548.

142 Sarah Dromgoole, 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, *International Journal of Marine and Coastal Law*, Vol. 18, 2003, p. 88.

"public benefit" is used instead of the term "the benefit of humanity", which might suggest the national benefit of the seizing State or States. The Article may also suggest that consideration of public benefit be taken into account, instead of imposing a duty to do so.[143]

Article 17(3) requires that States Parties shall cooperate to ensure the enforcement of sanctions imposed under this Article. Originally, the duty to cooperate was phrased in a way that meant that it was mandatory, and included examples of areas in which States might cooperate, such as the production of documents or extradition.[144] However, the complexities associated with many of these duties, especially that of extradition, proved to be problematic, and it was eventually agreed that this Article should not limit or list the manner in which States might cooperate.

C. Competent Authorities, Public Awareness, and Training

The preservation of the world's cultural heritage requires the participation of every State within the infrastructure of collective protection. Article 22 of the Convention requires that: "In order to ensure the proper implementation of this Convention, States Parties shall establish competent authorities or reinforce the existing ones where appropriate, with the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education."

Originally the draft Convention had referred to the creation or improvement of a "national service" that would implement its terms. The establishment of such a national service, however, requires expertise and government financing, which may be an obstacle for many developing States. Although UNESCO is able to provide some technical expertise, it is unable to provide the necessary financial aid. The use of the term "competent authorities" suggests an organization that will not necessarily implement the Convention within a State's territory, but rather an

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143 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 548.

144 Art. 10(2) of the secretariat draft stated that: "States Parties agree to cooperate with each other in the enforcement of these sanctions. Such cooperation shall include but not be limited to, production and transmission of documents, making witnesses available, service of process and extradition", CLT-96/CONF.202/5 Paris, Apr. 1998.

administering organization with the provision of the necessary infrastructure to implement the provision of the Convention, which might include a national service, as its aim. This may, however, be beneficial to developing states that may be unable establish national services to the extent that developed States could.[145] A uniform national service cannot be established in all States. With this in mind, Article 21 requires States to "cooperate in the provision of training in underwater archaeology, in techniques for the conversation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage".

Article 20 of the Convention has received little attention and has not been the subject of much negotiation at expert meetings, yet it arguably contains the most important tool for the preservation of underwater cultural heritage.[146] This Article requires that "Each State Party 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 Convention." There was, however, one alteration made during negotiations which replaced the term "education" with "public awareness".[147] It could be argued that the use of the term "public awareness" places a less burdensome duty on States, requiring only an awareness rather than requiring the education of the public, which may include formal training.[148]

Article 21 of the Convention requires States to "cooperate in the provision of training in underwater archaeology, in techniques for the conversation of underwater cultural heritage and, on agreed terms, in the transfer of technology

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145 This problem is recognized in the 1972 World Heritage Convention, which states that: "protection of this heritage at the national level often remains incomplete because of the scale of the resources which it requires and of the insufficient economic, scientific and technological resources of the country where the property to be protected is situated."

146 Education and public awareness are important features of many international conventions aimed at the protection of world cultural and natural heritage. See, e.g., Art. 10 of the 1970 UNESCO Convention, Art. 7 of the 1954 Hague Convention and Art. 12 of the 1956 UNESCO Recommendations. See also J Gifford, M Redknapp and N Fleming, UNESCO International Survey of Underwater Cultural Heritage, *World Archaeology*, Vol. 16, 1985, p. 374.

147 Art. 15 of the negotiating draft provided that, "each State Party shall endeavor by educational means to create and develop in the public mind a realization of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Rules of the Annex", CLT-96/CONF.202/5 Rev. 2, Paris, July 1999, 11.

148 A highly successful education and training programme is run by the Nautical Archaeological Society, and run in a number of states, including the US, South Africa, and Australia. See further at http://www.nasportsmouth.org.uk.

relating to underwater cultural heritage". The establishment of training facilities is not only expensive but also highly technical, placing it out of reach for many developing States. [149] Many of these States will require aid from developed States, particularly those with a rich tradition in underwater archaeology and the conservation of underwater cultural heritage. Thus Article 21 includes an obligation to cooperate in the transfer of technology. It is, however, unlikely that all States will allow the transfer of technology related to defence. As such, the transfer of technology will be on terms which are agreeable to the transferring State.

D. International Cooperation for the Protection of Underwater Cultural Heritage

Underwater cultural heritage, whether found in international or coastal waters, often has an international character, either in the origin of the vessel, its components, crew, cargo, or trading route. As such, it may be of archaeological, historical or cultural interest to a number of nations, thus giving rise to both a potential national and international interests as it reflects the common heritage of humankind. It is therefore incumbent on any State engaged in activities directed at underwater cultural heritage to endeavour to cooperate with other States that might be interested. While the duty to cooperate is evident in the preamble, the general principles and the jurisdiction structure, it has crystallised in a more concrete form within two provisions of the Convention, namely, in the collaboration of certain activities directed at underwater cultural heritage and the development of regional agreements.

Article 19 requires that "States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage" and "To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage,

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149 The Group of 77 stated that: "the convention can only be effective if a sufficient level of human and technological resources for appropriate protection of underwater cultural heritage can be assured; therefore the Convention should provide a system of capacity building, transfer of technology and training". CLT-2000/CONF.201/3add, Paris, June 2000, 10.

heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage." State parties ultimately realised that making information regarding underwater cultural heritage public may put the artifacts in danger. As such, States are required, as far as their national legislation allows, to keep such information confidential.[150]

The preservation of underwater cultural heritage has been the subject of a number of regional and bilateral agreements.[151] A number of States, most notably the European and Latin American/Caribbean States, were concerned that the Convention would inadequately protect underwater cultural heritage within certain regions and wished to ensure that they would be able to introduce more stringent protective measures at a regional level.[152] Promotion of regional agreements may enable the realization of certain objectives of the Convention, such as assistance in the creation of public awareness and training. For this reason, Article 6(1) encourages State Parties "to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage". It is noted that the creation of numerous regional and bilateral agreements would unfortunately create a fragmented regime. Such a regime would be contrary to the very aim of the Convention. The Convention established the

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150 Art. 19(3).

151 Examples of bilateral agreements include the Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties entered into between the US and Mexico on 17 July 1970; the Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties entered into between the US and Peru on 15 Sept 1981; and the Agreement Between the Government of the United States of America and the Government of Canada Concerning the Imposition of Import Restrictions on Certain Categories of Archaeological and Ethnological Material. The use of bilateral or regional agreements may be of particular importance for the preservation of identifiably historic wrecks. For example, the US has attempted to conclude a multi-lateral agreement to protect the wreck of the Titanic. Although no regional agreement exists in this respect, an analogous agreement may be the agreement concluded by Scandinavian Countries in order to protect the site of the wreck of the Estonia. See C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 522, note 188.

152 The Latin American group, led by the delegation from the Dominican Republic, complained about the slow pace of negotiations and stated that, if the process was not sped up, that they would consider establishing a regional agreement on the basis of the Declaration of Santo Domingo, which purports to implement many of the provision of the UNESCO draft. The Declaration of Santo Domingo was endorsed by the X Forum of Minister of Culture and Offices Responsible for Cultural Policies of Latin America and the Caribbean, 4-5 December 1998.

idea of protection of underwater cultural heritage, and the rationality behind the allowance of regional and bilateral agreements lies in expanding these advanced ideas to create an effective protection regime. Therefore, the Convention requires that: "All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention."[153]

VII. Conclusion

Like all other international conventions, the development of this Convention has included tremendous political pressure and has been impacted by maritime powers, including the US and UK.[154] As such, the final text was significantly different than the 1998 draft: Issues of ownership and abandonment were deleted, the relation between the Convention and salvage law was clarified, warships and state-owned vessels are now subject to the Convention, the scope of the Convention has become more narrow, and efforts to extend the jurisdiction of coastal states was unsuccessful. Whether or not the Convention will take effect is uncertain. Delegates from the US[155] and UK have declared that they will not support the Convention, while Canada has stated that it is prepared to discuss its approval and implementation process. Meanwhile, a number of provisions in the Convention have been questioned, such as the lack of a system of ownership and its tendency to sacrifice the economic value of underwater cultural heritage to protect its archaeological value.[156]

In spite of this, the Convention has been somewhat successful. First, it is the first general document for the protection of underwater cultural heritage

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153 C. Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, 2002, p. 553.

154 Especially France, Germany, Japan, the Netherlands, Norway and Russia. All these States casted negative votes or abstained from voting, except that Japan casted an affirmative vote.

155 The US strongly opposed certain articles such as Articles 9 and 10, assuming that they have deviated from the UNCLOS. See Sean D. Murphy, U.S. Concerns Regarding UNESCO Convention on Underwater Heritage, *American Journal of International Law*, Vol. 96, 2002, pp. 469~470.

156 Lauren W. Blatt, SOS (Save Our Ship)! Can the UNESCO 1999 Draft Convention on the Treatment of Underwater Cultural Heritage Do Any Better?, *Emory International Law Review*, Vol. 14, 2000, p. 1581.

at the international level; second, during negotiations states were able to find common ground on many important issues; third, it is consistent, in principle, with UNCLOS; and fourth, the terms used within the final version have effectively promoted its general application.[157] "Therefore, even though the new Convention doesn't follow the theoretical path in traditional maritime law, it does, as discussed above, reasonably build a set of legal regulations, countering the traditional way of commercializing underwater cultural heritage. We can say that the 1982 UNCLOS has established a solid regime for the boundary determination in marine law; and further, the new 2001 UNESCO Convention sets the new rules for protection of underwater cultural heritage located within different water boundaries in the world. These rules are non-commercial rules in public law."[158]

China has attached great importance to the protection of underwater cultural heritage. Issued on 20 October 1989, the Regulations of the People's Republic of China Concerning the Administration of the Work for Protection of Underwater Cultural Relics provides a specific management system for the protection of underwater cultural heritage and is considered by Western scholars as "a system developed through specific analysis of actions taken in other States, which puts China to a leading position in this aspect." These Regulations distinguish the jurisdiction according to the state of origin of the cultural relics,[159] however the regulations in the UNESCO Convention on the Protection of the Underwater Cultural Heritage are not provided in this manner. As such, it is likely that disputes will arise regarding the protection and recovery of underwater cultural heritage originating from China.[160] Although this may be the case, the system of

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157 Guido Carducci, New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage, *American Journal of International Law*, Vol. 96, 2002, pp. 433~434.

158 Kuen-chen FU, On the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, in *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 17~18. (in Chinese)

159 According to Articles 2 and 3, China shall own and exercise jurisdiction over all cultural relics of Chinese origin, or artifacts unidentified of foreign origin that remain within Chinese inland and territorial waters, and cultural relics that are of Chinese or unidentified origin that remain in sea areas outside of Chinese territorial waters but are still under Chinese jurisdiction according to Chinese law. For cultural relics of Chinese origin that remain in sea areas outside of the territorial waters of any foreign country but are under the jurisdiction of a certain country, or in the high seas, the state shall have the right to identify the owners of the objects.

160 Kuen-chen FU, On the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, in *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 14~15. (in Chinese)

coordinating states and meetings established in the Convention safeguards China's right to actively participate in the protection of its underwater cultural heritage. In addition, the relation between economic and archaeological value of underwater cultural heritage is an integral aspect of the Convention, which may be useful if integrated into China's regulations in order to develop new ideas on protection of underwater cultural heritage.

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海船拆解的管理与政策

Vijay Sakhuja*

废弃民用和军用海船的拆解已然成为海洋管理中的一个重要问题。随着世界经济的迅速发展和全球海上贸易的相应增加，造船业增长的速度和势头突飞猛进。货船、集装箱船、散货船、原油和天然气运输船等船舶的数量和类型也在以极快的速度增加。

运输平台的数量和种类正在增长，这使得韩国、日本及中国的造船业发展迅速。在民用运输船队数量增加的同时，配备各种大小、承载力以及推进力的新型水上和水下平台的全球海军舰队数量也相应增加。

船舶制造业的发展受以下条件限制：

1. 国际贸易的需要以及国际贸易对各类平台的需要；

2. 新技术已经很大程度上使得诸多现有的平台被废弃，事实上，不久前就有多个平台变成海上垃圾。

3. 老化的平台造成高折旧率和高昂的维护成本；

4. 海上平台价值的减损，以及老化平台随之而来的污染和污染风险。

事实上，海军科技的复杂性和硬件的精密度也在发展。建造海上平台使用的技术本质和合成材料都是为了实现科技最优化和操作高效化。然而，人们却很少关注新型海上平台建造中合成材料的选择。因此，造船和人工拆船会涉及诸多操作上和环境中的问题。

拆船可被定义为拆解废弃船舶的结构以报废或处理的过程。拆船作业通常在码头、干船坞、海滩、水边或拆船滑台开展，涉及到一系列作业，从拆除所有装备和设备，到切割金属框架，以及最后回收船舶材料。由于船舶结构的复杂性以及诸多相关环境、安全和健康问题，拆船可谓一项具有挑战性的过程。

通常认为，基于安全考量，船舶在经过 20 到 25 年的营运后就应报废处理。平均而言，每年约有大小不一、类型等级各异的 600 艘船舶退役 , 并被拆解变卖。由于没有固定的年度趋势，废钢市场波动显著。1998 年是废钢丰年 , 共拆除 673

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艘船舶总计 27254525 公吨。[1]

20 世纪 70 年代以前，拆船作业集中在欧洲码头。随着发达国家民众对拆船造成的健康和环境成本的关注，以及环保主义者的巨大压力，船东只能将船舶运至亚洲的贫穷国家。由于亚洲国家低廉的劳力、宽松的法律环境以及疲软的执法机构等主要原因，亚洲便成为倾倒各种废料的热门选择。

20 世纪 80 年代初以来，拆船作业已经迅速转移至贫穷的亚洲国家。孟加拉国、中国、印度以及巴基斯坦成为首选。截至 1993 年，全球有一半的海上运输船舶都是在中国拆解的。现如今，印度是拆船量最大的国家，其次分别是巴基斯坦、孟加拉国和中国。印度拆船业的年收益大约为 1000 亿卢比。

印度阿郎港回收了全球大约 50% 的退役船舶。位于坎贝湾的码头从 1983 年起便开始了拆船作业。这里共有 173 个拆解点，其中有 10 个专门负责巨型油轮的拆解。[2] 截至 2005 年 1 月，总计 3005 万公吨的 4035 艘船舶已经被拖上岸 (准备拆解)。阿郎港的拆船厂已产生诸如劳动条件、工人生活条件以及环境影响的争议。此外，工人日薪为 60 到 100 卢比不等，而美国的拆船业的工人时薪可达 40 到 45 美元。

在孟加拉国，开展拆船作业是为了满足国内的钢铁需求 , 拆船业不受任何环境法或工人身体健康和安全法律法规的限制。吉大港的拆船场已被高度污染，已造成多起事故和人员伤亡，并被认为是吉大港最不安全的区域。[3]

在中国，拆船作业并不是在海滩上进行，而是在码头用起重机和机械设备进行。[4] 可是，其劳动条件与亚洲其他地区的拆船厂相差无几。

拆解老化海上平台的目的有二：

1. 回收船舶上的可回收金属，使这些金属经过适当处理后可在新的运输平台上重新利用；

2. 获得可回收材料的商业转售价值，这使得拆船公司在回收和销售船舶废料和可回收材料时获得丰厚利润。

虽然海上平台材料的回收利用利润丰厚，但却会造成极其严重的环境危害。拆除海上平台和拆船中最关心的问题有：

1. 在需直接接触或处理腐蚀性复合材料的职业性危险操作中的人力投入。通

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1 The Social and Labor Impact of Globalization in the Manufacture of Transport Equipment, Report for discussion at the Tripartite Meeting on the Social and Labor Impact of Globalization in the Manufacture of Transport Equipment, Geneva, 8−12 May 2000, at http://www.ilo.org/public/english/dialogue/sector/techmeet/tmte2000/tmter6.htm, 20 January 2006.

2 船舶拆解相关信息 , 下载于 http://www.greenpeaceweb.org/shipbreak/whatis.asp,2006 年 1 月 20 日。

3 下载于 http://www.greenpeaceweb.org/shipbreak/whatis.asp,2006 年 1 月 20 日。

4 下载于 http://www.greenpeaceweb.org/shipbreak/whatis.asp,2006 年 1 月 20 日。

常而言，拆船工人在拆船作业中只穿着几乎没有任何防护装备的单薄衣物。

2. 一般认为，拆船作业会造成环境污染，并对接触从瓦解的平台上拆除的剧毒复合材料和放射性材料污染物的工人伤害巨大；

3. 拆船工人缺乏卫生标准和医疗护理的保障。从工人健康安全问题和人权角度来看，拆船场一直被认为是完全无视员工生命和痛苦的“海运业的杀戮场”。

4. 工业化国家是这一进程的罪魁祸首，他们视造船业为高端产业，而不利于其劳动力和破坏环境，带来灾难性后果的拆船转作业则移到他国。

5. 另一个受到很多关注的问题就是那些已被承包即将拆解的老化平台上的有毒物质的性质和数量缺乏透明度。正如法国航母“克莱蒙梭号”案一样，当局并未采用任何透明的标准来揭示该船上复合材料真正的潜在毒性水平。

6. 缺乏透明度很不利于拆解作业中劳动力的安全问题，以及拆解过程中释放大量有毒混合物所造成的环境污染。

危险活动的程度对劳动力有影响，而这种危险程度由拆船过程中释放出来的有毒化学物质的性质和毒性决定：

1. 作为绝缘复合材料使用的石棉，是一种致命有毒化学物质，多见于吊架衬垫、绝缘胶黏料、绝缘布、电缆、绝缘管道和船体、胶粘剂、管道附件的垫圈以及阀门盘根中。

2. 大量存在于橡胶制品（如胶皮管和泡沫塑料绝缘电缆）中的多氯联苯。

3. 银漆、家居涂料，见于隔膜板、船底板和船体钢主漆。

4. 铬酸铅涂料、铅压载、电池、发电机以及马达零件中的铅。

5. 船舶传感器、压载物、油漆涂料中包含有害物质和化学品的重金属；荧光灯管、温度计、电子开关、灯具、火灾探测器和油槽液面指示器中的汞。

6. 独立制冷设备（如水冷器和小冷冻器）中的氯氟烃。

7. 磨、锤、金属切割和其他活动产生的过量噪音。

8. 焚烧绝缘材料、垫子、防护套和剩余燃料产生的火灾，以及润滑油和其他易燃液体造成的火灾。

虽然船舶制造业是第一世界国家商业利润最高的产业，但拆船却是一种灾难性的人类活动，损害了第三世界国家的环境。拆船业反映了第一世界国家对第三世界国家安全和保安认识的严重缺陷。孟加拉、巴基斯坦和印度等第三世界国家受高额利润的驱使，不顾人道主义灾难以及环境破坏，牺牲了本国的人力成本和环境成本换取一己私利。

《巴塞尔公约》

长久以来，工业化国家都在寻找摆脱工业废物的廉价方式。这些有毒的商船

将危险废物运往发展中国家，这些行为被发现以后引起了国际公愤，也促成了《巴塞尔公约》的起草与通过。[5] 在第一个十年（1989—1999 年）里，公约旨在建立一个控制跨境转运危险废物的框架。2002 年 1 月，公约成员国首次就老化船舶相关法律问题进行了讨论。成员国一致认为，由于被拆船舶含有石棉和多氯联苯等有害物质，《巴塞尔公约》也应适用于被拆船舶。公约成员国还通过了拆船环境保护管理的指导原则。这些原则只具有建议性质，意在改善拆船设施的环保性能。

2004 年 4 月，一名土耳其法官判定，进口装有石棉和其他危险物质的废船属违法行为。[6] 印度、比利时和荷兰的法官均持此相同意见。但是，具有历史意义的 2004 年 10 月，《巴塞尔公约》规定，船舶可被视为国际法下的有毒废物，“临终”船舶在未取得进口国允许的情况下，不能离开所在国。公约要求 163 个缔约国必须确保拆船作业以环保方式开展，并减少船舶有毒废物的跨境转移。

“克莱蒙梭号”案

以乔治•克莱蒙梭（1841—1929 年）命名，服役 50 年之久的退役法国航空母舰“克莱蒙梭号”载有 27000 吨废钢和大约 500 吨包括石棉在内的有毒有害物质，一直在寻找可以回收这些钢铁的拆船场。“克莱蒙梭号”被不少欧洲国家拒绝入境，土耳其和希腊指出该船载有多氯联苯、三丁基锡、石棉等化学危险物品以及可能的放射性废物，从而也拒绝其入境。

法国当局计划在西班牙给该船去污，但该船因一些未知原因终未抵西班牙；法国还试图把该船出售给中国，但中国也拒绝其入境。最终，因为没有任何国家愿意拆解“克莱蒙梭号”，其便在地中海岸边高低搁浅。

但后来“克莱蒙梭号”在印度找到买家，由古吉拉特邦阿郎港的 AG Enterprises Ltd − Shree Ram Vessels Scrap Ltd 公司拆解该船。尽管绿色和平组织和当地非政府组织试图通过抗议来阻止“克莱蒙梭号”入境，该船仍于 2005 年 12 月 31 日驶离法国。

印度最高法院于 2006 年 1 月 16 日宣布拒绝“克莱蒙梭号”驶入其领海，直至 2006 年 2 月 13 日，等候法院就是否允许该船在印度拆解做出裁决。[7] 与此同时，这艘法国军舰的船东向最高法院承诺他们不会将船舶驶入印度专属经济区。

印度高院指定的危险废物管理委员会早前曾提交报告，建议不允许载有

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5 《巴塞尔公约》更多信息，下载于 http://www.basel.int/about.html，2006 年 1 月 5 日。

6 Basel Convention and Shipbreaking, at http://www.greenpeaceweb.org/shipbrea/basel_convention_shipb.asp, 20 January 2006.

7 French Toxic Ship not to Enter India Till Feb 13, *Hindustan Times*, New Delhi, 16 January 2006.

石棉的“克莱蒙梭号”驶入印度。印度高院危险废物管理监督委员会的主席 G. Thyagrajan 指出：

“我们不能让这艘船的拆解发生在印度，但我们有着开放的心态，现已要求法国政府提交更多相关细节和文件。”[8]

印度高院在 2003 年 10 月 14 日令中也提到了拆船问题，指出：

我们接受危险废物管理高级委员会提出的如下建议：“船舶到港前，应当获得国家海事委员会或相关部门的适当许可，并表明其不含任何危险废物或放射性物质……船东应在拆船之前对其进行适当的去污处理。”[9]

有趣的是，在 2004 年 12 月 20 日，法国的 3 个民间社会团体（Ban Asbestos France (Bannir l’Amiante) and Syndicat CGT de la DCN de Toulon）开始发动社会舆论抵制将克莱蒙梭号出售给印度进行拆解。[10] 在一封给法国政府的公开信中，这 3 个组织指出：（1）“克莱蒙梭号”上部分石棉已被处理这一不寻常情况；（2）丝毫没有考虑健康，将载有 22 吨石棉废料的“克莱蒙梭号”出口给印度。

此外，与法国政府签约在“克莱蒙梭号”驶往印度前对其进行去污作业的 Technopure 公司高管公开确认该船上有约 500 吨的石棉，大大超过法国政府所承认的数量。[11] 据报道，该公司尽管受保密条款的制约，但还是基于道德考量披露了这些信息。

2006 年 2 月 16 日，法国总统雅克希拉克在对印度进行国事访问之前召回了这艘船。在雅克希拉克做出召回申明之前，法国最高行政法院审理了绿色和平组织和其他 3 个反石棉组织提起的诉讼，并判定“克莱蒙梭号”应被召回。[12]

结 论

拆船业的损害和不利后果是具有毁灭性的，这种毁灭性不仅体现在有毒环境和危险作业活动的数量和程度上，更是体现在工作环境的糟糕以及拆船场对工人工作环境的完全忽视。另外，一定程度而言，由于劳动力在拆船作业中会受到损伤、残疾和慢性疾病等实际的毁灭性后果，拆船业已降级为第三世界产业。同时，

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8 Vaiju Naravane, Greenpeace Activists Meet French Officials, *The Hindu*, 21 January 2006

9 Supreme Court Monitoring Committee on Hazardous Wastes Final Report on *Clemenceau*, at http://www.scmc.info/special_issues/final_report_to_clemenceau_3.html, 20 January 2006.

10 Asbesto Laden Ship Steering for Indian Shore, *The Indus Telegraph*, 17 January 2006.

11 France Dumps Clemenceau on India in Deliberate Violation of International Law: Greenpeace, at http://www.greenpeace.org/india/press/release/france-dumps-clemenceau-on-ind, 10 January 2006.

12 India Hails Recall of Toxic Ship, at http://englsh.aljazeera.net/NR/exeres/12FF9E01-416F-4654-8CA1-F0A0D78CA4AA.htm, 20 February 2006.

拆船业也给地区环境带来了灾难性和永久性的破坏。

旨在解决毒废料倾销问题的法律法规易被规避，发达国家也一直在违反国际法的相关规定，但并未受到惩罚。在这一点上，“克莱蒙梭号”案是发达国家向发展中国家输倾倒毒废料的典型案例，发达国家绝不能认为一旦危险废物离开其港口，就不再负有对这些废物的责任。

(中译 : 王小伟)

Discussion about the Legal Issues concerning Vessel-sourced Pollution across the Taiwan Strait

Kuen-chen FU* LIU Xianming **

Abstract: How to efficiently regulate through legal approach the pollution in the Taiwan Strait caused by ships has become one of the major issues to be jointly resolved by the two sides across the Taiwan Strait. This article, in the first place, discusses the nature of the ships' right of passage in the Taiwan Strait under the international law and the current legislation framework of the two sides across the Taiwan Strait. Then, before analyzing the actual results of present vessel-sourced pollution control in the Taiwan Strait, it discusses the jurisdiction space that the governments across the Strait have over the vessel-sourced pollution based on relevant rules of the United Nations Conventions on the Law of the Sea and the International Maritime Organization. On the basis of the above arguments, this article regards the cooperation between the governments across the Taiwan Strait as an essential method to effectively control vessel-sourced pollution as well as a cooperation and legal approach available for reference should there be any difficulty in the cooperation across the Strait.

Key Words: Taiwan Strait; Vessel-sourced pollution; UN Convention on the Law of the Sea

The Taiwan Strait refers to the water area between the Taiwan Island and the seacoast of Fujian and Guangdong Provinces. The South tip of the Strait is located

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at about 22 degrees North latitude with a large opening, and there are about 350 nautical miles between the southern end of China Taiwan and Huilai County, Guangdong Province. The northernmost part of the Strait is located at about 25.5 degrees North latitude with a small opening, and there are about 135 nautical miles between the Danshui River mouth of China Taiwan and Pingtan County, Fujian Province.[1]

I. The Legal Nature of the Water Area of Taiwan Strait

The nature of the ships' right of passage in the Taiwan Strait related to the issues concerned with the legal control over vessel -sourced pollution must be specified. According to international law, the right of passage is determined by the legal nature of the water area in the Strait. Therefore, first of all, we will discuss the legal nature of Taiwan Strait.

A. What Is "a Strait Used for International Navigation"?

According to Part III of the United Nations Conventions on the Law of the Sea concerning straits, the right of transit passage is applicable to "straits used for international navigation",[2] yet UNCLOS did not make explicit definition as to what a "strait used for international navigation" is. The most authoritative definition on this concept up to now should be from the adjudication of the International Court of Justice.

In the Corfu Channel Case in 1949, the Albanian government denied that this Channel belongs to the class of international highways through which a right of passage exists, on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used almost exclusively for local traffic to and from the ports of Corfu and Saranda. Confronted with such a contention, the International Court of Justice decided that: "It may be asked whether the test is to be found in the volume of traffic passing through the Strait or in its greater or lesser importance for international navigation. But in the

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1 Kuen-chen FU, Research on the Legal Status of the Taiwan Strait, in Kuen-chen FU ed., *Legal Issues in Ocean Administration*, Taipei: Wensheng Book Store, 2003, p. 371. (in Chinese)

2 Article 37 of UN Convention on the Law of the Sea.

opinion of the court, the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation. Nor can it be decisive that this Strait is not a necessary route between two parts of the high areas, but only an alternative passage between the Aegean and the Adriatic Seas. It has nevertheless been a useful route for international maritime traffic."[3]

Judging from the adjudication of the International Court of Justice, the so-called "international channel" is a geographical waterway connecting two parts of the high seas and may be used functionally for international navigation. It's not important whether the channel belongs to the territorial sea of a coastal State, and the volume of traffic passing through the Strait does not matter. In other words, what matters is the physical character of the channel and whether the channel is actually used for international navigation. It has nothing to do with other substitutional navigation channels.[4]

Some scholars argued that the reason why International Court of Justice didn't take into consideration whether there was a backup passage or whether a strait in dispute was a necessary passage and then abandoned the "test of essentiality", was that in the straits in connection with high seas, few straits without other parallel passages exist, and it's unnecessary to involve "test of essentiality" in discussions on international straits, since only a few straits meet such requirement.[5]

The regime regarding international straits established by the International Court of Justice in the Corfu Channel Case has been gradually accepted by the international community. No material change in such regime was made within the Convention on the Territorial Sea and the Contiguous Zone of 1958 and the UN Convention on the Law of the Sea of 1982. According to the UN Convention

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3 Corfu Channel Case (Albania v. United Kingdom), Judgment of 1948, *I. C. J. Reports*, 1948—49, p. 4, para. 28. Quoted from S. N. Nandan and D. H. Anderson, Strait Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982, *British Year Book of International Law*, Vol. 60, 1989, p. 167.

4 Office for Ocean Affairs and the Law of the Sea (United Nations), *Strait Used for International Navigation*, 1992, p. 2, para. 7; U. N. Sales No. E. 91. V. 14. Quoted from Chan Hwang-chi, Legal Status Confirmation of Taiwan Strait and Penghu Waterway – the Possibility for Baseline Determination and Its Effect from the View of Strait Rules in International Laws, and Discussions on Relevant Provisions of Territorial Sea Law, *Legal Journal of Taiwan University*, Vol. 28, No. 3. (in Chinese)

5 Chan Hwang-chi, Legal Status Confirmation of Taiwan Strait and Penghu Waterway – the Possibility for Baseline Determination and Its Effect from the View of Strait Rules in International Laws, and Discussions on Relevant Provisions of Territorial sea Law, *Legal Journal of Taiwan University*, Vol. 28, No. 3. (in Chinese)

on the Law of the Sea of 1982, as the establishment of exclusive economic zone rules, partial high seas have been classified as exclusive economic zones, thus the geographic definition of a "strait used for international navigation" has been confirmed as a "zone between one part of the high seas or an exclusive economic zone and another part of high seas or an exclusive economic zone."[6]

B. Whether or Not the Taiwan Strait Is a "Strait Used for International Navigation"

In view of the functional standard in the Corfu Channel Case adopted by the International Court of Justice, on one hand the Taiwan Strait connects two parts of the high seas or an exclusive economic zone, and on the other hand it is definitely used for international navigation; thus from a literal perspective, the Taiwan Strait meets the requirement of the concept of a "strait used for international navigation".

Notwithstanding the foregoing, another characteristic of Taiwan Strait should be mentioned, namely the breadth of such strait is far wider than 24 nautical miles. According to the provision in the existing laws of the sea, the largest breadth accepted in order to be considered territorial sea is 12 nautical miles, and on the other hand, within the Taiwan Strait, there is definitely a waterway of the high seas and exclusive economic zones; and such kind of strait is known as "board strait", while the strait with breadth shorter than 24 nautical miles, in which all parts of waterway are territorial sea of coastal States, is named "territorial sea strait".

Regarding the characteristics of a "board strait", one shall not focus on the literal meaning of the concept of a "strait used for international navigation" but the initial purpose for the establishment of this legal concept shall be considered instead. The establishment of "straits used for international navigation" and of "transit passage" regime which is applicable in such straits are all based upon the proposing of the concept of "12 nautical miles territorial water". In the third UN Conference on the Law of the Sea, Mr. Dudgeon, the UK's representative, commented: "International community's acceptance of the regime of 12 nautical miles territorial water means that there will not be any high sea lanes (which are the territorial waters of coastal States)in many important straits which were previously important channels for international navigation and aviation, for which it is necessary to ensure the international community's freedom of passage in such

6 Article 37 of the UN Convention on the Law of the Sea.

straits that are critical to the global transportation network."[7] Based upon such consideration, the concept of a "strait used for international navigation" and the regime of "transit passage" have been established by the international community. Compared to the "Innocent Passage", which is applicable to territorial sea, the navigation nation is entitled to more rights under the regime of "transit passage"; for this reason, aircrafts and battleships will be entitled to "transit passage", and submarines will be entitled to navigate under water surface, while the coastal State has been restricted in many aspects. Therefore, the establishment of the concepts – "straits used for international navigation" and the "transit passage" is the result of game playing between coastal States and navigation States; it has not only fulfilled coastal States' requirements on the expansion of their territorial sea, but has also ensured navigation States' highly-valued navigation right in international straits.

Based upon the above analysis, the concept of a "strait used for international navigation" was established for the purpose of a "territorial strait", while the "board strait" is treated as a sea lane covering high seas and exclusive economic zones so the navigation States would enjoy the navigation freedom in the high seas and the exclusive economic zones, hence it's unnecessary to apply the "transit passage" regime.

There are some explicit answers in the UN Convention on the Law of the Sea. According to the Article 36 of the Convention, the provisions concerning "straits used for international navigation" in Part III of the Convention ,do not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of the Convention, including the provisions regarding the freedoms of navigation and overflight, shall apply in accordance with the legal nature of such routes (high seas or exclusive economic zones).

In summary, the Taiwan Strait is a "strait used for international navigation", but the regime of "transit passage" is not applicable, and the innocent passage, the freedoms of navigation and overflight shall apply in accordance with the legal nature of different waters, including territorial sea, exclusive economic zones and high seas.

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7 Mr. Dudgeon (UK), UNICLOS III Official Records, Vol. 2, p. 125 (para. 17). Quoted from S. N. Nandan & D. H. Anderson, Strait Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982, *British Year Book of International Law*, Vol. 60, 1989, p. 179.

C. Legislations of the Two Sides across the Taiwan Strait

The One-China policy is a generally accepted idea by the international community, and both sides across the Taiwan Strait are territories of China, which shall be governed by unitary and indivisible sovereign rights of China. Notwithstanding the foregoing, there are two governing entities in the two sides of the Taiwan Strait. Therefore, analyzing the legislations of the two sides across the Taiwan Strait regarding the legal nature of its waters would be helpful for us to understand the issue properly.

First, for the baselines used to measure the boundary of territorial sea and maritime spaces, there is no inconsistency between the two sides across the Taiwan Strait. China Mainland published partial base points and baselines of territorial sea in 1996, and China Taiwan also did it in 1999.[8] It shall be noticed that, for the regions such as Kinmen and Matsu, which are adjacent to the China Mainland and under the control of China Taiwan, the latter did not publish relevant baselines. This is obvious considering the relationship between the two sides across the Taiwan Strait.[9] In fact, the implied consideration is that Kinmen and Matsu have been included in the baselines of territorial sea published by China Mainland, and it is unnecessary to publish different baselines for such islands under the idea of "One China" to avoid repeated and inconsistent base points and baselines of China's territorial sea, which may offer foreign ships and aircrafts the opportunity to take advantage of some legislations and hinder the enforcement of laws.[10] Let alone the publicity of baselines is a sovereign behavior to the outside world instead of the internal affairs between China Mainland and China Taiwan. The consistency and conflict avoidance in publicity of baselines of the territorial sea between the China Mainland and China Taiwan laid the foundations to unify the legislations regarding the Taiwan Strait. For the purpose of this meaningful arrangement, the first author of this article, acted as a counsel of the Taiwan's "Executive Yuan" and shuttled

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8 For the exact base points and baselines published by two sides across the Taiwan Strait, please refer to Kuen-chen FU, Research on the Legal Status of the Taiwan Strait in Kuen-chen FU ed., *Legal Issues in Ocean Administration*, Taipei: Wensheng Bookstore, 2003, pp. 387~395. (in Chinese)

9 Zou Keyuan, Redefining the Legal Status of the Taiwan Strait, *International Journal of Marine and Coastal Law*, Vol. 15, No. 2, 2000, p. 256.

10 For example, the overfly freedom over the waters identified by one side of the Taiwan Strait as the territorial sea, while the other side doesn't identify it as the territorial sea.

between the competent authorities to persuade, which has made some positive contributions.[11]

Second, in view of the legal nature of the Taiwan Strait waters, there is no inconsistency between the two sides across the Taiwan Strait, and relevant provisions regarding the legal nature of the Taiwan Strait waters in the Territorial Sea and Contiguous Zone Law enacted by China Taiwan in 1988 are as follows:

> *Article 3 The breadth of territorial sea of "Republic of China" is 12 nautical miles, measured from baselines.*
>
> *Article 13 For non-territorial parts of the Taiwan Strait, which are used for international navigation, the government of the "Republic of China" is entitled to enact decrees to manage the passage of foreign ships and aircrafts for the following issues:*
>
> *13.1 For the purpose of maintaining the safety of navigation and management of maritime transportation;*
>
> *13.2 For prevention, reduction and control of the possible environmental pollution;*
>
> *13.3 For the prohibition of fishing;*
>
> *13.4 For prevention of and imposing punishment on loading and unloading any merchandise, currency or personnel, which are against decrees of customs, finance, immigration or health authorities of the "Republic of China".*
>
> *The aforementioned decrees regarding the passage through the Taiwan Strait are published by the "Executive Yuan".*

From these two articles, it could be concluded that the authority of China Taiwan also believes the Taiwan Strait includes the territorial sea and non-territorial sea (exclusive economic zone), which means different passage regimes will be applicable in different waters in accordance with the legal nature of such waters. More specifically, in the territorial sea, the innocent passage regime will be applicable for foreign ships; in the exclusive economic zone, the freedoms of navigation and overfly set forth in the Article 58 of the Convention on the Law

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11 Kuen-chen FU, Chinese People's Declaration of Ocean Rights- A Discussion on the Publicity of Baselines of the Territorial Sea, in Kuen-chen FU ed. *Legal Issues in Ocean Administration*, Taipei: Wensheng Bookstore, 2003, p. 318. (in Chinese)

of the Sea will be applicable to the foreign ships and aircrafts. But the Article 13 previously caused considerable controversy amongst Taiwan scholars, focusing mainly on whether the syntax of "the strait used for international navigation" means that the Taiwan Strait is the "strait used for international navigation" under the UN Convention on the Law of the Sea, and whether "the decree regarding the passage though the Taiwan Strait" means the regime of "transit passage" is applicable in the Taiwan Strait[12] The authors believe that, just as the foregoing mentioned, in accordance with the UN Convention on the Law of the Sea, there is a sea lane of exclusive economic zone beyond the territorial sea in the Taiwan Strait. The ships' right of passage shall be identified in accordance with the legal nature of such waters, and the regime of the "transit passage" shall not be applicable. The Territorial Sea and Contiguous Zone Law of China Taiwan confines the "the decree regarding the passage though the Taiwan Strait" to four specific circumstances, which is totally different with the contents of the "transit passage" regime of the UN Convention on the Law of the Sea, and is consistent with the rights of coastal States in the exclusive zone and contiguous zone. Therefore, it could be concluded that the Territorial Sea and Contiguous Zone Law of China Taiwan did not (nor was able to) establish the regime of "transit passage". In addition, in consideration of Taiwan's special position in the international community, although it is not a contracting State of the UN Convention on the Law of the Sea, it declares that it will comply with the new rules in the convention to manage maritime affairs. Such new rules are restricted to those rules proved being accepted in the Territorial Sea and Contiguous Zone Law dated from1998.[13] From the above legislations, we notice the Taiwan authority's respect for the UN Convention on the Law of the Sea. As a matter of fact, if China Taiwan deviates from the common practices of the international community under the global background of a shared ocean and frequent international voyages for the ships, it would be difficult for its legislations

12 Wang Renjie, A Commentary on the "Law of Exclusive Economic Zone Sea Waters and Continental Shelf of ROC" and the "Territorial Sea and Contiguous Zone Law of ROC", *Ordinance Journal*, Vol. 49, No. 3 (in Chinese). Quoted from Zhou Yi, A Commentary on the Legal Position of the Taiwan Strait in View of International Law, *Jurisprudence Collection of Chung Cheng University*, No. 8, (in Chinese); Chan Hwang-chi, Legal Status Confirmation of Taiwan Strait and Penghu Waterway – the Possibility for Baseline Determination and Its Effect from the View of Strait Rules in International Laws, and Discussions on Relevant Provisions of Territorial Sea, *Jurisprudence Collection of Taiwan University*, Vol. 28, No. 3. (in Chinese).

13 Zou Keyuan, Redefining the Legal Status of the Taiwan Strait, *International Journal of Marine and Coastal Law*, Vol. 15, No. 2, 2000, p. 247.

to be implemented.

As for China Mainland, there are no provisions regarding the legal nature of the waters of Taiwan Strait in the Territorial Sea and Contiguous Zone Law promulgated in 1992 and the Exclusive Economic Zone and Continental Shelf Law promulgated in 1998. In accordance with the Article 3 of the Territorial Sea and Contiguous Zone Law, the breadth of the territorial sea of China Mainland is 12 nautical miles from the baseline of territorial sea. Therefore, the sea area beyond 12 nautical miles from the baseline of territorial sea corresponds to the exclusive economic zone, and 200 nautical miles of exclusive economic zone is set forth in both the Exclusive Economic Zone and Continental Shelf Law of the PRC and Exclusive Economic Sea Areas and Continental Shelf Law of China Taiwan.[14] As a result, for the issue of legal status of the Taiwan Strait, the China Mainland and China Taiwan have achieved a consistency under the framework established by the UN Convention on the Law of the Sea.

While the largest breadth of the Taiwan Strait holds no more than 350 nautical miles, the waters within 12 nautical miles from both sides of the Strait correspond to the territorial sea of China, and the waters beyond such 12 nautical miles to the exclusive economic zone of China. Foreign ships within the territorial zone of China will be entitled to the innocent passage right; while in the exclusive economic zone of China, foreign ships and aircrafts will be entitled to freedoms of navigation and overfly set forth in the Article 58 of the Convention on the Law of the Sea. The consistency of both sides across the Taiwan Strait is decisive for the establishment of the navigation regime for the passage of foreign ships in the Taiwan Strait.

II. China's Jurisdiction within the Taiwan Strait

A. Provisions in the UN Convention on the Law of the Sea

The Taiwan Strait is within the jurisdiction of sovereignty of One China. In accordance with the UN Convention on the Law of the Sea, based upon different legal status of different waters, coastal States are entitled to different jurisdictions.

Foreign ships within the territorial sea will be entitled to the right of innocent

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14 Article 2 of the Exclusive Economic Zone and Continental Shelf Law of PRC, and Article 2 of "Exclusive Economic Sea Areas and Continental Shelf Law of ROC".

passage.[15] In accordance with the Article 21 of the UN Convention on the Law of the Sea, the coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea for the purpose of "preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof", but "such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."

On the other hand, foreign ships within the exclusive economic zone will be entitled the navigation freedom similar to that of the high seas with the consideration of the requirements of the coastal State for ocean environmental protection.[16] In accordance with Article 211(5) of the UN Convention on the Law of the Sea, coastal States may "in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules or standards established through the competent international organization or general diplomatic conference."

In accordance with the Article 21 and the Article 211(5) of the Convention, for different jurisdictions within the territorial sea and the exclusive economic zone of the coastal State, there might exist some differences. Within the territorial sea, the coastal State is entitled to sovereign rights, and may adopt laws and regulations with respect to vessel-sourced pollution , however "such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards"; On the other hand within the exclusive economic zone, the coastal State will only be entitled to the sovereign rights on the natural resources, therefore all domestic legislations promulgated by the coastal State shall be subject to "generally accepted international rules or standards". As a result, within the exclusive economic zone, the coastal State's jurisdiction is far less than the one within the territorial sea. The coastal State may promulgate the pollution discharge standards in the territorial sea at its sole discretion, but the adoption of the pollution discharge standards in the exclusive economic zone is within the authority of the international community.

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15 Refer to the attached schedule of this article for details of "Innocent Passage".
16 Article 58 of the UN Convention on the Law of the Sea.

B. Generally Accepted International Rules or Standards (GAIRS)

In view of the provisions regarding the territorial sea and the exclusive economic zone of the UN Convention on the Law of the Sea, the coastal State's jurisdiction over these two sea waters is limited by the "Generally Accepted International Rules or Standards".

"Generally Accepted International Rules or Standards" is a newly established legal concept in the UN Convention on the Law of the Sea. Its connotations focus on technical regulations and ordinances. The purpose of the establishment of this legal concept is "to enable the States that haven't adopted the technical conventions but have acceded to the Convention on the Law of the Sea to inscribe the widely-respected technical rules into their domestic legislations. Nevertheless, these generally accepted international rules or standards are not 'customary international law'. Without this measure, for the States that haven't adopted technical conventions, there would not be any applicable obligation."[17]

The reason for the existence of such provision in the UN Convention on the Law of the Sea is that domestic legislations promulgated by coastal States may apply to all foreign vessels within its jurisdiction; if there are no international laws to limit the pollution prevention standards promulgated by different coastal States, there would be absolutely a variety of pollution prevention standards in different sea waters of different States, which may cause the previously smooth international routes to become "rough and rugged". If the pollution prevention standards involve "design, construction, manning or equipment of foreign ships", it may prevent foreign ships from navigating in some specific sea waters as a result of failure to meet such requirements and the navigation right of the States granted by the Convention on the Law of the Sea will be deprived. Hence, since the international transportation may be impacted by the legislations promulgated by each coastal State regarding the jurisdiction imposed on foreign ships within their territorial sea or exclusive economic zone, the UN Convention on the Law of the Sea set limitations on their jurisdiction.

The establishment of the regime "Generally Accepted International Rules or Standards" makes the non-contracting States bonded by the Convention. It seems

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17 Kuen-chen FU, In View of the Convention on the Law of the Sea to Understand the Regulation and Law Enforcement Jurisdiction of Costal States on Pollution Prevention, in *A Monographic Study on the Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 65. (in Chinese)

that "the *pacta tertiis* principle" has been breached, which is against the Vienna Convention on the Law of Treaties dated from 1969. Nevertheless, contracting States joined in the UN Convention on the Law of the Sea of 1982, accepting all regimes established by such Convention upon their legislation procedure. Since the acceptance of UN Convention on the Law of the Sea is the result of the contracting States' free wills, then the acceptance of "Generally Accepted International Rules or Standards" does not breach the contracting States' free wills.[18]

What does "Generally Accepted International Rules or Standards" mean? The Committee on Coastal State Jurisdiction Relating to Marine Pollution, established by International Law Association in 1993, emphasized within its final report in the year 2000 that:

> *It is difficult to understand the exact acceptance level that needs to be achieved in order to be treated as "Generally Accepted". It is possible that the legislator intended to make it vague to keep the delicate balance. What we should consider as the key point is the acceptance level on some specific rules or standards established by the international community instead of the acceptance level of the legal document including such specific rules or standards. If such international document is generally accepted by all States, it is obvious that the rules or standards in such document are more likely to be "generally accepted". MARPOL 73/78 is a clear example of such kind of document.*[19]

The confirmation by the International Law Association on the International Convention for the Prevention of Pollution from Ships of 1973，as modified by the Protocol of 1978 relating thereto，in abbreviation "MARPOL 73/78", is based upon solid evidence instead of theoretical analysis. Currently there are 131 contracting States of MARPOL 73/78, covering 97.09% of the total tons of global

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18 Kuen-chen FU, In View of the Convention on the Law of the Sea to Understand the Regulation and Law Enforcement Jurisdiction of Costal States on Pollution Prevention, in *A Monographic Study on the Law of the Sea*, Xiemen: Xiamen University Press, 2004, p. 71. (in Chinese)

19 Kuen-chen FU, In View of the Convention on the Law of the Sea to Understand the Regulation and Law Enforcement Jurisdiction of Costal States on Pollution Prevention, in *A Monographic Study on the Law of the Sea*, Xiemen: Xiamen University Press, 2004, p. 65. (in Chinese)

commercial vessels,[20] and such general acceptance is decisive to confirm its status as a "Generally Accepted International Rule or Standard".

III. China's Actual Jurisdiction Effects in the Taiwan Strait (Taking Banishing Single-hull Tankers as an Example)

A. Decrees of Banishing Single-Hull Tankers-New Development of GAIRS

After the oil spill accident of Prestige in 2002, the governments of France and Spain announced on December 2002, that they would take unilateral measures in accordance with the UN Convention on the Law of the Sea to request all single-hull tankers[21] which loaded heavy oil to navigate beyond their exclusive economic zones. Furthermore, the European Union decided to banish all single-hull tankers out of EU sea waters. Under such pressure, the International Maritime Organization (IMO) shifted the elimination of single-hull tankers to an earlier date again in the Amendment within the Protocol I of MARPOL, passed in the IMO Marine Environment Protection Committee on December 4, 2003.[22] Such Amendment was effective on April 5, 2005, and in accordance with it, as from April 5, 2005, any tanker (single-hull tanker) built before MARPOL 73/78 shall not be operated in business. As China is a contracting State of MARPOL, the Transportation Ministry has announced that such Amendment is binding on China, thus China will comply with it.

Elimination of single-hull tankers is actually an improvement of the "Generally Accepted International Rules or Standards", namely it is the expansion of coastal

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20 At http://www.imo.org/Conventions/mainframe.asp?topic_id=247, 4 January 2005.

21 Single-hull tankers are tankers with only one hull protection. The accident rate of single-hull tankers is five times higher than that of double-hulls tankers due to defaults of design and quality, and oil spill is very likely to happen after an accident. China Marine Transportation, at http://www.cnshipping.com/youlun/newdetail.asp?id=477, 4 July 2005.

22 At http://www.imo.org/Conventions/contents.asp? doe-id =678&topic_id=258#2003, 4 December 2005.

States' jurisdiction.[23] If coastal States promulgate legislations restricting the passage of single-hull tankers in their territorial seas and exclusive economic zones in accordance with this Amendment, although such legislations involve "design, construction, manning or equipment of foreign ships", they are based upon MARPOL 73/78, so they are not only applicable under the framework of MARPOL 73/78, but also under the UN Convention on the Law of the Sea.

B. Applicability of International Conventions in China

Provided that it is necessary to discuss the actual law enforcement effect of the decree of elimination of single-hull tankers in the Taiwan Strait, the applicability of international conventions in China shall be discussed as a priority. Even though the principle of "One China" is generally accepted by the international community, China Taiwan is not a member of the UN, nor it has joined most of the international conventions of the world, thus the applicability of international conventions is mainly relevant to China Mainland. For the purpose of the applicability in China regarding the international rule of elimination of single-hull tankers, special attention should be paid to the following aspects:

1. Impacts Imposed by Conflict of Laws on the Applicability of International Conventions

There are no provisions regarding the enforcement of international conventions in the Regulations on Prevention of Sea Waters Pollution Caused by Vessels promulgated by China's State Council dated from 1983, while Article 97 of the Marine Environment Protection Law amended in 1999 prescribes that "if there is any otherwise provision regarding marine environment protection in any international convention contracted or joined by the PRC, such international convention shall be applicable, with the exception of the provisions on which the PRC has announced reservations." There is a precondition for applying an international convention prior to the domestic law when there is a conflict between such international convention and the domestic law. However, the amendment of elimination of single-hull tankers of MARPOL 73/78 dated from 2003 is not

23 There are 6 appendixes in MARPOL 73/78, regulating different vessel-sourced pollutions. The appendix 1 which focuses on oil pollution and the appendix 2 which focuses on toxic and harmful material are within general obligations which must be accepted, and other appendixes are optional to join in. The IMO amendment for elimination of single-hull tankers is within Appendix 1, which constitutes a requisite part of MARPOL 73/78.

in conflict with any legislation of China. As prescribed in Article 64 of Marine Environment Protection Law: "any vessel shall be equipped with pollution prevention facilities and tools. The structure and facilities of any vessel loaded with contaminative or harmful goods shall be able to prevent or reduce the contamination caused by its loaded goods to marine environment." Hence, the amendment of MARPOL 73/78 dated from 2003 actually refined and clarified the requirements of Article 64 of Marine Environment Protection Law. As prescribed in the Article 97 of the Marine Environment Protection Law, such refinement and clarification cannot be applied under the framework of China's existing legislations, and they will only be applied by promulgation of domestic legislations.

2. Impacts Imposed by the Nature of Legislations on Applicability of International Conventions

The nature of the Marine Environment Protection Law is an administration law, which is totally different to civil and commercial laws regarding the applicability mode. We can clearly know it by comparing MARPOL 73/78 with the UN Convention on Contracts for International Sale of Goods already joined by China. As prescribed in Article 142(2) of China's General Principles of Civil Law: "If any international convention concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international convention shall prevail, with the exception of the provisions on which the People's Republic of China has announced reservations" Hence, when hearing a civil or commercial case involving foreign affairs, a Chinese court may apply the UN Convention on Contracts for International Sale of Goods directly without promulgating a valid domestic law for the purpose of the UN Convention on Contracts for International Sale of Goods. The enforcement of an administrative law mainly depends on relevant administration authority exercising its function instead of the judgment of any court. Only in the event that the administrative counterpart refuses to accept the administrative management and brings an administrative lawsuit, the administrative law can be applied by a court. Therefore, as a technical regulation for prevention of vessel-sourced pollution, it is definitely the administrative authority who executes MARPOL 73/78 in a specific State in the first place. Nevertheless, the reason why an administrative authority cannot apply MARPOL 73/78 in accordance with the Marine Environment Protection Law is that an administrative authority can exercise its power in accordance with the principle of legal administration only under an explicit legislation. Although international convention can be applied according

to the Marine Environment Protection Law, the exact administrative authority and procedures for the implementation of such convention remains unclear, which is an especially prominent problem under the background of ambiguous division of maritime law enforcement functions among relevant authorities of China.[24]

3. Brief Summary

We can conclude that the international rule of the elimination of single-hull tankers cannot be applied domestically in China, but shall be achieved by express provisions in domestic legislations.

C. China's Current Legislations

On April 5, 2005, the Ministry of Transportation of China announced that MARPOL 73/78 was binding on China, thus China will comply with it.[25] Nevertheless, the announcement of the Ministry of Transportation only declares the binding force in the State level without any relevant domestic legislations or any promulgation of domestic administrative decree. The Ministry of Transportation forwarded this announcement particularly to the big-four State-owned shipping enterprises including COSCO, CSCL, CNFTTC and NJTC, and also to China Classification Society (CCS) and China Shipowners' Association (CSA), which means that China has demanded the domestic shipping enterprises to implement the amendment of MARPOL 73/78 of 2003, while there are no requirements in domestic legislation on foreign vessels in the sea waters within the jurisdiction of China. Namely, China has fulfilled the obligations of flag State under the Pollution Prevention Convention without exercising the right of coastal State under such Convention. Under that circumstance, in the event that an old single-hull tanker operated by a foreign company navigates the sea waters within the jurisdiction of China, there is no legislation to apply in order to prevent such navigation, and the

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24 Currently authorities with marine laws enforcement power in China are the Ministry of Transportation (the Maritime Bureau), the Ministry of Agriculture (the Department of Fisheries), the Ministry of Land and Resources (the National Bureau of Oceanography), environmental protection authority (the Ministry of Environmental Protection) and PLA, etc. Division of function between these authorities is not very clear.

25 The Ministry of Transportation of PRC, The Announcement regarding the Effectiveness of Amendment of Appendix I of "73/78 Pollution Prevention Convention and the Amendment of Status Evaluation Plan, *Announcement of the Ministry of Transportation*, No. 4, 2005, at http://www.moc.gov.cn/zhengwu/zhengwu/t20050405_12688.htm, 20 April 2005. (in Chinese)

international conventions with similar nature cannot be directly applied in China. Therefore, China cannot prevent foreign single-hull tankers' navigation in the sea waters within the jurisdiction of China.

According to the data of the Ministry of Transportation, the transportation capability of Chinese vessels engaging in international transportation does not meet the requirements of transportation of imported oil, and the implementation of China's strategic oil reserve plan will encourage more foreign vessels to participate in this market.[26] In addition, 90% of the imported oil of China in the marine oil transportation is conducted by the vessels leased or entrusted abroad.[27] Under the circumstance that the transportation of Chinese oil depends on foreign vessels, China's efforts to regulate domestic single-hull tankers will be invalid because foreign single-hull tankers still navigate freely in the sea waters within the jurisdiction of China.

As is prescribed by Article 4(2) of MARPOL 73/78, "any breach of this Convention occurs within the jurisdiction of a contracting State shall be prohibited and punished according to the legislation of such contracting State", which represents an obligation imposed by MARPOL 73/78 on a contracting State. If the contracting State lacks of legislation, prohibition and punishment will not be achieved. Under such obligation, a contracting State shall not only regulate its own ships in accordance with the identity as flag State, but also enforce the convention with the identity as coastal State, which is the only way to eliminate single-hull tankers and other low-level vessels effectively within the global scope and protect the marine safety and environment.

On the other hand, China Taiwan did not join in the framework set by UN Convention on the Law of the Sea and MARPOL 73/78 directly. Therefore, in view of the authority of China Taiwan, it has no obligation to eliminate single-hull tankers. However, it is necessary for China Taiwan to protect its marine and coastal environment. In theory, Taiwan is part of China, therefore any convention entered into by China Mainland will automatically be applicable for China Taiwan; however, such theory's actual effect is not remarkable because of the Taiwan Strait Confrontations. Nevertheless, regardless whether Taiwan authority is a member of

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26 Liu Gongchen, To Establish the Damage Compensation Regime Which Meets China's National Conditions, in *the Collection of Theses of 2005 Shanghai International Marine Forum*, p. 2. (in Chinese)

27 Xiang Chun, China Oil, Global Layout, *Southern Weekend*, 25 November 2004, p. A6. (in Chinese)

UN Convention on the Law of the Sea or MARPOL 73/78 or not, if any generally accepted rule is adopted in the governing of Taiwan Strait, it will be accepted by the international community.

IV. Cooperation between the Two Sides across the Taiwan Strait on the Issue of Vessel-sourced Pollution

According to Zou Keyuan, a researcher from the National University of Singapore, special attention should be paid to two key points in the research regarding the Taiwan Strait, one is the law of the sea, and the other is the relationship between the two sides. Any valuable research shall reflect these two key points.[28] As a matter of fact, whether the cooperation on the legislations regarding vessel-sourced pollution will be a success or a failure depends on the relationship between the two sides across the Taiwan Strait. Nevertheless, compared with other issues, vessel-sourced pollution has its own characteristic, which is that the control measures adopted by the two sides across the Taiwan Strait on vessel-sourced pollution not only focus on the pollution caused by the vessels owned by those two sides, but also on the pollution caused by foreign vessels. Such characteristic is attributed to the Taiwan Strait's nature as an important sea lane. The cooperation between the two sides across the Taiwan Strait exists in fact in order to exercise the coastal States' rights imposed by the Convention on the Law of the Sea, targeting foreign States to protect the marine environment of the Taiwan Strait by joining their hands together.

The cooperation between the two sides across the Taiwan Strait on vessel-sourced pollution can only be achieved by respecting the current status and respecting each other.[29] From this perspective, it is necessary for both sides to treat the other as a competent governing authority on the issue of vessel-sourced pollution, and both parties shall be entitled to exclusive jurisdiction within the area actually controlled by each side. Nevertheless, the exact contents of such jurisdiction may be negotiated to reach mutual consent. Beyond the territorial waters and internal waters of both sides, and within the sea lanes in the exclusive

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28 Zou Keyuan, Redefining the Legal Status of the Taiwan Strait, *International Journal of Marine and Coastal Law*, Vol. 15, No. 2, 2000, p. 250.

29 Kuen-chen FU, Jurisdiction over Marine Environmental Violations in the Taiwan Strait Area; A Perspective from Each Side of The Strait, in Kuen-chen FU ed., *Legal Issues in Ocean Administration*, Taipei: Wensheng Book Store, 2003, p.73.

economic zone, joint jurisdiction can be undertaken. Thus, this arrangement meets the consistent policies of "One Country, Two Systems" and "Taiwan is entitled to high-degree autonomy" , as well as it helps to prevent the dispute between unification and independence in China Taiwan, which will be helpful to reach some active and positive accomplishments for the environment protection in Taiwan Strait .

In order to reach the cooperation between the two sides across the Taiwan Strait on the issue of vessel-sourced pollution, the waters on which each side's jurisdiction is applicable shall be defined. According to the baselines of territorial sea published by both sides, they are both entitled to complete and exclusive jurisdiction over the internal waters and within12 nautical miles of the territorial seas. Beyond the territorial seas, within 24 nautical miles of the contiguous zones, both parties are entitled to partial exclusive jurisdiction in accordance with the legislations of both parties. It should be noticed that most of the waters surrounding Kinmen, Matsu and the nearby islands are within the straight baselines delimited by China Mainland, which are the internal waters of China Mainland. Therefore, in both parties' future negotiations on delimiting the waters for control over sea lanes, it is likely that the issue would only focus on an essential extent for the transportation and security of entry & exit of Kinmen and Matsu.[30]

Beyond territorial seas of both parties, there is a sea lane within the exclusive economic zone, which is an important sea lane for marine navigation, and foreign vessels are entitled to freedom of navigation set forth in the Article 58 of the UN Convention on the Law of the Sea. Therefore, compared to the innocent passage in the territorial seas of both sides, foreign vessels are more willing to navigate in such sea lane. But how do both sides exercise their jurisdiction over so many passing-by vessels in each day within such broad waters? In view of the implied common practice in more than forty years, it seems that only two principles are applicable to such jurisdiction: a. the authority which has received the application to exercise jurisdiction is entitled to such jurisdiction; b. Jurisdiction shall be delimited largely through the appropriate median line. Nevertheless, neither of the above principles

30 Kuen-chen FU, Research on the Legal Status of the Taiwan Strait in Kuen-chen FU ed., *Legal Issues in Ocean Administration*, Taipei: Taiwan Wensheng Book Store, 2003, pp. 387~395. (in Chinese)

can settle the issue completely.[31]

Regarding the jurisdiction over the sea lane within the exclusive economic zone, the fundamental solution should be that both parties shall delimit the sea waters through negotiations in order to exercise their jurisdiction, for which the only reference legislation is found on the Article 74 of the UN Convention on the Law of the Sea, that is, to delimit the boundary of the exclusive economic zone of each side to exercise their jurisdiction within "One China" according to the measures used by the States with opposite coasts or contiguous coasts in delimiting their exclusive economic zone. But if such provision is applicable, it may offer an excuse for China Taiwan Independence Force for the separation of our country by promoting "One China, one Taiwan", which may cause huge political risks. Therefore such provision is not suitable to be adopted under the background of current status of both sides across the Taiwan Strait.

What can be done under the current circumstances would be to establish joint jurisdiction over specific waters based upon previous implied common practices, which might be similar to the establishment of the Sino-Vietnam joint fishing zone, and in which the law enforcement is conducted jointly by both parties. However, in order to achieve the joint law enforcement, it is important that both parties cooperate first with the establishment of such law by enhancing the communication between the two sides, sharing data of scientific observations and measurements on the Taiwan Strait, formulating an emergency response cooperation plan, and jointly assessing the loss after accidents.

In order to achieve such joint law enforcement, a unified law enforcement foundation shall be paved namely by enacting uniform legislations. In a country of multi-jurisdiction such as the U.S., a uniform legislation is often used to settle the jurisdiction disputes.[32] In areas suffering from vessel-sourced pollution, a uniform legislation is easy to be achieved since the IMO has established a set of highly unified legislation within the global scope in such areas, and some conventions presided by the IMO, such as MARPOL 73/78, have been adopted as "Generally Accepted International Rules or Standard". Therefore, it is not difficult to achieve a

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31 Kuen-chen FU, Research on the Legal Status of the Taiwan Strait in Kuen-chen FU ed., *Legal Issues in Ocean Administration*, Taipei: Wensheng Book Store, 2003, p. 382. (in Chinese)

32 Kuen-chen FU, Jurisdiction over the Pollution in the Taiwan Strait, in Kuen-chen FU ed., *The Collection of Theses on International Law and China*, Taipei: Law School of Taiwan University, 1991, p. 101. (in Chinese)

uniform legislation between the two sides under the framework established by the IMO.

In order to achieve joint law enforcement, a cooperation mechanism shall be established. However, there are some defaults in the marine laws enforcement mechanism within China Mainland that make the joint law enforcement difficult.

According to the Article 5 of Marine Environment Protection Law, the current authorities with marine laws enforcement power in China are the National Bureau of Oceanography, the Ministry of Environmental Protection , the Maritime Bureau of the Ministry of Transportation, the Department of Fisheries of the Ministry of Agriculture and the Environmental Protection Authority of PLA (People's Liberation Army), amongst which the Maritime Bureau is responsible for the settlement of pollution caused by commercial vessels ;the Department of Fisheries for the settlement of pollution caused by fishing boats; and the Environmental Protection Authority of PLA for the settlement of pollution caused by battleships. The law enforcement function on the marine environment protection is divided into different governmental authorities, which is unavoidably causing overlapped functions and shuffling responsibilities, and for which the law enforcement effect is adversely affected. This is one of the severe defaults of the Marine Environment Protection Law promulgated in 1982, and it represents one of the important motives of the amendment of such law in 1999.[33] However, such default was not corrected in the amendment of 1999. In order to correct such default, Article 19 of this law prescribes that the authorities exercising the supervision and administration power on marine environment protection are encouraged to jointly enforce this law. But will the attitude of encouraging joint law enforcement absolutely eliminate the adverse effect of the separation of the law enforcement function? The answer may not be optimistic.

In order to control the vessel-sourced pollution in the Taiwan Strait, the cooperation between the two sides across the Strait is necessary. But under the circumstance of the separation of law enforcement function in China Mainland, such cooperation would be more difficult. In order to achieve effective cooperation,

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33 Zhang Haoruo, Explanation of the Revised Draft of the Marine Environmental Protection Law of the People's Republic of China, *Gazette of the Standing Committee of the National People's Congress of the People's Republic of China*, Vol. 7, 1999, p. 674 (in Chinese). Quoted from Zou Keyuan, Current Legal Development: People's Republic of China-Curbing Marine Environmental Degradation: China's New Legislation, *International Journal of Marine and Coastal Law*, Vol. 16, No. 2, 2001, p. 356.

it is necessary for China Mainland to unify the law enforcement function to promote communication and coordination. The practical solution may be to establish a governing authority over relevant existing authorities in charge of the settlement of the vessel-sourced pollution in the Taiwan Strait to exercise a uniform law enforcement power. As for the communication with the relevant authority of Taiwan, it is also important to establish an authority to assume full responsibilities. The above measures may ensure the smooth enforcement of laws, which would be feasible and beneficial for the protection of the environment.

V. Epilogue

After nearly half-century of confrontation, the Taiwan Strait is basically treated as a political-and-military-sensitive zone by the authorities of the two sides; the management and protection on the Strait have not been put into schedule for a long period of time. When considering the Taiwan Strait's position as an important sea channel of East Asia, as well as acknowledging the increasing pressure of navigation in such channel as a result of rapid development of China's economy, we have to face up to the administration and environment protection of the Taiwan Strait. All in all, the Strait is the only one strait between both sides, which is not only a transportation channel, but there are also various fisheries in the vast water area in the Strait, and the beautiful coastal scenery is a vital resource for tourism. All of the above valuable resources may be damaged by a severe oil spill accident or a high intensity radiation pollution event. Therefore, both sides shall enhance the cooperation in this area. In addition, since Taiwan sovereignty is not accepted, most environment protection conventions are not applicable for it. Some people from China Taiwan are, in the name of controlling environmental deterioration, persuading the international community to allow China Taiwan to join in relevant international environment protection conventions regarding environmental deterioration.[34] Under such circumstance, if China Mainland is willing to help China Taiwan to join in and implement such international environment protection conventions in the name of Taipei, China or with other proper identity. It would not only be positive for the environmental protection, but also for politics. Pollution in

34 Daniel C. K. Chow, Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan's Direct Participation in International Environmental Law Treaties, *Stanford Environmental Law Journal*, Vol. 14, 2001, p. 256.

the Taiwan Strait is the main interest of the people living in the two sides across the Strait, for which the opposition is less in that area, and the aforementioned uniform legislation and joint law enforcement is worthy for both sides to make endeavors.

Appendix: Comparison between Transit Passage and Innocent Passage[35]

Transit Passage	Innocent Passage
Transit passage refers to the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit. (§ 38(2))	Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. (§ 19(1)) Passage considered to be prejudicial to the peace, good order or security of the coastal State is set forth in UNCLOS (§ 19(2)).
The transit passage does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State. (§ 38(2))	Innocent Passage refers to navigation through the territorial sea or for the purpose of proceeding to or from internal waters or a call at such roadstead or port facility. (§ 18(1))
Ships shall refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress; (§ 39(1)(c))	Exceptions of "continuous and expeditious": incidental to ordinary navigation or rendered necessary by force majeure or by distress for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.
States bordering straits shall not hamper transit passage (without proper reasons). (§ 44)	The coastal States shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. (§ 24)
States bordering straits shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. (§ 44)	The coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea. (§ 24(2))

35 K. L. Koh., *Straits in International Navigation*, New York: Oceana Publications, 1982, pp. 167~169. Quoted from Zhou Yi, A Commentary on the Legal Position of the Taiwan Strait in View of International Law, *Jurisprudence Collection of Chung Cheng University*, No. 8. (in Chinese)

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The right grants the freedom of overflight to commercial and military aircrafts. § 38(1))	The right shall be exercised by ships, not by aircrafts (authorized in written).
All ships and aircraft enjoy the right of transit passage, which shall not be impeded. (§ 38)	No express provision in any convention on the issue that whether this right can be hampered. It seems that the coastal State may hamper innocent passage. (§ 24(1))
Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this Article. (§ 41(7))	The coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships. (§ 22(1))
More restrictions are imposed on the power of States bordering straits to adopt laws and regulations relating to transmit passage through the straits. (§ 42(1))	The scope of the coastal State may adopt laws and regulations relating to innocent passage is vast.(§ 21)
Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. (§ 41(4))	The coastal State may designate or prescribe sea lanes and traffic separation schemes without submitting the designation and prescription to any competent organization, but in the designation of sea lanes and the prescription of traffic separation schemes, it shall take into account the recommendations of the competent international organization. (§ 22)
Sea lanes and traffic separation schemes designated by States bordering straits shall conform to generally accepted international regulations. (§ 41(3))	There are no express provisions to require sea lanes and traffic separation schemes adopted by the coastal State to conform to generally accepted international regulations.
Such laws and regulations shall not in their application have the practical effect of denying, hampering or impairing the right of transit passage. (§ 42(2))	In any laws or regulations adopted in conformity with this Convention, the coastal State shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage. (§ 24(1)(a))

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No express provisions prohibit submarines and other underwater vehicles from navigating under the water.	In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and show their flag.
No express provision is enacted to stop transit passage of foreign ships that do not comply with the laws and regulations of States bordering straits.	Any foreign warship that does not comply with the laws and regulations of the coastal State may be required to leave the territorial sea immediately. (§ 30)
No express provision prevents a passage which is not transit.	The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent. (§ 25(1))
There is no express provision on charges that shall be imposed on a foreign ship for specific services.	Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination. (§26(2))
States bordering straits shall not stop transit passage on the ground of national security. (§ 45(2))	The coastal State may suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published. (§ 25(3))
No ship is obliged to be innocent, regardless whether it is specific or not.	The costal State may prevent a passage which is not innocent, upon its determination regarding whether a ship is innocent or not.
A foreign battleship is entitled to transit passage in a strait used for international navigation.	Whether a foreign battleship is entitled to an innocent passage remains in dispute.

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International Law Issues Regarding Clandestine Transportation of Nuclear Materials by Sea

WANG Xiaohui *

Abstract: With the advancement of science and technology, the use of nuclear energy has become a necessity in recent years due to extreme energy shortages. As such, some States favor using spent nuclear fuel from nuclear reactors as a form of energy. This has increasingly led to the international trade of nuclear materials, mainly spent nuclear fuel. Most commonly, this trade takes place via clandestine sea transportation. Because of the clandestine nature of this transportation, issues arise as conflicts between traditional navigational freedom laws and the protection of the marine environment and human safety, the applicability of precautionary principle, requirements of prior notice, and assumption of liability of States. In particular, Japan is one of the major States transporting nuclear materials by sea. Despite the clandestine shipping lanes, such Japanese transportation undoubtedly navigates through the South China Sea and Taiwan Straits. Therefore, China must be aware of issues regarding clandestine transportation of nuclear materials by considering theories of international law and the potential threats that it faces. In doing so, China should seek cooperative solutions to safeguard itself against the dangers posed by those States transporting nuclear materials.

Key Words: Clandestine transportation of nuclear materials; Freedom of navigation; Marine environment

Nuclear materials are the substance of considerable destruction. Exposure to radiation can lead to death, cancer, genetic variations and other consequences to humans. Accordingly, the international community has strict control over highly-

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radioactive nuclear materials. However, due to global energy shortages, some States now favor nuclear energy. Advancements in science and technology have given rise to its more prevalent use as an alternative form of energy. As such, exporting processed nuclear materials has significantly increased. Transporting nuclear materials via sea has the potential to create great threats to costal States, with some of these States opposing sea transportation. This has led to sharp conflicts of interests between coastal States and transporting States.

Transporting nuclear materials by sea involves the following legal disputes: disputes between freedom of navigation and the marine environmental protection, application of precautionary principle, and the necessity of prior notification, among other concerns.

I. Dispute between Freedom of Navigation and the Marine Environment and Human Safety

The traditional navigational freedoms when transporting nuclear materials are constrained by requirements to protect both human safety and the marine environment. Severe disputes can occur between the States that transport nuclear materials and coastal States. These disputes arise where States transporting nuclear materials argue that, based on the principles of navigational freedom, ships carrying nuclear substances are not required to give prior notice to coastal States just as prior notice is not required of other materials. Coastal States argue that safeguarding life and protecting the marine environment, traditional navigational freedoms shall not be applicable to ships transporting nuclear materials and thus, these States require prior notification and the application of precautionary principle. Examining international law regimes can help guide in balancing the interests of these States.

A. Regimes under International law in Relation to Freedom of Navigation

The United Nations Convention on the Law of the Sea (UNCLOS), the Geneva Conventions, and international customary law, all have legal regimes that regulate transporting highly-radioactive spent-nuclear fuel by sea. Currently, most States apply the provisions of the UNCLOS, so it is necessary to analyze the regimes under the UNCLOS and the Geneva Conventions in relation to freedom of navigation.

1. Regime of Passage in the Territorial Sea – Innocent Passage

Ships of all States, whether costal or landlocked, enjoy the right of innocent passage through territorial seas, according to the Convention on the Territorial Sea and the Contiguous Zone and the UNCLOS.[1] Although this right includes passage through territorial seas, it is not limited to passage. The right also includes stopping and anchoring. However, stopping and anchoring must be incidental to ordinary navigation, rendered necessary by force majeure or distress, or for rendering assistance to persons, ships or aircraft in danger or distress.[2] UNCLOS provides that coastal States shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with the UNCLOS.[3] However, the UNCLOS also vests appropriate right of protection to the coastal State, meaning that the coastal State can take necessary steps in its territorial sea to prevent non-innocent passage.[4]

The UNCLOS takes an objectivity-based point of view in terms of verification standard of the right of innocent passage. This standard bases the right of innocent passage on actual actions rather than subjective purposes.[5] UNCLOS says that passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with the UNCLOS as well as with other rules of international law. Accordingly, the coastal State has the right to take necessary actions in its territorial sea to prevent any non-innocent passage.[6] With prior notice, the coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises.[7] Furthermore, passage of a foreign ship that is prejudicial to the peace, good order or security of the coastal State shall not be considered innocent passage. Of course, the coastal State has the right to judge the passage of the ship to which a potential incident

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1 UNCLOS, Art. 17.
2 UNCLOS, Art. 18(2).
3 UNCLOS, Art. 24.
4 UNCLOS, Art. 25(1).
5 As declared by the 1930 Hague Conference, "Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State." League of Nations Doc. C. 351 (b). M. 145(b), 1930, p.217.
6 UNCLOS, Art. 25(1).
7 UNCLOS, Art. 25(3).

may occur and which creates a catastrophic disaster to the coastal State.

The sovereignty of the coastal State extends to its territorial sea area and it can enact laws and regulations that are applicable in such areas. It can do so in order to prevent, reduce, or control ship-induced pollution from foreign ships, including those entitled to innocent passage, so long as the laws and regulations do not violate the regime of innocent passage as provided for in Chapter Three, Part II, of the UNCLOS.

2. Passage Regime Applicable to Straits Used for International Navigation – Transit Passage

UNCLOS set forth provisions respecting the straits used for international navigation. These provisions have granted passing ships more freedoms that largely cancel conditional requirements set forth for innocent passage. With certain exceptions, this Convention stipulates that the regime of transit passage is applicable to the straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.[8] The UNCLOS does not allow coastal States to interrupt a ship during transit passage. In addition, it does not set forth "innocence" as a general requirement of transit passage. However, the UNCLOS does put the following limitations on the regime of transit passage:

Transit passage must be the exercise of the freedom of navigation and over-flight solely for the purpose of continuous and expeditious transit. This requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.[9]

Ships in transit passage shall (1) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea; and (2) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.[10] Further, ships and aircraft, while exercising the right of transit passage, shall (1) proceed without delay through or over the strait; (2) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in

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8 UNCLOS, Art. 37.
9 UNCLOS, Art. 38(2).
10 UNCOLOS, Art. 39(2).

any other manner in violation of the principles of international law embodied in the Charter of the United Nations; and (3) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress.[11] As part of transit passage, it is also required that foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.[12]

When activities irrelevant to the exercise of the right of transit passage are carried out, the ship in transit passage shall comply with other applicable provisions of the UNCLOS.[13] Such activity shall be subject to the regime of innocent passage that are applicable to the territorial sea, meaning that if the passage is not innocent, the coastal State has the right to interrupt passage. If the passage does not comply with the requirement of continuous and expeditious passage as set forth in Paragraph 2, Article 38 of the UNCLOS, the regime of transit passage will not be applicable.[14]

The UNCLOS stipulates the laws and regulations respecting transit passage of the States bordering straits can adopt laws and regulations with respect to transit passage through straits in relation to all or any of the following items so long as such laws and regulations do not discriminate in form or substance among foreign ships, or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this chapter. Besides, they shall make applicable international law in relation to discharge of oil, oil pollution waste and other hazardous substances in straits effective in order to prevent, reduce and control pollution.[15]

States bordering straits can take appropriate actions against ships that have caused severe damage or pose threat of causing severe damage to the marine environment of straits in violation of the laws and regulations as specified in Items (a) and (b), Paragraph 1, Article 42 of the UNCLOS except those entitled to sovereign immunity.[16]

If a foreign ship other than those entitled to sovereign immunity has committed

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11 UNCLOS, Art. 39(1).
12 UNCLOS, Art. 40.
13 UNCLOS, Art. 38(3).
14 Duncan E. J. Currie, The Right to Control Passage of Nuclear Transport Vessels under International Law, at http://www.globelaw.com/Nukes/, 5 October 2006.
15 UNCLOS, Art. 42(2).
16 UNCLOS, Art. 233.

a violation of the laws and regulations referred to in Paragraphs 1(a) and (b), Article 42, the UNCLOS, causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures.

Overall, although the UNCLOS makes looser provisions than those in respect of the right of innocent passage for straits used for international navigation, it emphasizes the safety rules to be abided by while passing through the straits used for such navigation, in particular, the rules aiming to prevent any pollution at sea.

3. Regime of Archipelagic Sea Lanes Passage

The UNCLOS has set forth special international law regimes for archipelagic States or States constituted by interrelated islands. In pursuance of the provisions of Article 47 of the UNCLOS, an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago. The waters enclosed by the archipelagic baselines are called archipelagic waters, of which the archipelagic State enjoys sovereignty.[17] Based on the special provisions of the UNCLOS, archipelagic sea lanes passage is applicable to these waters. An important difference between this right and the right of innocent passage is that ships are only entitled to innocent passage within the scope of sea lanes as designated by an archipelagic State. If an archipelagic State does not designate sea lanes, ships can exercise the right of archipelagic sea lanes passage through the lanes used for international navigation under normal conditions.[18]

4. Regime of Passage in Exclusive Economic Zone

An exclusive economic zone refers to the waters that do not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. According to the provisions of the UNCLOS, a coastal State has sovereign rights of protecting and preserving the marine environment in this area.[19] Article 58 of the UNCLOS prescribes that in the exclusive economic zone, all States, whether coastal or landlocked, enjoy, subject to the relevant provisions of this Convention, the freedoms of navigation and over-flight referred to in Article 87. The UNCLOS also provides that in exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner

17 UNCLOS, Art. 49.
18 UNCLOS, Art. 53.
19 UNCLOS, Art. 56(2)(c).

compatible with the provisions of this Convention.[20] Furthermore, Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone as far as they are not incompatible with this Part. Pertinent provisions in respect to the freedom of navigation on the high seas are applicable to the navigational right of ships in the exclusive economic zone. However, the author argues that this does not mean that the ship carrying nuclear materials enjoys total freedom of navigation because, among other things, the UNCLOS sets forth provisions for the protection and preservation of the marine environment, and the conservation and management of living resources. The transportation of highly radioactive materials by sea can undoubtedly impose destructive influences on the marine environment and its living resources because of leakage due to accidents. Therefore, in the exclusive economic zone, ships carrying nuclear materials need to comply with pertinent rules, especially the constraint under the precautionary principle.

The UNCLOS provides for certain limitations, as well. In particular, it requires that ships granted navigational freedom rights respect the interests of coastal States to protect the marine environment and human safety. The Preamble of the UNCLOS stipulates that, "recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment." From this perspective, efficient communication as well as preservation and protection of marine environment are important purposes of the UNCLOS. Thus, the extent of navigational freedom allocated to which ships carrying nuclear materials are entitled is an important issue that deserves further discussion.

B. International Law Respecting the of Protection of the Marine Environment and Human Safety

Presently, the protection and preservation of the marine environment are important contents of jurisdiction of coastal States. According to Article 194 of the UNCLOS: 1. States are obliged to protect and preserve the marine environment

20 UNCLOS, Art. 56(2).

and shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection; 2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention; and 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize pollution to the fullest possible extent, including (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels. The Convention also stipulates that in taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.[21] Thus, the UNCLOS is balancing the protection of the marine environment and the protection of freedom of activities at sea to safeguard the smooth performance of activities at sea with the precondition of not allowing the destruction of the marine environment.

Additionally, as prescribed in Paragraph 7, Article 220 of the UNCLOS, notwithstanding the provisions of Paragraph 6, whenever appropriate procedures have been established, either through the competent international organization or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed. Pursuant to international law, both customary and conventional, States have the right to take and enforce measures beyond their territorial sea that are proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following a maritime casualty or acts relating to such a casualty

21 UNCLOS, Art. 194.

that may reasonably result in major harmful consequences.

The provision discussed above are those pertinent under the UNCLOS in order to protect the marine environment. They constitute the counter-restriction of the right of freedom of navigation of the ships carrying nuclear materials.

Human safety is another issue of international law that is contradictory to the freedom of navigation. Relative to the freedom of navigation for ships, interests respecting human safety are more important. Where the transportation of nuclear materials imposes or potentially imposes critical safety interests of any State, such State has the right to discontinue the act of transporting nuclear materials.[22] States have the right to discontinue the transportation of nuclear materials without prior notice, because such an act is either prejudicial to the peace, good order or national security of the coastal State or in violation of pertinent laws and regulations of the international community. The UNCLOS lists the acts that are prejudicial to the peace, good order or national security of the coastal State. Without a doubt, any act listed under Article 19 in the territorial sea of a coastal State are prejudicial to the peace, good order or national security of the coastal State, but this Article does not include all of the harmful acts. Hence, any activity beyond the acts of Article 19 are also prejudicial to the peace, good order or tranquility of the coastal State if it causes catastrophic damage to the environment of the coastal State.[23] The Canadian Arctic Waters Pollution Prevention Act that Canada enacted in 1970 has similar provisions. The Canadian Government considers preventing environmental damage as one of the most important self-defense mechanisms.[24] Primary considerations under traditional principles of international law were given to navigational freedoms of the flag-State ships. But it is these same flag States in the international community, that at present, are transporting highly radioactive spent nuclear fuel accompanied by numerous hazards, which will inevitably pose considerable threats to the peace, tranquility and good order of the coastal State when a maritime casualty occurs. Apparently, in this case, it is not appropriate to invoke

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22 UNCLOS, Art. 25(3).

23 UNCLOS, Art. 19.

24 See 9 ILM 607,610. The Canadian reply to a United States protest also further stated that "Such concepts are particularly relevant, however, to an area having the unique characteristics of the Arctic, where there is an intimate relationship between the sea, the ice and the land, and where the permanent defilement of the environment could occur and result in the destruction of whole species." It should be noted that this was over twenty years ago and subsequent to the Rio declaration and the entry into force of UNCLOS the rights and duties of coastal states to protect the environment have been further extended.

the old principles under international law because it cannot protect the interests in connection with the marine environment of the entire international community.

C. Result of Harmonization of This Issue by the International Community – Traffic Separation Schemes

The international community has made great efforts to harmonize the contradiction between the need to transport nuclear materials and the protection of the marine environment and human safety. As a compromise of these interests, UNCLOS created separate sea-lanes for transporting nuclear materials and the right of innocent passage.

The UNCLOS set out special provision in Article 22 because it foresaw the potential conflict between the right of innocent passage of ships transporting nuclear materials and the costal States' need to protect the marine environment. These special provisions allow costal States to designate certain sea lanes for the passage of ships carrying nuclear substances to enjoy the right of innocent passage only in certain sea lanes.[25] As stipulated in Article 22(2), in particular, tankers, nuclear-powered ships, ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required by the coastal State to confine their passage to such sea lanes. A similar regime of sea lanes and traffic separation schemes are also set forth in the regimes for straits used for international navigation and archipelagic waters.

This separation of sea lanes aims to harmonize the relationship between freedom of navigation and the need to protect the marine environment by coastal States. It not only supports the proposition that ships carrying nuclear substances or materials enjoy the right of innocent passage, but also safeguards the sovereignty over territorial sea areas of coastal States and stands up for the need of protecting interests of the marine environment. Another balance between these interests is found in the provisions set forth by the International Code of Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-level Radioactive Wastes on Aboard Ships (hereinafter "INF Code")[26] as well as in the stipulations and safeguard measures of the International Atomic Energy Agency (IAEA) regarding cross-

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25 UNCLOS, Arts. 22, 23.

26 The INF Code entered into force officially by being adopted by the International Convention for the Safety of Life at Sea (SOLAS) in 2001 and it mainly sets forth operational procedures and condition requirements in respect of transportation of nuclear materials.

border transportation of nuclear materials.

Although disastrous consequences can result from transporting nuclear materials, nuclear energy trade has become necessary due to global energy shortages. Because of this, it is unwise for costal States and States transporting nuclear materials to stand on opposing ground. Transporting States should not request the entitlement to the right of navigational freedom, including the right of innocent passage, while at the same time, costal States cannot refuse the passage of ships carrying nuclear substances. States requesting the right of innocent passage should recognize that transporting nuclear materials is anything but innocent. To the contrary, these transports pose the threat of nuclear material leakage that can have a fatal and irreversible threat to the surrounding environment. Insisting on the right of innocent passage in this manner is an irresponsible and irrational argument. By contrast, repeated hampering by costal States to the passage of ships transporting nuclear materials will force these ships to use clandestine shipping lanes in order to avoid detection and monitoring by costal States. Thus States transporting nuclear materials and coastal States should cooperate with each other frankly and sincerely, recognizing the necessity of regulation and promotion of the use of nuclear energy. Without any other alternative, the traffic separation scheme currently used is the most suitable solution to transporting nuclear materials by sea.

II. Application of the Precautionary Principle in Transporting Nuclear Materials by Sea

A. Background and Meaning of the Precautionary Principle

No simple and clear legal definition exists for the expression of "precautionary principle." Some German scholars believe that the precautionary principle first appeared in national legislation of West Germany and Switzerland in the 1980s, when the so called "Vorsorgeprinzip" existed in the legal systems of these two States.[27] Because we lack scientific data on the exact sources of human pollution creating global destruction of the environment and ecosystems, "precautionary methods" with excessive carefulness are preferred for immediate pollution management rather than allowing unmitigated pollution. Such a basic stance is

27 Kuen-chen FU, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 97~98. (in Chinese)

called "precautionary principle."[28]

B. Significance of the Precautionary Principle

The precautionary principle is a policy orientation, requiring policy-makers to have foresight. To reduce environmental damage or the threat of such damage, this policy requires immediate implementation, even in the absence of scientific data that shows how the serious the damage will be.[29] Accordingly, international law does not allow an excuse of uncertainty to buy policy makers time in the implementation. Similarly, States, even in the face of this scientific uncertainty, should not delay in issuing injunctions against acts that potentially cause environmental damage. The Netherlands has drafted a discussion paper asserting the point of view that implementation of the precautionary principle has two focal points: (1) adopt preventive standards and norms, and (2) activate procedures that have a preventive effect.[30] The later emphasizing on timeliness: implementation of the precautionary principle excludes the practice of waiting for definite scientific data before taking any action. Instead, it requires immediate action in case of any occurrence. Even if there is no certainty of environmental pollution, action should occur beforehand to ensure environmental protection.

In fact, the precautionary principle reverses the burden of proof, meaning that burden of proof is shifted to the actor (the polluter) when environmental damages are uncertain. It requires that the actor prove the acts do not cause environmental pollution. As such, this exempts the burden of proof by the States that could potentially suffer pollution damage. Through theoretical analysis, this is an impartial practice putting forth higher requirements on actors to protect the environment and mitigate potential environmental threats. After all, it is considerably difficult, unrealistic, and infeasible for States suffering damage caused by pollution to bear the burden of proof or estimate the damage to the marine environment caused by an act conducted by another State. Therefore, through the policy of the precautionary principle, States transporting hazardous materials will

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28 Kuen-chen FU, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 97~98. (in Chinese)

29 Relevance and Application of the Principle of Precautionary Action to the Caribbean Environment Programme, *CEP Technical Report*, No. 21, 1993, p. 3.

30 Eugnene R. Fidell, Maritime Transportation of Plutonium and Spent Nuclear Fuel, *International Lawyer*, Vol. 31, 1997, p. 757.

pay closer attention to the safety and prudence of their acts by bearing the burden of proof. Undoubtedly, this burden shifting is conducive to better environmental protections.

Following the provisions of the UNCLOS relating to the protection and maintenance of the marine environment, States shall be committed to, based on national policies, current situations, resources and other factors, striving to prevent, reducing and controlling the worsening of the marine environment. In following the provisions of UNCLOS, these States will be able maintain and improve production capacities. In a final analysis, it is necessary to endeavor to apply the precautionary principle to prevent marine environmental pollution and to prevent the deterioration of marine environments by reducing long-term, irreversible negative influences on the marine environment.[31]

Similarly, flag State of ships carrying nuclear materials should also adopt the precautionary principle to prevent potentially severe damage to the environment due to nuclear accidents. Flag States and the States transporting nuclear materials shall be responsible for the acts of their ships as coastal States are responsible for their territorial sea, contiguous zones and exclusive economic zones. This means that in accordance with the precautionary principle, the States transporting nuclear materials shall perform an assessment on the environmental influence and work out safe solutions that shall be submitted to the coastal State or relevant international organization in order to confirm compliance of such transportation with the requirements of environmental and safety standards.

III. Application of the Obligation of Prior Notification

Another dispute of the interpretation of the right of innocent passage and the scope of its application stems from differing points of view on the obligation of prior notification of passage. Nuclear-capable States or the States transporting nuclear materials argue that the obligation of prior notification contradicts the freedom of navigation provided for by the UNCLOS. However, it is necessary to recognize that in practice, these States most often give prior notification when navigating through the waters of trusted States and political allies.[32] On December

31 Agenda 21, Chapter 17. 17. 22.

32 Eugnene R. Fidell, Maritime Transportation of Plutonium and Spent Nuclear Fuel, *International Lawyer*, Vol. 31, 1997, p. 757.

18, 1997, Japan declared that it would announce the shipping route of a ship carrying nuclear materials from France after it set sail in 1998. Similarly, the U.K. gave the Panama Canal Commission prior notification of its transportation activities to pass through the Panama Canal in 1998. However, smaller States throughout the Caribbean did not receive any prior notification. This shows how nuclear-capable States use double standards when it comes to prior notification by considering smaller and weaker States as "second-class members" of the international community. Clearly, such double standards go against the important principle of international law that States are all equal, whether small or large, making the double standard unfair and unacceptable.

A. Necessity of Prior Notification

Prior notification plays two roles: (1) when made to relevant States, transparency is improved by reducing rumors of nuclear material transportation by sea and avoiding disturbance in the international community, and (2) States are able to make effective preparations beforehand for potential maritime accidents resulting from cross-border transport of nuclear materials. Furthermore, pertinent international conventions, such as the Basel Convention, and relevant regulations of the IAEA, prescribe notification as an important obligation of the States transporting nuclear materials.

B. State Practice in Relation to Prior Notification

There are numerous past cases of ships transporting dangerous materials giving prior notification to costal States. Denmark, Norway and Sweden require foreign warships to make prior notification before entering their respective territorial seas. Since 1991, the Canadian Government has approved the United States' application for passage of nuclear-powered submarines through Canada's internal waters. Another important example is found in the draft of the Protocol on the Prevention of Pollution of the Mediterranean Sea by Trans-boundary Movements of Hazardous Wastes and Their Disposal, signed in Izmir, Turkey in October 1996. Article 6 of the Protocol requires ships in transit passage to obtain permission from the transit State prior to passage through its territorial sea. According to Paragraph 4, Article 6, the transit State will pay due attention to the act of transit passage of the ship in transit passage based on its prior application. Recent research shows States have

differing practices of prior notification of ships in transit passage. States requiring only prior notification are Canada, Djibouti, Pakistan, Portugal and the United Arab Emirates. States that require authorization before passage include Egypt, Guinea, Iran, Malaysia, Oman, Saudi Arabia, Turkey and the Republic of Yemen. States that do not permit the passage of such ships regardless of prior notification include Argentina, Haiti, Ivory Coast, Nigeria, the Philippines, and Venezuela.[33]

It can be seen that a large number of State practices require ships transporting nuclear materials through territorial seas to give prior notification. If such practices, powerful enough to prevent ships carrying nuclear materials from entering their territorial sea or exclusive economic zones, continues into the future, their significance could considerably change and promote the establishment of a new international law for the obligation of prior notification. Additionally, once relevant lawsuits are filed, these State practices may be considered as evidence of international customary law that establishes the obligation of prior notification by a relevant court or the arbitration court. Furthermore, interpreting the relevant UNCLOS provisions, these State practices may also be considered and recognized by a relevant court or the arbitration court. This is so because, in accordance with the provision of Article 31 of the Vienna Convention on the Law of Treaties, 1969, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be considered an important factor of the interpretation of this treaty.[34]

A large number of State practices have made the ships carrying these substances fearful in choosing shipping routes. In the 1990s, when over 40 States were fiercely opposed, ships gradually began avoiding entering into the territorial sea of any those States. In particular, transportation routes in 1999 bypassed not only the Malacca Straits and territorial seas of Southeast Asian States, but also Panama Canal.[35]

Therefore, the large number of national practices requiring prior notification should pay close attention to the international community. Additionally, relevant States shall require, as they have previously done, ships carrying nuclear materials to give prior notification before entering the territorial sea of States rather than

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33 Jon M. Van Dyke, The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials, *Ocean Development & International Law*, Vol. 33, 2002, pp. 77~108.

34 The Vienna Convention on the Law of Treaties, Art. 31(3)(b).

35 Radioactive Sea Shipment, at http://www.nci.org/seatrans.htm, 24 June 2006.

using a clandestine transport lane. As a transit State for the ships carrying nuclear materials, China shall take the same stance and use the same national practice as Pacific and other coastal States by requiring prior notification and opposing clandestine transportation of nuclear materials.

IV. Influences on China Imposed by Clandestine Transportation of Nuclear Materials by Sea and China's Countermeasures

A. Influences on China Imposed by Clandestine Transportation of Nuclear Materials by Sea

China is a transit State for Japanese ships carrying nuclear materials. In fact, the shipping routes of navigation used by Japan to carry highly radioactive spent nuclear fuel from nine Japanese electricity companies pass through the Taiwan Straits to the U.K. and France.[36] On at least occasion, the transportation ship traversed the South China Sea after passing Malacca Straits and returned to Japan, bypassing Taiwan Island.[37] China's South China Sea is a semi-enclosed sea as defined in the UNCLOS, which features poor self-cleaning capacity due to constraints of its special geographic conditions, making it easier to accumulate pollutants and suffer from pollution, classifying it as a "vulnerable ecosystem." The Taiwan Strait, used for international navigation, measures approximately 350 nautical miles on its south end, making it considerably wider than the north end, which measures only about 135 nautical miles. Currently, pursuant to pertinent laws and regulations promulgated by China Mainland and China Taiwan, respectively, have each delimited their own territorial sea, contiguous zone and exclusive economic zones extending for 200 nautical miles across the Taiwan Strait. Nuclear materials, whether passing through the South China Sea or Taiwan Straits, will cause catastrophic consequences to the marine environment when an incident occurs, with the capability of destroying the living resources found in those waters. These consequences will also impose long-term negative influences on the financial

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36 Kuen-chen FU, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 368. (in Chinese)

37 Zhao Yajuan, Legal Considerations on Clandestine Transportation of Ultra-hazardous Nuclear Substance by Japan, *China Oceans Law Review*, No. 1, 2005. (in Chinese).

production and lives of citizens across the Taiwan Strait.

B. China's Countermeasures

The author advocates that both sides across Taiwan Straits and Southeast Asian States cooperate with each other and take the following measures against Japan's clandestine transportation of nuclear materials:

1. Delimitation of "Particularly Sensitive Sea Areas"

The author proposes that China and relevant States file an application to the International Maritime Organization (IMO) for delimiting South China Sea Waters and Taiwan Straits Sea Waters as a "Particularly Sensitive Sea Area" (PSSA). Designating these waters as PSSA is a means to manage the seawaters beyond territorial sea of coastal States that have vulnerable navigation environments. The IMO defines a PSSA as "an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities."[38] Once a sea area is approved as a PSSA, a State can control activities in these waters with special and additional measures regarding shipping routes, compulsory ship reporting systems, and ship traffic service. The author proposes taking this action due to the inherently dangerous characteristic of transporting nuclear materials. The special hydrological features of the Taiwan Straits and the special geological environment of the South China Sea require protection. First, taking action to delimit these two areas as PSSAs is an enforced port regulation measure that is not prejudicial to the principal of the freedom of navigation. Despite the stipulations of execution in Chapter VI of the UNCLOS, that a costal State can only enact laws and regulations that comply with generally recognized global rules and standards, established by acting through competent international organizations or diplomatic conferences for its exclusive economic zone, an exception exists in Paragraph 6, Article 211. This exception allows the costal State to make a proposal to the IMO. The proposal must be a request to take special compulsory measures to prevent pollution by vessels. These measures cannot have the practical effect of denying, hampering, or impairing the right of

38 Annex 2, Assembly Resolution A. 927(22), Guidelines for the Designation of Special Areas under MARPOL73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, Adopted on 29 November 2001, A 22/Res. 927.

navigational ships. As of July 13, 2004, the IMO has approved three PSSAs, which are the Baltic Sea Waters, Galapagos Islands (Ecuador) and Canary Islands Sea Wasters (Spain).[39]

As one of the busiest waterways in the world, the South China Sea features concentrated islands, wide and narrow straits used as vital communication lines, crowded and narrow estuaries, densely-populated countries with a high demand for ocean fishes, rich but decreasing coral reefs, sea grass and mangrove resources. These waterways are also home to the phenomenon of clandestine transportation of hazardous substances, including nuclear materials, which create unique environmental characteristics. China has a full standing to apply to the IMO for delimiting it as a PSSA. As a result, help will be offered by international organizations for delimiting special shipping lanes for transporting nuclear materials by sea, taking compulsory port regulation measures or establishing reporting system in addition to attention paid by China and adjacent countries.

2. Regional Cooperation

In addition to applying for delimitation of PSSA to the IMO, another solution is for the regional cooperation of implementing joint regulation measures by port States.

As mentioned above, with its geographic particularity, the South China Sea is consistent with the definition of a semi-enclosed sea as described by the UNCLOS, offering a basis of and conditions for regional cooperation. However, due to historical reasons, territorial controversy over the South China Sea waters exists as well as disputes over islands in South China Sea among neighboring countries. Two important straits connect the South China Sea and the high seas – the Taiwan Straits and the Malacca Straits. The Taiwan Straits is a sensitive area in terms of diplomatic and military affairs due to the "Taiwan Issue." Malacca Straits is of great military significance. Cooperation in the Malacca Straits is complicated because it is controlled and penetrated by external powers. Accomplishing cooperation in these sensitive areas will involve law enforcement and diplomatic negotiations. However, disputes among States will likely threaten and/or suspend regional cooperation. The fundamental reasons of the controversy are due to diversified historical and cultural backgrounds among this region, as well as present differences of political and economic development levels.

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39 At http://www.sdmsa.gov.cn/n435777/n435800/n435827/n435858/n435866/4543.html, 24 June 2006.

However, this does not mean that southeast Asian States cannot reach common interests regarding the issues of transporting nuclear materials, because nuclear pollution reaches beyond boundaries. Therefore, these States may find common ground for cooperation on the issue of clandestine transportation of nuclear materials by Japan. Cooperation could take the form of "shelving differences." The Chinese government proposed, "shelving differences and seeking joint development," as a means for cooperation. The view of this proposal is that joint regulations for transporting nuclear materials by port States and the historically persistent territorial disputes are dealt with separately. By implementing this proposal, States would agree to cooperate by agreeing on transport methods and shipping lanes used for transporting nuclear materials.

The key issue with this proposal concerns Japan. Japan keeps transportation routes of nuclear materials to its cooperating States – France and the U.K. – strictly confidential. As a result, it is impossible to initiate any announcement to the Japanese Government port regulations imposed by China and other coastal States, or emergency actions, if nothing is known about Japan's transportation of spent nuclear fuel. Therefore, China and other southeastern Asian States must negotiate with Japan to advocate for regional cooperation. Negotiations are also important in order to convey to Japan that joint port regulation will strengthen regulations to prevent any occurrence of a nuclear incident at sea rather than limiting or prohibiting the right of passage of Japanese ships carrying nuclear materials. Where possible, these regulations would require Japan to submit reports and all necessary documents for ships carrying spent nuclear fuel to the coastal States and to accept onboard inspections conducted by the coastal States.

If the application for delimiting the South China Sea or Taiwan Straits as a PSSA is not approved, or before the approval is granted, an alternative would be to use regional cooperation by initiating regional negotiations. By establishing the pattern of joint regulation by port States while exerting pressure on Japan, it might be inclined to join the regional cooperation arrangement.

3. Implementation of Traffic Separation Scheme by Strengthening Cross-Straits Cooperation

Across both of Taiwan Straits, China Mainland and China Taiwan shall cooperate with each other through negotiations to establish a traffic separation scheme (TSS). Article 22 of the UNCLOS provides for that States can "require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe

for the regulation of the passage of ships." Paragraph 2 of the same article stipulates that "in particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes." The passage of nuclear materials through the Taiwan Straits imposes profound consequences on the people across the Taiwan Straits and the marine environment surrounding the Straits. Professor Kuen-chen FU made this proposal in his discussion about the legal status of Taiwan Straits Sea waters.[40] The implementation of the TSS will provide the following benefits:

First, designations of special shipping routes can reduce the passage of ships through the territorial sea of transit States. Relevant States can determine the shipping routes for these ships by agreement. Together with the precautionary principle, designation of special shipping routes provides aid for the prompt and timely response of relevant States in the event of any nuclear incident. Quicker response times by States to nuclear incidents can only happen if States are well informed of the shipping routes, which is not possible if transportation routes of ships remain confidential.

Second, special designation of routes will keep ships from entering environmentally sensitive areas thereby minimizing environmental damages of nuclear incidents. Accounting for weather concerns in these special routes will steer ships away from seawater encountering bad weather. For example, the weather in seawater routes located between the Equator and the Tropic of Cancer are better than the Cape Horn and the Cape of Good Hope seawater.

Third, the designation of special shipping routes will reduce of the number of ships in transit passage. Only certain ships would pass through the designated shipping routes while other merchant ships would take ordinary shipping lanes, thereby considerably decreasing the chance of ship collisions.

Therefore, we propose that far-sighted people across Taiwan Straits shall cooperate with each other first with regard to the issue of traffic separation scheme, which is also the most practical and feasible way.

Translator: WANG Shunv
Editor (English): Katie Annette Roth

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40 Kuen-chen FU, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, pp. 359~377. (in Chinese)

Abolishing the Exemption of Liability for Fault in Ship Management in the Nautical Fault Exemption System

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Abstract: The nautical fault exemption generally refers to the carrier's exemption from liability for the loss or damage of goods arising or resulting from the act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or management of the ship. To date, the nautical fault exemption has always been the most important exemption clause for carriers, and countries and legislation on international maritime cargo transport have paid much attention to the question of whether the nautical fault exemption system should continue to exist or be abolished. This paper analyzes the meaning of the nautical fault exemption, explores the socioeconomic roots of its emergence and development, and examines the current allocation of interests and risks between the ship owner and the cargo owner. After taking the relevant factors into account, the paper concludes that the nautical fault exemption system should undergo certain reforms.

Key Words: Nautical fault exemption; Balance of interests; Differentiation; Systemic reform

Nautical fault includes fault in navigation and fault in the management of the ship. Legal provisions on nautical fault generally define it as the fault of the master, mariner, pilot, or other servants of the carrier in the navigation or management of the ship. Navigation fault refers to the fault of the master, mariner, pilot, etc. that occurs during navigation and berthing; ship management fault refers to the fault of the master, mariner, etc. that occurs during the maintenance of the ship's performance and operational status. Here, management does not mean operational

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management or administrative management.[1]

Article 4, Paragraph 2 of the Hague Rules, which went into effect in the 1930s, states: "Neither the carrier nor the ship shall be liable for any loss or damage of goods arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." This is the well-known nautical fault exemption. To date, the nautical fault exemption has always been the most important exemption clause for the carrier, and countries and legislation on international maritime cargo transport have paid much attention to the question of whether the nautical fault exemption system should continue to exist or be abolished.

The writer believes that, under the current conditions of the shipping industry – and especially for China, a country with a large trade volume and a major shipping country on the ascendancy – the nautical fault exemption system should neither be regarded as sacrosanct nor be abandoned before its time. Rather, we should separate the nautical fault exemption into two parts: fault in navigation and fault in ship management, and retain the relatively reasonable navigation fault exemption and abolish the obsolete ship management fault exemption. The discussion in this paper will proceed in two steps. First, the paper will analyze the meaning and interpretations of the nautical fault exemption as well as the history of the exemption. Second, we will examine the various considerations for reforming the system and conclude that the navigation fault exemption should be retained and the ship management fault exemption abolished.

I. The Nautical Fault Exemption's Meaning, History, and Socioeconomic Roots

A. The Meaning of the Nautical Fault Exemption

The nautical fault exemption is generally defined as the carrier's exemption from liability for any loss or damage of goods arising or resulting from neglect or default of the mariner, pilot, or the servants and agents of the carrier in the navigation or management of the ship.[2]

This system is an obvious departure from two traditional doctrines of civil

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1 Si Yuzhuo ed., *Maritime Law*, Beijing: Law Press China, 2003, p. 113. (in Chinese)
2 Hague Rules, Art. 4(2).

liability: fault liability and respondeat superior. Under the doctrine of fault liability, the mariner assumes liability for damage to the goods arising or resulting from the mariner's fault in the navigation or management of the ship. Under the doctrine of respondeat superior, the ship owner, as the mariner's employer, assumes the liability that results from the mariner's action or inaction in the performance of the mariner's duties. But under the nautical fault exemption system, the ship owner is exempt from liability, and the cargo owner has to absorb the damage to the cargo that results from the mariner's fault. This seems to be unfair and unreasonable at first glance: the cargo owner is an innocent victim, and the ship owner evades the liability that results from his employee's actions. But before the ship has set sail, the ship owner must have performed his duty and made the ship seaworthy. The exemption of liability for navigation and management faults that arise after the ship has set sail is reasonable and realistic under certain historical conditions.[3]

In legislation, the risk-sharing system inherent in the nautical fault exemption is expressed by multiple liability standards. This type of legislation allocates liability through a mix of concepts, definitions, and structural designs.[4]

B. The Establishment and Evolution of the Nautical Fault Exemption

History is a mirror. A review of the history of the nautical fault exemption system will help us understand and analyze the system's socioeconomic significance and roots and also articulate our approach to it more clearly.

The concept of "nautical fault exemption" first emerged in the United States in the 1893 Harter Act. Prior to the Harter Act, strict liability was the norm in breach-of-contract disputes in Anglo-American common law. Before the 19th century, communication was relatively poor, and the shipper lost all contact with and control of the cargo after handing it over to the carrier. But the carrier had the ability to control, and has intimate knowledge of, the cargo's status during the transport. It was very difficult, even impossible, for the shipper to prove the carrier's or his agent's fault if the cargo was damaged during transport. Under common law, the ship owner could be exempted from liability under five conditions: an act of God, an act of a public enemy, the cargo's inherent defects and poor packaging,

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3 Yang Liangyi, *The Bill of Lading*, Dalian: Dalian Maritime University Publishing House, 1994, p. 304. (in Chinese)

4 WU Huanning ed., *Maritime Law*, Beijing: Law Press China, 1996, p. 114. (in Chinese)

general average sacrifice, and fire. At the same time, common law imposed three types of implied obligations on the ship owner: (1) the ship must be absolutely seaworthy; (2) the ship could not take unreasonable detours; and (3) the ship must navigate with due dispatch. If the ship owner failed to meet the first obligation (seaworthiness), he would be liable for the resulting loss. If the ship owner failed to meet the second or third obligation, he would also be deprived of his entitlement to the five exemptions, unless he could prove that one of the five occurrences in the exemptions would have caused the cargo owner's loss even if the ship owner had met the obligation.[5] It is evident that, under the common law of the time, the ship owner bore a risk of enormous liability. This variation of strict liability constrained the shipping industry to a certain degree.[6]

In an age when navigational technology was relatively undeveloped, maritime transportation carried huge risks. Navigation was extremely dangerous, and ships had few ways of insulating themselves against these dangers. Navigation was considered not as much a mere journey as an adventure. While the mariner faced physical dangers, the carrier also shouldered tremendous capital risks due to the huge sums of capital required in the building of ships that were capable of traversing the ocean. In addition, because communications was relatively poor at that time, the carrier had difficulty in effectively controlling and managing the mariners, and the lifestyle particular to maritime travel imposed on the mariners professional behavioral risks that were much greater than those associated with land travel and transport. Given these special risks to both person and property, basing the carrier's contractual liability on a strict liability theory had resulted in a material imbalance of interests and risks between the ship owner and the cargo owner and seriously hampered the development of the shipping industry.

In order to reverse this disadvantageous position and making use of the freedom of contract, the ship owner began to add liability exemption provisions into the carriage contract and expanded the scope of exemption from liability. As long as these provisions were clear and understandable, courts at the time generally gave effect to them. As one of the three major principles of modern civil law, the freedom of contract should have been respected by the law. However, in practice,

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5 Shi Shengke, *Theories of Liability and the Nautical Fault Exemption* (Master's Thesis), Shanghai: Shanghai Maritime Institute, December 2001, p. 7. (in Chinese)

6 Si Yuzhuo, Major Changes to the Liability Bases of Bills of Lading, in *Dalian Maritime Institute Maritime Law Department Theses*, Beijing: Beijing Academic Publications Publishing House, 1989. (in Chinese)

due to the vast difference in the negotiating power of the contracting parties, the resulting carriage contracts came to be extremely unfair. The ship owner, acting as the carrier, had great leverage. The ordinary cargo owner could not compete, and the cargo owner's freedom of contract was in fact not comparable to that enjoyed by the shipping company. According to some of these contracts, the ship owner actually had no responsibility other than the "obligation" of collecting the freight.[7] These actions on the part of the ship owner obviously did not reasonably allocate interests and risks; rather, they pushed the imbalance to the other extreme. The holder of the bill of lading often did not receive the cargo, which substantially weakened the credibility of the bill of lading in international trade. The normal flow of international trade was hindered, which in turn worked against the shipping industry's own interests.

Under these circumstances, international merchants and the shipping industry both needed a system to balance the risks and interests of the cargo owner and the ship owner so the shipping industry and international trade could grow normally. The 1893 Harter Act responded to this need in the United States. The Harter Act provided a set of minimum obligations and maximum exemption standards for the ship owner. Its main provisions were the following: (1) there was no exemption from liability for relative seaworthiness; (2) there was no exemption from liability for negligence in managing the cargo; (3) the ship owner was not liable for losses arising or resulting from fault in navigation, the management of the ship, acts of God, acts of public enemies, the cargo's inherent defects and poor packaging, lawful arrest, marine salvage, etc. The Harter Act granted broad exemptions to the ship owner, which was a departure from the ship owner's strict liability under common law. At the same time, it mandated minimum liability for the ship owner, thereby bringing to an end the era of unlimited exemptions for the ship owner when the freedom of contract was given free rein during the time of laissez-faire capitalism. It was an attempt to balance the interests of the cargo owner and the ship owner.

Because of these elements, the Harter Act had great influence on the shipping legislation of various countries and in the international community. They followed the Harter Act in granting exemptions from liability for fault in navigation and the management of ships. Examples include the 1904 Carriage of Goods by Sea Act

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7 Shi Shengke, *Theories of Liability and the Nautical Fault Exemption* (Master's Thesis), Shanghai: Shanghai Maritime Institute, December 2001, p. 7. (in Chinese)

(Australia), the 1908 Shipping and Mariner Act (New Zealand), the 1910 Canadian Carriage of Goods by Water Act (Canada). In China, Article 51 of the Maritime Law also provides for exemptions from liability for nautical fault.

In 1924, the international community adopted the International Convention for the Unification of Certain Rules of Law Relating to Bill of Lading (the Hague Rules), which established an international standard for the nautical fault exemption system. In 1968, the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bill of Lading (the Hague-Visby Rules) also went into effect. The Hague-Visby Rules added the carrier's servant and agent to the group of people who could take advantage of the nautical fault exemption. The Hague-Visby Rules also included tort as a possible rebuttal to the defense of a nautical fault exemption, thereby increasing the number of possible rebuttals.[8]

But since the nautical fault exemption system became a part of international shipping through the Hague Rules in 1924, the arguments over its continued existence or abolishment has gotten more and more intense as the practical realities of shipping and international trade have evolved. The proponents for abolishing the nautical fault exemption has become more vocal, and various countries have advanced their points of view based on their own national interests. Countries with robust shipping industries have tended to support the nautical fault exemption, while countries whose trade was relatively developed have pushed for the opposite. International organizations have also issued rules on this issue. The Hamburg Rules of 1978 abolished the nautical fault exemption, revived strict liability, and imposed the presumption of fault on the carrier.[9] The United States' Carriage of Goods by Sea Act (COGSA) of 1999 also abolished the nautical fault exemption, but provided for the opposite burden of proof, *i.e.*, there was no presumption of fault on the part of the carrier.[10] The UNCITRAL Draft Convention on the Carriage of Goods (draft from the UNCITRAL's 16th session; same below), whose drafting was begun by the Comité Maritime International (CMI) in 1999, also imposed liability on the carrier. However, fault was only presumed outside the scope of the exemption; there was no presumption of fault if the exemption applied.[11]

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8 The Visby Rules, Art. 3(1)~(2).
9 The Visby Rules, Art. 3(1)~(2).
10 United States' 1999 COGSA, Art. 9(C)~(D).
11 UNCITRAL Draft Convention on the Carriage of Goods, Art.14.

C. The Socioeconomic Background of the Emergence and Development of the Nautical Fault Exemption

The emergence and development of the nautical fault exemption system were influenced by the changing conditions of the economy and maritime trade. They reflect the theories and bases for the carrier's liability for cargo.[12]

Even though the United States had enacted the 1893 Harter Act to protect the interests of its own cargo owners, the nautical fault exemption system that it provided began to act as a fulcrum for balancing the interests of the ship owner and the cargo owner. At the technological and economic levels of the time, the exemption apportioned both parties' risks in a reasonable manner and maximized the public interest. The carrier invested the resources saved by the nautical fault exemption into the shipping business, navigation technology, the ship's capacity to weather navigational risks, and the general seaworthiness of the ship. The increased seaworthiness of ships in turn benefited the cargo owner. The nautical fault exemption was a low-cost legal tool that resulted in high returns in the form of flourishing trade and the rapid development of the international shipping industry.[13] These are the socioeconomic reasons for the nautical fault exemption system's continued vitality.

But with technological and economic progress, the wide use of modern technology in navigation, and the rapid development of the modern maritime insurance industry, the balance established by the nautical fault exemption has gradually become lopsided. This is the fundamental reason that various countries and the international community have begun to question the system and even propose its abolishment. It is necessary to update the nautical fault exemption system, search for a new fulcrum in the law, and rebalance the interests of the ship owner and the cargo owner.

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12 Zhao Yuelin and Hu Zhengliang, The Effects of Abolishing the Nautical Fault Exemption on the Carrier's Liabilities and Obligations and Other Maritime Legal Systems, *Dalian Maritime University Journal*, No. 4, 2002. (in Chinese)

13 Ni Xuewei, The Continuation and the Abolishment of the Nautical Fault Exemption, *Research on Maritime Law*, Vol. 3, Beijing: Law Press China, 2001, p. 84. (in Chinese)

II. Consider Relevant Factors as a Whole and Reform the Nautical Fault Exemption System in a Reasonable Manner

A. China's Main Reasons for Proposing the Abolishment or Retention of the Nautical Fault Exemption

1. Entities or scholars who advocate for cargo owners' interests tend to favor the abolishment of the nautical fault exemption for the following reasons:

(1) The Chinese Maritime Law grew out of customs from the early stages of the shipping industry, and these customs were closely tied to the shipping practices of the time. With the progress of technology and their extensive use in navigation, the risks associated with sea travel have decreased dramatically. Ship functionalities, navigational aids, and on-board communications equipment have substantially improved. As a result, the earlier view of sea travel as an "adventure" no longer applies, and there is likewise no longer any factual basis for granting special protection, exemptions, and privileges to the ship owner under the law.

(2) The carrier now has far greater control over the mariner. One reasons for creating an exemption for the fault of the master and the mariner during navigation was that, due to the poor state of communications at the time, the ship owner had little control over the ship and might even know nothing about the happenings on board. Hence, the doctrine of respondeat superior could not be applied to determine the carrier's liability. But now, because of technological progress, communication between ship and shore has become very easy, and the ship owner can effectively control the ship. So there is one less reason for the continual existence of the nautical fault exemption.

(3) The 1978 International Convention on Standards of Training, Certification and Watch keeping for Seafarers (STCW) (as amended in 1995) and the International Management Code for the Safe Operation of Ships and for Pollution Prevention (the ISM Code) will reduce errors and fault by the master and the mariner during navigation and in the management of ships.

(4) With the containerization and specialization in the transport of cargo (mainly oil and bulk cargo), the amount of general cargo as a percentage of all cargo in the transport chain has gradually decreased. Transport is simpler and

faster, the damage and loss of cargo are considerably rarer occurrences, and the ship owner's risks are greatly reduced. Therefore, the current way of determining the carrier's liability has resulted in an unbalanced allocation of risks and interests between the ship owner and the cargo owner.

(5) The nautical fault exemption will probably allow the carrier to avoid the liability that arises from fault in the management of cargo. Because it is usually difficult to distinguish fault arising from cargo management and that from the management of the ship, the cargo owner will find it very challenging to offer proof that distinguishes between causation from cargo management and causation from ship management.

(6) Strict liability is the rule for transport by national standard railway and highway. The abolishment of the nautical fault exemption will standardize the liability system for multi-modal transport.

(7) The Hamburg Rules of 1978, the United States Draft COGSA of 1999 and the UNCITRAL Draft Convention on the Carriage of Goods all reflect the general international trend toward doing away with the nautical fault exemption.

2. Entities and scholars who represent ship owners' interests tend to advocate for the continued existence of the nautical fault exemption for the following reasons:

(1) Although there has been steady progress in navigation technology, maritime accidents like collisions and stranding still occur from time to time. Additionally, ship tonnage and the dangers of carrying cargo are far greater than in earlier times. The modern large container ships, chemical cargo ships, and oil tankers are themselves gigantic risks. With the upsizing and specialization of ships, ship operations have become more difficult and complicated. Moreover, losses in the event of accidents are often catastrophic.

(2) Even though the carrier has much greater control and supervision over the mariners, the growth in the sizes of ships and the reduction in the number of mariners have placed mariners under greater psychological stress. This problem cannot be alleviated simply by standardizing operations. The fact that human error has remained a major cause of maritime accidents for the past decades is testament to this.

(3) With respect to risk allocation, the cargo owner and the ship owner have reached a delicate balance. Further, insurance and general average mechanisms are moving towards stability and maturity, and their progress should not be disturbed.

(4) The abolishment of the nautical fault exemption will likely deprive the

carrier of the exemption from liability for loss and damage to cargo arising from maritime risks such as inclement weather. Since nautical fault and maritime risks tend to occur together, it is extremely difficult for the carrier to prove what has been caused by nautical fault and what by maritime risks.

(5) Currently, the vast majority of countries in the world have adopted the Hague Rules or the Hague-Visby Rules, which use the partial fault liability system. Fewer countries use the Hamburg Rules, and most of them are third world countries with undeveloped shipping industries. The Hamburg Rules have not been accepted by any major shipping or trade nation.

(6) If China unilaterally abolishes the nautical fault exemption and increases the carrier's responsibility, the competitiveness of China's shipping industry will suffer enormously. The shipping industry is closely related to the national economy and national defense, and the drafting and revision of China's shipping regulations should aid the growth of the shipping industry. As a major shipping country, China should protect ship owners' interests in a practical manner and not get ahead of itself when it comes to abolishing the nautical fault exemption.

At this time, although the majority of Chinese academics recognize the disadvantages of the nautical fault exemption system, mainstream opinion still supports the maintenance of the nautical fault exemption out of consideration for the national interest.[14] But regardless of whether they advocate retaining or abolishing the nautical fault exemption or the reasons for their positions, they do not seem to have paid attention to the differences between navigation and ship management. With the current rapid pace of economic and social development, the differences between navigation and ship management have become increasingly obvious in their levels of difficulty, risks, and results when the risks materialize. It is no longer fair, reasonable, or efficient to apply the same doctrine of liability to both. Rather, the two types of activities should be distinguished and treated differently.

B. Distinguishing the Exemptions for Fault in Navigation and Fault in Ship Management

The international community has always treated navigation fault and ship

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14 Shi Shengke, *Theories of Liability and the Nautical Fault Exemption* (Master's Thesis), Shanghai: Shanghai Maritime Institute, December 2001, p. 46. (in Chinese)

management fault differently. As early as during the drafting process of the Hamburg Rules, experts were unanimous in their opinion that the exemption for fault in ship management should be abolished, but differed greatly as to fault in navigation. Many thought that the exemption for fault in navigation should be kept and the exemption for fault in ship management should be abandoned. The main differences between fault in navigation and fault in ship management are the following:[15]

1. The identities of the actors: the actors who may be at fault in navigation fault are the personnel moving the ship, *i.e.,* the personnel on duty on the bridge and in the engine department. On the other hand, the entire crew is responsible for managing the ship. The single goal of the crew on board is to maintain the ship's performance so that the ship can be navigated in a safe manner. Therefore, the group of actors involved in navigation is much smaller than that involved in managing the ship.

2. Causation of the fault: fault in navigation arises when the ship is being moved, while fault in managing the ship is related to the maintenance of the ship's effective performance. The difficulty and complexity in navigation are generally greater than those in ship management.

3. Consequences: fault arising from navigation can cause collision, stranding, the striking of a reef, or shipwreck in a storm. In other words, the losses resulting from navigation fault are usually directed to the body of the ship, and the consequences are relatively severe. On the other hand, the consequences from fault in ship management are comparatively complicated, and the damage to the body of the ship is generally minor. For this reason, mariners tend to be more cautious while navigating and less so when managing the ship.

C. Why the Exemption for Navigation Fault Should Be Retained, but the Exemption for Ship Management Fault Should Be Abolished

Based on the above comparison of navigation and ship management and taking the following factors into consideration,[16] we believe that the exemption for navigation fault should be retained, but the exemption for fault in the management

15 Xu Zhongjian, Nautical Fault and Cargo Management Fault, *Zhejiang Wanli University Journal*, No. 4, 2002. (in Chinese)

16 While a certain factor standing alone may not be very persuasive, but taken together with the discussion, they support this paper's position.

of the ship should be abolished:

1. Fairness and Reasonableness of the System, and the Balance of Interests: while the cargo owner's significant investment and high risks in maritime cargo transport should be taken into account, attention should also be paid to the carrier's basic obligations.

The interests of different parties determine a legal system's course of development and implementation, and the fundamental task of law is to regulate these interests.[17] A legal system that allocates the parties' rights and liabilities in a reasonable manner also balances their interests and risks and achieves fairness. Fairness is the basic value of a legal system and achieving it is an important task.[18] A legal system that can achieve fairness through the balance of interests is more useful than one that does not.

The basic analysis that determines the continued existence or abolishment of the nautical fault exemption is one of the interests of the ship owner and the cargo owner, which have varied in accordance with the economic conditions and the conditions of maritime trade of the time. Between the United States' Harter Act in 1893, the Hague Rules, the Hamburg Rules, the United States' 1999 COGSA, and the recent UNCITRAL Draft Convention on the Carriage of Goods, the establishment, retention, and proposed abolishment of the nautical fault exemption in legislation all reflect changes and adjustments in the balance of interests of the ship owner and the cargo owner as well as the conflicts and coordination of shipping interests among various countries.

As discussed above, the most direct reason for the emergence of the nautical fault exemption was the special risks accompanying shipping in earlier times: to balance the interests and risks of the ship owner and the cargo owner, some of the risks that were originally assumed by the carrier were transferred to the cargo owner. However, with the progress and extensive use of modern navigation technology, many of these risks have been neutralized. Thanks to the constant innovation and progress in methods of ship positioning, object identification, and communication, ship operation and management will continue to improve as a whole, with digitalization, standardization and interface standardization,

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17 Zhang Wenxian, *Jurisprudence*, Beijing: Law Press China, 1997, p. 270. (in Chinese)

18 Li Long ed., *Jurisprudence*, Beijing: People's Court Publishing House, 2003, p. 242. (in Chinese)

modularization, and the use of "smart" devices as major trends.[19] Our capabilities to avoid and protect ourselves against maritime risks have substantially increased, the number of maritime accidents has fallen dramatically, and the so-called "maritime adventure" is a thing of the past.

Of course, even with the constant progress in nautical technology, maritime accidents still occur. Moreover, with the upsizing and specialization of ships and the increase in dangerous cargo, accidents tend to cause tremendous losses, which mean that maritime transport still has enormous risks.

Nonetheless, there is no comparison between present-day maritime risks and the earlier risks. The risks have fundamental differences. In earlier times, maritime risks were huge because people had a more limited understanding of and control over these risks. People had little way of containing or reducing accidents. Because accidents occurred frequently, the lives of mariners were constantly at risk, and ship owners could not predict when they might lose a lot of property. Today's maritime risks are of a totally different nature. Our understanding of and control over maritime risks have grown qualitatively by leaps and bounds, and the safety of mariners is much better guaranteed. Maritime risks usually manifest themselves in the huge losses from a single accident, and the losses are mainly property losses. At the same time, the development of the modern maritime insurance industry has spread and moderated the risks to a large extent. Contemporary maritime risks no longer constitute a "maritime adventure" in the traditional sense. With the development and application of scientific technology, similar risks also exist in various high-tech and capital-intensive industries.

As discussed above, compared to fault in ship management, fault in navigation is more likely to give rise to disastrous accidents and cause enormous losses of the mariners' lives and the ship owners' property. Therefore, mariners tend to be very prudent in navigation. However, mariners operate huge ships in many different complicated and variable conditions. They have to deal with a pace of work that changes constantly. These and other challenges put them under great pressure and, when complicated with a lack of technical skill and experience, errors will occur. Therefore, the strict application of fault-based liability is still somewhat unfair. The situation is very different with ship management personnel. Their work often includes various daily routines that have relatively lower levels of difficulty and a

19 Jin Yongxing and Wu Xiaoyun, Navigation Technology in the New Century, *Chinese Navigation*, No. 1, 2002. (in Chinese)

slower pace. These mariners are under less stress. In addition, with improvements in communications, they can receive more assistance and instructions from the carrier. At the same time, fault in ship management has relatively complicated consequences and do not lead to disastrous accidents as a rule; rather, they more often cause the loss or delayed delivery of the cargo. For these reasons, ship management personnel typically are less meticulous and are more likely to be negligent in a subjective sense. Hence, fault-based liability should apply to return the liability arising from fault in ship management to the carrier.

Keeping in mind these changes, the goal of balancing the risks and interests of the ship owner and the cargo owner, and the doctrine of fault-based liability, the writer believes that the rights and liabilities of the ship owner and the cargo owner should be reallocated, the exemption for navigation should continue to exist, and the exemption for fault in ship management should be abolished.

2. The Costs and Benefits of Systemic Reform: the reform of any legal system has certain costs. A reform can be considered reasonable if it requires relatively low costs and yields relatively high social and economic benefits.

The operation of a legal system and the allocation of resources evolve as a process of constant reallocation of rights, adjustments to the structure of rights, and reforms to the procedure of implementation, all guided by the goal of minimizing transaction costs.[20]

Those who advocate keeping the nautical fault exemption posit that systemic reform will have enormous costs. According to this view, the cargo owner and the ship owner have reached a delicate balance in risk-sharing. Further, the institutions related to insurance, general average, and collision have improved and are moving toward stabilization, and costs will result if they are done away with too quickly.

According to new institutional economics, during institutional transformation, increasing returns and self-reinforcement will occur, *i.e.,* there will be a so-called "path dependence." Path dependence means that, once a system is chosen at a certain point in history, the choice will inevitably influence the building of other systems because the chosen system exists in a certain institutional environment and is connected with various other systems. The chosen system thereby reinforces

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20 Richard A. Posner, translated by Jiang Zhaokang and Lin Yifu, *Economic Analysis of Law*, Beijing: Chinese Encyclopedia Publishing House, 1992, Translators' Preface, p. 18. (in Chinese)

itself.[21]

The nautical fault exemption has also experienced uninterrupted self-reinforcement since its beginnings. Other systems in maritime transport related to insurance, general average, and ship collisions are constantly influenced by and must coordinate with the nautical fault exemption system. For this reason, reforming the nautical fault exemption requires changes in the relevant supporting systems as well, and these systemic changes will have costs.

Even though the reform of the nautical fault exemption system will require the reform of other related systems, these reforms are neither fundamental nor destructive and are sometimes even constructive. We can see this from the effects on maritime insurance and the general average.

(1) Maritime insurance: with the elimination of the exemption for fault in ship management, the carrier liability insurer should expand coverage and increase its ability to pay claims. For the cargo insurer, since the losses resulting from fault in ship management can be recovered from the carrier, the risks have been lowered, which can translate to lower freight rates.

(2) General average: the reform of the nautical fault exemption system will not affect the continued existence of the law of general average. Rather, the reforms only affect apportionment, mainly in revisions of the adjustment rule. In addition, removal of the exemption for ship management fault will decrease the scope of the actual general average, which better conforms to the original intent of the general average system and helps balance the relationships of the parties.[22]

It is clear that the reform of the nautical fault exemption system will not bring about enormous costs. More importantly, these reforms can produce great social and economic benefits. Holding people responsible for their own actions is both fair and efficient. If people are made liable for the actions of others, inefficiency will occur because they have little control over others and will have difficulty in preventing the occurrence of fault. But if people are liable for their own negligence, they will be motivated to take action to prevent faults from occurring, reduce losses resulting from fault, and preserve property for the good of the entire society. The traditional fault-based liability doctrine came about out of consideration for fairness

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21 Lu Xianxiang, *New Institutional Economics*, Wuhan: Wuhan University Press, 2004, p. 168. (in Chinese)

22 Zhao Yuelin and Hu Zhengliang, The Effects of Abolishing the Nautical Fault Exemption on the Carrier's Liabilities and Obligations and Other Maritime Legal Systems, *Dalian Maritime University Journal*, No. 4, 2002.

and efficiency. Reforms in the nautical fault exemption system will bring about the benefit of a reduction in the number of accidents in an efficient manner and the consequential protection of property for society. These benefits are fundamental and primary compared with the secondary costs of systemic reform. The concern for costs should not hinder economic and social progress.

Therefore, from the perspective of costs and benefits in systemic changes, the liability for fault in ship management should be reallocated to the carrier for relatively large economic and social benefits at a relatively small cost. On the other hand, the exemption for fault in navigation should be retained for the reasons elaborated above, *i.e.,* fault in navigation is usually not a result of the actor's negligence, but rather of the mariner's lack of skill and experience. If the exemption for fault in navigation is eliminated, the aforesaid economic and social benefits are unlikely to accrue. Therefore, it is not advisable to eliminate the exemption for fault in navigation at present.

3. Efficiency of the Legal System: a legal system should be relatively efficient so that both disputes and litigation expenses can be kept to a minimum.

In cases involving the operation of the nautical fault exemption system, there have always been two pairs of facts and legal issues that are difficult to distinguish: (1) the risk of maritime accidents and navigation fault; (2) ship management fault and cargo management fault. In determining the causes of an accident that resulted in cargo damage, it is difficult to tell maritime accident risk from navigation fault and tell ship management fault from cargo management fault. These difficulties have posed problems for courts and increased the number of disputes as well as dispute settlement costs.

When the ship encounters a sudden natural disaster, the navigator will most likely use reasonable skill and effort to prevent an accident. However, because of the complexity and variety of natural environments at sea, it is unlikely that the navigator can avoid all dangerous conditions in emergencies. Once an accident occurs, cargo loss will usually result. The causes of the accident are usually maritime accident risk and navigation fault. Since these two factors are intertwined during the accident, it is very difficult to determine which caused the accident or the extent of their respective contributions to the disaster. Because there is an exemption from liability for losses resulting from natural disasters, the elimination of the navigation fault exemption will give rise to difficult disputes regardless of who has the burden of proof. Disputes and lawsuits will occur more frequently.

Similarly, due to the characteristics of ship management work, it is usually difficult to distinguish between ship management fault and cargo management fault. The same act can be considered a ship management act or a cargo management act. Since the actions involved in such type of work can be categorized either way, several standards for distinguishing between the two have emerged in the judicial practice of various countries. They include the following: (1) the purpose of the act and the entity being acted upon; (2) the original nature and purpose of the act; (3) the direct cause of damage to the cargo; (4) the entity that bears the effects of the negligent act.[23] In the same case, different categorizing standards will lead to different conclusions, making it even more difficult to tell ship management fault from cargo management fault and thereby increasing disputes and lawsuits. The elimination of the exemption for fault in ship management will certainly reduce the number of this type of disputes and bring down litigation costs.

Therefore, to improve the efficiency of the law and reduce the number of disputes as well as litigation costs, the exemption for navigation fault should be retained, and the exemption for fault in ship management should be eliminated.

4. The Legal System's Protection of the Domestic Economy

Abolishing the nautical fault exemption will add to the carrier's liabilities to some extent and may exert an adverse influence on the Chinese shipping industry, which is still at a nascent stage. This is one main reason offered by those who advocate the maintenance of the nautical fault exemption.

The writer believes that, assuming that the nautical fault exemption continues to exist, even though abolishing the ship management fault exemption will add to the carrier's liability, increase liability insurance premiums, the costs of transport, and in turn the freight, the risks borne by the cargo owner will be substantially reduced at the same time and lead to a decrease in cargo carriage insurance premiums. The two sides of the balance will compensate for each other to some extent. Therefore, the abolishment of the exemption for fault in ship management in China will not lead to a significant disadvantage in price competition.

Further, in the long run, this step will not impair, but rather enhance, the competitiveness of the Chinese shipping industry. China's competitiveness among international shippers has improved as the Chinese shipping industry has evolved, especially after China's entry into the WTO, but competition has also become

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23 Xu Zhongjian, Nautical Fault and Cargo Management Fault, *Zhejiang Wanli University Journal*, No. 4, 2002. (in Chinese)

increasingly fierce. Abolishing the exemption for fault in ship management will reasonably maintain and protect cargo owners' interests and thereby secure a greater market share for the Chinese shipping industry. Meanwhile, it can also encourage improvements in ship management more efficiently to an extent that the Chinese shipping industry can bear, making the Chinese shipping industry more competitive.

5. International Consistency and Innovation: maritime law is to a large extent international law. If the legal systems in maritime law are not consistent with the shipping legislation of most countries in the world, conflicts of laws will inevitably intensify, and the development of international trade and shipping will be hindered.

From the Hamburg Rules to the United States' 1999 Draft COGSA and the recent UNCITRAL Draft Convention on the Carriage of Goods, the international inclination for eliminating the nautical fault exemption has grown to be a general trend.

It is true that the Hamburg Rules still have very limited influence in the international community, various countries have complained about the United States' 1999 Draft COGSA,[24] and the UNCITRAL Draft Convention on the Carriage of Goods still has not become an international convention, and discussions and actions on the reform and abolishment of the nautical fault exemption system has proceeded in fits and starts. However, it is clear that the rapid development of the shipping industry and international trade has made the reform and abolishment of the nautical fault exemption system a matter of time.

Nevertheless, the current conditions of international shipping legislation shows that the time is not yet ripe for eliminating the nautical fault exemption entirely. At present, with respect to carrier liability, the Hague Rules and the Hague-Visby Rules are still the most widely-applied international rules. The nautical fault exemption remains the mainstream approach. The Hamburg Rules, which abolished the nautical fault exemption, has only been adopted by small Third World countries in Africa. Developed countries that tend to stand behind cargo owners' interests, such as the United States and France (not to mention shipping powers like the United Kingdom and Northern European countries) have not signed on to

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24 Many scholars believe that, even though the United States' 1999 COGSA abolished the nautical fault exemption, the fact that it transferred the burden of proof from the carrier to the cargo owner essentially granted the nautical fault exemption to the carrier.

the Hamburg Rules. We can see that the major shipping countries and even powers that tend to protect cargo owner in the world hold a prudent attitude in this respect. Therefore, China should not be too hasty when dealing with this issue.

The establishment and reform of a system should include keep in mind both consistency with the international community and a sense of innovation. With the elimination of the nautical fault exemption being the general trend, retaining the exemption for fault in navigation and eliminating the exemption for fault in ship management will make the carrier liability system consistent with international norms as well as forward-looking. Moreover, these steps can prevent the misallocation of rights and obligations, as well as the intensification of conflicts of laws from radical systemic change.

III. Conclusion

With the continual improvements in nautical technology and mariner management, the unreasonableness, high costs, and inefficiency of the nautical fault exemption system are increasingly apparent. International legislation has also shown a trend toward eliminating the nautical fault exemption. Moreover, such a system is not an optimal way to protect China's backward shipping industry. Therefore, the writer believes that, given the current situation, the nautical fault exemption system should be reformed by retaining the exemption for fault in navigation and abolishing the exemption for fault in ship management.

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On the Connotation and Practice of the Right of Hot Pursuit

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Abstract: The right of hot pursuit is a national territorial jurisdiction derived from national sovereignty. It is an expansion and extension of the coastal State's territorial jurisdiction as well as an exception to freedom of the high seas. As a main executive measure of the coastal State, the right of hot pursuit has some new developments. The United Nations Convention on the Law of the Sea of 1982 (UNCLOS 1982) has developed and expanded the right of hot pursuit, which can now start from the superjacent waters of the coastal State's contiguous zone, archipelagic waters, exclusive economic zone and continental shelf. The right of hot pursuit is also the coastal State's main means and form of effective maritime law enforcement. The illegal fishing events that happen in the coastal State's territorial waters, contiguous zone, exclusive economic zone, and particularly, exclusive fishery zone have caused increasingly frequent exercise of the right of hot pursuit. The occurrence of other maritime cases has also resulted in the exercise of the right of hot pursuit. International crimes and international criminal cases have also involved the exercise of the right of hot pursuit, e.g. global smuggling, drug trafficking, stow-away, piracy and maritime terrorism in the Middle East, Asia, Africa, European countries, North America and Oceania.

Key Words: Maritime right of hot pursuit; United Nations Convention on the Law of the Sea (UNCLOS); Connotation of the right of hot pursuit

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The right of hot pursuit in international law can be divided into the right of hot pursuit on land, at sea and in the air.

The maritime right of hot pursuit in international law on the sea refers to the right of hot pursuit of a foreign ship which may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. The right of hot pursuit is a national territorial jurisdiction derived from national sovereignty. It is an expansion and extension of the coastal State's territorial jurisdiction as well as an exception to freedom of the high seas. The right of hot pursuit is a right in traditional international law and constitutes a rule in customary international law. As early as in the first half of the 19th Century, the right of hot pursuit has factually occurred in the practice of Britain, the United States, and other countries. By 1930 when the conference on the codification of international law was held in Hague, it had become a practice universally recognized by most countries, in which respect the *I'm Alone Case* (1935) was an example. However, the right of hot pursuit, a rule under the customary international law, had not been explicitly defined until the Convention on the High Seas was developed at the First Conference on the Law of the Sea. Then it became a rule in international law and was generally recognized and accepted by the international community. At that time, it was applicable only when a foreign ship has violated the laws and regulations of the coastal State in its internal waters and territorial sea. The right of hot pursuit in the international law of the sea had become a rule in international law, with binding effect on not only States Parties to the UNCLOS 1982 but also non-States Parties in the form of a rule in customary international law. This right has basically not changed since it was lastly compiled at the 1958 Geneva Conference on the Law of the Sea. Along with the gradual development of the international law of the sea during the Third United Nations Conference on the Law of the Sea, the marine right of hot pursuit has had some new developments in connection with the regions where the right of hot pursuit is exercised.

I. The UNCLOS and New Developments of the Right of Hot Pursuit

The right of hot pursuit refers to the coastal State's right to pursue a foreign ship which has violated its laws and regulations, and is sailing from within the waters under the jurisdiction of that State to the high seas. The coastal State, when

exercising the right of hot pursuit, should abide by the following rules: 1. The hot pursuit may be undertaken only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and officially authorized to that effect. 2. The hot pursuit can start from the internal waters, the territorial sea, the contiguous zone or the exclusive economic zone of a State. 3. The hot pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship. 4. The hot pursuit may only be continued into the high seas to complete the pursuit and take measures according to law if the pursuit has not been interrupted. 5. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

According to the international law of the sea, in essence and in terms of legislative authority, the maritime right of hot pursuit is actually a national territorial jurisdiction derived from national sovereignty. It is an expansion and extension of the coastal State's jurisdiction. What the coastal State exercises is its national sovereignty, its judicial power and its enforcement power such as hot pursuit, visit, inspection, capture, etc., which conform to the domestic law and regulation in international law. The rights of the coastal State mainly include: 1. a territorial jurisdiction derived from national sovereignty (the exercise of territorial sovereignty); 2. Exclusive jurisdiction of the coastal State in its exclusive economic zone and on its continental shelf as endowed by the UNCLOS (two sovereign rights and three exclusive jurisdictions); 3. Universal jurisdiction endowed to all States by the international law (in the high seas); 4. It is an expansion and extension of the coastal State's jurisdiction as well as an exception to freedom of the high seas.

Article 111 of the UNCLOS explicitly stipulates the application conditions of the right of hot pursuit:[1]

> *1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the*

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1 *United Nations Convention on the Law of the Sea* (Chinese and English), Beijing: China Ocean Press, 1996, p. 52.

contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:

(a) the provisions of paragraphs 1 to 4 shall apply mutatis mutandis;

(b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the

competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

Prescriptions of Article 111, Paragraph 2 of the UNCLOS reflect the new development in the international law of the sea. At the two conferences successively held in New York and Geneva respectively within one year, a sentence, i.e. "including safety zones around continental shelf installations", was added after the term "continental shelf". Obviously, the wording of Article 111, Paragraph 2 clearly indicates that for States to which Article 76, Paragraph 5 of the UNCLOS 1982 is applicable, they can even exercise the right of hot pursuit from within 350 nautical miles from the baselines from which the breadth of the territorial sea is measured, or within 100 nautical miles from the 2500 meter isobath, which is a line connecting the depth of 2,500 meters. Furthermore, as the case may be, when sending an order to stop to the illegal ship, the patrol boat of the coastal State can exercise hot pursuit outside the limit of 200 nautical miles in the exclusive economic zone, and even outside the maximum limit of 350 nautical miles on the continental shelf. When put together, Article 111, Paragraphs 1 and 2 of the UNCLOS 1982 have made it clear that: "It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone." This also applies to violations in the exclusive economic zone and on the continental shelf.

As to whether the hot pursuit of a ship which has entered the exclusive economic zone of its own State or of a third State should cease immediately, there is no explicit stipulation in the UNCLOS. Based on Article 111, Paragraph 3, as the case may be, when the ship pursued has entered the exclusive economic zone of its own State or of a third State, the hot pursuit can generally continue on the ground that it does not influence the economic rights of the region, and yet it can also cease in the event of any effect on international relations. What's more, where a foreign ship in the high seas sends its boat to engage in illegal activities in the territorial sea or administrated waters of the coastal State, that State can capture the foreign ship

and exercise the right of hot pursuit against it.

The area in which the right of hot pursuit can be exercised, particularly the exercise of the marine right of hot pursuit, has developed greatly during and after the Third United Nations Conference on the Law of the Sea when it comes to the practice in various States. It is related to sovereign rights and exclusive jurisdiction following the establishment of the continental shelf and the exclusive economic zone. The development of science and technology also has and will continue to have impact and influence on the right of hot pursuit in practice. All these changes adapt to the mode of law enforcement of the coastal State which has new sovereign rights and exclusive jurisdiction, as well as the modernization of its infrastructure. The role of the right of hot pursuit as a main means of law enforcement of the coastal State has increased.

II. Fishing Events and the Right of Hot Pursuit

Illegal fishing events which happen in the coastal State's territorial sea, contiguous zone, exclusive economic zone, and particularly, exclusive fishing zone have caused increasingly frequent exercise of the right of hot pursuit. The occurrence of other maritime cases has also resulted in the exercise of the right of hot pursuit.

Following the emergence of the Convention on the High Seas under which the right of hot pursuit is prescribed, there have been several cases concerning the right of hot pursuit in multiple States. Most of these cases are illegal fishing events which have occurred in the coastal State's territorial sea or its adjacent area or contiguous zone set up to protect the fishing industry. Due to the establishment of 200 nautical miles exclusive economic zone or the 200-nautical-mile expansion of the fishery zone towards the high seas, fishing events have doubled just as expected. Some cases feature the hot pursuit of ships smuggling taxable goods or narcotics and of ships carrying illegal immigrants.[2]

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2 Such smuggling of illegal immigrants occurred frequently between Cuba and the United States and between Haiti and the United States in the past. However, smuggling of illegal immigrants from Asia to Greek Islands in the eastern Aegean Sea by means of Turkish boats had also increased with each passing day. During the armed confrontation between Greek Coast Guard ships and Turkish smugglers, the latter forced the illegal immigrants on board to jump into the sea so as to escape the pursuit of Greek Coast Guard, resulting in the death of many people. Afterwards, Greek Court began to impose severe imprisonment on Turkish smugglers for a general term of 10 to 17 years.

The West and Central African National Conference on Environment should also be mentioned. The Conference formulated the Abidjan Convention of 1981, and proposed to grant the right of hot pursuit against ships which are spotted causing pollution to the waters under the jurisdiction of the participating States.[3] Senegal and Gambia have also held discussions concerning the right of hot pursuit in the exclusive economic zone. States in this region have had multilateral talks in order to agree on joint supervision within the frameworks of Guinea Bay Regional Fisheries Commission and Sub-Regional Fisheries Commission. They have also conducted detailed discussions on the exercising condition and situation of the right of hot pursuit in the exclusive economic zone.[4] In other regions, the Committee for Eastern Central Atlantic Fisheries (CECAF) supervises the implementation of the UNCLOS 1982 for the management and development of fisheries. The Sub-Regional Commission on Fisheries under CECAF decides to "establish a regional fishing boat registration institution resembling the South Pacific Forum Fisheries Agency". More importantly, the Commission has passed the "Regional Convention on Joint Supervision and Operation of the Right of Hot Pursuit". This regional convention also stipulates: "The State Party, in whose territorial waters the ship pursued seeks shelter, is obliged to capture the ship and transfer it to the patrol boat which is undertaking the hot pursuit."[5]

There have been increasing cases concerning the right of hot pursuit caused by fishery events, e.g. *The Lamut and The Kolyvan Case*. On the night of January 17 to 18, 1972, a serious event occurred near St. Matthew in the Bering Sea. The Soviet Union processing fishing boat *The Lamut* and fishing trawler *The Kolyvan* were captured by United States Coast Guard's icebreaker *The Storis*. *The Lamut* was the flagship of a herring fleet of 80 ships. When captured, the two ships were 9.4 nautical miles outside of the Cape Upright, and about 250 nautical miles away from Alaska mainland. The crew of *The Storis* boarded the two Soviet ships, and led the Soviet ships back to Alaska.

Afterwards, the captain of *The Lamut* claimed that the arrest was illegal as they were not fishing at that time, and that it was due to the bad weather that they had mistakenly sailed into the 12-nautical-miles fishery contiguous zone of the United

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3 See *International Legal Materials*, 1981, p. 738; See *The Right of Hot Pursuit*, pp. 137~144, Cf. also Gr. Tiamagenis, *International Control of Marine Pollution*, Vol. I, 1980, p. 60.

4 See FAO Fisheries Report, No. 406, Fisheries Management, p. 1376.

5 See The Law of the Sea, Annual Reviews of Ocean Affairs, Law and Policy, Law of the Sea Review, United Nations, 1993, pp. 21~22.

States. As a result, he drove the ship towards the open waters, with the visiting personnel of the United States thereon. After *The Storis* of the United States began the hot pursuit, a report was sent to the Coast Guard Headquarters in Washington D.C. The Headquarters allowed the captain to fire warning shots to the Soviet ship pursued when it was sailing through the United States' fishery zone towards the high seas. At the same time, the US Department of State informed the Soviet Embassy in Washington D. C. of the progress of the arrest of the Soviet trawler.[6]

In the process of the pursuit, the captain of Coast Guard icebreaker *The Storis* warned the escaping Soviet ship *The Lamut* through the radio, ordering it to "stop immediately, or else firing will be proceeded to". However, in the whole process of pursuit which lasted for two hours, firing was not proceeded to. The US crew on board *The Lamut* was not in danger in the whole process of pursuit. At last, the Soviet commander Vladimir Artemov surrendered for a second time. But both *The Lamut* and *The Kolyvan* refused to accept the order to sail to Adac in Aleutian Islands. When the United States Coast Guard icebreaker *The Storis* could not capture the Soviet ships, another bigger United States Coast Guard icebreaker *The Balsam* sailed from Adac to the scene and led the two Soviet ships to the US territory. The US Court in Adac ruled that a fine, which amounted to USD 250,000 in total, be imposed on the two Soviet ships' captains and first mates. The Soviet Embassy in Washington D. C. took bad weather conditions or difficulties caused by force majeure as an excuse, arguing that the Soviet ships had been forced to enter the 12-nautical-mile US fishery zone.[7] In this case, US's abidance by the international law clauses related to the exercise of the right of hot pursuit is laudable. In forcing the Soviet ship to stop sailing, the United States Coast Guard's ship did not abuse force allowed by the international law. In this case, after it was captured, the Soviet ship fled to the high seas with a team of American visiting personnel on board. In accordance with the international law, the

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6 It is appropriate, even though not mandatory, to notify the flag State through diplomatic channels following the arrest of the ship. Article 73, Paragraph 4 of the UNCLOS 1982, stipulates: "In cases of arrest or detention of foreign vessels, the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed."

7 If the Soviet ship was within the United States' territorial waters when being intercepted, the defense by force majeure or distress may equal to the right of innocent passage. The United States shall not interrupt these ships' innocent passage in so far as such a defense of legitimacy is valid. See Article 14, Paragraph 3 of Geneva Convention on the Territorial Sea and the Contiguous Zone and Article 18, Paragraph 2 of the UNCLOS 1982.

US pursuing ship *The Storis* had the right to reasonably use force in order to force the ship pursued to stop. If the use of force is reasonable, it should not be deemed that the US government should bear international liability. Not to mention the US government had notified immediately the Soviet Embassy in Washington D. C., and subsequently authorized upon *The Storis* the moderate use of force in order to stop the ship pursued.[8]

In the 48 illegal fishing cases reported by the United States Coast Guard involving foreign fishing ships in the territorial waters or adjacent fishery zone of the US, foreign ships were captured in only 25 cases. In other cases, after patrol aircraft had detected violations of U.S. fisheries law, they either could not effectively capture illegal ships at that time, or managed to capture the ships. After 1970, the punishment on the law-breaking foreign ships became very severe. The Japanese fishing boat Ebisu 88 arrested on March 20, 1974 was punished most severely with a fine of USD 300,000. The aforesaid Soviet ships *The Lamut* and *The Kolyvan*, and *The Armaturschchik* which was arrested on February 5, 1974, were also subject to a severe fine amounting to USD 250,000 in that they had refused to obey the order given by the United States Coast Guard.

These changes[9] indicate that the coastal State needs to strengthen and modernize the enforcement measures in the new sovereign and exclusive jurisdiction areas.[10] As a major enforcement measure of the coastal State, the right of hot pursuit has gained new developments.

Some cases are relevant to the hot pursuit of ships which deal with illegal smuggling of taxable goods or narcotics and illegal immigrants.[11] What's equally surprising is that during the hearing of cases concerning the right of hot pursuit by

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8 However, in the case of The Shikoku, the United States Coast Guard's ship, The Klondike, sent The Shikoku to the bottom and caused the death of two persons. Such use of force was unjust and unreasonable, and the United States Government should assume international liability.

9 The Right of Hot Pursuit Especially Under the Geneva Convention on the High Seas, *AHDI*, 1961, pp. 196~224; The Freedom of Navigation: Some Recent Developments, *Shipping, International Monthly Review*, December 1987, p. 27.

10 About this point, see N. M. Poulantzas, Recent Developments in Canada Relating to Enforcement Measures in an Expanded Fisheries Zone, *RHDI*, 1977, pp. 109~119.

11 See *The Right of Hot Pursuit*, pp. 137~144, Cf. also Gr. Timagenis, *International Control of Marine Pollution*, Vo1. I, 1980, p. 60.

the High Court of Justice of Nova Scotia, Canada,[12] the judges made absolutely no mention of the UNCLOS 1982. Article 111 of the UNCLOS, which provides for the right of hot pursuit, basically retains prescriptions of the previous Geneva Convention on the High Seas, 1958. It represents a rule in international law with effect on all States, even on those States which have not signed or ratified the UNCLOS 1982 in the sense of customary law.[13] Of course it is easy to understand and sympathize with Canadian authorities and the Canadian judicial organs which are concerned about drug trafficking cases within their jurisdiction. Drug trafficking has become a major crime and a long-term threat to the civilized countries.[14] But international law should be strictly abided by. Although the UNCLOS 1982 has taken a step forward compared with the Geneva Convention, 1958, it still does not stipulate that drug trafficking is an international crime (just like piracy and the slave

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12 See R. V. Sunila and Soleyman, *Nova Scotia Supreme Court Appeal Division*, No. I, 2 January 1986, pp. 300~308; No. 5; Supreme Court, Trial Division, 28 January 1986, pp. 308~314; No. 3, 6 February 1986, pp, 315~319; No. 4, 11 February 1986, pp. 319~322; No. 5, 24 March 1986, pp. 322~326, *Nova Scotia Reports* (second series), Vol. 73, cited (1986), 73 N. S. R. (2d) 30; See also the original decision by Judge Glube of 8 August 1985, in C. J. T. D.

13 See M. L. Mash ed., *Digest of United States Practice in International Law*, Washington, D. C.: Department of State. The United States has recently urged Caribbean States to strengthen the cooperation in the suppression of drug trafficking. The US government asserts that of the drugs smuggled to the United States, 40% have come from Caribbean States. According to the BBC News Bulletin dated 17 November 1996, at the conference of Caribbean Community (CARICOM) recently held in Barbados, the United States demanded that these States allow the United States Coast Guard's ships and other US ships on government service to continue the hot pursuit of foreign ships engaged in drug trafficking in their territorial seas. As reported by BBC, Jamaica and Barbados refused to grant such right to the US government. Based on the previous experience of other Caribbean States which had granted such right, the US authorities would abuse such right. Owing to repeated protest made by the flag State party, the US government was considering its stance of unilateral visit and arrest, on the high seas, of foreign ships transporting drugs to the United States. See, e.g. the case of United States v. Gonzalez, 7 76F 2d 931, U. S. Court of Appeals, 11th Cir., 1 November 1985. The US government seeks unilateral extraterritorial jurisdiction over foreign ships on the high seas relying on the Marihuana on the High Seas Act (MHSA) developed by the United States Congress in 1981. The Maritime Drug Law Enforcement Act (MDLA) of 1986, an amendment to the MHSA, requires that foreign States agree to the United States' visit of foreign ships on the high seas. For the extraterritorial criminal jurisdiction of Canada and the United States, see N. M. Poulantzas, *Extraterritorial Criminal Jurisdiction: The Canadian Experience, Revue de droit international*, No. 4, Geneva, 1982, pp. 262~272.

14 Recently, officials of German judicial department, officials of the British government and the French government have criticized Mrs. Citer for her active involvement in and support of the illicit traffic in Turkish narcotic drugs targeting these States and other European States. See inter alia, *Kathimerini, Athens*, 28 January 1977; *The Ottawa Citizen*, 6 July 1977; etc.

trade), or admit the right to visit and search a foreign ship on the high seas.[15] It simply calls upon all States to cooperate in the suppression of illicit traffic in narcotic drugs in Article 108, Paragraph 1. In Paragraph 2 of that article, the Convention stipulates that any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

III. International Crime and Maritime Right of Hot Pursuit

The latest development of the maritime right of hot pursuit is undertaking hot pursuit against the new international criminals.

1. Smuggling, with ships, illegal immigrants from the Middle East, Asia, Africa, etc. to the European Union countries, North America and Australia is now regarded an international crime.

Smuggling is a crime, and even an organized international gang crime. The criminals earn several billions of US dollars from illicit trading each year. In Greece alone (sheltering about 1.5 million immigrants), 6,864 foreigners were arrested by Coast Guard in 2001. This number was only the tip of the iceberg considering the large number of illegal immigrants having entered Greece. 137 smugglers were arrested, of whom the vast majority were Turkish. For Greece, the illegal entry of Muslim immigrants has become a security threat. Turkey has refused to take back these illegal immigrants, although the two countries have signed a special memorandum. Greece, Italy and France have also signed similar agreements. Thousands of illegal immigrants, who had entered Italy and France secretly via Greece, have returned to Greece. In April 1996, a serious diplomatic incident happened between Turkey and Greece. A Greek patrol boat (when undertaking hot pursuit) fired at a Turkish ship believed to be carrying Iran refugees to Greece. Turkey protested, while Athens accused Ankara of "paying no heed to the smugglers and protecting the slave trade".[16] On March 29, 1997, the US criticized the Italian government of naval blockade against Albania. Italy replied

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15 About the coastal State's criminal jurisdiction exercised on board a foreign ship passing through its territorial sea during "innocent passage" (in the case of illicit traffic in narcotic drugs), see Article 19(d) of the Geneva Convention on the Territorial Sea and the Contiguous Zone (1958) and Article 27(d) of the UNCLOS (1982).

16 See *International Herald Tribune*, 28 June 1996.

that the naval blockade was based on an agreement between Albania and Italy, and the purpose was "to prevent illegal immigrants from Albania to the coast of Italy".[17] Now, almost every day sees the occurrence of new cases concerning hot pursuit of the slave ship at sea, especially between the west coast of Turkey and Greek islands in Aegean Sea.[18]

2. Drug trafficking is destined to become a kind of international crime, although the UNCLOS 1982 does not stipulate it as an international crime just like piracy and the slave trade (piracy and the slave trade are two crimes which give rise to the right to visit and search foreign ships on the high seas).[19] However, Article108, Paragraph 1 does call upon all States to cooperate in the suppression of such crime. On June 12, 2002, the United States, Spain, Greece and France jointly undertook a long-term cooperation and by means of ships, aircraft and surveillance satellite, finally visited and arrested the 100-meter ship entitled "The Winner". The ship flied the flag of Kampuchea, but was controlled by a Greek company called "Polis" whose base was in Piraeus, Greek.

3. In the wake of the September 11 event, the United States has taken drastic measures to fight against international terrorism. However, the anti-international terrorism acts of the US government have greatly gone beyond the provisions of international law, especially in the aspects of national sovereignty and human rights in treatment of prisoners. Recently, the United States has required several European countries, such as France, Italy, Spain, Portugal and Norway, to authorize USA Navy to intercept and visit any ship engaging in suspected terrorist activities in its territorial sea, and where possible, undertake hot pursuit of such ship. So far, only Turkey accepts such requirement of the United States. The Greek government has reasonably rejected such crazy demands of the US government.[20]

Another crazy requirement of the US government is the so-called "container terrorism". The United States requires all countries possessing container terminals to accept American supervisor, for the purpose of inspecting the goods loaded in the containers before the container ship leave the port for the United States.[21] The reason is that considering that a huge number of container ships are entering

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17 *BBC News Bulletin*, 29 March 1997.

18 See *International Herald Tribune*, 28 June 1996.

19 See R. V. Sunila and Soleyman, *Nova Scotia Supreme Court Appeal Division*, No. I, 2 January 1986, p. 26.

20 See *Eleftherotypia*, 1 June 2002.

21 Cf. also N. M. Poulantzas, *International Terrorism 1970-1980*, Dept. of External Affairs of Canada, Ottawa, 1980, p. 230

ports of the United States, the US authorities are afraid that international terrorists will transport weapons of mass destruction to the United States by container ships, making disasters similar to the collapse of the New York Twin Towers, or even greater disasters. Such concerns seem rather unreasonable in that the US government's requirement has ignored the international law rules related to harbor and national sovereignty.

IV. The Development and Change of the Applicable Scope and Object of the Right of Hot Pursuit

1. The right of hot pursuit shall apply *mutatis mutandis* to violations in the archipelagic waters, in the contiguous zone, in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

2. The right of hot pursuit can start from the expanded waters mentioned above.

3. The right of hot pursuit shall apply *mutatis mutandis* to the aircraft, submarines and amphibious aircraft.

4. During the exercise of the right of hot pursuit, the scope of application thereof should be expanded based on the provisions of the convention on the law of the sea. In order to seize the pirate ship, the hot pursuit can be undertaken in the exclusive economic zone and even the territorial sea of another State. But at the same time, the pursuing ship should send a notice to the coastal State, ask it for assistance and turn the arrested ship to the coastal State for handling through consultation.

5. In maritime international crimes, international criminal cases, unconventional security cases and anti-terrorism actions, the scope of the exercise of the right of hot pursuit can be expanded. But at the same time, the pursuing ship should send a notice to the coastal State, ask it for assistance and turn the arrested ship to the coastal State for handling through consultation.

On the one hand, both of the two Conventions on the Law of the Sea of 1958 and 1982 have recognized the coastal State's right of hot pursuit against law-breaking foreign ships in its internal waters, territorial sea, and contiguous zone. When the law-enforcing ship began the hot pursuit, if the ship pursued is within the

limit of jurisdiction of the coastal State, the hot pursuit is legal. However, because the waters under the jurisdiction of the coastal State have different legal status, the beginning of the exercise of the right of hot pursuit is different. The internal waters and territorial waters are within the sovereignty scope of the coastal State. In these waters, as long as the foreign ship violates any laws and regulations of the coastal State, the hot pursuit can be undertaken starting therefrom. If a foreign ship violates the innocent passage rules, the hot pursuit can be undertaken starting from where the violations take place. The contiguous zone is not within a State's full sovereignty scope. Therefore, in the contiguous zone, the hot pursuit can only be undertaken against ships in violation of customs, immigration, health care and other safety regulations. In the exclusive economic zone and on the continental shelf, only where a foreign ship has violated the coastal State's relevant laws and regulations which comply with the UNCLOS, e.g. the exclusive economic zone law, continental shelf law, fishery law, environmental protection law, regulations on artificial islands and facilities and scientific research, etc., can the hot pursuit be undertaken. International law experts believe that the coastal State's right to undertake hot pursuit in its exclusive economic zone and on its continental shelf against foreign ships having violated its laws and regulations is the inevitable result of the coastal State's national jurisdiction over its coastal resources. Some coastal States have affirmed the application of the right of hot pursuit against violations of its laws and regulations on the continental shelf, and some others have exercised rights granted under fishery laws in its exclusive economic zone. The pursuit of ships having violated laws and regulations on the continental shelf, including safety zones around continental shelf installations, even if the pursuit is on the continental shelf outside the exclusive economic zone which may be wider than 200 nautical miles, is also approved in the UNCLOS 1982. The right of hot pursuit in this regard has played an important role in such aspects as protection of offshore oil facilities and prevention of terrorist attacks.

It can be said that at present, the most important modern development of the right of hot pursuit theory is the increase and rapid expansion of the ocean area under the claimed jurisdiction of the coastal State. A large number of coastal States have announced the contiguous zone, the exclusive economic zone and the continental shelf, in addition to its territorial sea. According to Article 111 of the UNCLOS 1982, the coastal State can undertake the hot pursuit in any of the jurisdiction areas mentioned above.

On the other hand, this issue is highlighted to emphasize that besides the areas

mentioned above, the right of hot pursuit can also be exercised on the high seas. In other words, except for the territorial sea of the flag State or of a third State, provided that no damage is caused to the coastal States' rights, the hot pursuit can be exercised. Moreover, in so far as the flag State or the third State so agree, the hot pursuit can even be undertaken within these States' territorial seas.

V. The Use of Force

Article 23 of the United Nations Convention on the High Seas, 1958 and Article 111 of the UNCLOS 1982, which are regulations on the right of hot pursuit, do not mention the use of force in the process of hot pursuit. However, it is quite obvious that international law endows the right to use force during the arrest of illegal ships, because the right to arrest suspected ships are endowed by the two international conventions. Moreover, the arrest cannot be effectively implemented without appropriate use of force. If force is not resorted to, the right of hot pursuit will possibly become an invalid legal act. Countries such as the United States have already approved and adopted such an extreme measure. They argue that when a law-enforcing ship or aircraft is in the pursuit of a ship subject to seizure, if the ship does not stop sailing, as a last resort, the use of force should be justified.

However, currently, how to use force and the scope of the use of force in hot pursuit are vague and controversial internationally speaking. In hot pursuit cases, excessive use of force or use of force with no evidence by the law-enforcing ship has led to arbitration. With respect to the use of force in pursuit, the International Tribunal for the Law of the Sea (ITLOS) suggests that the use of force should be avoided as much as possible. Where it is impossible to avoid the use of force, the rationality and necessity should be ensured at the least and every effort should be made to ensure that people's lives are not endangered.

At present, some international law experts hold that if it is necessary to use force to stop the escaping ship, a special warning must be given before firing. This often requires that law-enforcing ship or aircraft first use non-lethal methods to prevent the ship from escaping. And finally, it should be ensured that the escaping ship is the target of any shooting. The firing should aim to disenable the ship to escape rather than bombarding and sinking the ship or targeting people on board. The utmost efforts should be made to avoid causing casualties to the other side. Thus, the use of force is not banned, but its use conditions are fairly strict. A related issue to be considered here is whether it is a must to inform the flag State of the

arrest or sinking of the ship pursued. The present conventions and domestic law do not clearly stipulate that the flag State should be informed. Of course, the consular agreements or other treaties (if any) between relevant States should govern. Some scholars claim that, as an international customary practice and for the purpose of peaceful coexistence between different States, it is advisable to inform the flag State of the incident through diplomatic channels.

VI. Damage Compensation Arising from Improper Exercise of the Right of Hot Pursuit

The issue of damage compensation caused by improper exercise of the right of hot pursuit is, in fact, the issue of related States' international liability, because the right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. As such, it is a behavior attributable to the State. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

A. The Provisions of Relevant Conventions

Not all codification of international law concerning the right of hot pursuit pays attention to the loss compensation following the illegal use of the right of hot pursuit. In the final resolution of the Hague Conference in 1930, Article 11 on the right of hot pursuit does not mention a State's international liability arising from illegal exercise of the right of hot pursuit. As to the International Law Commission, although there are terms elaborating on the right of hot pursuit, no reference is made to international liability. In spite that the report on the eighth meeting of the International Law Commission has touched on this issue, at the 1958 United Nations Conference on the Law of the Sea, Article 47 regarding the right of hot pursuit does not even mention the State's liability for damage compensation following illegal exercise of the right of hot pursuit.

On April 8, 1958, the British government suggested adding the following contents in Article 47: "Where a ship has been intercepted or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any damage or loss that have been thereby sustained."

On April 9, 1958, Israel also proposed to add Subparagraph 7 after Subparagraph 6 in Article 47, namely: "Subparagraph 3 in Article 46 applies to the right of hot pursuit." Subparagraph 3 in Article 46 stipulates: "If the suspect is proven not justifiable, and the ship is clear of any charges, the ship shall be compensated for any damage or loss that have been thereby sustained." Article 23, Paragraph 7 of the Geneva Convention on the High Seas, 1958 prescribes: "Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained." Article 111, Paragraph 8 of the UNCLOS 1982 provides: "Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained."

B. Related Legal Issues

The subjects demanding damage compensation due to improper exercise of the right of hot pursuit generally fall into two categories, i.e. the owner of the ship pursued and other victims, and the State of nationality of the ship pursued.

The first category of subject generally claims, as an individual or private entity, the damage compensation from the State which owns the ship exercising the right of hot pursuit. This usually requires the application of domestic law procedure of that State. For example, in the case of La Provence, Iceland suspected that the French trawler *La Provence* engaged in illegal fishing in its territorial sea. The bailiff in Westman Island ruled that a hefty fine be imposed on the captain while the ship and the fish on board be confiscated. On October 10, 1929, the Iceland Supreme Court revoked the above decision. The ship owner claimed for damage compensation with the Court of Reykjavik. On June 4, 1932, the Court rejected the said claims on the following grounds: the Iceland Coast Guard had arrested the ship in accordance with international law; due to lack of evidence, the captain had been acquitted. Therefore, the Court was of the opinion that no damage had occurred in this case.

In the case of *The Itata*, after the incident, the United States domestic courts unanimously declared the defendant (*The Itata*) innocent. After the verdict was made, the ship owner of *The Itata* claimed for damage compensation with the US-Chile Compensation Committee (established following the occurrence of

the incident based on an agreement between the United States and Chile). The Committee finally made a decision to the disadvantage of the United States on the ground that the American ship responsible for the hot pursuit had entered the Chilean territorial sea and the arrest occurred after *The Itata* had entered the American territorial sea without any intercept. The Committee ultimately decided that the owner could obtain compensation.

If in the exhaustion of the State's every relief procedure, the ship owner and other victims fail to get effective relief (the rule of exhaustion of local remedies), their country of citizenship can provide them with diplomatic protection and solve the issue of compensation through diplomatic channels. Where a country claims for compensation for damages suffered by an individual or private entity from the country exercising the right of hot pursuit, the following conditions shall generally be met:

1. The victim should continuously have the nationality of the requesting country; which is called the principle of continuity of nationality in the diplomatic protection.

It is noteworthy that if the ship pursued is a foreign ship and yet the owner is a national of the State of nationality of the pursuing ship, then it is not within the scope of compensation. *The I'm Alone* case clearly illustrated this point. The arbitration committee of the said case deemed that although "The I'm Alone" was a British ship registered in Canada, it was in fact almost entirely owned and controlled by American citizens, and was operated and managed thereby in critical periods. The navigation of the ship was controlled by them, while the cargos on board were also managed and disposed of by them. So in the arbitral decision, Canada's claims, on behalf of the ship owner, for compensation for the ship and the cargos were rejected for the reason that the owner of the ship and the cargos was an American citizen rather than a Canadian citizen. Nonetheless, the captain and the crew were mostly British. Although they worked for a smuggling ship, they were not the personnel in direct violation of American law. Therefore, the illegal infringement caused thereto should be compensated by the United States. Finally, the committee ruled that the United States should recognize the illegalness of its behavior and make compensation to the captain and the crew of the ship in an amount of USD 25,666.5. In this case, the arbitration committee actually distinguished the misconduct imposed on the requesting country and that imposed on the ship owner.

2. The Rule of Exhaustion of Local Remedies

It refers to the rule that the victim who suffers from damage due to improper exercise of the right of hot pursuit should first claim compensation from the judicial or administrative authorities of the flag State undertaking the hot pursuit. If all the relevant procedures and methods are exhausted and the compensation is still not made effectively, its own State can provide diplomatic protection and solve the dispute through diplomatic or legal channels. The solution can be obtained through diplomatic means or, with the consent of the State, through legal channels by submitting the dispute to an international tribunal or arbitration tribunal.

In the compensation cases caused by improper exercise of the right of hot pursuit, should the exhaustion of local remedies be applied as in other diplomatic protection cases? The illegal damage caused by improper exercise of the right of hot pursuit may be done to not only individuals or private entities such as the ship owner and operator, but also the country of citizenship of the ship pursued, if the ship pursued and the private entities have the same nationality. So we often see cases similar to *The I'm Alone* case, in which the country of citizenship of the ship pursued may negotiate with the offending country to solve the issue of damage compensation on the ground that both the country and its citizens have been infringed upon. In *The I'm Alone* case, the arbitration committee also recommended that the United States apologize to the British and Canadian governments and pay compensation amounting to USD 25,000 as a substantial compensation for the sinking of the ship flying its flag on the high seas. It should be noted that *The I'm Alone* case did not involve the issue of compensation to the French crew, because Britain was not entitled to give diplomatic protection to French people by claiming, on their behalf, for compensation from the United States. It is thus clear that in the cases of damage compensation concerning the right of hot pursuit, if both countries are willing to solve problems at the country level on behalf of individuals or private entities, the exhaustion of local remedies may not be a necessary condition.

3. The Principle of Clean Hands

Some scholars are of the view that a country my claim, on behalf of its national, for compensation from another country only when the behavior of the individual is justifiable. When a country's liability concerning the right of hot pursuit is investigated, it is very important that the victim should have clean hands. According to this view, only when all the behaviors of the ship pursued are legitimate can the hot pursuit be called illegal. It is on this precondition that the victim is entitled to request diplomatic protection from its country of citizenship. Generally, whether or not the hot pursuit is illegal should be subject to the domestic

law of the State of nationality of the pursuing ship or the international law.

In fact, the principle of clean hands on the part of the victim had been proposed by the US government before the famous *The I'm Alone* case was handled by the commissioners. In this case, the US government believed that the illegal behavior of *The I'm Alone* made it unreasonable for the Canadian government to claim for compensation, while the Canadian government contended that the procedure in front of the arbitration committee should not be established on the ship's ethical standards. The committee pointed out in the final report dated January 5, 1935 that although the behavior of *The I'm Alone* was illegal, the Canadian government was entitled to claim for damage compensation from the US government on the ground that the ship flying its flag had been illegally sent to the bottom.

However, whether the principle exists is questionable, because the improper exercise of the right of hot pursuit refers to violation of the domestic law and international laws in particular in respect of the right of hot pursuit, and cannot be affirmed taking the legality of the behavior of the ship pursued as a judgment standard. Once the improper exercise is confirmed, where the victimized individuals or private entities cannot obtain compensation following the exhaustion of local remedies, their country of citizenship can provide diplomatic protection to them.

Where the second category of subject is involved, the improper exercise of the right of hot pursuit has caused damage to the country. It can be further divided into two categories. For one thing, the improper exercise of the right of hot pursuit is aimed at the national ship, which is very rare because, generally, the national ship enjoys the right of immunity. For another, the improper exercise of the right of hot pursuit is aimed at other ships, usually ships belonging to individuals or private entities. This kind of improper exercise usually will not cause direct damage to the property of the country, so there will not be the issue of damage compensation. But the verdict of *The I'm Alone* case is believed to be the first precedent where the offended country obtains substantial compensation for the spiritual and non-material damage. The arbitration committee recommended that the United States apologize to the British and Canadian governments and pay compensation amounting to USD 25,000 as a substantial compensation for the sinking of the ship flying its flag on the high seas.

It should be said that on the issue of damage compensation caused by improper exercise of the right of the hot pursuit, the first thing is to make sure whether or not the improper exercise of the right of the hot pursuit actually exists.

If there is sufficient evidence to prove its existence, the victim is entitled to demand compensation from the offending side. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

If the damage compensation caused by improper exercise of the right of hot pursuit is submitted to the international tribunal or arbitration committee to make claims, two circumstances should be distinguished: the first is that the improper exercise of the right of hot pursuit causes harm to the national property; the second is that the improper exercise of the right of hot pursuit causes harm to individuals or private entities. In the first circumstance, if there is evidence proving that the improper exercise of the right of hot pursuit has caused harm to the national property, the victimized country can immediately claim for compensation with the international tribunal or international arbitration body, or obtain compensation through diplomatic channels. In the second circumstance, in order to claim for compensation with the international tribunal or arbitration body, the victimized individuals or private entities should first gain the support of their country of citizenship because individuals or private entities are not the subject under the international law. What's more, the following conditions should be met: (1) they should have continuous nationality; (2) they are supported or given diplomatic protection by the country of citizenship; (3) they have followed the rule of the exhaustion of local remedies; (4) the victims have clean hands.

In order to seize the pirate ship, the hot pursuit can be undertaken in the exclusive economic zone and even the territorial sea of another State. But at the same time, the pursuing ship should send a notice to the coastal State, ask it for assistance and turn the arrested ship to the coastal State for handling through consultation.

VII. Conclusion

The right of hot pursuit in the international law of the sea has become a rule of international law, with effect on all States Parties to the UNCLOS 1982 as well as non-States Parties in the form of international customary law. These changes have gradually appeared and developed along with the convening of the Third United Nations Conference on the Law of the Sea and the entry into force of the UNCLOS. The recent developments of the right of hot pursuit in the international law of the

sea are mainly:

1. The UNCLOS 1982 has developed and expanded the right of hot pursuit. Hot pursuit can now start from the superjacent waters of the coastal State's contiguous zone, archipelagic waters, exclusive economic zone and continental shelf.

2. The right of hot pursuit is a main means and form of law enforcement at sea for the coastal State.

3. The illegal fishing events that happen in the territorial sea, the contiguous zone, the exclusive economic zone, and especially the exclusive fishery zone have caused increasingly frequent exercise of the right of hot pursuit. The occurrence of other maritime cases has also resulted in the exercise of the right of hot pursuit.

4. In international crimes and international criminal cases, the right of hot pursuit is also exercised, such as global smuggling, drug trafficking, stow-away, piracy and maritime terrorism in the Middle East, Asia, Africa, European countries, North America and Oceania.

5. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea or archipelagic waters of its own State or of a third State.

The so-called right of hot pursuit refers to the way or means that the coastal State uses to ensure the enforcement of its rights and jurisdiction. The coastal State's exercise of its sovereign rights and jurisdiction can be summarized as follows: (1) the coastal State has the right to formulate laws and regulations respecting its exclusive economic zone and exercise its sovereign rights and jurisdiction over the exclusive economic zone, with no interference from any other State; (2) In the exercise of the jurisdiction, the enforcers should be officials, warships and military aircraft authorized by State authorities, and other personnel or ships explicitly authorized by the government to that effect; (3) The specific contents of enforcement of the jurisdiction include supervision, visit, search, arrest, detention and confiscation, judicial procedure, etc.; (4) The sovereign rights over all natural resources, the exclusive jurisdiction over international frame, the artificial islands, installations and structures, and the jurisdiction or restrictions over marine scientific research, pollution prevention and navigation, overflight, and the laying of submarine cables and pipelines should be exercised respectively.

The right of hot pursuit shall apply *mutatis mutandis* to violations in the archipelagic waters, in the contiguous zone, in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such

safety zones. During the exercise of the right of hot pursuit, the scope of application thereof should be expanded based on the provisions of the convention on the law of the sea. In order to seize the pirate ship, the hot pursuit can be undertaken in the exclusive economic zone and even the territorial sea of another State. But at the same time, the pursuing ship should send a notice to the coastal State, ask it for assistance and turn the arrested ship to the coastal State for handling through consultation. In maritime international crimes, international criminal cases, unconventional security cases and anti-terrorism actions, the scope of the exercise of the right of hot pursuit can be expanded. But at the same time, the pursuing ship should send a notice to the coastal State, ask it for assistance and turn the arrested ship to the coastal State for handling through consultation.

China is a State Party to the UNCLOS as well as a major marine country. The maritime right of hot pursuit is expressly regulated in the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone: The right of hot pursuit of a foreign ship may be undertaken when the competent authorities of the People's Republic of China have good reason to believe that the ship has violated the laws and regulations of the People's Republic of China. The right of hot pursuit should be exercised by military ships and military aircraft of the People's Republic of China, or ships and aircraft on government service authorized by the government of the People's Republic of China to that effect. Such pursuit must be commenced when the foreign ship or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the internal waters, the territorial sea or the contiguous zone of the People's Republic of China. If the foreign ship is in the contiguous zone of the People's Republic of China, the pursuit can only be undertaken when the rights stipulated by laws and regulations concerning the security, customs, finance, health or entry and exit management have been infringed upon. As long as the pursuit is not interrupted, it may be continued outside the territorial sea or the contiguous zone of the People's Republic of China. The pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State. However, in this aspect, China's legislation is not yet perfect, and the law enforcement still lacks strength. We should strengthen the research on the right of hot pursuit, perfect the legislation and strengthen the law enforcement, so as to protect China's sovereignty and maritime rights and interests and safeguard world order and peace.

Translator: LU Qiong

Piracy and the Relevant Legislative Issues in China

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Abstract: Piracy has been a serious crime in international criminal law. However, provisions on piracy are still absent in Chinese criminal law. Strategically speaking, it is necessary for China to lay down provisions on piracy, which will facilitate our fight against piracy and protection of the national interests of China.

Key Words: Piracy; Personal purpose; Domestic legislation

Piracy is a serious crime in today's world. Also, it is known as one of the oldest international crimes. The Chinese domestic criminal law fails to make any explicit stipulations on piracy, though piracy is becoming rampant in recent years. Therefore, in order to combat crimes, it is necessary for the Chinese government to set out provisions on piracy so as to provide explicit legal basis to fight against piracy, and to protect Chinese national maritime interests. This article is going to analyze these relevant issues.

I. The Current Situation of Piracy

The ocean has been destined to become another hotbed for criminal activity since it was first conquered by human beings. Starting at the beginning of the Greek era, piracy has had a long history. Internationally speaking, modern piracy has developed a new trend in which advanced equipment, cruel tactics, high levels of organization, and internationalization are key factors. Piracy's growing threat and harm lie in its advanced weapons and tight organizations. The five territories most affected by piracy in the world are: the Malacca Strait, the Red Sea and the waters

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encompassing the Gulf of Aden, the West African coast, the Somali Peninsula, and the coastal waters of the Bay of Bengal. Piracy in the Malacca Strait is especially serious, where it accounts for 56% of piracy acts worldwide.[1] Because 80% of the transportation of Chinese petroleum passes through the Malacca Strait,[2] rampant piracy there gravely threatens China's economic development.

Recently, there was a series of horrendous acts of piracy. In September 1998, a Panama-registered cargo ship *Tenyu* was hijacked in the Malacca Strait, after which 16 crew members were reported missing and possibly killed. Several months later, this ship reappeared in the international shipping industry, but with a different name and crew. The government is all but helpless in the matter. One day in February 2000, a group of heavily armed pirates in Malaysian waters hijacked the Japanese-owned tanker *MT Global Mars*. 17 Korean and Burmese crewmembers were cast off in a lifeboat. By the time they were rescued three days later by fishermen, the hijacked tanker had probably already been repainted and given a new name. On the morning of March 20, 2003, a Yongfeng Pelagic Fisheries Co., Ltd. fishing vessel *Fu Yuan Yu 225* was surrounded by eight pirate ships in Sri Lankan waters while trawling for fish. The ensuing attack resulted in the fishing vessel being sunk and the murder of 17 crewmembers.[3] On the morning of November 5, 2005, *Seaborne Spirit*, a United States luxury cruise ship carrying more than 300 people was suddenly attacked in the Indian Ocean by pirates in two speedboats. The pirates used rocket propelled grenades and guns to launch attacks on the ship, and then attempted to rob the passengers. Fortunately, the captain of the cruise ship ordered the detonation of non-lethal weapons − "sound bombs" − that were installed beside the ship, causing the pirates to give up and giving the cruise ship a chance to flee. In the end, the *Seaborne Spirit* successfully escaped the pirates with only a single crewmember sustaining slight injury.[4] Another pirate-conducted assault occurred just recently. According to the Guangdong *Yangcheng Evening News*, on April 16 this year, a yacht carrying four Americans was attacked by a group of pirates in the eastern waters off the Yemen coast. Fortunately, there were no casualties or property losses.[5]

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1 At http://news.sohu.com/s2005/xdhhd.shtml, 16 May 2006. (in Chinese)
2 At http://news.sohu.com/20050804/n226564358.shtml, 16 May 2006. (in Chinese)
3 At http://news.sol.com.cn/news_msg.asp? id=51535, 18 May 2006. (in Chinese)
4 At http://news.sol.com.cn/news_msg.asp? id=51509, 18 May 2006. (in Chinese)
5 At http://www. sun2008.com/news/world/20060417/102213.shtml, 18 May 2006. (in Chinese)

These examples clearly demonstrate the damage and impact piracy has on international society. China is a significant maritime power with an extensive coastline. Furthermore, it transports a wealth of strategic materials by sea, such as petroleum. Therefore, it is necessary for China to adopt effective measures to protect its maritime interests. That is the main purpose of this thesis. Legislative research on this topic could help us to more effectively exercise rule of law in the punishment of piracy. We will discuss Chinese legislative issues on piracy later.

II. The Definition of Piracy and Its Features

Piracy, in its original and strict meaning, is every unauthorized act of violence committed by a private vessel on the open sea against another vessel with intent to plunder.[6] This is the preliminary definition of piracy. Comparing it with other definitions, this concept does not stipulate that there must be a private purpose when committing a crime of piracy, and it is not explicit in its definition of the concept of violence. The authors feel that the definition of piracy provided by scholar Huang Yee from China Taiwan is more appropriate. Huang Yee asserted that under customary international law, a crime of piracy must be done with a private purpose on the high seas, which includes any ship committing an illegal act such as plunder or detention on another ship, goods or persons on board.[7] These are the initial definitions of piracy. Because of the limitation of technology in early times, acts of piracy were almost exclusively committed by one ship on another ship. This remains the major way in which piracy is conducted today. However, due to the changing of the times, it has become possible for acts of piracy between aircraft or by an aircraft on a ship. Though there are few examples of this brand of piracy, it is necessary to include it in the definition. In 1982, the United Nations Convention on the Law of the Sea (UNCLOS) explicitly added aircraft into the definition of piracy, as seen in Article 101:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation,

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6 Robert Jennings and Arthur Watts eds., translated by Wang Tieya, *Oppenheim's International Law (Volume I, Fascicle 2)*, Beijing: Encyclopedia of China Publishing House, 1995, p. 174. (in Chinese)

7 Huang Yee, *International Law of the Sea*, Taipei: Bohaitang Culture Ltd., 1992, p. 84. (in Chinese)

committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Any of the above actions are considered acts of piracy in the context of international law. This is also the most popular definition of piracy among most domestic textbooks.[8] This thesis also adopts the definition used by the UNCLOS, because it clearly stipulates each act of piracy, includes solicitation and conspiracy in its definition, and is more comprehensive in general. In the next section, this paper will analyze various features of piracy in order to deepen the understanding of it.

There are several features of piracy:

1. The crime subject of piracy is any crew or passenger of a private ship or a private aircraft. These people are responsible for the majority of piracy acts. In addition, according to Article 102 of the UNCLOS, the acts of piracy, as defined in Article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft. Therefore, a warship, government ship or government aircraft is only guilty of piracy after its crew has mutinied and conducted an illegal act as defined in Article 101. Although warships, government ships and aircraft belong to the government, once they have been taken over by individuals, their actions are no longer considered to be government actions, and are instead considered personal actions.

2. The *mens rea* of piracy requires direct intent derived from a private purpose. In general, this private purpose is manifested by an illegal act of plunder or robbery

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8 Gao Yupei and Gao Ge, *The New System of International Criminal Law*, Beijing: Peking University Press, 2005, p. 263 (in Chinese); Jia Yu, *International Criminal Law*, Beijing: China University of Political Science and Law Press, September 2004, p. 278 (in Chinese); Zhang Zhihui, *The General Theory of International Criminal Law*, Beijing: China University of Political Science and Law Press, 1999, p. 212. (in Chinese)

of another ship or aircraft's property. If the crew or staff of a warship, government ship, or government aircraft commit an illegal act of violence, detention, and plunder against another ship or aircraft on the high seas in order to comply with an order of an organization or a government for political purposes, it is not a crime of piracy. On April 27, 2006, a Chinese fishing ship from Qionghai, Hainan Province, China was shot at and robbed by an armed foreign ship when it was fishing near a traditional fishing ground of the Spratly Islands. Four fishermen were killed, and three fishermen were injured, and all the money and property on the ship were taken.[9] Though the illegal act conducted by the foreign ship in this case was robbery and plunder, Chinese media reports did not indicate that incident was a crime of piracy. It was instead defined as "the most terrible incident to happen in the waters around the Spratly Islands, in which Chinese fishermen were killed and injured". This is correct. If the foreign ship was private and had committed the crime with a private purpose, this incident could be defined as a crime of piracy. But if the foreign ship was simply complying with a governmental order for political purposes, this incident should not be considered a crime of piracy. Therefore, we can see that having a private purpose is critical when defining an act of piracy.

However, if crew members from a warship, government ship or government aircraft mutiny and take control of the vehicle, and proceed to commit an illegal act of violence, detention, or plunder against another ship, aircraft, or the members thereon on the high seas or in an area beyond national jurisdiction, their actions should be considered an act of piracy. In this case, their intent is assimilated to be private.[10]

As regard to the intent of piracy, in Article 101(a) of the UNCLOS, there is a very explicit explanation of the criminal intent behind the crime of piracy. Generally speaking, it must be direct intention. In Article 101(b), a voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or aircraft is necessary. In Article 101(c), defining a crime as an act of piracy requires inciting or facilitating an act described in subparagraph (a) or (b), which means intentionally inciting or intentionally facilitating direct depredation or participation in the crime.

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9 At http://news.qq.com/a/20060501.htm, 20 May 2006. (in Chinese)

10 Zhang Hu, A New Explanation on Piracy: The Perspective of International Law, *Journal of Yunnan University (Law Edition)*, No. 6, 2005.

Because of the growth of international terrorism, it is easy for a ship on the sea or an aircraft to become the target or tool of a terrorist attack. Were it to happen, how could we to define this crime? A terrorist group does not rob a ship or an aircraft merely for private ends, therefore, such robbery does not constitute piracy in terms of *mens rea*, instead, it should be considered a crime of terrorism.

3. According to the UNCLOS, the *actus reus* of piracy are:

(1) Any illegal acts of violence or detention, or any act of depredation, committed by criminals, and directed against another ship or aircraft, or against persons or property on board such ship or aircraft. Today, pirates are no longer satisfied with attacking people or plundering property on board. They also detain the target ship or aircraft with the intent to resell it and make a profit, such as the *Tenyu* case. Due to the advent of new technology, modern pirates have become crueler when they commit crimes. They use a number of firearms, ammunition, and heavy weapons when attacking other ships, aircraft, or people on board, which often results in significant casualties.

Meanwhile, according to the UNCLOS, any person that voluntarily participates in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft, commits a crime of piracy. Only participation in such operation qualifies as piracy in and of itself, without having to commit any other illegal act of violence, detention, or plunder. This provision is worthy of our consideration when drawing up future legislation. Moreover, the facilitation and solicitation also constitute crime of piracy, which complies with the definition of an accomplice under domestic criminal law.

(2) The target of a crime of piracy is another ship or aircraft. The pirate ship or aircraft in question must conduct an illegal act against another ship or aircraft, or persons and goods on board in order for it to be considered piracy. In other words, both an attacking ship/aircraft and a victim ship/aircraft are necessary under this definition. According to Article 103 of the UNCLOS: "A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act." Victim Ship or aircraft is the one infringed by pirate ship or aircraft. Therefore, it is important to provide a concise definition of pirate ship or aircraft, as every country has the right of hot pursuit and the right of visit against them.

Another common question is how to define an act of violence, plunder, or

detention if it occurs between passengers on board the same craft, and whether it should be classified as an act of piracy. Some Chinese scholars consider this act a crime of piracy.[11] However, the authors find this debatable. In this scenario, according to the "flag State jurisdiction", the classification of the illegal action should be determined by the flag State of the vehicle, which has the jurisdiction over such acts. We should not consider this scenario a crime of piracy. However, if pirates board in advance and then star attacking the ship or aircraft, it should be considered a crime of piracy.

(3) An act of piracy can only occur on the high seas or outside the jurisdiction of any Sate. According to Article 86 of the UNCLOS, "high seas" specifically means "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."[12] With respect to the definition of "areas outside the jurisdiction of any State", some scholars hold that it "should include Antarctic, public airspace, contiguous zone, exclusive economic zone and continental shelf. In other words, it includes the high seas and all areas outside the territory of any State (territorial land, territorial waters and territorial airspace)."[13] The authors think this definition is both precise and easy to understand.

However, there is still a question of how to handle acts of piracy that occur within a State's jurisdiction, such as the Malacca Strait. Are these acts of piracy still crimes of piracy if they do not occur on the high seas or in the areas outside any State's jurisdiction, as stipulated by the international criminal law on crime of piracy?

These are very real problems. First of all, let's analyze whether or not the above acts are considered crimes of piracy in the context of international criminal law. Theoretically, they are not considered crimes of piracy in terms of the location as traditionally stipulated by the international criminal law. In order to solve this problem, there are two options: one is to expand the scope of international criminal law on the crime of piracy to include the acts stated above; the other is

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11 Zhou Zhonghai ed., *International Law*, Beijing: China University of Political Science and Law Press, 2004, pp. 471~472. (in Chinese)

12 Zhang Zhihui, *The General Theory of International Criminal Law*, Beijing: China University of Political Science and Law Press, 1999, p. 212. (in Chinese)

13 Huang Yee, *International Law of the Sea*, Taipei: Bohaitang Culture Ltd., 1992, p. 86. (in Chinese)

not to consider the above acts as piracy, and put them into domestic criminal law.[14] The authors prefer the latter option because expanding the scope of international criminal law on the crime of piracy is unfeasible. It is hard to reach the consensus among various countries necessary to grant this expansion. Furthermore, if we include the above acts in the international criminal law's definition of piracy, and each country involved gains universal jurisdiction over the above mentioned acts, there are likely to be severe conflicts between the sovereignty of coastal States and the universal jurisdiction of other States. Therefore, the most reasonable option is to have the above acts consigned to the jurisdiction of domestic criminal law. However, the specific legal implementation should not be limited to the sovereign State that has jurisdiction over the above acts. For example, in the Malacca Strait, the defense of the Malacca Strait is jointly carried out by Malaysia, Indonesia, and Singapore.[15] Even when a crime of piracy occurs within one country's jurisdiction, all three of these countries jointly defend it. This is a good lesson for us to learn. When a sovereign State is not able to defend against piracy, it may seek the cooperation of other coastal countries nearby. Also, the sovereign State could seek military or material assistance from other countries that might have relevant interests. But in order to protect national sovereignty, the sovereign State has the right to decide whether or not this help is necessary.

III. A Legislative Proposal concerning the Crime of Piracy in China and the Relevant Legislation of Other Countries

Precedents on legislations concerning the crime of piracy in other countries:

Canadian Criminal Code gives a special provision on the crime of piracy, and differentiates the definitions of piracy within the contexts of international criminal law and domestic criminal law:

Piracy by law of nations

74. (1) every one commits piracy who does any act that, by the law of

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14 At http://www.publiclaw-events.com/legalsh/ArticleShow.asp?ArticleID= 192, 20 May 2006.

15 Yu Kun, Who Keeps Safety for the Malacca Strait?, *Contemporary World*, No. 5, 2006. (in Chinese)

nations, is piracy.

Punishment

(2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.

Piratical acts

75. Every one who, while in or out of Canada,

(a) Steals a Canadian ship,

(b) Steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,

(c) Does or attempts to do a mutinous act on a Canadian ship, or

(d) Counsels a person to do anything mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."[16]

Article 199 of the Draft for the Revised Penal Code of Japan states: "A person who uses violence or threatens to use violence against another person to make him unconscious or unable to resist, so as to rob a ship or aircraft in navigation shall receive life imprisonment or imprisonment no less than six years. A person who robs any property on board a ship or aircraft by the same means above shall receive life imprisonment or imprisonment no less than five years. These two offenses are considered as a piracy in accordance with the Articles 327 to 329 (robbery causing death or injury; murder caused by robbery and rape on the scene of robbery) and Article 331 (Attempted crimes)."[17]

The Criminal Code of the Russian Federation:

Article 227 Piracy

(1) Assault on a sea-going ship or a river boat with the aim of capturing other people's property, committed with the use of violence or with the threat of its use, shall be punishable by deprivation of liberty for a term of five to ten years.

(2) The same act committed repeatedly or with the use of arms or objects

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16 Bian Jianlin et al. trans., *Canadian Criminal Code*, Beijing: China University of Political Science and Law Press, 1999, pp. 44~45. (in Chinese)

17 Zhang Mingkai trans., *Japanese Criminal Code*, Beijing: Law Press China, 1998, p. 158. (in Chinese)

used as arms, shall be punishable by deprivation of liberty for a term of eight to twelve years, with confiscation of property.

(3) Acts provided for in the first or second part of this Article, if they have been committed by an organized group or have entailed, by negligence, the death of a person, or any other grave consequences, shall be punishable by deprivation of liberty for a term of ten to fifteen years, with confiscation of property.[18]

Of course, there are many rules of law concerning the crime of piracy around the world, and we are not able to cite them all. We have chosen three representative nations with legal provisions on the crime of piracy to act as examples. We will examine the characteristics of their legislations, and thereby obtain practical knowledge for our own situation.

The legislation of Canada on the crime of piracy is special because it differentiates the definition of piracy under international criminal law and domestic criminal law. The Canadian legislation defines the criminal elements of piracy differently on the international and domestic levels. The definition under international criminal law on the crime of piracy requires the crime to have a private purpose and use a private ship or aircraft. But the requirement for domestic criminal law on the crime of piracy is much broader, and not limited to needing a private purpose and a private ship or aircraft. A person committing an illegal act of violence, detention, plunder against another ship with a political purpose is considered guilty of the crime of piracy under domestic criminal law. The actus reus of international criminal law emphasizes any illegal act of violence, detention, or plunder; whereas the actus reus of domestic criminal law includes more stipulations on illegal acts, such as the behavior of stealing. The advantage of the Canadian Criminal Code lies in its connection of international criminal law on the crime of piracy and the UNCLOS. It also adopts a broader definition of piracy under domestic criminal law in order to protect relevant interests.

However, both Japanese and Russian Criminal Code adopt a definition of the crime of piracy in their domestic criminal law. This can help maintain the integrity and stability of domestic criminal law. Moreover, it is simply more convenient

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18 V. M. Lebedev and Y. I. Skuratov eds., translated by Huang Daoxiu, *Commentary to the Criminal Code of the Russian Federation (Volume II)*, Beijing: China University of Political Science and Law Press, 2000, p. 612. (in Chinese)

to incorporate international criminal law's extant crime of piracy into domestic criminal law.

According to China's current legislation, there is no practice of separately regulating crimes in international criminal law. We have not differentiated the definition within the context of international criminal law and domestic criminal law. In this way, China's criminal code is similar to that of Japan and Russia. This strategy has proven feasible, and the legislation governing the crime of piracy should follow this example.

The specific chapter of domestic criminal law that is most suited to dealing with the crime of piracy is debatable among scholars. Some think it is appropriate to place the crime of piracy within the chapter of "Crimes against Property". This is based on the reasoning that the nature of the crime of piracy is at heart an act of infringement of property safety on a ship or aircraft on the high seas, while infringement on personal safety is just a means to this end.[19] Some scholars have proposed using a new section of Article 236, *bis* 1 (Crime of Piracy) (1) if any person on board a private ship or aircraft uses violence, intimidation, detention, and plunder against another ship or aircraft, or any person and property on board on the high seas or in any areas beyond national jurisdiction, his offence constitutes piracy, and thus he shall receive fixed-term imprisonment no less than seven years, life imprisonment or death penalty; (2) any passenger or crew on board pilots or directs a ship or aircraft intending to commit one of the acts referred to in paragraph 1 commits a crime of piracy; (3) any person who commits any of the acts above shall receive death penalty in case of causing death, and life imprisonment or death penalty in case of causing serious injury.[20] Some of the scholars have proposed putting the crime of piracy within chapter II Crimes of Endangering Public Security.[21] The authors are of the second opinion. Though the direct criminal intent is against property, it has always accompanied the infringement of personal safety from the beginning. Therefore, the crime of piracy endangers not only property but also people's lives. It is more reasonable to place the crime of piracy within the chapter of "Crimes Endangering Public Safety". This is based on our assessment

19 Guo Qi and Zhao Wenyan, The Legislative Analysis of Domestic Criminal Law on the Crime of Piracy, *Journal of Guangdong University of Foreign Studies*, No. 4, December 2003. (in Chinese)

20 Kunchen Fu, *Legal Issues on Marine Managing*, Taipei: Wensheng Book Store, 2003, p. 402. (in Chinese)

21 Tan Zhujian, Chinese Criminal Law on the Crime of Piracy, *Journal of Fujian Public Security College (Research on Social Public Security)*, No. 3, March 2001.

that the crime of piracy is committed against legal interest of no particular person's or a number of people's lives, bodies, or property.

Specifically, similar to the Criminal Law of the People's Republic of China Article 120 (the crime of organizing, leading, or joining a terrorist organization), we are not necessary to provide the details of the crime of piracy. Under these circumstances, we can bypass the requirements of *mens rea* (private purpose) and *actus reus* (an illegal act of violence, detention, plunder). Moreover, the location of the crime of piracy will not be limited to the "high seas" and "areas outside the jurisdiction of any State". In this case, the regulation can not only cover acts of piracy as understood within the context of international criminal law, but also protect broader interests. Therefore, we think the provisions for dealing with those guilty of the crime of piracy should be as such: "Any person guilty of conducting an act of piracy should be sentenced… any person guilty of actively participating in a pirate organization should be sentenced… any other person guilty of participating in a pirate organization should be sentenced…" The act of piracy in Article 101(c) of the UNCLOS is dealt by the General Provisions, Joint Crimes of the domestic criminal law, which concerns solicitation and conspiracy. So there is no need to have separate provisions for dealing with those guilty of piracy specifically.

To discuss the various elements of the crime of piracy, it is helpful to start with its definition. First of all, any person or organization is capable of committing the crime of piracy. Specifically, any crew, staff, or passenger of a private ship or aircraft could commit the crime of piracy. And any crew or staff on a warship, government ship or aircraft who mutinies and takes control of the warship, government ship or aircraft to conduct an illegal act against another private ship commits the crime of piracy. If the criminal unit commits the act of piracy in an organized way, it can also be guilty of the crime of piracy. Some pirates escalated the severity of their crimes due to the support they received from massive pirate organizations. Therefore, it is necessary to include criminal organizations as one of the subjects capable of committing the crime of piracy. Moreover, under China's legal system, the Chinese government can punish both an individual criminal and a criminal organization, which can combat piracy more effectively. Secondly, the *mens rea* of the crime is intent, including direct and indirect intent. Mere negligence cannot constitute a crime of piracy. The international criminal law requires a private purpose, a stipulation which should not be adopted by domestic criminal law when dealing with piracy. Both private purpose and political purpose, or any other purpose for that matter, should be included within the *mens rea* of the crime

of piracy. This will help us fight piracy more effectively. Thirdly, the actus reus of the crime of piracy should be defined as illegally conducting an act of piracy, or participating in a pirate organization. General stipulations of the *actus reus* of the crime include not only an illegal act of violence, detention or plunder by any person against another ship or aircraft, or against people on board, but also the act of stealing another ship or aircraft. Then the content of piracy could be expanded. The *mens rea* and *actus reus* of piracy are changing to adapt to the times. The essential this legislation model is to make the definition of piracy within domestic criminal law more general and flexible enough to allow the provisions thereof to adapt to a changing situation.

Dealing with legislation concerning the crime of piracy is not only crucial to improving China's legal system, but also crucial for protecting China's maritime interests. The enactment of this legislation can provide China a legal basis for fighting piracy. It will also allow China to avoid interference on our coastline from other countries using these kinds of excuses. Therefore, it is necessary for China to strength research on the crime of piracy and initiate legislation on it as soon as possible.

Translator: HU Yingying
Editor (English): George Feldman

Impact of Maritime Non-traditional Security Factors on Marine Legal Order

GONG Yingchun*

Abstract: Since the adoption of the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention"), some new issues, which were not regulated by the Convention or regulated only in principle, emerged. Therefore, a number of countries started to explore security modalities in the new situation. Facing non-traditional security factors, such as piracy and armed robbery at sea, maritime terrorism, proliferation of weapons of mass destruction, certain countries extended the scope of jurisdiction of non-flag States over the high seas and other sea areas by concluding special treaties or amending existing international treaties; while the United States, Japan and other countries or groups of countries have, through their domestic laws or State practices, taken unilateral actions, by "filling-in" or "specific" application of the "blank" parts of the Convention which are not specifically regulated or parts which are regulated only in principle, in order to shape a new system or order in their favor. The endeavor of Japan to build a multilateral maritime security mechanism in Asia with maritime joint law enforcement as the ultimate goal may significantly impact the current status of maritime order in Asian Pacific region.

International Law does not prohibit a State from entrusting the exercise of jurisdiction over matters within the jurisdiction of its national sovereignty to another State voluntarily, or by way of concluding regional agreements or granting prior authorization, therefore, joint law enforcement at sea is feasible in law, and some precedents can also be found in State practice. However, maritime joint law enforcement also implies a range of questions worthy of studying in international law: such as the relationship between multinational law enforcement and the principle of freedom of navigation on the high seas; the international law basis for

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a third State to participate in maritime law enforcement; and the relationship between a third State, authorized by a coastal State, exercising jurisdiction over foreign ships within the territorial waters of the coastal State, and the principle of the innocent passage through the territorial waters, etc. In the future, the building of multilateral maritime security mechanism in the region and its tendency deserve close attention.

Key Words: Non-traditional security factors; Ocean peace-keeping; Multilateral maritime security mechanism; Maritime joint law enforcement

I. Emergence of Non-traditional Security Factors in the Marine Sector

Since the adoption of the United Nations Convention on the Law of the Sea (hereinafter the "Convention" or the "UNCLOS") in 1982, 25 years elapsed. During this period, some new issues, which did not exist at the drafting stage of the Convention and for which the Convention did not provide, emerged. For example, bigger and more oil tankers pose increased potential threat of large-scale maritime pollution to coastal States of international straits and other international waterways. Accordingly, some coastal States advocate user States of the Straits should jointly bear the burden of maintaining the safety and security of the waterways and prevention of tanker pollution.[1]

After the September 11 attacks, the US-led Proliferation Security Initiative (PSI) aiming to prevent weapons of mass destruction and chemical weapons contains interdiction principles concerning ship boarding and inspection, which are apparently not consistent with the principle of innocent passage through the territorial waters and flag State jurisdiction over the exclusive economic zone as provided under the UNCLOS. Objectively speaking, such an initiative is in line with the security concerns of some States, therefore, under the pressure from the US, more States are inclined to participate in the PSI. Nevertheless, establishing a regime beyond the UNCLOS inevitably affects the legal regime concerning jurisdiction of ships specified therein.

Prompted by the concern of and stirred up by the threat posed by terrorists

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1 Gong Yingchun, Analysis of the Background and Current Status of the Obligations on Cooperation among the User-States of the Strait of Malacca, *Foreign Affairs Review*, No. 1, 2006. (in Chinese)

together with pirates to the security of the sea lanes in the Strait of Malacca, the coastal States of the Strait carried out joint patrols with others in the region in order to prevent maritime powers from seizing the opportunity to involve themselves in the defense affairs of the Strait. The change of their attitudes towards joint patrols from refusal to active acceptance, especially the move of inviting in Thailand, a State not bordering the Strait, reflects a new development in the joint maintenance of maritime security of Southeast Asian countries.

In addition, UNCLOS limits lieu of piracy "on the high seas, or in a place outside the jurisdiction of any State" (Article 101), therefore, the provision of Article 105 of the Convention, that every State may exercise universal jurisdiction over a pirate ship or aircraft does not apply to similar acts occurred within the territorial waters of the coastal States. Acts of armed robbery at sea against foreign cargo vessels and crew, such as looting, kidnapping, even killing, committed in recent years in the territorial waters of Indonesia, Malaysia and other coastal States, which are also straits used for international navigation, do not fall within the scope of the definition of piracy of the UNCLOS. How to combat effectively such crimes at sea has become a new problem for the coastal States and the user States of straits.

Due to different national circumstances, the non-traditional security factors and priorities involved in solving them vary from one country to another.[2] It is almost impossible to enumerate all the elements of maritime non-traditional security factors with traditional and non-traditional security boundaries and scope of non-traditional security factors unidentified. However, non-traditional security factors in the marine sector should at least have the characteristics of universality and trans-nationality. Issues of maritime terrorism, piracy and armed robbery at sea, large-scale marine pollution, illegal maritime migration, drug and arms smuggling, proliferation of weapons of mass destruction and chemical weapons should all be included in the list of maritime non-traditional security factors.

II. Impact of Maritime Non-traditional Security Factors on Marine Legal Order

The emergence of maritime non-traditional security factors has effected to a

2 Wang Yizhou, China and Non-Traditional Security, *International Economics Review*, No. 6, 2004. (in Chinese)

certain degree the regime of jurisdiction over ships on the high seas established by the UNCLOS. Specifically, on the high seas and in the exclusive economic zones, exceptions to the application of flag State jurisdiction increased, the principle of flag State jurisdiction has been challenged to a certain extent. This challenge is reflected in two ways: one is the extension of non-flag State jurisdiction on the high seas and other waters by concluding special treaties or amending existing international treaties. The other is: some maritime powers or groups of countries have taken unilateral actions, by "filling-in" or "specific" application of the "blank" parts of the Convention which are not specifically regulated or parts which are regulated only in principle, in order to shape a new system or order in their favor.

Example of the first case: through the amendments to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its Protocol,[3] member States of the International Maritime Organization empower parties States to the Amendments to exercise jurisdiction over ships of other States parties to the Convention outside the territorial waters of the coastal State, which carry weapons of mass destruction, biological, chemical weapons and other materials prohibited by international treaties, including stopping, boarding and inspecting such ships. Before the revision, the SUA Convention only provided that States parties had the contentious jurisdiction over suspects who may have committed offenses endangering the safety of maritime navigation, as well as the obligation of prosecution or extradition, but jurisdiction over the ship itself was vested in the flag State. But after the revision, the SUA Convention granted State parties jurisdiction of stopping, boarding, searching, and questioning ships of other States parties. Article 8 bis of the SUA Convention stipulates, measures such as boarding and searching a suspected ship require authorization of the flag State, but at the same time, it provides also that when a State party's governmental ship finds a suspicious ship in the waters outside the territorial waters of the coastal State, the State party is entitled to request the flag State claimed by the suspected ship (which should be a State party as well) to confirm the nationality of the ship, and if the flag State does not respond within four hours, it can be presumed that the flag State has already acquiesced to the requesting State's exercising of stopping, boarding,

3 IMO Document, LEG/CONF.15/DC/1, 13 October 2005, adopted by the Diplomatic Conference on the Revision of the SUA Treaties, 10–14 October 2005, at http://www.imo.org.

searching, and questioning.[4]

A typical example for the latter is the reflection in 2005 Amendments to SUA and its Protocol of the interdiction principle of the Proliferation Security Initiative (PSI) promoted unilaterally by the United States, and the elements of the bilateral ship boarding agreements signed between the United States and Liberia, Panama, the Marshall Islands and other States of flags of convenience.[5] The revision of SUA Convention and its Protocol was a specific act of the United States "in an effort to strengthen international law and relevant international framework in an appropriate manner when necessary", after its announcement in September 2003 of the PSI Statement of Interdiction Principles.

State practice of Japan in building a multilateral maritime security mechanism in Asia relates to the latter case as well. Japan's exploration in legal theory and its State practice in area of maritime joint law enforcement could have significant impact on the current status of maritime order in Asian Pacific region.

III. Japan and the Building of Multilateral Maritime Security Mechanism

In recent years, many Japanese scholars and policy researchers advocate that: as a maritime State, Japan should, from national strategic point of view, make use of its advantages in terms of policy imagination, leadership and financial strength, take the lead in the marine affairs and the building of maritime order in Asian Pacific region together with the coastal countries and island countries in the region.[6] In the area of maritime security, the researchers of the National Institute for Defense Studies (NIDS) of the Ministry of Defense of Japan proposed a

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4 That provision concerning acquiescence requires State party's commitment of prior acceptance by way of written notification to the Secretary-General upon or after depositing its instrument of ratification, acceptance, approval, or accession. This commitment can be withdrawn at any time.

5 It is specifically reflected in the following aspects: the objects subject to the PSI is the offences provided for under the 2005 Amendments to SUA and its Protocol; a State party may exercise jurisdiction over the ship of a flag State under certain circumstance; and the 4-hour rule is established.

6 Takeda Isami, Cooperation among Islands States in the Asian-Pacific Region: Asian Islands States Forum (Research Program on Cooperation among Islands States in the Asian-Pacific Region), at http://www.tkfd.or. jp/division/public/asia/pdf/2003shimaguni.pdf, 20 October 2003 (in Japanese); Masahiro Akiyama, Yoshida and Maritime State – Japan, at http://www.sof.or.jp/ocean/newsletter/077/a0l.php, 15 October 2003. (in Japanese)

strategic vision of multilateral maritime security mechanism - Ocean-peace keeping (OPK) as early as 1996. Southeast Asian countries did not respond positively to the Japanese proposal at that time, due to their attitude of vigilance towards OPK actions with Japanese Maritime Self Defense Force as a main participant. However, in the following years, Japan modified the idea of OPK: with the strategic objective of building a multilateral maritime security mechanism led by Japan unchanged, they diminished the military nature of the idea of OPK by "utilizing military power for policing purpose".[7] Since 2000, Japan has strengthened bilateral co-operations with Southeast Asian countries in the field of maritime security, with Japan Coast Guard,[8] which is responsible for maritime police tasks, as the principal organ of external cooperation. Through semi-official and non-governmental organizations such as Japan International Cooperation Agency (JICA) and Nippon Foundation etc., Japan assisted Southeast Asian countries in creating their Coast Guards and aided them in personnel, technology and equipment. On this basis, Japan promoted the shaping of a Japan-led Asian multilateral anti-piracy cooperation mechanism. This mechanism has laid a foundation for the eventual establishment of a multilateral maritime security mechanism under the auspices of Japan, established a framework, and reserved talents. Another purpose of Japan coming forward to build maritime multilateral security mechanism in Asian Pacific region is to "help the United States to fill the security gap caused by its not being able to intervene directly in the affairs of the South China Sea and the Malacca Strait militarily, due to political and other factors."[9]

A. Putting Forward the Concept of OPK

OPK is a new concept first proposed in 1996 by researchers of the NIDS of the Ministry of Defense of Japan. In June 1998, Susumu Takai, director of First Research Office, NIDS, wrote an article devoted to OPK, which explored its meaning, basis

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7 Speech by Minister of State for Defense SHIGERU ISHIBA at the IISS Asia Security Conference, Singapore, 5 June 2004, at http://www.iiss.org/conferences/the-shangri-la-dialogue/2004-speech-archive/second-plenary-shigeru-ishiba, 19 August 2004.

8 In 2000, the English name of Japanese Maritime Safety Agency was changed to Japan Coast Guard.

9 Tokyo Foundation & Emergency Motions Committee for the New National Defense Program Outline, 18 Motions Concerning the Drafting of the New National Defense Program Outline, at http://www.tkfd.or.jp/division/research/pr/pdf/2004_08_teigen.pdf, 21 August 2004. (in Japanese)

of operation, its subjects, methods, objects and scope of operation, the need for action and expected results, relationship between OPK and the building of regional security guarantee mechanism, and others: [10]

1. Meaning and basis of operation of OPK. OPK refers to maritime joint law enforcement action of searching and banning acts in violation of the laws and regulations of the coastal States in the region, based on the UNCLOS, by maritime defense forces of the countries in the region, through regional agreements or acquirement of prior authorization from relevant countries.

2. Subjects, methods and objects of OPK operations. "Navy officials" of Asian-Pacific countries take frigates or aircrafts provided by Japan or the United States patrolling certain waters of the East China Sea, South China Sea, the Strait of Malacca and surrounding areas, carry out law enforcement actions, including stopping, searching and arresting ships suspected of violating the UNCLOS or domestic laws and regulations of the coastal States. However, such maritime peacekeeping operations should be preconditioned on regional agreements or prior authorization of the coastal States.

3. The necessity and tasks of OPK. Susumu Takai's article demonstrates OPK from two perspectives. First, the UNCLOS stipulates the international obligations assumed by the coastal States in the sustainable use of fisheries resources and marine environment protection. In order to fulfill its treaty obligations, a coastal State is entitled to formulate domestic laws and implement effective law enforcement actions to exercise jurisdiction by taking such measures including stopping, searching, arresting the law-breaking foreign ships and bringing such ships to judicial procedures. If international rules or standards relating to marine environment protection are not applied by a coastal State due to incompleteness of its legal system or weak law enforcement force, or failure to take effective measures to provide appropriate protection and management of fisheries resources, an international litigation or arbitration may be brought against that State, and it would be liable for damages arising therefrom. On the other hand, sovereignty disputes with neighboring countries over islands may also render the scope of law enforcement of the coastal State uncertain, resulting in failure of the coastal State to fulfill effectively its obligations under the UNCLOS. In this regard, the author

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10 Susumu Takai, Introduction on the Study of OPK, at http://www.bk.dfma.or.jp/~sec/1998/06/opk.htm, 21 September 1998 (in Japanese); Susumu Takai, OPK and Maritime Security Cooperation, *NIDSNEWS*, June, 2003. (in Japanese)

proposes that, OPK operations with participation of maritime defense forces of a number of countries in the disputed waters are conducive to the promotion of political and military stability in the region and to the prevention of armed conflicts between States arising out of issues relating to sovereignty over and utilization of resource in the Spratly Islands and other islands. Thus, the tasks of OPK operations are not limited to the protection of the fisheries resources and marine environment of the coastal States, they also include the maintenance of the security of the regional sea routes and maritime lanes, as well as patrolling and law enforcement actions in the disputed waters.

4. Relationship between OPK and the building of the regional security guarantee mechanism. In the OPK operations, officials of one State may travel by ships and aircrafts of another State. Law enforcement officers may carry out law enforcement actions including stopping and searching suspected ships, collecting evidence of illegal behaviors, within the exclusive economic zones of their own country and that of the other countries. OPK operations may increase the awareness of relatedness of each State, and may help to maintain the regional security cooperation mechanism. Therefore, consideration should be given to setting up an international training center in Japan to provide education and training to officials dispatched by Asian Pacific countries in communication, operation and maintenance of ships and aircrafts, search methods, marine environment protection, fisheries resources protection and management, etc.

The original idea of OPK proposed by Japan did not receive positive responses from countries concerned, as its main participants would be the navies of the countries in the region, its scope of operation includes the exclusive economic zones of coastal States and even their territorial waters, it is based on regional agreements or transfer of jurisdiction from the coastal States, thus, after it was proposed, it encountered problems as "sovereign barriers", "longstanding vigilance against Japan" of the Southeast Asian countries and financial difficulties.[11]

B. Concrete Steps Taken by Japan in Building a Multilateral Maritime Security Mechanism

11 Yamada Hiroshi, Counter-terrorism Cooperation with South-East Asia is an Opportunity to for Japan to Grow, *Japanese Power*, No. 10, at http://www.tkfd.or.jp/publication/reserch/chikaral0_5.Shtml, 22 July 2004. (in Japanese)

The September 11 attacks and the recent rampant piracy in the waters around the Strait of Malacca made maritime security the focus of national concerns for some time. After 2002, the United States took the lead in a range of maritime security initiatives, such as the Container Security Initiative (CSI), the Proliferation Security Initiative (PSI) and the Regional Maritime Security Initiative (RMSI), and promoted the revision of the 1988 SUA Convention and its Protocol. However, of above initiatives, the RMSI, which contains provisions of sending troops to the Strait of Malacca and direct involvement in defense affairs of the coastal States, was expressly opposed by Malaysia and Indonesia – coastal States of the Strait of Malacca.

While US direct military intervention was refused, Japan went another way, quietly building a multilateral maritime security mechanism in the region under the auspices of Japan through the following steps.

1. Formation of an Anti-piracy Cooperation Mechanism in Asia under the Auspices of Japan

In October 1999, the Panamanian-registered Japanese cargo ship, *Alondra Rainbow*, carrying aluminum block of 1.2 billion yen, was robbed by pirates in the Malacca Strait. The ship and its cargo were hijacked, and 17 crew members, including the Japanese captain were forced to drift at sea on life-raft before being rescued 10 days later by Thai fishermen. Japan seized this opportunity to establish an initial anti-piracy cooperation mechanism in Asia under its leadrship through cooperation with Southeast Asian countries at governmental and maritime guard agencies levels since 2000.

First, on governmental level, the Japanese Government hosted the "Regional Conference on Combating Piracy and Armed Robbery against Ships" with the participation of the coast guard agencies, officials of maritime policy authorities, ship-owner associations of 17 States and areas, including the 10 ASEAN countries, Japan, China, India, South Korea and others. An important outcome of the Conference was the adoption of the Asian Anti-piracy Challenges 2000. The document states that, in the fight against piracy, the coast guard agencies of the participating countries shall cooperate "to the extent possible" in pirate intelligence exchange, stopping and arresting ships, technical assistance and other aspects, and shall convene experts meetings of coast guard agencies of the participating States to discuss specific implementation measures.

Subsequently, Japan and Southeast Asian countries actively promoted the bilateral co-operations among them in the fight against piracy, through such

measures as exchange of views, intelligence gathering and joint training. In September 2000, the Japanese Government dispatched "Mission for Combating Piracy and Armed Robbery against Ships", consisting of officials from the Japanese Ministry of Foreign Affairs, Ministry of Transport and Coast Guard, to the Philippines, Malaysia, Singapore, and Indonesia respectively, to exchange views on such matters as regional cooperation in the fight against piracy, the holding of relevant international meetings, Japan's willingness to provide cooperation assistance, mutual visits of patrol vessels and joint exercises, convening of expert meetings and joint patrols.

With these preparations, in November 2000, the Japanese Coast Guard dispatched patrol vessels to visit India and Malaysia, and held joint anti-piracy exercises with each of them. After that, Japan held joint anti-piracy exercises with the Philippines, Thailand, Indonesia, Brunei in October and December 2001 and in March and August 2002 respectively.[12]

Asia Cooperation Conference on Combating Piracy and Armed Robbery against Ship was held at Japan's proposal in October 2001. As the ultimate goal of Japan was to establish a multilateral maritime security mechanism under the auspices of Japan, this meeting aimed to push the bilateral anti-piracy cooperation to become a multilateral one. At this conference, the representative of the Japanese Coast Guard put forward a proposal: to organize officials of coast guard agencies of several countries to conduct joint patrol on ocean areas frequented by pirates in patrol vessels or aircrafts. In fact, this proposal is but a modified version of the afore-mentioned OPK idea, with the only change of the participating body from Japan being the Coast Guard responsible for marine policing tasks, instead of Maritime Self-Defense Force. At the ASEAN +3 Summit held in Brunei in November 2001, Japan advocated the establishment of a legal framework in order to combat piracy and promote regional cooperation more effectively. Thereafter, at Japan's initiative, 16 countries, including the 10 ASEAN countries, China, South Korea, India, Sri Lanka and Cambodia, participated in the drafting and development of the legal framework, resulting in the adoption in November 2004 of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia. Up to now, the Japan-led anti-piracy cooperation mechanism in Asia was established by concluding regional agreement. As of January 2006,

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12 The Status Quo of Japan's Piracy Problems and Countermeasures, at http://www.mofa.go.jp/mofaj/gaiko/pirate/index.html, 19 July 2004. (in Japanese)

Japan, Singapore, Laos, Thailand had completed domestic procedures for the signing and concluding of the agreement, sent notifications to the Government of Singapore, the agreed depositary. In addition, Cambodia, the Philippines and Brunei had also signed the agreement, but not yet completed their domestic procedures. The Agreement shall enter into force 90 days after the reception by the Government of Singapore of the notification from the 10th State party.

2. Assisting Southeast Asian Countries in the Creation of Coast Guards as well as Assistance in Personnel, Technology and Equipment

While promoting multilateral anti-piracy cooperation mechanism, Japan continues to strengthen its bilateral cooperation and exchanges with maritime law enforcement agencies of Southeast Asian countries in specific sectors, laying the foundation, establishing a framework and building a reserve of talents for a broader multilateral maritime security mechanism.

Due to insufficient and decentralized maritime law enforcement forces, most Southeast Asian countries welcomed the Japanese proposal of assisting their maritime law enforcement capacity building, helping to create their coast guards, and providing assistance in personnel, technology and equipment. Since 2001, Japan Coast Guard has been providing annual training courses for personnel from coast guard agencies of Asian countries in combating piracy, human smuggling, arms and drug smuggling and other crimes at sea. The Japan Coast Guard Academy has been accepting overseas students from related agencies of 15 countries and areas in Asia since April 2001.[13] Japanese ocean policy researchers also suggested that Japan should establish Asian Coast Guard Academy or similar training institutions to train more maritime law enforcement officials for the Southeast Asian countries, disseminate Japanese police culture, harmonize means of law enforcement and build a reserve of talents for future maritime joint law enforcement.[14]

a. Assistance to the Philippine Coast Guard

The Philippine Coast Guard (PCG) was created in 1968, affiliated to the Navy. Separated from the Navy in 1998, it is currently affiliated to the Department of Transportation and Communications. Since 2002, the Japan International

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13 The Status Quo of Japan's Piracy Problems and Countermeasures, at http://www.mofa.go.jp/mofaj/gaiko/pirate/index.html, 19 July 2004. (in Japanese)

14 Tokyo Foundation, Asia-Pacific Island Countries Cooperation Forum (Research Program on Asia-Pacific Island Countries Cooperation), *2004 Annual Study Report*, at http://nippon.zaidan.info/seikabutsu/2004/00312/contents/0010.htm, 27 October 2004. (in Japanese)

Cooperation Agency (JICA) started a five-year training program for Philippine maritime security officials, with permanent presence of five officials from Japan Coast Guard in the Philippines to provide guidance to Philippine maritime law enforcement personnel in such areas as international law, use of search equipment, methods of arrest and evidence collection. In December 2004, the Japan Coast Guard dispatched vessels to Manila Bay and held joint training exercises there with the Philippine Coast Guard in maritime law enforcement, anti-piracy, and prevention of oil pollution. On January 24, 2006, Japan and the Philippines held their first maritime search and rescue training exercises in the waters at the east side of the Batang Island between the Philippines and China Taiwan.[15]

b. Assistance in the Establishment of Malaysian Maritime Enforcement Agency

In July 2003, Japan Coast Guard dispatched patrol vessels to visit Malaysia and carried out the "on-board training for coast guard agency personnel".[16] In 2004, Malaysia decided to set up the Malaysian Maritime Enforcement Agency (MMEA). Japan Coast Guard officials were involved in its creation. After the formal establishment of MMEA (with 800 staff) in February 2005, Japan continued to send officials of the Japan Coast Guard to provide training for the staff of MMEA. In addition, on April 25, 2006, Nippon Foundation also delivered to MMEA as a gift the ocean training vessel built for it at a cost of 830 million yen.[17]

c. Assistance in the Establishment of the Marine Police and Adjustment Agency - Marine Police Organ of Indonesia

The new administration of Indonesia since 1998 began consideration of setting up a marine police organ - marine police and adjustment agency. In March 2003, Japan Coast Guard dispatched three experts through the JICA to the National Development Planning Agency of Indonesia, in order to provide necessary recommendations to the upcoming Indonesian marine police organ in terms of its

15 Tokyo Foundation, Asia-Pacific Island Countries Cooperation Forum (Research Program on Asia-Pacific Island Countries Cooperation), 2004 Annual Study Report, at http://nippon.zaidan.info/seikabutsu/2004/00312/contents/0010.htm, 27 October 2004. (in Japanese)

16 International Cooperation Promoted by Japan Coast Guard, at http://www.kaiho. mlit.go.jp/info/books/report2005/honpen/p114.html, 20 December 2005. (in Japanese)

17 Nippon Foundation, Regional Cooperation Should Be Established against Piracy and Maritime Terrorism, at http://www.nippon-foundation.or.jp/org/press/05141/051411.html, 18 March 2006. (in Japanese)

system, equipment and facilities to be furnished. [18] In January 2004, during his visit to Jakarta, the Indonesian capital, Japanese Foreign Minister Machimura said that Japan was considering using the budget of Official Development Assistance (ODA) in 2006 to provide to Indonesia with two or three medium-sized patrol vessels about 20 meters in size free of charge. [19] The reason why the size is limited to 20 meters is that: providing bigger vessels of more than 30 meters might contradict to the requirement of "avoid being used for military purposes and contributing to international disputes" stipulated in "the principles of implementation of assistance" of the ODA.

Through assisting the existing and future coast guards of the Philippines, Malaysia, Indonesia and other countries in personnel training, technology and equipment, etc., Japan met the requirements of improving maritime law enforcement capacity of the recipient countries objectively in terms of human and material resources. Meanwhile, as assistance is provided through the agencies like JICA, Nippon Foundation and Japan Coast Guard, it is easier for the recipient countries to accept. However, as the maritime security agencies of the above-mentioned countries in Southeast Asia are spin-offs of the armed forces, such as the Navy, the provision of assistance, including patrol vessels, by Japan has in fact a hidden military nature.

3. Establishing a Multilateral Maritime Security Mechanism under the auspices of Japan, in Order to Conduct Maritime Joint Law Enforcement in the Region

In 2003, a study funded by Tokyo Foundation[20] explained the steps and prospects of the multilateral maritime security mechanism being built by Japan as follows: by constructing "dots", "lines", and "areas", a Japan-led multilateral maritime security mechanism would ultimately be established. The so-called "dots" mean the coast guards created by Southeast Asian countries; "lines" refer to connecting the dots to form lines by Japan through the provision of patrol

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18 Cooperation on and Assistance to Indonesia's Idea of Setting up Its Coast Guard, at http://www.kaiho.mlit.go.jp/info/kouhou/hl5/k20030312/in-dex.html, 21 March 2006. (in Japanese)

19 Japan-Indonesia Joint Publication on Marine Issues, at http://www.mofa.go.jp/mofaj/area/indonesia/ji_seimei/kh_m.html, 21 March 2006. (in Japanese)

20 Takeda Isami, Cooperation among Islands States in the Asian-Pacific Region: Asian Islands States Forum (Research Program on Cooperation among Islands States in the Asian-Pacific Region), at http://www.tkfd.or. jp/division/public/asia/pdf/2003shimaguni.pdf, 20 October 2003. (in Japanese)

vessels, personnel training and other assistance to the maritime guard authorities of Southeast Asian countries; "areas" refer to the expansion of Japan's range of maritime patrol and law enforcement to areas - exclusive economic zones or even the territorial waters of coastal States, in which jurisdiction and enforcement activities could originally only be exercised by these States. This may be done by conducting joint law enforcement and patrol activities on the sea by Japan and above-mentioned Southeast Asian countries, and dispatching maritime police to ships of the other party, with prior authorization from relevant States.

The deliberate establishment by Japan, from dots to areas, a multilateral maritime security mechanism in Asia is clearly not aiming only to combat piracy and terrorism, but to reach far-reaching strategic goals. On December 10, 2004, the Japanese Cabinet meeting adopted the New National Defense Program Outline which determined Japan's defense policy for the next 10 years. The Outline clearly stated for the first time "be vigilant to China's moves of military modernization and constant expansion of its scope of ocean activities". In addition, the views as "Taiwan should not be placed outside the multilateral maritime security mechanism", "multilateral maritime security mechanism should be used flexibly to make it a complement to the Japan-US military alliance" proposed by Japanese ocean policy researchers explained to a certain extent Japan's true intentions of building multilateral maritime security mechanism.

IV. Challenges Facing China

The emergence of non-traditional security factors in the marine sector, including terrorism, piracy and armed robbery at sea, drugs and arms trade, proliferation of chemical weapons and weapons of mass destruction and large-scale pollution of the marine environment, puts dual pressures on the coastal States with weak maritime law enforcement capabilities: their inability to fulfill effectively their obligations under the UNCLOS, and the intention of the United States, Japan and other military powers to intervene directly in their defense affairs. Compared with the direct military intervention of the United States, Southeast Asian countries have chosen to accept the new security concept of "military force for police purposes" advocated by Japan.

The Chinese Navy has put forward the concept of "Maritime Common

Security" [21] and the vision of building a maritime security system[22], but compared to other States, China is in a disadvantageous position, lagging behind in theory construction, operational deployment, financing, coordination among departments and technical support. China's weak and decentralized maritime law enforcement forces remain unchanged, despite of the callings for improvement from parties concerned for many years. In contrast, Southeast Asian countries have been setting up maritime police organs modeled on Japan Coast Guard, bearing the influence of the Japanese police culture in terms of law enforcement methods, equipment and staffing. These moves tend to have a profound impact on the shaping of the future maritime order in the Asian-Pacific region.

It is worth noting that the vision of joint law enforcement proposed by Japan is preconditioned on not violating the principles of the UNCLOS and other international laws. Japan stressed that, the joint law enforcement operations must be based on regional agreements or the prior authorization from the coastal States concerned. Therefore, from a legal perspective, in practice, joint law enforcement operations carried out under any of one of the cases do not violate international law, as international law does not prohibit a State from voluntarily entrusting other States to exercise jurisdiction over matters within its sovereign jurisdiction on its behalf. In this connection, even in case that a flag State does not agree to or does not participate in joint law enforcement, its ships violating laws and decrees of a coastal State in the exclusive economic zone or the territorial sea of that coastal State, should be subject to joint law enforcement operations with prior authorization from the coastal State concerned. Once accepted by the countries in the region, this modality of maritime joint law enforcement would have a profound impact on the existing maritime legal system.

For example, the following case might appear: while exercising the right of hot pursuit against a foreign ship violating its national laws and decrees, a coastal State may request multinational hot pursuit operation involving maritime law enforcement forces of a third country or countries. In fact, multinational hot pursuit operation is not without precedents. On August 7, 2003, Australia began a 21-day hot pursuit, covering 3,900 nautical miles, from its exclusive economic zone

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21 Building an Effective Maritime Security System, *Guangming Daily*, 11 January 2006, p. 9. (in Chinese)

22 Duan Yanzhi, Zhang Xiaofeng, East Asian Geo-strategic Environment and Chinese Maritime Security, *Contemporary Asia-Pacific Studies*, No. 4, 2004, at http://iaps.cass.cn/Bak/ddyt/0404-1.htm, 21 November 2005. (in Chinese)

against a Uruguayan registered boat which illegally caught toothfish in its exclusive economic zone. In the process, at the request of Australia, government vessels of South Africa and the United Kingdom joined in the hot pursuit. Eventually, Australian Customs and Fisheries officials approached the Uruguayan fishing boat by first travelling by British government vessel and then taking two Australian boats. Afterwards, the officials carried out law enforcement activities including boarding and inspecting the boat.[23] However, such joint law enforcement operations also involve a range of issues in international law, e.g., relationship between joint law enforcement and the principle of freedom of navigation on the high seas; international law basis for the participation of a third party whose legal rights and interests have not been infringed, although authorized by the coastal State; the relationship between the exercise of jurisdiction over the ships of another State by a third State in the territorial waters of the coastal State with authorization of that coastal State and the principle of innocent passage in the territorial waters. In this regard, it is necessary to carry out a more detailed legal research in the future.

In conclusion, non-traditional security threats in the marine sector have resulted in the emergence of security gaps which have been not covered by the existing international maritime legal system and the traditional military alliances. That is because non-traditional security threats are universal and transnational, and also interrelated and convertible with traditional security threats. Therefore, some countries began to explore modalities of security mechanism in the new situation while maintaining existing military alliance. In the Asian-Pacific region, Japan is undoubtedly in the forefront. The multilateral anti-piracy cooperation mechanism led by Japan provides to a large extent a prototype to the multilateral strategic alliance in the region intended by the United States, while cleverly avoiding the possible political risks of arousing vigilance of other countries in the region.[24] In the face of the multilateral maritime security mechanism being established under the auspices of Japan and the United States, China needs to continue to

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23 In this case, Australia which was exercising the right to hot pursuit, UK and South Africa, which participated in the hot pursuit, as well as the flag State of the ship being hot pursued Uruguayan were all State parties to the Convention on the Conservation of Antarctic Marine Living Resources, which took effect in 1982. Molenaar E. J., Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa and the South Tomi, *The International Journal of Marine and Coastal Law*, Vol. 19, 2004, pp. 20~22.

24 Chris Rahman, Naval Cooperation and Coalition Building in Southeast Asia and the South-west Pacific: Status and Prospects, Working Paper No. 7, Royal Australian Navy, Sea Power Centre and Centre for Maritime Policy, October 2001.

advocate in various security dialogues new security concepts of mutual security, comprehensive security, coordinated security and cooperative security; and on the other hand, China should proactively participate in the process of the shaping of the mechanism, in order to grasp the tendency of the regional maritime order to prevent its development from going towards the direction of paramilitary alliances.

Translator: YANG Xiaoping

Legislative Analysis on the Ownership of Uninhabited Islands

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Abstract: With abundant natural resources, uninhabited islands are the important basis for our national economy and social sustainable development. The unique geographic location of the uninhabited islands makes them irreplaceable in maintaining the territorial integrity of the State and safeguarding the maritime rights and interests. However, a lack of definite legal regulations on their ownership resulted in the disordered development and exploitation such as low level development and damage to the environment and resources which negatively influenced the interests of the State and society and threatened the national defense security. To this end, it is of great theoretical and practical significance to strengthen legislation on islands, define the legal status and ownership of the uninhabited island so that we can safeguard the sovereignty, territorial integrity and national security of the State.

Key Words: Uninhabited Island; Island sovereignty; Island ownership; Island legislation

In geographical sense, territory, a special realm governed under the sovereignty of a State on the earth and an essential element of a State, is the space and scope for a State to exercise its sovereignty on. Territory and sovereignty are two concepts highly interlinked with and indispensible from each other as a State exercises its sovereignty on its territory and safeguards the independence and integrity of its territory with its State sovereignty. Territorial sovereignty integrates the concepts of

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territory and sovereignty. The territory consists of territorial land, territorial sea, airspace and subsoil. The uninhabited island in territorial seas should be considered as a part of the territory. Since there are rich resources on the uninhabited island, it would be helpful to realize its value with a clearly defined ownership. Under the premise that the uninhabited island belongs to the State, the paper here puts forward certain recommendations on how to deal with the ownership of the uninhabited island.

I. There Are No Regulations on the Ownership of the Uninhabited Island in the Promulgated China Law

The island has the feature of property in the civil law and hence the ownership of it is within the scope of property rights system. Property rights refer to the rights to directly control certain property.[1] It is an exclusive right that the civil subjects own, manage, control and enjoy the benefits of the property.[2] The Draft Property Law of the People's Republic of China has defined the property rights in Article 2(3): "The property right mentioned in this Law means the exclusive right enjoyed by the obligee to directly dominate a given thing according to law, which consists of the right of ownership, the usufruct and the security interest on property." The property right of a State refers to "as a special form of ownership, the State has the right to occupy, utilize, benefit from and deal with the State property. In essence, it is a reflection of the State ownership."[3] Since the State is a political but not an economic organization, it cannot directly operate and utilize the island. Therefore, to fully realize the economic value of the island, the State has to entrust a particular unit, individual or economic entity to develop, operate and utilize the island. The study on the ownership of the island needs to answer the questions: Whom does the island belong to; who is the owner of the island; what rights are the obligee entitled to; what obligations should other people shoulder; how should the ownership of the island be protected and what are the civil responsibilities of the infringing party. In short, the core issue about the island ownership is to define its ownership,

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1 Yin Tian, On the Definition and Essence of Property Rights − From the Perspective of Methodology, at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=24504, 13 March 2006.

2 Li Kaiguo, *The Basic Problems of Civil Law*, Beijing: Law Press China, 1997, p. 269. (in Chinese)

3 Tong Rou ed., *China Civil Law*, Beijing: Law Press China, 1994, p. 249. (in Chinese)

utilization and protection. The island ownership is the prerequisite for its utilization and protection. However, there is no clear definition concerning the ownership of an island in the Constitution of the People's Republic of China or the promulgated laws concerning the administration of the ocean, land, mineral resources, forestry, environment protection and etc.

The Constitution of the People's Republic of China (passed on December 4 NPC and promulgated afterwards, amended on the 8th NPC on March 29, 1993) defines the principle that natural resources are owned by the State in Articles 9 and 10, yet there are no clear statements that the ocean and island are included in the natural resources. Most people consider the island to be a part of an ocean. But there is no such inclusion of ocean into the list in Article 9. (It should be admitted that there are obvious defects in the Constitution). There is no explanation on whether river, lake and ocean are included in the scope of waters. Though the ocean water is flowing, most people think waters refer to rivers and at home or abroad there is no classification of the ocean into the waters. As to "tidal flats", it is by no means an island.

If we manage to incorporate the island into the Article 9 "and other natural resources", the island ownership is still not clear. There are different types of ownership in China. Will that be State-owned or collectively owned? It can't be decided. Some uninhabited islands might be State-owned, including islands used as base points while some might be collectively owned. The authors believe that the long time failure to incorporate the ocean (islands included) into the Constitution is an important reason resulting in the disorderly, excessive and gratuitous development of the ocean and the island.

There are no definition of the island ownership in the series of laws such as the Constitution, Land Administration Law of the PRC (1998), Forestry Law of the PRC (1998), Law of the PRC on the Protection of Wildlife (1989), Mineral Resources Law of the PRC (1996), Fisheries Law of PRC (amended in 2000) and Environmental Protection Law of the PRC (1989).

The Draft Property Law of the People's Republic of China (Seeking public

comments in July 2005)[4] adjusts the tangible property relations and answers to whom the property belong, what rights are obligee entitled to and how should property rights be protected. As to the ownership of the important resources, there are clear regulations in the Property Law.[5] The Draft Property Law clearly regulates that sea areas belong to the State and the State Council exercise the ownership on behalf of the State. But just like the Law of the People's Republic of China on the Administration of the Use of Sea Areas, it fails to provide clear definition on the island ownership. Uninhabited islands are important resources of the State. As a unique ecosystem, the island is considered to be an important part of the sea area whose ownership belongs to the State. Therefore, it should be clearly defined in the Property Law that the island belongs to the State and the on the basis of this regulation, there should be further regulations on the utilization of the island.

II. The Current Situation of Uninhabited Islands in China

The ownership of uninhibited islands, in other words, who is the owner of the island, is the essential issue here. According to law, the one who owns the island has the basic rights to utilize, handle and benefit from the uninhabited island. Since China is a socialist country, its means of production are mainly public owned. There are various economic sectors in existence and a complex structure of rights is in shape which features State, collective and individual ownership. In addition, the socialist market economic system has been established but we are yet to have a unified regulation on the ownership of the relevant resources, so there are no clearly defined regulations on the ownership of the uninhabited island. Therefore, the ownership of our coastal uninhabited islands is a complicated question with a

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4 General Office of the NPC Standing Committee points out in the notice of Comments Seeking on the Draft Property Law of PRC, this Law is "the draft civil law that has a close bearing to the immediate benefits of the people by defining the ownership of the property, protecting property rights and fully playing the efficiency of property in order to safeguard the order of the socialist market economy and maintain the basic economic system of the State.

5 Article 51: "All mineral resources, waters, sea areas and land in the cities belong to the State". Article 52: "Such natural resources as forests, mountains, grasslands, wasteland and tidal flats belong to the State, except where they belong to the collectives as is provided for by law." Article 53: "Land in the rural and suburban areas and all resources of the wildlife which belong to the State as are provided for by law are owned by the State." Article 54: "On behalf of the State, the State Council shall exercise ownership of natural resources like mineral resources, waters, sea areas, the State-owned land and grasslands."

lot of historical and current problems waiting for in depth discussion.

Judging from our national conditions, if we decide on the ownership according to who can make the decisions, there are three types of ownership on uninhabited islands in China: State-owned (owned by the nation or by the army), collective (village) owned and individual (in the name of an individual or a company) owned.

A. State Owned

Article 3 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas regulates "the sea areas are owned by the State, and the State Council exercises the right of ownership in the sea areas on behalf of the State." The uninhabited island is located in the sea and should be under the ownership of the State. Currently, the majority of the uninhabited islands are under the administration of the local government. For northern offshore uninhabited islands, individuals or units have been issued with aquaculture licenses to utilize the offshore barriers and their surrounding sea areas in accordance with the Law of the People's Republic of China on the Administration of the Use of Sea Areas. Majority of the people living in the coastal areas think that the oceanic islands and the islands under the unique protection and utilization of the State belong to the State and should be administered by the State.

Some garrison islands are uninhabited islands. The objective of the garrison island is for national defense and should be guaranteed. The ownership of such islands belongs to the State. The problems arise after the withdrawal of the military groups. The handling of these islands might be complicated. Some islands are under the management of local government or have been entrusted to the local government for their management, such as Qianliyan Island (also called Qianli Island or Qianli Mountain, which is located in south of the Yellow Sea at north latitude 36°15'57", east longitude 121°23'09". It covers an area of 0.2 square kilometers with the altitude 90.9 meter and distance 24.8 nautical miles to the nearest land point: Haiyang Pier). Before the garrison withdrew from the island, it signed an agreement with Haiyang government and entrust the latter to manage its over 40 mu camp production and over 100 barracks. However, when it comes to Zhoushan city of Zhejiang Province, things are quite different. Some are under the management of the government with the entrustment of the garrison and some have been rented by the garrison to the company or individual for development and utilization. We can take Fenghuangshan Island in Dinghai District of Zhoushan

City as one example. It covers a small area of 0.09 square kilometers and whose nearest point is only 1 kilometer away from the Zhoushan Island. It embraces pretty scenery with mountainous and ocean view. After the withdrawal of the garrison, Zhejiang Xinhui Industrial & Trade Co., Ltd. and Ningbo Huamao Real Estate Co., Ltd. have jointly developed the Phoenix Island Holiday Inn with construction investment for Phase I about RMB 40 million (including pier, seawall, hotel, which are under operation now). The Phase II construction is under construction and expected to be concluded by 2006. The manager is not clear about the transfer procedures, transfer commission and has been applying for the land certification. Since the island used to be a garrison island, the two forts on the island are maintained because of the principle that military installations can't be destroyed.

B. Collective Ownership

Up till now, there are still some villagers living along the seaside one-sided believe that the island close to the village belongs to the village. Therefore, the development and utilization of some offshore uninhabited island have received approval or oral agreement from the local village committee. Most of the development is for the aquaculture or culture and proliferation around this area. For instance, several villagers from Gangdong Village of Laoshan District, Qingdao City got consent from the local village committee engaged in sea farming of abalone and sea cucumber in offshore barrier or subtidal zone in Tuzi Island (which located at north latitude 36°16'27.3", east longitude 120°42'49.6". It covers an area of 0.505 square kilometers with the distance 1.62 nautical miles to the coast). Haier Group has already built small wharf and planted trees to develop a base for recreation and holiday as its international training center. However, since the offshore barrier has been occupied by the villagers who do not allow others to pass by, Haier Group had to ask the oceanic administration department of Laoshan District government to lead the negotiation with Gangdong Village and hire Shandong Maritime Judicial Expert Testimony Center to evaluate the value of the facilities and species raised by the sea farmers so as to provide economic compensations and acquire the whole right to develop and utilize Tuzi Island.

For another instance, Zhoushan City is the only prefecture-level one set on the basis of islands. It is situated on the northeast of Zhejiang Province, south of Yangtze River Estuary and in the East China Sea area outside the Hangzhou Bay. There are two districts and two counties in the city: Dinghai District, Putuo

District, Daishan County and Shengsi Country which cover a total area of 22,216 square kilometers with 20,599.06 square kilometers of sea area and 1,256.94 square kilometers of land area. There are 1390 islands under jurisdiction of the city, each of which area is greater than or equal to 500 square meters above the mean high tide line. In total, there are 1,311 uninhabited islands in the city, taking about 94.32% of the number of total islands. The uninhabited islands cover an area of 52.79 square kilometers, account for 4.2% of the total land area of the city. Among which, there are four islands which cover more than 1 square kilometers (100 hectares): Xugong Island of Shengsi County, Da Xi'an Island of Daishan County, Xifeng Island and Lianghengshan Island from Putuo District. As the biggest one among uninhabited islands, Da Xi'an Island covers an area of 2.52 square kilometers. There are 422 islands that cover the area between 1~100 hectares and 865 islands cover an area smaller than 1 hectare. Since Zhoushan City has been considered a city with 1000 islands, all the land and forestry counterpoising truly of islands here, no matter inhabited or not, have been entrusted by the State to the collective in accordance with the relevant law of forestry and land. Certificates of ownership have been issued already. For example, the ownership certificate of mountain and forest issued by Daishan County government in 1982 has the public sealing of the county government and signature of the county head. It clearly regulates that "in line with the national policy, we confirm the mountain and forestry of … belong to the commune. The certificate is issued and under the protection of national laws. No infringement from other units or individuals are allowed". After the land and forestry counterpoising truly had been entrusted to the commune, most of them have been further subcontracted to the individual farmers.

C. Individual or Company Ownership

Because of unclear ownership, some uninhabited islands which are close to the land and small in size are almost in a state of neglect. Neighboring villagers call these islands "deserted islands", and some engage in small scale agricultural production or aquaculture activities and consider themselves owners of the "deserted island".

Due to unclear ownership, some uninhabited islands were developed by certain well-funded companies who believe that those first take the island will be the landowner. For example, the Wu Island (also called Xiekou Island, at north altitude 37°06'24", east longitude 122°28'42") is an uninhabited island with a limited area

of 0.0005 kilometers and the elevation of highest point 3.4 meter. However, since it is close to the shore (just 0.63 nautical miles), a company landed on the island and started to construct. Its bulldozer and excavator are on the island now. Another example is Datu Yu of Xiamen, Fujian Province. Three villas had been established on the island and were abandoned before the conclusion of the construction since they were illegal.

The above analysis demonstrates that since there are no clearly defined ownership of the uninhabited island, no effective policies and measures to deal with the relevant issues, certain problems arise. The ownership of the uninhabited island is not clear and some local governments, units or individuals in the coastal areas believe that the island near their administrative region belongs to them and take the land or transfer and rent the island, resulting in a disorderly development of the uninhabited island.

III. Recommendations on the Ownership of Uninhabited Islands

A. Improve the Legal Regime of Ocean Property Right

Ocean, including the islands and sea areas, is an important natural resource supporting the economic and social development of China. Law of the People's Republic of China on the Administration of the Use of Sea Areas has established a management system of ocean property. Inhabited islands are incorporated in the current city and village system and are subject to the jurisdiction of the relevant laws and regulations on property rights. While, as a unique natural resource, it is not until recently that the importance of uninhabited islands has been recognized, and therefore, there are no definite laws regulating their ownership. On one hand, the uninhabited island has high comprehensive resource value because of its significance on the State sovereignty, security, transportation and energy. While on the other hand, the uninhabited island usually just covers a small area with limited soil, no fresh water and frequent natural disasters. Furthermore, they have substantial ocean attributes and basically do not have land worthy of development and can't be used as agricultural land for farming, plowing, or animal husbandry. In addition, the high fragility and irretrievability of its ecosystem make it improper to include uninhabited island into the collective ownership of the farmers. Article 9 of Constitution stipulates that "[m]ineral resources, waters, forests,

mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the State, that is, by the whole people, with the exception of the forests, mountains, grassland, unreclaimed land and beaches that are owned by collectives in accordance with the law." Like mountains, beaches and unreclaimed land, the uninhabited islands should be administered as a special and independent resource in the administration of legal regulations and systems. However, what makes the difference is the single ownership of uninhabited islands; therefore, they should be regarded as one of the "other natural resources" regulated by the *Constitution.* Their ownership should belong to the State[6] and a complete property system should be established. Due to a lack of legal regulations on the ownership of uninhabited islands, there are frequent random occupation, utilization and damaging of uninhabited islands. The recent "island owner" fashion, in particular, has attracted certain enterprises and individuals to develop and utilize uninhabited islands through various chancels which has worsened the waste of island resources, damaged local ecosystem and disrupted development order of the island and even threatened China's State sovereignty and security. Therefore, it is really urgent for us to establish the property system of the uninhabited island via legislation and perfect our marine property system.

In addition, since there are large varieties of islands in different areas which might have certain historical issues, it might be advisable to make detailed rules by the local government. The benefits of the public must be properly handled to safeguard the social stability.

Uninhabited islands belong to the State. But for the island that has been occupied (utilized) in the real life, the State might adopt different methods in accordance with different situations if it wants to reclaim it: first, is it unjustifiable occupation or justifiable one and are there any legitimate formalities? If there are no legitimate formalities and it is simply an occupation without permission, it should be reclaimed; while if it is rational utilization, for instance, the user has already done the application process from the village committee, then relevant compensation should be made according to law if the State is to reclaim the island; if several farmers form a partnership and jointly cooperate and develop the island, they could continue to use upon paying using fees in accordance with relevant provisions; if the island belongs to the collective ownership of the village before

6 Jiang Chengsong and Zhai Yong, Constitution Principles on Legal Regulations of Natural Resources, at http://www.chinalawedu.com/news/2004_7/2/1340484979.htm, 20 July 2006.

the issuance of relevant law, and its development or utilization has been conducted under the prerequisite of protecting the uninhabited island, then it should be classified as justifiable operation (utilization).

B. Give Full Play to the Role of State Oceanic Administration Department in the Comprehensive Administration of Uninhabited Islands

Uninhabited islands are national asset, should be owned by all the people and whose ownership exercised by the State Council on behalf of the State. But it is impossible for the State Council to exercise its ownership and right to use around the whole State. Therefore, it is necessary to define a specific department to take the charge from the State Council and mobilize the enthusiasm of the coastal provincial governments. The Sixteenth National Congress of the China's Communist Party points out: "Continuing to adjust the layout and structure of the State sector and reform the State property management system is a major task for deepening economic restructuring. We should give full play to the initiative of both the central and local authorities on the precondition of upholding State ownership. The State should make laws and regulations and establish a State property management system under which the Central Government and local governments perform the responsibilities of investor on behalf of the State respectively, enjoying owner's equity, combining rights with obligations and duties and administering assets, personnel and other affairs."

Because of the multiple values that the uninhabited island possesses, there are several departments in the State Council involved in its management, such as ocean, land, forestry, mineral resources, fishery, transportation, tourism, environmental protection and etc. The oceanic administration department should be the best choice to offer relatively concentrated comprehensive management. The reasons are as follows:

First, the island is an integral part of the ocean, but the administration mode of the ocean in 1960s to 1970s by most States is based on the principle of maximizing the efficiency of resource utilization. For instance, the transportation department was responsible for port, the fish section was responsible for fishery, tourism sector for entertainment and chemical engineering department for salt industry and etc.

Since each department was concerned about the maximum benefits that its resource can create, there was limited coordination among the different departments. In addition, there is only singular discipline base for each department which resulted even in the extension of management model of the land into the ocean. Experience and data have shown that this management model is an important reason for the conflicts in the utilization of the marine resources and deterioration of the environment. Since 1990s, with people have more understanding about of the importance of the ocean and marine ecosystem, they put forward the comprehensive management model for marine resources on the basis of their past experience. There are proposals to have integration among departments, at various levels (like State level, provincial level or local level), between science and management and among different spaces (sea areas). Ecosystem Approached Management, which was introduced by the academia and administrative departments in the end of the 20th century, takes into all relations of living and non-living resources into consideration, rather than solve a single problem in isolation.

Islands are important components of the marine ecosystem and they themselves can form a clearly bordered and comparatively complete unique ecosystem which can also be called as island ecosystem. The basic cell structure of it consists of three geological ones: sea area, land-sea transition zone, and land area; or it can be divided into four parts (sub-system): island land, island beach, reefs and the surrounding seas. The main features of the island ecosystem and its physical flow and energy flow are mainly controlled and restrained by the ocean. Therefore, the management of the island should base on the scientific study and technological method of the marine and is inseparable from the management of the ocean. State Oceanic Administration is not a simple resource management department; rather, it provides comprehensive marine administration. It is advisable to have the State Oceanic Administration to take charge of uninhabited islands around the country on behalf of the State Council, which could avoid the conflicts arisen from the singular resource management and provide a comprehensive and ecological administration for the uninhabited island.

In addition, the “three determination” (determination of the department in charge, and its functions and personnel allocation) plan of the State Council points out that the State Oceanic Administration is responsible for the relevant work of islands. The Administration has already formed a mature management system and regulations of islands over the past 20 years. With the cooperation with relevant department, it has conducted a comprehensive investigation of all national island

resources from 1988 to 1996 and established three island pilot programs like island development experimental zone, island management demonstration zone and etc. In 1996, in line with the spirit of the United Nations Conference on Environment and Development and the future development strategy of the China's Agenda 21 − White Paper on China's Population, Environment and Development in the 21st Century, the Administration made China Ocean Agenda 21. Chapter IV "sustainable development of the island" outlines the strategic development framework for the economic development of the island, protection of island resources and environment, management and protection of uninhabited islands and the infrastructure construction of the island and its social development. It points out "to achieve a sustainable development, we must strengthen the comprehensive management of the island, develop and use the island in a rational and proper manner to avoid blind and damaging productive activities, pay attention to the protection of ecosystem in the development process and give particular attention to the islands that play important roles in protecting the biodiversity." On the basis of this principle, the State Oceanic Administration, together with Ministry of Civil Affairs and the Headquarters of the General Staff jointly promulgated the Provisions on the Management of the Protection and Utilization of Uninhabited Islands, which started the system construction for our island protection and management, directed and guided the island management of the local People's Congress and government in the coastal areas. Currently, a set of mature island management system and regulations have taken into shape between the oceanic administrations from the State level to the local level.

Furthermore, the management of the uninhabited island needs to be equipped with special marine facilities, such as vessels, navigation communication, devices for offshore survey, detection, monitoring and surveillance together with professional personnel who are familiar with the offshore working technology and management; or it would be impossible to conduct the management. At present, the oceanic administrative departments have had all these personnel and equipment. If various departments are there to take the charge, a large amount of equipments and personnel would be required, which would not only lead to an economic waste but also prevent us from having a concentrated and comprehensive management.

C. Give Full Play to the Enthusiasm of Local Government in the Administration of Uninhabited Islands

Currently, a new system with a hierarchical management of the central government and local government under the unified leadership of the State is in power for our marine management. As Article 7 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas regulates that "[t]he department in charge of marine administration under the State Council shall be responsible for supervision over the use of the sea areas nationwide. The departments in charge of marine administration under the local people's governments at or above the county level shall, as authorized, be responsible for supervision over the use of the sea areas adjacent to their administrative regions respectively. The department in charge of marine administration shall, in accordance with the Fisheries Law of the People's Republic of China, conduct supervision over marine fishery. The maritime administration authority shall exercise supervision over maritime traffic safety in accordance with the Maritime Traffic Safety Law of the People's Republic of China." Article 10 regulates that "[t] he department in charge of marine administration under the State Council shall, in conjunction with the departments concerned and the people's governments of coastal provinces, autonomous regions, and municipalities directly under the Central Government work out marine function zoning plans. The departments in charge of marine administration under the coastal local people's governments at or above the county level shall, in conjunction with the departments concerned of the people's governments at the same level, work out the local marine function zoning plans on the basis of such plans worked out at the next higher level." Articles 12, 17 and 18 regulate the examination and approval of marine function zones by different levels.

The administration of the uninhabited island should abide by the basic spirit of the Law of the People's Republic of China on the Administration of the Use of Sea Areas to have hierarchical administration between the central government and local government under the united leadership of the State. The island has become the new forefront for China's marine economic development and the property system has been developing from the ownership oriented model to use oriented model. The extension from ownership to right of use covers a serious of policies, measures and large amounts of detailed work. The task that the local government is capable of can be handed to them. For the administration of the uninhabited island that involves the sovereignty, national interests, national plan, legislation, policies, development strategies, standards, organization of national islands investigation, monitoring, surveillance, science plan, deciding on the list of uninhabited islands

that need special protection and base points as well as the guidance for the local administration should be conducted by the central level government. (Some functions can also be fulfilled by some agencies, such as the three institutes of the State Oceanic Administration); while for the local governments, they are mainly responsible for making plans of the local island on the basis of the national plan, accepting applications for the approval of non-national key islands development and protection, supervising and inspecting uninhabited islands in its administrative region, collecting island using fees in accordance with the regulations and imposing punishment on the activities that violate the law. Therefore, the role of the local administration should be regulated in the legislation so as to fully mobilize their enthusiasm.

Translator: GE Weihong

Seabed Politics and International Law: A Review of *Seabed Politics* by Barry Buzan – And New Developments in International Seabed Politics

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Abstract: This article introduces the main contents and research methods of the book *Seabed Politics* by the Canadian scholar Barry Buzan. The book analyzes the occurrence and the development of the political process of the international seabed regime by reference to full and accurate historical data, adopting a historical approach. The book, through seabed politics, reviews the interactive relationship between economic value and political processes, as well as the interaction and interplay between political actions taken by countries and international organizations and the international legal regime. Barry Buzan's thinking is significant for both research into the present international seabed regime and the law of the sea, and even the whole international legal regime. Based on the review of Barry Buzan's thinking, this article discusses the new development of the international seabed regime over the 30 years since that book was published.

Key Words: Seabed Politics; Law of the sea; Continental shelf; Area; International seabed regime

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Since ancient Rome, people have begun to pay close attention to the ocean - the azure waters, and ocean regime has experienced changes. During the changes in the ocean regime over thousands of years, the seabed has been sleeping all the while, hardly being noticed by the human society. In the 19th century, under the impact of a rapid developing science and technology, the seabed began to acquire an importance of its own: the laying of marine telegraph cables, offshore oil exploitation and the discovery of the economic value of all kinds of seabed nodules have drawn people's attention to this long ignored area. The political scramble among States developed as economic interest in the seabed grew, with the core and key lying in the ownership of the seabed and the allocation of relevant interests. The fight in connection with the international seabed regime and the establishment of the U.N. Seabed Committee gave rise to the profound changes made in the entire international law of the sea, which directly led to the Third United Nations Conference on the Law of the Sea and the creation of the United Nations Convention on the Law of the Sea. However, among the research on international law and international politics, there is rarely any systematic research on the international seabed regime. While the *Seabed Politics*[1] by the Canadian scholar Barry Buzan is a masterpiece in the field of international seabed regime.

Barry Buzan is a researcher at the Institute of International Relations of the University of British Columbia who attended the three Conferences on the Law of the Sea of the United Nations. In his book *Seabed Politics*, he uses full and accurate historical data to provide a systematic discussion about the generation, development, evolution and development of the seabed issue as well as the development of seabed law, and gives an accurate analytical prediction about the development of international seabed conditions in the future based on his incisive insight. In 1976 when Barry finished this book, the argument about the seabed had not finished and the Third United Nations Conference on the Law of the Sea was still under way. As the recorder and summarizer of this segment of history, Barry laid a solid foundation for later researchers. This book was published 30 years ago and seabed law has undergone 30 years of twists and turns, however, the development of seabed law has not ended. Hence, it is beneficial for us to review Barry Buzan's thoughts and to apply his unique analytical method to today's research on seabed law and the law of the sea, and even the whole international

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1 Barry Buzan, translated by Shi Fuxin, *Seabed Politics*, Shanghai: SDX Joint Publishing Company, 1981. (in Chinese)

legal regime.

I. Main Contents of *Seabed Politics*

There are in total eleven chapters in the book *Seabed Politics*. In the Introduction, Barry Buzan raises three questions in the first place: (1) who owns the seabed and how should its development and use be controlled, and how does it develop into an international issue? (2) How is the issue resolved? (3) What are the factors deciding the resolution of this issue? Through these three questions, the subjects of the research in *Seabed Politics* are put forward, namely the generation, resolution and influencing factors of the issues related to seabed ownership and control. From Chapter 1 to Chapter 10, based on a large amount of historical data, he carries his chronological account of the generation and development of the seabed issue involving political forces, as well as the evolution of seabed law in detail. Additionally, he carries out an in-depth analysis of the international political contest over the seabed. In this part, he examines the following three aspects: the development of economic and technical factors increasing the value of the seabed; the actions taken by various countries against the seabed issue, especially the claims made by countries to seabed area; and the actions taken by international organizations against the seabed issue, particularly the possibility whether such actions may generate positive international jurisdiction and supervision. Chapter 11, the last chapter, is the summary and conclusion, where the author arrives at his own opinion based on the analyses of the previous historical data: the issue of seabed politics became international due to the influence of economic and technical factors and reflected the interaction of economic value and political processes. Countries and international organizations took actions to seek a solution for the seabed issue, and the factors influencing the resolution of such an issue were very profound and complex. The resolution of the seabed issue depends on the initiative of international organizations to take an active part in international seabed affairs and to promote organizational development. Various interest groups and political alignments in connection with seabed politics were created, which had a profound influence on the political process of the seabed issue, the seabed law and the development of oceans law. The following is a concrete analysis and exploration of seabed politics in chronological order.

A. Before 1945: the Sprouting of Seabed Politics

Barry Buzan indicates that the history of seabed politics is closely related with the history of ocean politics. In ancient Rome, the ocean was considered as a "common possession" without the division into high seas and territorial waters. People thought the whole ocean was just as inexhaustible as air, and anyone could use it but not own it. In the Middle Ages, maritime countries were impelled to raise sovereignty claims to the oceans due to the competition in the oceans with the development of commerce and seafaring. In 1493, to confirm the geographical discoveries made by Portugal and Spain, the then Pope Alexander VI enacted a papal edict to specify a meridian in the Pacific Ocean as the boundary for Portugal and Spain to exercise their control over the ocean. By then, the ocean, which had been deemed a common possession in ancient Rome, had started its process of division. Division of the ocean hampered the development of capitalism, giving rise to a fierce fight between supporters of sovereignty over the ocean and those of the maintenance of freedom of the seas. In 1609, Hugo Grotius, the Dutch jurist known as the "father of modern international law", published his book *Mare Liberum* (*The Free Sea*), which first formulated the notion of freedom of the seas. This notion was opposed by Selden, a British jurist representing the interests of traditional maritime countries, which began the debate about the concepts of "*mare clausum*" and "*mare liberum*". The debate ended in the 17th century with the establishment of the legal order of the freedom of the seas and sovereignty over territorial waters, and it was generally established that an area covering three nautical miles off the coast should be under the control of the coastal State.

In these changes to the ocean regime, the seabed drew very little attention because it was a region out of reach. However, with the rapid advancement of technology, people had turned their attention from the surface to the bottom of the sea. The exploration of the ocean depths and the laying of marine cables gradually highlighted the importance of the seabed. In the meanwhile, the development of marine science and technology and fishing technology, among others, caused States to be dissatisfied with the existing jurisdiction of coastal States, and some States started to seek more extensive coastal jurisdiction unilaterally. In the Conference for the Codification of International Law held in 1930, it was obvious that the two parties were in opposition to each other: one was the maritime powers trying to defend the existing ocean regime, and the other was the less-powerful States and

non-maritime States seeking changes to the old regime that damaged their interests. As this conference failed to reach an agreement as to the limits of territorial waters, more and more countries took unilateral action thereafter, which symbolized the beginning of the long process of coastal States enlarging their jurisdiction unilaterally. For the issue of seabed politics in this period, Barry only briefly introduces in the first chapter the fact that this is the start of the seabed issue, the initial development and achievement of seabed science and technology. A great amount of information was acquired through the long and tedious survey of the seabed by the end of the 19th century, which was powerful enough to prove that the continental shelf is the natural extension of the continental plate.[2] This conclusion was the cornerstone for the countries to assert claims to the continental shelf.

B. The First Stage of the Development of Seabed Politics: 1945-1958 [3]

After the World War II, coastal States sought every way to enlarge their jurisdiction over maritime areas by extending the breadth of the territorial sea, changing the baselines for its measurement and declaring special contiguous zones, etc. On September 28, 1945, the then American President published the President Truman's Proclamations on U.S. Policy Concerning Natural Resources of Sea Bed and Fisheries on High Seas to claim that "the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control",[4] which again broke the traditional order and attracted the attention of the world to the continental shelf. Afterwards, claims over the continental shelf became an important means for coastal States to enlarge their jurisdiction. For example, such countries as Mexico, Guatemala, Iran and the Philippines declared their functional jurisdiction over resources in the same way as America.

With the wave of countries raising claims over the continental shelf unilaterally, many countries, one after another, started to claim broader territorial

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2 Barry Buzan, translated by Shi Fuxin, *Seabed Politics*, Shanghai: SDX Joint Publishing Company, 1981, p. 12. (in Chinese)

3 In the book *Seabed Politics* by Barry Buzan, the seabed issue involves the continental shelf as well as the deep-sea bed, but not merely the "international seabed area" we now refer to.

4 Barry Buzan, translated by Shi Fuxin, *Seabed Politics*, Shanghai: SDX Joint Publishing Company, 1981, p. 15. (in Chinese)

waters. Countries such as Argentina, Chile, Costa Rica, Ecuador, El Salvador and Peru made territorial claims to the continental shelf and the superjacent waters over the continental shelf. The government of Chile declared it would carry out protection and control over the maritime area covering 200 nautical miles from it coast, and El Salvador even declared the whole of the 200 nautical miles to be territorial waters. These extreme claims were, as a matter of fact, using the seabed to seek broader fishing areas.

While unilateral actions were increasing with each passing day, countries with the same ocean policies in small geographic regions started to make joint declarations, and alignments about seabed politics came into being. In August 1952, Chile, Ecuador and Peru in the Latin America published the Santiago Declaration to declare that the three governments had complete sovereignty and jurisdiction over the sea area adjacent to and extending 200 nautical miles from the coasts of their countries.[5] This Declaration laid the foundation for the extreme coastal States to build long-term positive alignments to defend their standpoint. Yet in the whole Latin America region at that time, Latin American States did not reach a regional consensus as to the question of oceans law because of their differing geographical conditions.

The international community also made active responses to the increasing number of unilateral actions. In response to the swift development of legislation on the oceans, since 1949, the International Law Commission had discussed the various problems relating to the territorial waters, high seas and continental shelf many times and proposed draft provisions on the law of the sea, which provided a series of systematic proposals to be discussed at the United Nations Conference on the Law of the Sea.

C. The Initial Establishment of the Seabed Regime and Its Destruction: 1958-1967

The second and third chapters of *Seabed Politics* describe the processes and results of the First and Second United Nations Conferences on the Law of the Sea, and the process whereby international power thereafter rendered the Geneva Conventions unsuitable to the development of new trends. When the First and

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5 Barry Buzan, translated by Shi Fuxin, *Seabed Politics*, Shanghai: SDX Joint Publishing Company, 1981, p. 28. (in Chinese)

the Second United Nations Conferences on the Law of the Sea were held in 1958 and 1960 respectively, oceanology was blooming and marine activities were diversifying, such as research and development of navy technologies, research on marine science and the development of the offshore oil industry. The development of the offshore oil industry, in particular, had made people become aware that marine resources might be exhausted, and caused the international community to gradually agree on the coastal States' expansion of jurisdiction over the resources on their continental shelves. At this point, the argument about the limits of territorial waters had become increasingly furious, and at least half of the countries attending the United Nations Conference on the Law of the Sea wished to have jurisdiction over the maritime area extending more than three nautical miles.

Blocs of countries emerged at the two Conferences, in which 29 belonged to the western bloc, 10 to the Soviet Bloc, 20 to Latin American countries, 9 to Arab countries, 16 to Asian countries and 2 to African countries. These countries formed different alignments based on their own claims: one side consisted of the vast majority of the Western countries, and the other side consisted of Arab countries and Eastern European countries. Latin American countries and Asian-African countries were scattered between these two alignments about half-and-half. The alignments resulted in polarization. The divergence between the parties to the cold war and the opposition between maritime States and coastal States dominated the Conferences, which reflected alignment conditions in the era of the cold war as well as the true divergence of interests in the dispute. The western developed countries with their colonies and allies insisted on the regime of narrow territorial seas out of tradition and economic interest, hoping to keep freedom of the seas to the largest extent for ocean users, while the developing countries such as Latin America and Arab countries wished to increase the extent of their control over offshore resources and activities as well as the forms of control. Due to the cold war and for the purposes of fishing and security, the Soviet Bloc shared the same standpoint as the developing countries to seek greater coastal interests, which lead to a balance of power between the alignment based on ocean benefits and the alignment based on coastal benefits. The interweaving of the cold war and the divergence of ocean interests made the problem even more complicated.

Four conventions were adopted at the Geneva Conference of 1958, including the Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas and Convention on the Continental Shelf. As no agreement on the

breadth of territorial sea had been reached, the Second Conference on the Law of the Sea was convened in 1960 to focus on the territorial waters and fishing zone. However, due to the fact that the divergences could not be bridged, no agreement was reached on the conference. As for the seabed issue, the Geneva Conference of 1958 established the principle of continental shelf, and coastal States acquired exclusive rights to explore and develop the natural resources of the continental shelf. "The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation."[6] It also defined the continental shelf as "the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas."[7] This definition flexibly employed the term "admits of the exploitation" to reduce the difficulty of establishing a regime, which was widely accepted at that time and helped to maintain seabed politics quiet for a certain period, but such ambiguous concepts as "adjacent" and "admits of exploitation" served as the basis for future adjustment to the regime.

Of the 86 countries which attended the Geneva Conference of 1958, developed countries were in the majority, as only 30 Asian, African, and Latin American developing countries attended the conference. Therefore, the Geneva Conventions better reflected the will of developed countries. After the 1960s, the appearance of a large number of emerging countries significantly changed the context of the international community, and the Geneva Conventions gradually failed to meet the new trend. In addition, with the rapid development of science and technology, technological development capability advanced increasingly beyond the 200 meters of exploitable depth of the continental shelf, and certain principles and rules in the Geneva Conventions were difficult to apply.

The springing-up of the movement for national independence on a large-scale caused the developing countries to shake off their relationship with their ex-colonial masters and to become a group with common interests. The Group of 77 had become an important means for the developing countries to oppose the developed countries. In the 1960s, the fact that a large number of new countries were founded in Africa and the establishment of Organization of African Unity

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6 Article 2 of the Convention on the Continental Shelf.
7 Article 1 of the Convention on the Continental Shelf.

gradually strengthened Africa's say on the international stage. Before 1967, more and more developing countries claimed a broader limit for territorial waters, and the claims for 12 nautical miles were no longer in a minority; instead, they became equal in number to the claims for a narrow territorial sea. Back then, the western developed countries were dedicated to utilizing marine technology and capability, and Soviet Union improved its ability to fish on the high seas and its oceanographic research to establish its position as a great maritime power, starting a "marine competition" with the United States. The progress of marine activities, especially the rapid development momentum of the offshore oil industry, re-attracted people's attention to the seabed, and the prospect of the exploration of nodules on the seabed also caught people's eye. From 1966, the United Nations General Assembly paid even closer attention to the seabed issue, and the developing countries also realized their common interest in it and were unwilling to let the minority of developed countries use their technical advantages to monopolize numerous important new resources in the area which was not yet open to possession or control by anyone. All the evidence indicated that a new round of political scramble for the seabed was just around the corner.

D. The Second Stage of the Seabed Politics: 1967-1976 [8]

Chapters 4 to 10 of *Seabed Politics* recount the process of the second round of political scramble for the seabed. On August 17, 1967, Arvid Pardo, the Maltese ambassador, presented a proposal "Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Seabed and of the Ocean Floor, Underlying the Seas beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interest of Mankind" to the 22nd United Nations General Assembly. Pardo's proposal became a key event in the history of seabed politics, which brought the seabed issue to the center of people's attention again. He proposed that the seabed and ocean floor and their resources beyond national jurisdiction should be the common heritage of mankind, a key principle soon supported by the United Nations and the great majority of countries. In December of the same year, the United Nations General Assembly adopted the

8 As a matter of fact, the negotiations in connection with seabed politics did not end in 1976. It is only that the book solely covers matters before this point, and developments after 1976 will be introduced in what follows.

Resolution No. 2340 establishing an ad hoc committee, consisting of 35 members, to study the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction. The ad hoc committee collected and collated a large amount of background information concerning the seabed issue, clarified the divisions between each group and tried to reach an agreement on the principles for a declaration on the seabed. As no agreement on the principles for a declaration on the seabed was reached in the United Nations General Assembly in 1968, it was agreed in December 1968 by Resolution No. 2467A of the United Nations General Assembly that a permanent seabed committee consisting of 42 members, namely the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (hereinafter referred to as "Sea-Bed Committee"), should be established, which basically continued the work of the ad hoc committee. The Sea-Bed Committee spent two years of hard work to draft the declaration of principles, in which process various interest groups had gone through disintegration and unification, confrontation and compromise. In 1970, Resolution No. 2749 was passed by the 25th United Nations General Assembly, namely the "Declaration of Principles governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction", which included all the top-drawer points in Pardo's proposal. The international seabed area was proclaimed to be the common heritage of humankind, of which no country may take possession, and the income arising from the seabed should be used to promote development. This area should be reserved for peaceful purposes and an international regime and organization should be established to this end.

In the two years from 1969 to 1970, the political background to the seabed issue started to change. In seabed politics and maritime politics, the interests of coastal States and maritime States conflicted with each other, and the discussion about the seabed regime had been expanded into an extensive discussion on all issues related to the law of the sea.

By the year 1970, the number of the countries advocating broader limits for territorial waters had increased, so had the claims made to the continental shelf. In this context, the international community had concluded an increasing number of agreements on maritime delimitations; however, more conflicts over delimitation also appeared. In the meanwhile, with the great debate over the seabed issue among the international community, all sorts of alignments based on such issues gradually took shape. In the book *Seabed Politics*, alignments were divided into such groups as alignments outside the Conference, regional alignments and specific

alignments, etc. The most outstanding alignment outside the Conference was the developed countries as against the Group of 77 of developing countries. The Group of 77 wished to establish an international marine regime consistent with the general objective of the new international political and economic order, and to take the advantage of their number to challenge the old marine regime by their voting power; developed countries, however, were utilizing their economic and technical superiority to defend the old regime favorable to them. Yet as the negotiations became deeper, the mere analysis of these two alignments was no longer enough to cover all interest groups concerned, and as the negotiations proceeded to a later stage, regional alignments and specific alignments became all the more important. Amongst the regional alignments, Latin America and Africa had developed important roles, and the group of coastal States and the group of land-locked States were independently formed at a relatively early stage amongst the specific alignments.

A series of maritime issues, led by the seabed issue, brought all issues relating to the law of the sea on the agenda of the United Nations General Assembly. In 1971, the Sea-Bed Committee turned into a large-scale preparatory committee responsible for the preparation of the Third United Nations Conference on the Law of the Sea, and the full members increased to 91. The expanded Sea-Bed Committee consisted of three working groups responsible for research on the seabed issue, issues relating to the law of the sea and marine environmental protection and scientific research respectively. At this point, developed countries made a series of developments in the exploration of nodules on the deep seabed, and the mining industry in the United States repeatedly submitted the Deep Seabed Hard Mineral Resources Bill to the Congress, wishing to extend US jurisdiction over the exploration of the resources of the deep seabed. The Bill was strongly condemned by developing countries, which triggered a violent debate, and no agreement to completely suspend exploration was reached because of the serious divergences. The United States put the Bill aside at the beginning of 1973 in order temporarily to ease the quarrel. This episode lead to tension in the continuing seabed negotiations, but the proposals of the countries on the seabed regime and organizational problems indicated that the two parties stood prominently on opposing grounds. Most developed countries wished to establish a loose international body, yet the developing countries wished to have a strong international body because the developed countries had mastered the economic and technical advantages in developing the seabed. From 1971 to 1973, as compared with the deadlock in the

seabed discussions, ocean law issues, which were more extensive, attracted people's attention. The Africa Group became stronger and became a unified entity, and land-locked and shelf-locked States, the two major "geographically disadvantaged States", joined up to become the major power opposing the coastal States. Due to the increasing complexity of the policy divergences on the entire ocean issue, these regional alignments or specific alignments played a key role on this issue. The 200 nautical mile exclusive economic zone was initiated by a regional alignment in this period, which was widely accepted by countries.

On December 3, 1973, the Third United Nations Conference on the Law of the Sea was inaugurated in New York. By the end of 1975 when the *Seabed Politics* was finished, three sessions of the conference had been held, with the 2nd session in Caracas, Venezuela and the 3rd in Geneva. After continuous negotiations during these sessions, the continental shelf regime and the 200 nautical mile exclusive economic zone were finally accepted. However, the divergence on the seabed regime and organization was still fairly serious. The progress of the conference made people realize that only by reaching a blanket agreement would it be possible to resolve the entire issue of the law of the sea.

II. The Major Theoretical Achievements of the *Seabed Politics*: the Analysis of the Relationship between International Law and the Political Actions of the Subjects Thereof

Countries and international organizations are the two major subjects of international laws. In the concluding chapter of *Seabed Politics*, Barry Buzan makes a detailed analysis of the roles these two subjects played in seabed politics, and suggests the interaction model for seabed politics (see the Figure below). This characteristic and the conclusion also form the major theoretical achievement of the book.

As shown in the Figure, the economic value of the seabed was boosted with the development of undersea technology and the fishing industry, as well as the increasing demand for resources by countries after the World War II, which caused various countries to make unilateral claims to the continental shelf. The influence of such economic value on the actions of countries also motivated international action. With the increase in unilateral claims, the convening of the International

Law Commission meetings and the United Nations Conference on the Law of the Sea lead to the adoption of the Geneva Conventions in 1958, which was a result of such international action. After the conclusion of the Conventions, countries were subject to the Conventions: on the one hand, the new ocean regime triggered disputes over plenty of maritime areas, for example, many disputes over the delimitation of the continental shelf to various extents occurred in the North Sea, the Persian Gulf, the Baltic Sea, the South China Sea, the Aegean and other sea areas; on the other hand, many new continental shelf delimitation agreements were reached, but in the continental shelf delimitation agreements adopted after the Convention on the Continental Shelf, the principle of "equidistance median line" approved by the Convention was more fully followed. The further development of economics and politics caused an increasing number of countries to become dissatisfied with the provisions of the Geneva Conventions, which no longer provided a balance between certain disputes over maritime rights and interests. The international political conflict evoked by maritime rights disputes required the international community to introduce a general scheme as soon as possible to provide comprehensive and thorough institutional arrangements for maritime issues.

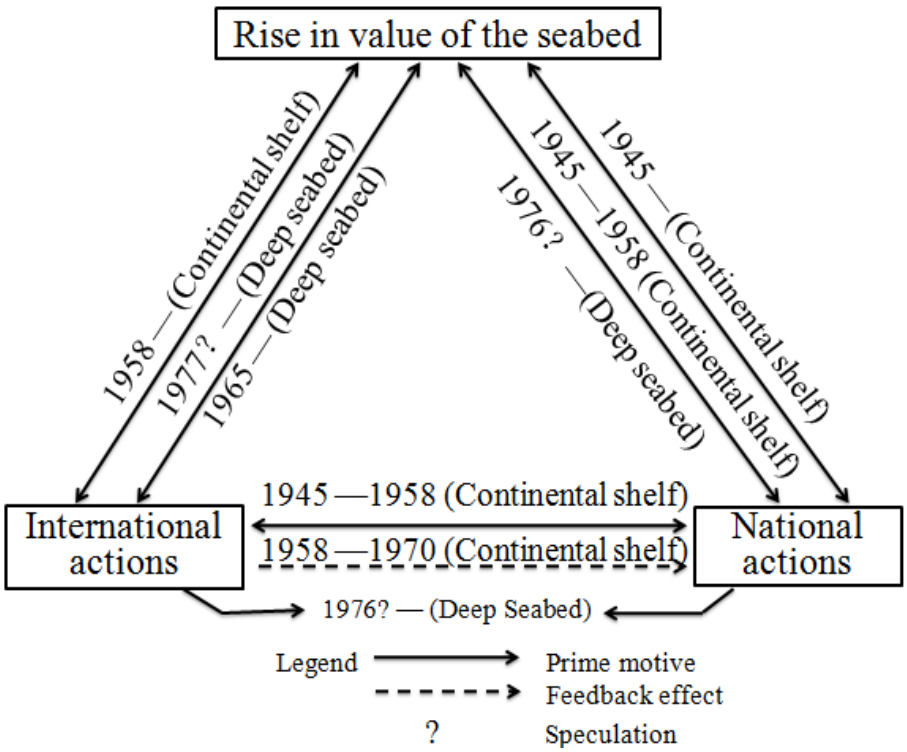

Fig. 1 Interaction Model for Seabed Politics[9]

In the mid and late 1960s, the increase in the economic value of the seabed directly brought about international action. At that time, the value of the deep seabed was not closely noted by any country while international organizations adopted an active attitude, such as Pardo's proposal in the forum of the United Nations in 1967 and the resolution of the United Nations General Assembly in 1970, which declared that the seabed should be the common heritage of mankind. These actions laid the foundation for the establishment of the deep seabed regime.

The international legal regime applicable to a particular region created by the political actions of countries and international organizations would in turn make a difference to the resource development of that region. Just as the conventions concluded in the first two Conferences on the Law of the Sea influenced the succeeding ocean politics and marine economy, the results of the Third Conference on the Law of the Sea will similarly have a material effect on the subsequent world

9 Barry Buzan, translated by Shi Fuxin, *Seabed Politics*, Shanghai: SDX Joint Publishing Company, 1981, p. 319. (in Chinese)

maritime order.

After a brief introduction to the interactive relationship among economic value, political actions and legal rules in the international community, Barry Buzan reaches pertinent conclusions about international negotiations, international organizations and international laws through an analysis of the international political negotiations process at this stage.

A. Analysis of Factors Influencing the International Political Negotiation Process and Their Effect by Taking the Example of the Seabed Political Process

In the analysis of the negotiations, Barry's primary interpretation is from the perspective of the influence on the negotiation process, the influence on the negotiations on the continental shelf and the influence on the seabed regime and organization. And he discusses the factors influencing the speed of negotiations and a State's assumption of international commitments and the contents of specific negotiations.

As for the speed of negotiations, the effect of factors delaying the process was far greater than the stimuli. The complexity of the seabed issue, the procedural problems of a large number of countries participating in the negotiations, and the inability to stipulate rigid deadlines caused negotiations on seabed politics to be a time consuming process. The effect of procedural rules needed particular attention. In the confrontation between alignments backed by the economic and political strength of their member countries, procedural rules for the seabed issue were a matter for negotiation, which slowed down the negotiation process and, however, reflected the strong influence of economic and technical capability on action. Although the developing country group was great in the number of members, its economic and technical capability lagged far behind the minority of developed countries. Further, a unified ocean regime established without these powerful minorities would be unstable. Because of the strong influence of this kind of action, developing countries had a weaker say in international forums even if they could get a large number of votes.

It can be concluded from the analysis of the commitments made by countries that more countries showed a positive attitude toward international commitments. Developed and developing countries both hoped to establish a stable maritime order to make the best of marine and seabed resources. In addition, the development

of such issues as free maritime trade, prevention of military conflicts and marine environmental pollution, drove the countries to agree that certain international issues involving the common interest of almost all countries may only be resolved at an international level. Generally speaking, a region's stable legal regime would always increase its economic value, and the expectation for such a legal regime was just the reason why the time consuming negotiations never stopped, despite the fact that there was grave divergence on the deep-sea bed issues.

Specific subjects of negotiations were the increase in economic value, unilateral actions by countries, the political opinions of various alignments, proposals by international organizations and other results from multiple factors. The above factors interweaved to form the international political negotiation process and the framework of the conclusion, and the above analysis also underlay the entire process of the Third UN Conference on the Law of the Sea from argument, deadlock, and compromise to the final outcome.

B. Discussion of the Role Actively Played by International Organizations in International Politics: Experiences, Lessons and Implications

With regards to the two development stages of seabed politics, the first stage was mainly concerned with the continental shelf. Countries made unilateral claims in the first place, and then actions were taken at the international level, till preliminary agreement was reached via an international conference. At this stage, international organizations, to a certain extent, mainly provided platforms for countries to hold international negotiations. At the second stage, the relevant divergences centered on the deep-sea bed, and the international organizations took the initiative. After 1967 when countries had not yet made claims to the value of deep-sea bed, Pardo's proposal at the United Nations General Assembly motivated the United Nations' active reaction, which thereby dominated the entire scenario of seabed politics in this stage. Well then, would it be feasible in international practice for international organizations to take the initiative to make policies? Barry considers the prolongation of the negotiation process to be the biggest X factor. If the negotiation progressed too slowly, all sorts of factors may have an impact on

the negotiation.[10] At the worst, if progress went too slow, all kinds of deceleration and destruction may lead to a break-down of the entire negotiation. Yet from the perspective of the effect of the international regime, these actions might cause some gradual changes to the international regime where some countries had a dominating place, even if the active conduct of international organization had limited effect.

In addition, the analysis of the seabed politics process may also show the importance of planning and organizing international actions with discretion. In international political negotiations, certain delaying factors may be avoided with care. However, the practical significance of such prudent design and preparation may be weakened because international action may be manipulated by great powers. Anyway, such active conducts by international organizations on the seabed issue as well as their results were highly meaningful for the future evolution of international organizations and the creation of all kinds of international regimes.

C. The Analysis of the Influence of the Seabed Political Process on International Law from the Perspective of Process and Outcome

"International laws are laws for countries. Countries are subject to international laws and are also the law maker. Therefore the force of international laws should rest with the countries themselves, namely the will of the countries".[11] In the process of seabed politics, rules agreed by countries by unanimity would become new provisions of international law. With the emergence of coastal States and developing States, the contents of the law of the sea may differ from those of the previous ones due to the diversification of subjects concluding them and the multiplicity of interest groups. The new maritime order may indicate a greater balance of interests among subjects. The new development of the law of the sea may have some influence on and provide a reference point for other provisions of international law in the future.

The negotiation process on seabed politics was slow but continuous, which indicated, on the one hand, most countries unexpectedly assumed their basic

10 Barry Buzan, translated by Shi Fuxin, *Seabed Politics*, Shanghai: SDX Joint Publishing Company, 1981, p. 347. (in Chinese)

11 Wang Tieya ed., *International Law*, Beijing: Law Press China, 1995, p. 9. (in Chinese)

obligations under the international law.[12] Their trust in international law showed that the seemingly frail international negotiations might in fact be capable of bearing greater pressures, and the international political process which appeared to be all divergence and in danger may, in fact, be endowed with unpredictable flexibility. Even if the negotiations really broke down, this may have a fairly significant influence on international relations. No matter what is the final result of the Third United Nations Conference on the Law of the Sea, this conference would have a major impact on international law. On the other hand, the fact that the slow negotiations on continental shelf issues objectively reinforced coastal States' position demonstrated that customary international law had played a significant role in this process: a claim challenging tradition was raised and accepted by more and more countries with time, and to some extent it can be regarded that this claim was gradually achieving legal status. An analysis like this made people retain confidence in the significance of international law after experiencing repeated, critical incidents where the authority of international law was challenged, and pay more attention to the influence of similar international law-making procedures when handling issues in international relations.

The political process of drafting the international law leaves signposts in the final texts, and "these signposts take the form of vaguely worded compromises, and are often the focus of difficulties in practical implementation of the law".[13]At the first stage of seabed politics, the Geneva Conventions, as the achievement of a political process, were themselves stamped with the then political die. These vaguely worded compromises also became the weak link, which afterwards caused the destruction of the conventions including the Convention on the Continental Shelf. At the second stage, where serious divergences could not be resolved in the international negotiations, abstract and ambiguous texts were adopted to satisfy all parties, which naturally would create difficulties in practical implementation in the future and result in new disputes. With the alleviation, escalation or compromise of these disputes, international law would also be modified, improved and developed.

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12 Barry Buzan, translated by Shi Fuxin, *Seabed Politics*, Shanghai: SDX Joint Publishing Company, 1981, p. 350. (in Chinese)

13 Barry Buzan, translated by Shi Fuxin, *Seabed Politics*, Shanghai: SDX Joint Publishing Company, 1981, p. 349. (in Chinese)

III. New Developments in Seabed Politics after the Publication of the Book *Seabed Politics*

The book *Seabed Politics* was published over 30 years ago, during which period the Third United Nations Conference on the Law of the Sea has long since finished. The conference adopted the United Nations Convention on the Law of the Sea (hereinafter referred to as the "Convention"), a convention praised as the "comprehensive maritime charter", which created an international maritime legal regime, including the international seabed regime. The Convention finally entered into force in 1994 after many setbacks. Yet the length of the Third United Nations Conference on the Law of the Sea lasted even longer than that estimated in *Seabed Politics* by Barry Buzan. In 1982, after 9 years and 11 sessions of negotiations, various interest groups finally came to a compromise to reach a "blanket agreement". The Convention, while re-stating such customary international law rules as the freedom of the high seas, established a series of regimes such as the territorial waters regime, the transit passage regime, the archipelagic State regime, the regime of exclusive economic zones, the continental shelf regime, the international seabed regime and the regime relating to marine environmental protection and scientific research to establish a whole integrated legal order for the oceans.

The Convention established the regime that the international seabed area (the "Area") and its resources are the common heritage of mankind,[14] which should be used solely for peaceful purposes. "1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized. 2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority. 3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be

14 Article 136 of the United Nations Convention on the Law of the Sea.

recognized."[15] The Convention set up a specialized International Seabed Authority to carry out the control of Area and the management of its resources, and used the "parallel exploration system" for the transitional period to develop a regime for the resources in the Area.[16]

The adoption of the seabed regime went through all sorts of difficulties, and the seabed regime under the Convention was finalized in 1977. Nevertheless, the United States and some western industrialized countries enacted domestic laws contradictory to this regime and requested that the draft convention should be reexamined. Therefore at the end of the Third United Nations Conference on the Law of the Sea, the consensus principle had to be given up and the Conference ended in voting. The Convention was adopted with an overwhelming majority of 130 affirmative votes, with four negative votes and 17 abstentions. However the use of voting meant that divergences among different interest groups still existed.

Being dissatisfied with the international seabed regime provided under the Convention, the United States, United Kingdom, Germany and other western countries did not sign it and requested to resume the talks about the seabed part of the Convention. Some developed countries even concluded restricted treaties to oppose the Convention and establish their own deep sea-bed mining regime. For example, the United States, Germany, United Kingdom and France concluded the Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Sea Bed in September 1982, and the US, Germany, France, Japan and other States concluded the Provisional Understanding Regarding Deep Sea-bed Matters in 1984. The developing countries were compelled to make concessions in consideration of the integrity and universality of the Convention, the huge cost burden of establishing the International Seabed Authority and the International Tribunal on the Law of the Sea and the concern that the market for

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15 Article 137 of the United Nations Convention on the Law of the Sea.

16 The Area may be co-developed by the Enterprise of the International Sea-Bed Authority with the State or private individuals by the following method: any State or entity desiring to exploit the international seabed should, in the first place, file an application with the International Sea-Bed Authority to acquire a contract. The applicant should provide the Authority with two "mine sites" of equal commercial value as well as the information and data thereon. The Authority chooses one as the "reserved area" to be the exploited by the Enterprise itself or jointly with the developing States, and the other as the "non-reserved area" to be granted by the Authority to the applicant for development. The applicant must transfer technology to the Enterprise, and transfer profit pro rata to the Authority, which should distribute such profits to developing States. This system is to be implemented for 15 years and then move to the single exploitation system.

deep seabed mining was not as promising as imagined. The Group of 77 issued a statement in 1989, declaring that: in order to ensure the universal acceptability of the Convention, the Group of 77 was willing to negotiate with any group and any countries that signed or did not sign the Convention about the Convention and any issue in the work of the Seabed Preparatory Committee. In July 1990, the Secretary-General of the United Nations addressed a letter to the five permanent members of the Security Council as well as other countries concerned to suggest the initiation of informal negotiations on the international seabed issue to seek the universality and integrity of the Convention and to bring the Convention into force as soon as possible. The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10, December 1982 (hereinafter referred to as the "Agreement") was finally adopted after two rounds of informal negotiations (15 negotiations in total) were carried out from July 1990 to June 1994. The Agreement made significant adjustments to the provisions under Part XI of the Convention, including those in connection with the decision-making process of the organs under the International Seabed Authority, the functioning and operation of the Enterprise, the deep sea mining production policies and financial clauses. It also laid down stipulations regarding provisional applications and arrangements concerning temporary membership, considering the divergent interests and requirements of all the parties concerned, especially those of the developed countries and potential deep-sea bed mining countries, thus laying the foundation for the full implementation of the Convention and avoiding the coexistence of two international seabed area regimes. On November 16, 1994, the Convention became formally effective and the International Sea-Bed Authority was established, which symbolized the fundamental establishment of a widely-accepted international seabed area regime.

It was quite a tortuous and complicated journey for the seabed regime from its first proposal to the final establishment. It could be said that the adoption of the Convention through voting in 1982 was a victory for group efforts and the huge number of countries who manifested their voting power, but the developed countries fully gained the upper hand in the international negotiations thereafter with their strong economic and technical resources. The seabed issue, a primary issue discussed at the Third United Nations Conference on the Law of the Sea, triggered the reconstruction of the whole ocean regime. It could be observed from the analysis of the factors influencing the negotiations that the pressure from developed countries' unilateral actions resulted in deadlock in the negotiations

on the one hand, and on the other hand bestowed them with important chips to be tough in international negotiations. After 1977, the internal legislation of developed countries concerned with the seabed regime and the restricted treaties, though they violated the principle that "the international sea-bed area is the common heritage of mankind", created a powerful political effect in the international community. Not all unilateral actions could achieve their purposes, however, and the reason why the requirements of developed countries may be achieved is that they were backed by strong resources and technical capability. On the contrary, the insufficiency of resources and technology and the lack of relevant seabed information were the Achilles' heel for developing countries in the international negotiations, putting the developing countries at a disadvantage, though they had the advantage of voting power. Judged from the perspective of the establishment of a new international maritime order, the modification of Part XI of the Convention undoubtedly leads to frustration on the part of developing countries that have been opposed in the fight for a new international economic order. This is a significant and temporary compromise under pressure from developed countries, showing that the gross divergences have not been bridged. Seeing from the perspective of the developmental track of seabed politics, one can say that it was still possible to break the temporary calmness of the relevant seabed regimes through the enhancement of the comprehensive national power of developing countries and the gradual improvement of the new international political and economic order.

It should be noted that, however, the negotiations on this Agreement were initiated and convened by the Secretary-General of the United Nations. International organizations once again played an active role in the new round of international negotiations, promoting the universal application of the Convention and the establishment of such organizations as the International Sea-Bed Authority. The active involvement of international organizations opened up new thinking for the international political process as well as the construction of an international legal regime for the future.

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