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卷首语

南中国海争端由于牵涉诸多国家和地区，一直是世人瞩目的海洋争端。为以和平、共赢的方式解决南海争端，中国政府早在上个世纪90年代初就提议“主权属我，搁置争议，共同开发”。这一提议由于2005年3月在马尼拉签署的三方协定而取得初步进展。但各方在共同开发南海油气资源的过程中存在一些障碍。本期的《中国海洋法学评论》刊出了中国南海研究院吴士存院长的一篇英文论文，对存在障碍的原因以及努力的方向进行了探讨。

中国政府在2006年8月25日根据《联合国海洋法公约》第298条发表了排除性声明，对于海洋划界、军事活动、渔业和科研执法等重要领域的争端，中国政府不接受《联合国海洋法公约》第十五部分第二节规定的任何国际司法或仲裁管辖。这一声明必将对中国未来海洋争端的解决前景产生重大影响。古俊峰博士生的论文对该声明的法律效果及其对中国当前所涉海洋争端解决途径的实质影响做了详细分析。田士臣先生从国际法和国内法两个层面对外国军舰在领海的法律地位问题进行了研究。随着生物技术领域的发展，国际上对国际海底区域（“区域”）遗传资源的兴趣以及与此相关的活动日益增多。江家栋先生根据有关国际公约，对“区域”遗传资源管理的法律问题进行了深入探讨，这将有助于我国开发和利用“区域”遗传资源。

目前国内学者对“precautionary principle”的翻译并不统一，存在“预防原则”、“风险预防原则”、“审慎预防原则”和“预警原则”等多种译法。褚晓琳博士生就这一法律术语的中文翻译进行了认真细致的比较研究，得出了她自己的结论，对读者或有启发。

台湾海峡两岸在诸多领域存在合作的可能性，本期发表了2篇这方面的文章。林婉玲探讨了构建台湾海峡海洋环保合作机制的必要性和可行性，并提出对于台湾海峡海洋环保合作机制的构想。李佳丽对两岸水下文化遗产保护合作的法律基础进行了分析，讨论了两岸合作的范围、内容以及方案和步骤。

随着中国对外贸易的发展和海事活动的增加，发生了越来越多的与提单仲裁条款有关的管辖权争端。张丽英教授的英文论文对提单中仲裁条款的有效

性问题进行了深入的分析和探讨。刑事附带民事诉讼制度与海事案件专属管辖制度的并存，造成了我国司法审判实务中审理海事与刑事交叉案件的混乱。韩冰的论文对海事与刑事交叉案件的审理机制问题进行了研究。我国各海事法院目前关于船舶及船载货物拍卖的现行做法与相关法律规范不符，在拍卖过程中存在诸多问题。徐曾沧博士生通过调查全国 10 家海事法院船舶及船载货物拍卖的具体做法，分析了这些存在的问题，并提出了解决这些问题的具体建议。杨轶的论文明确了托运危险货物的义务与责任问题。这些文章都具有很强的实用性。

年终岁末，本期又发表了 2 篇综述性的文章。其一是赵伟博士生对国际法院的最新判决——尼加拉瓜共和国诉洪都拉斯共和国的海洋区域划界争端案的详细介绍，其二是本刊课题组对中国在 2007 年关于海洋法律和政策方面的研究的综述。相信能使相关研究人员更好地把握中国海洋法学的研究现状和动态。

编辑部　谨识

EDITOR'S NOTE

The South China Sea (SCS) dispute, involving many countries and regions, has always been the centre of attention. In order to resolve SCS dispute in a peaceful and win-win manner, the Chinese government has put forward the principle of "shelving differences and seeking joint development on the premise that sovereignty belongs to China" in the early 1990s. Initial progress has been made in this direction with the signing of a tripartite agreement in Manila in March 2005, but unfortunately, some obstacles still exist in the implementation of the joint development of oil and gas resources in the SCS. The current Issue of China Oceans Law Review publishes an English article authored by President WU Shicun of the National Institute for South China Sea Studies, aiming to probe into the reasons causing such obstacles and the way to target our efforts.

On 25 August 2006, the Chinese government made a declaration under Article 298 of the UNCLOS that "the Government of the People's Republic of China does not accept any of the [judicial or arbitration] procedures provided for in Section 2 of Part XV of the Convention with respect to" sea boundary delimitations, military activities and law enforcement on fisheries and marine science. This declaration will certainly have a significant impact on China's resolution of maritime disputes in the future. Dr. GU Junfeng gives a detailed analysis of the legal effect of the declaration, as well as its real impact on the resolution of the maritime disputes involving China at present. Mr. TIAN Shichen studies the legal status of foreign warships in territorial seas from perspectives of both international and domestic laws. The progress of biotechnology has led to a growing interest in genetic resources in the international seabed area (hereinafter "the Area") among the international community and an increase of relevant activities. Mr. JIANG Jiadong, in compliance with relevant international conventions, goes deeply into the legal issues related to the management of genetic resources in the Area, which will contribute to China's development and sustainable utilization of genetic resources in the Area.

At present, Chinese scholars fail to maintain a consistent translation of "precautionary principle". Loosely translated, "precautionary principle" can have

four meanings: “ 预防原则 ”, “ 风险预防原则 ”, “ 审慎预防原则 ” and “ 预警原则 .” Dr. CHU Xiaolin makes an earnest and careful comparative research on the Chinese translations of this legal term and draws her own conclusion on this issue, which may inspire our readers.

The possibility of cooperation exists in many fields across the Taiwan Strait. This Issue publishes two articles about this kind of cooperation: LIN Wanlin discusses the necessity and feasibility of establishing a marine environment protection mechanism for the Strait and proposes a blueprint for such a cooperation mechanism; and LI Jiali analyzes the legal basis of cooperation for both sides of the Strait to protect the underwater culture heritage and discusses the scope, content, scheme and steps of such cooperation.

The development of China’s foreign trade and increase of maritime activities gives rise toan increasing number of disputes concerning the arbitration clause in bill of lading. Hence, Prof. ZHANG Liying provides an in-depth analysis and discussion in her article on the validity of arbitration clause in bill of lading. The co-existence of mechanisms of incidental civil action and the exclusive jurisdiction of maritime cases has caused disorder and confusion in the trial of overlapping maritime and criminal cases in judicial practice in China. HAN Bing studies the trial mechanisms of overlapping maritime and criminal cases.The current practices of various Chinese maritime courts regarding the auction of ships and goods on board are inconsistent with relevant laws and regulations, therefore causing a multitude of problems. Having researched the specific practices of 10 domestic maritime courts in auction of ships and goods on board, Dr. XU Zengcang conducts an analysis of the existing problems and identifies corresponding solutions in his paper. YANG Yi’s article specifies the obligations and liabilities for consigning dangerous goods. All these articles have great practical value.

At the close of the year, the current Issue publishes two review articles. One is authoredby Dr. ZHAO Wei, who offers a detailed introduction of the ICJ’s latest judgment on the Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras, 1999-2007); the other is a review of the research on China oceans laws and policies in the year of 2007 written by the research team of the Journal. We believe that these two articles may facilitate researchers’ understanding of the status quo and trends of research on China’s oceans laws.

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"Joint Development": An *Ad Hoc* Solution to the South China Sea Dispute

WU Shicun*

Abstract: The latest developments in the South China Sea (SCS) dispute has transformed it as the most intricate maritime dispute in the world presently, involving many States and regions. The situation becomes more severe due to the contention for resources among the involved countries. The resource development, especially oil and gas exploitation in the SCS area, is being carried out by the involved States unilaterally, ignoring protest from other countries, which could add to the complexity and severity of the SCS dispute. With an aim to resolve the SCS dispute in a peaceful and win-win way, the Chinese government has proposed to "shelve disputes and seek joint development" in early 1990s. This proposal has achieved initial achievement with the tripartite agreement signed in Manila in March 2005 to jointly explore oil and gas resource in the disputed SCS. Even though, some obstacles still exist in the promotion and process of joint development. Hence, other efforts should be made in order to help resolve the SCS dispute peacefully, including enhancing cooperation in such fields as fishery development and conservation, marine research and maritime transportation.

Key Words: Joint development; South China Sea; Dispute resolution

I. Situation in the Disputed South China Sea

The latest developments in the South China Sea (SCS) dispute has transformed it as the most intricate maritime dispute in the world presently, involving many States and regions including China Mainland, Vietnam, the Philippines, Malaysia, Indonesia and Brunei and China Taiwan. The focus of the SCS dispute is actually dispute surrounding the the Spratly Islands. The factors causing this phenomenon

* Dr. WU Shicun, Professor, President of National Institute for the South China Sea Studies.

can be categorized as follows. Firstly, as the transit from the Pacific to the Indian Ocean, the Spratly Islands are located in a strategic geopolitical position with multiple neighboring countries around it. Besides, it also falls into military and economic interests of other maritime powers out of this region, such as the United States, Japan and India. Secondly, with increasing populations in the neighboring areas and growing economies in the surrounding developing countries, demands for resources have been increasing rapidly. Therefore, the abundant resources in the Spratly area have been sought after by the surrounding countries. Thirdly, the colonial invasions of the Spratly Islands caused major problems throughout history. Moreover, the contention for hegemony, especially with the development of Cold War structure, has made the Spratly Islands dispute highly sophisticated and becomes something more than just a dispute over sovereignty and jurisdiction. The Spratly dispute has become a significant factor affecting regional stability and even the international political situation. Fourthly, the attempt to judge China's traditional jurisdictional behavior by using the definition under the current international laws concerning sovereignty, is in fact greatly irrational, and reduces the legal significance of such jurisdictional behaviors. The United Nations Convention on the Law of the Sea (UNCLOS) is actually intensifying international struggles for islands due to its vague definition of "historical rights". It lacks expressive and effective provisions to resolve maritime disputes among States with opposite or adjacent coasts, which allows the coexistence of various conflicting claims due to its ambiguous provisions.

Among all the listed factors leading to the SCS dispute, the highly expected oil and gas deposit in this area, in my point of view, is a key cause of potential conflicts. The demand for oil and gas in the SCS area increases sharply with the economic development of the countries and regions neighboring China. Some countries have started exploitation in the disputed areas disregarding the objection of involved countries. Some have even started joint development with foreign companies aiming to internationalize the dispute.

II. Resources Development in the Disputed SCS Area

According to decades of reconnaissance, 13 large and medium sediment basins have been found in the SCS area, with a total area of 619,500 km^2, among which 417,000 km^2 is within China's U-shaped line. This area is estimated to contain 23.5 billion tons of oil and 10,000 billion stere of natural gas. Besides, there is a

large quantity of gas hydrate (also known as "flammable ice") in the SCS area. Gas hydrate is regarded as a strategic resource with great business potential in the twenty-first century due to its features of high density, extensive distribution and large scale. Experts believe that gas hydrate will be developed and utilized in a large scale in 15~20 years. The National Natural Science Foundation of China affirmed some projects about gas hydrate in the late 1990s. In 1996, a research project was carried out with the name of "Prospect and Methodology Research on Gas Hydrate in the West Pacific". The "Research on Gas Hydrate Survey in China's Sea Area" was completed in 1998. In 1999, Guangzhou Marine Geological Survey discovered gas hydrate in Paracel Islands in the SCS and continued an earthquake survey in the same area in 2000. The initial survey shows that an area of 8,000 km^2 may contain gas hydrate, an amount equal to 80 billion tons oil, covering 50 percent of the total oil reserve in China. Nevertheless, China is still in the stage of research and survey, leaving drilling, exploitation and development to be done.

In the early 1980s, China started oil survey in the Spratly Islands, though only touching physical geography reconnaissance. In 1992, China National Offshore Oil Corporation signed a contract with Creston Energy Corporation of America on joint development of gas and oil at Wan'an Tan. However this could not be implemented due to counteract from Vietnam. So far, China has not yet exploited any oil in the Spratly Islands.

Ever since the 1970s, some ASEAN (Association of South East Asian Nations) countries, including Vietnam, the Philippines, Malaysia, Indonesia and Brunei have made use of their geographic advantage and speeded up the exploitation of gas and oil in SCS by means of introducing foreign oil companies, especially companies from western countries. Some of the exploitation areas fall within Chinese U-shaped line. In 1947, the Chinese government issued a map indicating the location of the four archipelagos in the SCS, namely Spratly Islands (Nansha), Paracel Islands (Xisha), Pratas Islands (Dongsha) and Macclesfield Bank (Zhongsha) and also the 11 dotted line around the islands. This line is known as Chinese U-shaped line since then. China enjoys the historical rights including fishing rights and jurisdiction over resources exploitation within the U-shaped line.

Vietnam used to be one of the poorest countries in Southeast Asia. It's oil resources that have helped this country to get rid of its poverty. In order to reconstruct its economy after 30 years' civil war and the loss of oil assistance from former Soviet Union, Vietnam has endeavored to develop onshore and offshore oil. Vietnam has signed 33 contracts with more than 50 foreign oil companies since it

opened its oil exploitation market to the world. Statistics show that the annual oil exploitation in the SCS continental shelf reached 11 million tons and Vietnam has increased its oil and natural gas exportation gradually. It exported 12.1 million tons of oil in 1998 and 14.5 million in 1999, thus earning 2 billion USD. According to the updated figures issued by the Energy Information Agency of America in May 2002, the daily oil production capacity of Vietnam in the SCS area reaches 356,000 barrels. The annual production of natural gas amounts to 19 billion cubic feet. In 2000, Vietnam exported 133,000 barrels of oil per day, most of which is exploited from the SCS area. Oil exportation thus becomes the major source of foreign exchange in Vietnam.

The discovery of oil in the SCS gives the Philippines, 95 percent of whose oil needs rely on importation, hope to reduce the oil import proportion from 95 percent to 85 percent. It started to exploit oil at Liletan jointly with foreign oil companies in 1976. The Philippines are currently trying to jointly develop the natural gas field located northwest of Palawan Island with the Shell Company. This natural gas field is estimated to produce 120 million barrels of oil in 20 years. According to the data issued by the Energy Information Agency of America in May 2002, the Philippines exploit 9,460 barrels of oil and one billion cubic feet of natural gas per day in the SCS area. The Philippine press also reports that the country plans to extend its continental shelf from 200 nautical miles to 350 nautical miles in order to further scramble for oil in the SCS area. The International Law Research Institute of the National University of the Philippines has requested the Senate to fund the proposal in order to collect related data.

Different from Vietnam and the Philippines, Malaysia refuses the involvement of other countries outside the SCS region in the SCS disputes and opposes the internationalization of the SCS dispute. However, it also participated in oil exploitation and thus gained profits. In recent years, Malaysia has built man-made facilities in its occupied islands and reefs under the excuse of establishing facilities for scientific research purpose. Besides, it has speeded up oil exploitation in the SCS. Up to present, Malaysia has developed 18 oil fields and 40 gas fields within the U-shaped line of China. In 2000, its total daily oil production only amounted to 690,000 barrels, however, its daily oil production in the SCS reached 668,000 barrels, covering 89.07 percent of the total. The report from the Energy Information Agency of America in May 2002 indicates that the daily oil production of Malaysia in the SCS amounts to 750 million barrels and its daily natural gas production reaches 1,437 billion cubic feet.

Indonesia, as an OPEC country, is one of the main countries of oil production and exportation. Energy is the leading industry of Indonesia, which has been paid great attention by both the central government and local governments. The energy and mineral resources industries provide 25~30 percent of the total tax income for the whole country. Liquefied natural gas accounts for 1/3 market share in the Asia-Pacific area with great competitiveness. Indonesia has gained much profit from the exploitation of the Natuna Gas Field which has been jointly developed by Indonesia National Oil Corporation and America Exxon Corporation with the available capacity of 1,600 billion cubic meters. This project, with a cost of 40 billion USD, has been designed to produce 6 million tons of liquefied natural gas every year once completed. Indonesia produced 1.22 million barrels of oil every day in 2001, 20 percent of which was exploited from the SCS area. At present, Indonesia produces 215,000 barrels of oil per day in the SCS area and 12 billion cubic feet of natural gas per year.

Brunei is a main oil production country in Asia-Pacific area and one of the largest oil export countries in the world. Its main exploitation area is situated at Shaba Basin. Oil and gas exploitation is the principle economic source of the Bruneian people. However, the current oil and gas field exploitation can only last 25 years. Hence, the Bruneian government feels the urgency to develop new offshore oil fields in order to maintain its current prosperity. Swallow Reef is located within the U-shaped line of China. Once it occupies the Swallow Reef, Brunei has the right to develop the oil contained in the continental shelf in this area. At present, Brunei has a daily production of 195,000 barrels of oil in the SCS area and an annual production of 334 billion cube feet of natural gas.

Petroleum has been called the "blood" for industry, which is directly related to the economic development, political stability and national security of a State. One common comment among the energy experts of the world is "petroleum remains the principal energy among all the available resources in 21st century". Before an alternative energy is found, most countries have to face a series of urgent issues such as how to increase oil supply and assure import security in order to ensure the sustainable development of its economy and society. The competition for oil among the international community has become fiercer in 21st century, which might lead to political and military conflicts. This is particularly true in the SCS area.

III. China's Proposal of "Joint Development"

As indicated in the above paragraphs, the SCS area abounds in gas and oil deposits, which is of great significance to the countries and regions in this area. However, due to the intricate situation in the disputed SCS area, oil and gas exploitation will undoubtedly become a sensitive issue which might not only bring about conflicts, but also many problems related to investment and cooperation, such as potential risk and high cost.

The special features of the disputed area make it possible that conflicts will happen unavoidably while exploitation is being carried out. Therefore the claiming parties may take the following actions:

(1) Unilateral action, which means that the claiming party takes action alone ignoring the protest of other parties involved;

(2) Bilateral cooperation, meaning that the two parties concerned enhance cooperation in their disputed area so as to avoid conflicts;

(3) Multilateral cooperation, which is normally conducted in the disputed area among several parties; or

(4) Frozen behavior, which means laying aside the dispute and freezing the development activities in the disputed area.

The following are some successful cases on joint development in the disputed area:

(1) The case of Tunisia-Libya continental shelf. The dispute on the continental shelf between these two countries in 1982 caused by oil development in the Gulf of Gabes was submitted to the International Court of Justice (ICJ). The proposal of joint development was recommended by the judges of ICJ. The dispute was eventually solved by signing the agreement between Tunisia and Libya on joint development in the Gulf of Gabes.[1]

(2) The joint development agreement between Iceland and Norway. Iceland and Norway signed an agreement in October 1981 on the continental shelf between Iceland and Jan Mayen[2] as a solution to the dispute over sovereign right claims in this sea area related to fishery. Both parties eventually signed an agreement on joint development after bilateral negotiations.

(3) The mutual development case of Thailand and Malaysia.[3] The Malaysia-

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1 Agreement between the Libyan Arab Socialist People's Jamahariya and the Republic of Tunisia to Implement the Judgment of the International Court of Justice in the Tunisia/ Libya Continental Shelf Case 8 August 1988.

2 The 1981 Iceland-Norwegian Agreement Relating to Jan Mayen (Iceland-Norway 1981).

3 Malaysia–Thailand 1979 Memorandum of Understanding (Malaysia-Thailand 1979).

Thailand Agreement establishes a very powerful Joint Authority which assumes the rights and responsibilities of the parties in the described zone of cooperation. This Authority is an international organization with legal personality, which manages the aggregate of activities in the area, including the terms of contracts.

No matter what model is adopted to develop the disputed area, it is regarded as a kind of temporary interest arrangement based on the existing disputes and conflicts. The agreement of cooperation is based on the compromise between political entities that have acknowledged the existence of the dispute and have reached an agreement through political negotiation aiming to reach consensus on interest share. However, these kinds of temporary arrangements can be easily influenced by various factors. The Timor Agreement signed by Australia and Indonesia terminated due to the independence of East Timor. Within the framework of geopolitics and economic security with the national interest as the priority, the temporary interest arrangement could work as "safety valve", but may lead to conflict as well. Multilateral development is more difficult to achieve than bilateral ones due to the intricate situation regarding interest division and political compromise. Therefore, the cooperative model can only be set up after the parties concerned reach an agreement on the mechanism of cooperation and conflict management with the necessary political guarantee and financial support.

After long-term negotiation and disputes, late Chinese leader Deng Xiaoping initiated his famous proposal on the issue, namely "shelving disputes and seeking joint development" in the region. This proposal shares the same feature of the cooperation model analyzed above. The proposal has taken into consideration the practical interest of the parties involved and helps to find away to eventually resolve the SCS dispute. This demonstrates China's good will and sincerity in this issue.

The Chinese government has made great efforts in recent years to put Deng's proposition into practice, and frequently discusses with ASEAN partners specific issues such as the oceanic environmental protection, maritime scientific research, fishing and other relevant issues.

In November 2002, China and the 10-member ASEAN adopted a Declaration on the Conduct of Parties in the SCS, laying a political foundation for future possible commercial cooperation between China and ASEAN countries as well as the long-term peace and stability in the region.

The oil companies of the Philippines, China and Vietnam signed a land-mark tripartite agreement in Manila on March 14, 2005 to conduct a joint seismic survey

of oil potential in disputed areas of the SCS. The survey, which is expected to begin before the start of the typhoon season this year, will cover an area of about 143,000 km^2. In a joint statement, the three parties confirmed that the agreement was signed in accordance with the basic positions held by their respective governments to turn the SCS into an area of peace, stability, cooperation and development under the UNCLOS and the 2002 ASEAN-China Declaration on the Conduct of Parties in the SCS.

The signing of the agreement was commonly regarded as initial practice by the Chinese side of Deng Xiaoping's proposal. It shows the three nations are taking active measures to fulfill the 2002 ASEAN-China Declaration on the Conduct of Parties in the SCS.

Experts in China assert that China, Vietnam and the Philippines, in a spirit of mutual benefit, flexibility and pragmatism, have cut a new path to peacefully settle the disputes on the SCS, and set an example for other countries to handle such kind of issue.

It is believed that as long as countries in the region actively participate in the concrete cooperation and adhere to the principle of "shelving the disputes and seeking joint development" of the region, the goal of turning the SCS into peace, stability, friendship and cooperation can definitely be achieved.

Besides, as the efforts made on pushing the proposal of "shelving disputes and seeking joint development", China has signed a series of agreements with ASEAN, such as the Joint Declaration of ASEAN-China on Cooperation in the Field of the Non-traditional Security Issues and Treaty of Amity and Cooperation in Southeast Asia, through which both parties have built up mutual confidence. Additionally, China and ASEAN have expanded bilateral economic cooperation through the establishment of a free trade zone. It is believed that the proposal of "shelving disputes and seeking joint development" will be more convincible in the international community with the promotion of such actions.

IV. Conclusions

Although the proposal of joint development of the disputed SCS area has been agreed upon to some extent and been pushed forward recently, there still exist many obstacles at present due to the complexity of the SCS dispute. Firstly, the geopolitical interests of SCS countries in the area and their contention for resources required by economic development have led to a more intricate situation in this

area. Although the consensus on cooperation, development and win-win agreements have been reached, security problems still exist in the SCS area. Despite the execution of the Declaration, incidents such as arresting and driving out the other countries' legally-working fishermen spitefully by military force, continually take place. The strategic situation of China is restricted by the force inside and outside the region.

Secondly, the involvement of major powers outside this region has added to the complexity and internationalization of the Spratly dispute, thus setting potential obstacles for the implementation of joint development. The United States is the most powerful player due to its great strategic interest in Southeast Asia. After "9/11" terrorist attack, the U.S. government has strengthened its military interference and control in the SCS in the name of "anti-terrorism". Because of the political right deviation and development of militarism in Japan, Japan has broken its commitment to the Peace Constitution and even sent troops to Iraq, which facilitates Japan to protect its economic and security interests in the Southeast Asia. The Japanese military force has been stretched to the SCS by establishing cooperation with some ASEAN countries in non-traditional security fields. With these latest developments, the security in the SCS has become more complex and great changes have occurred to the international environment concerning this issue. India, after becoming a nuclear power, has gradually implemented its "major power" strategy and enhanced its influence on regional and international affairs. Using Southeast Asia as a breakthrough to promote its "Look East" policy, India has, to a large extent, improved its comprehensive relationship with ASEAN. Considering the geographical politics, India is concerned about China's increasing influence in Southeast Asia which is considered as a threat to the security of India and even South Asia. Hence, India believes it is essential to prevent China from expanding it influence to the Indian Ocean. While hoping to accomplish this by restricting China's role in the SCS, India has become one of the latest players involved in the SCS dispute.

Thirdly, it is difficult to define the area for joint development in the SCS due to the overlapping sovereignty claims in this area. Such overlapping claims includes territorial and jurisdictional claims and sovereignty claims for islands, reefs, cays and shallows. Hence, the definition of the area for joint development has largely restricted its implementation in the SCS.

In addition to the above factors, the engagement of oil companies outside the SCS region also brings difficulties to the joint development in the SCS area. So far,

there are more than 200 oil companies involved in oil and gas exploitation in the SCS, most of which are from the United States, Netherlands, Britain, Japan, France, Canada, Australia, Russia, India, Norway and South Korea. These oil companies have made large amount of financial and technical investment in the SCS. The engagement of these oil companies will undoubtedly enhance the complexity and internationalization of the SCS dispute and become the potential drawback for joint development in this area.

With an aim to maintain the peace and stability in the disputed SCS area, other efforts should be made in addition to the joint development on oil and gas. Regional cooperation through various methods should be encouraged, which shall include cooperation on fishery development and conservation, cooperation in the fields of marine research and marine environmental protection, disaster prevention and rescue and cooperation on maritime transportation. So far, China has cooperated with other countries in the area of oil, fishing, marine environmental protection and marine climate etc., which will help China, together with the parties involved, find a model to resolve the SCS issue and further their cooperation and accumulate experiences. Besides, each party concerned should respect the principles stipulated in the Declamation on the Conduct of Parties in the South China Sea and maintain the security of the SCS for establishing an advantageous international situation and improving the sustainable development of the society and regional economy.

中国根据《联合国海洋法公约》第 298 条发表排除性声明的法律效果分析

古俊峰 *

内容摘要: 对于海洋争端的解决途径，中国一直坚持争端各方通过和平协商方式解决的基本立场。但是，《联合国海洋法公约》第十五部分所规定的争端解决程序具有相当程度的强制性。为了调和这一矛盾，中国政府近期根据《海洋法公约》第 298 条发表了排除性声明，对于海洋划界、军事活动、渔业和科研执法等重要领域的争端，中国政府不接受《海洋法公约》第十五部分第二节规定的任何国际司法或仲裁管辖。这一声明必将对中国将来海洋争端的解决前景产生重大影响。然而，中国发表该声明的法律效果，并非简单地用“排除”一词就能解释，其中蕴涵着丰富而复杂的法律意义。本文力图根据《海洋法公约》的规定，对该声明的法律效果及其对中国当前所涉海洋争端解决途径的实质影响进行详细分析。

关键词: 《联合国海洋法公约》第 298 条　　排除性声明　　法律效果

一、引　言

2006 年 8 月 25 日，中国依据《联合国海洋法公约》（以下简称“《公约》”）第

* 古俊峰，厦门大学法学院国际法博士研究生。

298 条之规定，[1] 向联合国秘书长提交如下书面声明：

“对于《联合国海洋法公约》第 298 条第 1 款 (a)、(b) 和 (c) 项所述的任何争端，中国政府不接受《公约》第十五部分第二节规定的任何国际司法或仲裁管辖。”[2]

这一声明的发表，对于中国所涉海洋争端的解决途径将产生重要的影响：未经中国政府同意，与中国相关的海洋划界、军事活动、渔业和科研执法等重要领域的争端，都不得提交《公约》所规定的第三方强制解决程序，而只能通过双边协商等政治方法加以解决。这一声明与中国一贯坚持的通过协商方式解决海洋争端的基本立场是完全一致的，是中国政府积极运用《公约》规则维护自身立场的一个重要体现。

早在第三次联合国海洋法会议上，中国代表团团长即发言指出：中国政府一贯主张，国家之间的任何争端，应当由各当事国在互相尊重主权和领土完整以及平等的基础上通过谈判协商解决。[3] 在 1996 年批准加入《公约》之后，中国有关争端

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1 《联合国海洋法公约》第 298 条（适用第二节的任择性例外）第 1 款规定：1. 一国在签署、批准或加入本公约时，或在其后任何时间，在不妨害根据第一节所产生的义务的情形下，可以书面声明对于下列各类争端的一类或一类以上，不接受第二节规定的一种或一种以上的程序：(a)(1) 关于划定海洋边界的第十五条、第七十四条、第八十三条在解释或适用上的争端，或涉及历史性海湾或所有权的争端，但如这种争端发生于本公约生效之后，经争端各方谈判仍未能在合理期间内达成协议，则作此声明的国家，经争端任何一方请求，应同意将该事项提交附件五第二节所规定的调解；此外，任何争端如果必然涉及同时审议与大陆或岛屿陆地领土的主权或其他权利有关的任何尚未解决的争端，则不应提交这一程序。(2) 在调解委员会提出其中说明所根据的理由的报告后，争端各方应根据该报告以谈判达成协议；如果谈判未能达成协议，经彼此同意，争端各方应将问题提交第二节所规定的程序之一，除非争端各方另有协议。(3) 本项不适用于争端各方已以一项安排确定解决的任何海洋边界争端，也不适用于按照对争端各方有拘束力的双边或多边协定加以解决的任何争端。(b) 关于军事活动，包括从事非商业服务的政府船只和飞机的军事活动的争端，以及根据第二九七条第 2 款和第 3 款不属法院或法庭管辖的关于行使主权权利或管辖权的法律执行活动的争端。(c) 正由联合国安全理事会执行《联合国宪章》所赋予的职务的争端，但安全理事会决定将该事项从其议程删除或要求争端各方用本公约规定的方法解决该争端者除外。

2 联合国海洋事务和海洋法处，下载于 http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification，2007 年 10 月 2 日。

3 陈德恭著：《现代国际海洋法》，北京：中国社会科学出版社 1988 年版，第 476 页。

解决问题的立场并未改变，时任外交部条法司司长刘振民在 2005 年的一次公开演讲中，再次阐明了中国通过协商解决海洋争端的基本立场。[4] 然而，《公约》第十五部分所规定的争端解决程序却具有相当程度的强制性：如果争端已诉诸当事国自行选择的和平方法仍未得到解决，经任何一方请求，即应提交第十五部分第二节规定的导致有拘束力裁判的强制程序。[5] 而且，缔约国对于《公约》的规定不得提出任何保留，[6] 这使争端解决程序的强制性问题显得更为突出。中国在争端解决问题上的立场与《公约》的这些规定显然是不一致的，但是中国作为缔约国又必须遵守《公约》，因此我们只能运用《公约》本身的制度调和这一矛盾。

所幸的是，《公约》争端解决制度的强制性并不是绝对的，第十五部分第三节同时规定了“适用第二节的限制和例外”：一些类型的争端，作为自动例外不受第二节规定的强制程序约束；还有一些类型的争端，则可由缔约国发表声明，排除第二节强制程序对其的适用。其中，后一类型的争端由《公约》第 298 条列明，涵盖了诸如海洋划界、军事活动、渔业执法等重要领域。中国政府按照《公约》规定的方式对这些争端的强制解决程序加以排除，有助于自身立场的实现，也必将对中国所涉海洋争端的解决途径产生重大的影响。鉴于国际海洋争端的多样性和复杂性以及《公约》争端解决机制本身的复杂性，本文力图对中国发表该项排除性声明所产生的法律效果及其对中国当前所涉海洋争端的实质影响加以详细分析。

二、《公约》争端解决机制概述

《公约》第十五部分所规定的争端解决机制并非一开始便表现出强制性，而是首先体现了对国家主权的尊重。该部分第一节规定，所有争端应当首先使用缔约国自行选择的任何和平方法解决，包括《联合国宪章》第 33 条第 1 款所指的谈判、调查、调停、调解、仲裁、司法解决、诉诸区域机关等各种和平解决争端的方法。[7] 当争端当事国已经选择了某种和平解决方式时，只有在诉诸这种方法而仍未得到

4 Liu Zhenmin, The Basic Position of China on the Settlement of Maritime Disputes through Negotiations, *China Oceans Law Review*, No. 2, 2005, pp. 18~23.
5 《联合国海洋法公约》第 286 条。
6 《联合国海洋法公约》第 309 条。
7 《联合国海洋法公约》第 279 条、第 280 条。

解决，以及争端各方间的协议并不排除任何其他程序的情形下，才适用第二节规定的强制解决程序。[8] 此外，如果当事国参与的任何一般性、区域性或双边协定或以其他方式协议，已规定应将争端提交该协议下的某种导致有拘束力裁判的程序，则除非争端各方另有协议，该程序应代替《公约》第十五部分规定的程序。[9] 第一节还规定争端各方负有就争端解决迅速交换意见的义务，力求使争端各方通过对话化解争端。[10]《公约》进一步规定，在自愿的前提下，争端当事方可以邀请另一方将争端提交调解。第十五部分第一节所规定的调解程序不是强制性的，如果另一方不接受调解，则调解视为终止。[11] 上述各项规定也适用于因“区域”内活动产生的争端的当事方，并比照适用于作为这类争端当事一方的缔约国以外的实体。[12] 从实践来看，各国一般也都是在通过外交方法失败后，才把争端交付导致有拘束力裁判的第三方强制程序进行解决。这反映了各国的一种普遍心态，即在解决国际争端的过程中，不愿或不轻易交出国家主权权利，希望尽可能多地参与和控制争端解决程序。所以，诉诸法律方法是《公约》设立的第二步解决争端的程序。[13]

当诉诸争端各方自行选择的方式而争端仍未得到解决时，任何一方即可启动《公约》第十五部分第二节的强制解决程序。该程序的强制性体现在不需得到争端对方的同意，当事一方即可将争端提交该节规定的国际法庭或仲裁庭解决。根据《公约》第 287 条第 1 款，缔约国可以在任何时候以书面声明方式选择一个或一个以上机构来处理争端：(a) 按照附件六设立的国际海洋法法庭；(b) 国际法院；(c) 按照附件七组成的仲裁庭；(d) 按照附件八组成的特别仲裁庭。缔约国若未作出任何选择或作出的声明不具效力，应视为已接受附件七所规定的仲裁。缔约国的选择也可以以书面声明随时撤销，撤销声明的通知在交存于联合国秘书长后满三个月生效。四个争端解决机构处于并列地位，但是如果争端当事国选择的是不同的法院或法庭；或者一个已作出选择和一个没有作出选择；或者两国都作出选择声明，但声明尚未生效；或者双方都没有作出选择，除各方另有协议外，则争端仅可提交附件七仲裁庭。[14] 因此，附件七仲裁庭起到的是剩余备用作用。

然而，并非涉及《公约》的所有海洋争端都可以提交导致有拘束力裁判的强制解决程序。《公约》第十五部分第三节规定了强制程序的限制和例外。第十五部分第三节对适用强制程序的限制和例外主要规定在第 297 条第 2 款、第 3 款和第

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8 《联合国海洋法公约》第 281 条。
9 《联合国海洋法公约》第 282 条。
10 《联合国海洋法公约》第 283 条。
11 《联合国海洋法公约》第 284 条。
12 《联合国海洋法公约》第 285 条。
13 吴慧：《法律方法解决国际海洋争端的实践分析》，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〉签署二十周年学术研讨会论文集》（2002 年 8 月），第 38 页。
14 《联合国海洋法公约》第 287 条第 3 款至第 6 款。

298 条 2 个条文中。第 297 条第 2 款、第 3 款规定自动排除适用强制程序的争端范围，可称为自动例外条款；第 298 条规定需要缔约国以书面声明方式排除适用强制程序的争端范围，可称为任择性例外条款。

根据《公约》第 297 条第 2 款，关于沿海国对在其专属经济区和大陆架上进行海洋科学研究的规定在解释或适用上的争端，在以下两种情况下，沿海国无义务将争端提交强制解决程序：(1) 沿海国按照《公约》第 246 条（专属经济区和大陆架上的海洋科学研究）行使权利或斟酌决定权而引起的争端；(2) 沿海国按照《公约》第 253 条（海洋科学研究活动的暂停或停止）决定暂停或停止一项研究计划而引起的争端。该款同时规定，因进行研究国家指控沿海国对某一特定计划行使第 246 条和第 253 条所规定权利的方式不符合本《公约》而引起的争端，经任何一方请求，应按照附件五第二节提交强制调解程序，但调解委员会对沿海国行使斟酌决定权指定第 246 条第 6 款所指特定区域，或按照第 246 条第 5 款行使斟酌决定权拒不同意，不应提出疑问。

根据《公约》第 297 条第 3 款，有关沿海国对其专属经济区内生物资源的主权权利或此项权利行使的争端，包括关于沿海国决定可捕量、其捕捞能力、分配剩余量给其他国家、其关于养护和管理这种资源的法律和规章中所制订的条款和条件的斟酌决定权的争端，沿海国无义务同意提交强制解决程序。

《公约》将涉及专属经济区内渔业资源开发的争端排除在强制争端解决程序之外，体现了对沿海国在专属经济区内的主权权利和管辖权的尊重，这也是广大发展中国家在联合国海洋法会议上坚持的结果。[15] 但是从国际渔业实践来看，200 海里专属经济区内往往集中了最为丰富的渔业资源。将涉及专属经济区内渔业资源可捕量、其捕捞能力、分配剩余量等的争端排除在强制程序之外，这显然是不符合远洋渔业大国的利益的。[16] 作为妥协，第 297 条第 3 款同时规定了一个强制调解程序。即在以下三种情况下，缔约国如已诉诸第十五部分第一节的和平争端解决方法而仍未解决争端，应将争端提交附件五第二节规定的调解程序：(1) 一个沿海国明显地没有履行其义务，通过适当的养护和管理措施，以确保专属经济区内生物资源的维持不致受到严重危害；(2) 一个沿海国，经另一国请求，对该另一国有意捕捞的种群，专断地拒绝决定可捕量及沿海国捕捞生物资源的能力；(3) 一个沿海国专断地拒绝根据第 62 条、第 69 条和第 70 条以及该沿海国所制订的符合本公约的条款和条件，将其已宣布存在的剩余量的全部或一部分分配给任何国家。

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15 Third United Nations Conference on the Law of the Sea, Official Records, Vol. V, p. 18．厄瓜多尔、秘鲁、阿根廷、印度、巴基斯坦、尼泊尔、毛里求斯等国都主张国际海洋法法庭只对有关国际海底区域的事项行使管辖。印度代表强调，沿海国对专属经济区和大陆架的资源开发、其他经济利用、建立设施或科学研究等应具有完全管辖权。

16 Third United Nations Conference on the Law of the Sea, Official Records, Vol. V, p. 23．美国、西班牙、荷兰、卢森堡、比利时、联邦德国、新西兰等国家都主张强制程序不仅应适用于国家管辖范围以外的海域，还应该适用于国家管辖范围以内的海域。

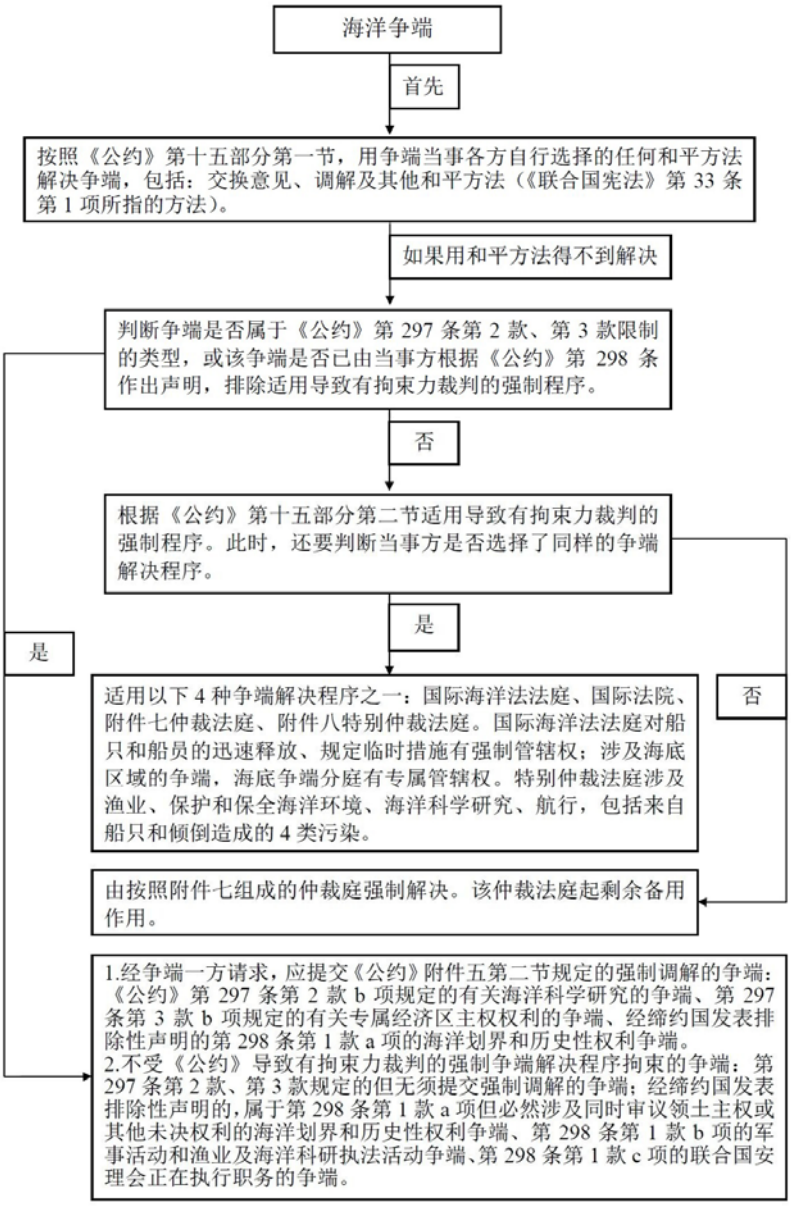
不仅涉及沿海国在专属经济区内行使主权权利和管辖权的相当部分事项不受强制争端解决程序的约束，《公约》第 298 条还赋予缔约国行使选择权排除特定类型争端的权利。缔约国可以在签署、批准或加入《公约》时，或在其后任何时间，书面声明对于某些类型的争端，不接受第二节的强制解决程序。这些争端包括：(1) 关于划定海洋边界的第 15 条（领海划界）、第 74 条（专属经济区划界）和第 83 条（大陆架划界）在解释或适用上的争端，或涉及历史性海湾或所有权的争端；(2) 关于军事活动，包括从事非商业服务的政府船只和飞机的军事活动的争端，以及根据第 297 条第 2 款和第 3 款不属法院或法庭管辖的关于行使主权权利或管辖权的法律执行活动的争端；(3) 正由联合国安全理事会执行《联合国宪章》所赋予的职务的争端。但是对于上述第一项有关海洋划界和历史性权利的争端，如果符合一定条件，经一方请求应提交强制调解程序。[17] 一旦缔约国作出排除性声明，不仅意味着就其排除的争端类型该国不受国际法庭或仲裁庭管辖权的约束，也意味着该国“无权对另一缔约国，将属于被除外的一类争端的任何争端，未经该另一缔约国同意，提交本公约的任何程序”。[18]

对于《公约》如此复杂的争端解决机制，我们可以用下列争端处理流程图加以描述：（见下页）

三、中国根据第 298 条发表声明所排除的争端类型

《公约》第 298 条允许缔约国将某些特定类型的海洋争端从强制解决程序中排除出去，这是《公约》起草时“一揽子交易”的结果。如果没有第 298 条规定的选择性例外，许多国家将不会接受第十五部分所规定的强制性争端解决程序，并进而拒绝加入《公约》。对《公约》争端解决机制的强制性持反对态度的缔约国，可以积极运用第 298 条作出排除性声明。中国政府目前作出的声明涵盖了第 298 条列明的所有事项，意味着中国所涉及的海洋争端只要属于这些事项范围之内，将不受《公约》第十五部分第二节强制解决程序的管辖。

17 《联合国海洋法公约》第 298 条第 1 款。
18 《联合国海洋法公约》第 298 条第 3 款。



《联合国海洋法公约》第十五部分规定的争端解决程序流程图 [19]

19 吴慧：《法律方法解决国际海洋争端的实践分析》，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〉签署二十周年学术研讨会论文集》（2002 年 8 月），第 37 页。

（一）海洋划界和历史性权利[20]争端

根据《公约》第 298 条第 1 款 a 项，缔约国可以以声明方式从强制性第三方解决程序中排除出去的第一类争端是：关于划定海洋边界的第 15 条（领海划界）、第 74 条（专属经济区划界）和第 83 条（大陆架划界）在解释或适用上的争端，或涉及历史性海湾或所有权的争端。

1. 海洋划界争端

海洋划界包括相邻或相向国家间领海、专属经济区和大陆架界线的划定。对于领海划界，《公约》第 15 条规定了一项较为具体的原则，即“等距离＋特殊情况”原则。[21] 根据这一原则，领海界限一般是等距离中间线，但如果存在历史性权利或其他特殊情况，则按照这些特殊情况对中间线进行修正。但究竟哪些情况属于“特殊情况”，《公约》除了明确列出“历史性所有权”一种情况之外，对于其他特殊情况并未加以列举。实践中，岸外岛屿的存在、海岸线形状等是否构成应当考虑的“特殊情况”，甚至在具体个案中是否存在“历史性所有权”，都可能成为相关国家争议的问题。而对于专属经济区和大陆架划界，《公约》第 74 条和第 83 条则作了措辞几乎相同的规定：“海岸相向或相邻的国家间专属经济区（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。”这两个条文，除了要求相关国家为公平（衡平）[22] 解决之目的在国际法基础上以协议方式划定界线之外，没有为划界规定任何具体规则。这是在第三次联合国海洋法会议上，主张“等距离中间线原则”和主张“公平（衡平）原则”的两大国家集团争议不下，最终相互妥协的结果。由于《公约》没有规定具体的划界规则，在国家实践中存在“等距离中间线原则”和“公平（衡平）原则”两种相互对立的主张，相邻或相向国家间专属经济区和大陆架的划界无疑是极易发生争端的领域。

海洋划界争端由于涉及国家主权或重要的主权权利，如果提交导致有拘束力裁判的第三方程序，将意味着拿重要的国家利益冒风险。以往有关海洋划界的判例表明，国际法庭或仲裁庭一般是在考量与划界有关的各种因素（如海岸线形状、

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20 “历史性所有权”与“历史性权利”在概念上并无本质区别，而且，《公约》的中文译本将“title”译为“所有权”，似有误译之嫌，且不易理解。为了理解上的方便，后文均使用“历史性权利”一语。

21 《联合国海洋法公约》第 15 条规定：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。

22 《联合国海洋法公约》中文译本将“equitable”一词译为“公平”，但有学者指出该词译为“衡平”更为准确（参见傅崐成著：《国际海洋法——衡平划界论》，台北：台湾三民书局 1992 年版）。笔者亦赞同后一种译法，因此在后文论述时一般使用“衡平”一词，但在引述《公约》条文和中国政府的主张时，仍保留其使用的“公平”一语。

岸外岛屿的存在、海岸线长度等）的基础上进行衡平裁判，但在具体个案中究竟考虑哪些因素以及各因素对判决影响的比重如何，法庭或仲裁庭往往享有相当大的自由裁量权，因此也难以预计最终的判决结果。这也正是许多学者（甚至国际法庭的一些法官）否认法庭或仲裁庭是在根据某些法律原则进行划界的原因：他们实际上是在根据公允及善良原则进行裁判。[23] 对于国家而言，与其将争端提交既无法控制进程又不能预知后果的第三方程序，不如将解决争议的主动权保留在自己手中，采用灵活程度较高的政治性谈判或协商程序。

鉴于海洋划界对于国家利益的重要性，《公约》起草过程中就有不少国家反对将解决这方面争端的权利无条件地移转给国际法庭或仲裁庭。一些社会主义国家当时曾指出，如果《公约》条文包含必须将海洋划界争端提交导致有拘束力裁判的强制程序的内容，他们就不会接受该条文，甚至不会接受整个《公约》。《公约》不允许缔约国提出任何保留使这个问题显得更为尖锐。因此，最终达成的妥协是，有关海洋划界和历史性权利的争端将纳入强制解决的框架，但国家可以发表声明将其排除在强制解决程序之外，尽管仍有义务在满足某些条件的情况下提交强制调解。[24]

2. 历史性权利争端

《公约》多处条文承认沿海国对某些海域享有历史性权利，这些条文包括第 10 条对历史性海湾的规定、第 15 条对领海划界的规定，以及第 47 条、第 51 条对群岛国群岛水域的规定。《公约》第 10 条“海湾”第 1 款至第 5 款规定了一般海湾的构成及海湾的内水水域的划定规则，但第 6 款同时规定如果某一海湾属于沿岸国的历史性海湾，即使其不符合正常的海湾标准，也可以作为例外适用内水制度。然而，《公约》并没有对历史性海湾的概念作出规定，虽然一般认为它是指沿岸国历史上一向将其作为内水进行管辖的海湾，但具体的判定标准并不明确，实践中也容易发生争议。目前大约有 20 个国家宣布了其历史性海湾，但不少主张都遭到其他国家的反对。例如，俄罗斯对大彼得湾的主张就遭到英国和美国等国的反对，越南对泰国湾和东京湾的主张则遭到法国、泰国、中国和美国等国的反对。[25]

历史性权利还可适用于历史性海湾之外的其他水域，如海峡、群岛水域以及

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23 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 190.

24 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 256.

25 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 44.

其他国家管辖范围内的水域。[26]《公约》第 47 条规定，如果群岛水域的一部分位于一个直接相邻国家的两个部分之间，该邻国传统上在该水域内行使的现有权利应继续存在，并予以尊重。第 51 条则规定群岛国应承认直接相邻的国家在群岛水域内的传统捕鱼权这一历史性权利。除了《公约》明确承认的上述历史性权利之外，还存在沿海国对某些海域主张历史性权利或历史性水域的国家实践。例如，加拿大外交部在 1973 年 12 月发表的一封信中指出，“基于历史原因，加拿大坚持认为，加拿大北极群岛水域是加拿大的内水，尽管并未在任何条约中或借助于任何法律作过类似的表述”；1973 年汤加政府以 1887 年皇家公告为依据，宣布在 4 个小岛之间所划出的一块长方形海域为“历史性水域”，享有“群岛水域”的法律地位；1974 年印度与斯里兰卡经过谈判签订了《关于两国间历史性水域的疆界及有关事项的协定》。[27] 对于《公约》明确承认的历史性权利，其在法律上的构成要件如何以及在具体个案中是否符合这些要件；对于《公约》条文没有涉及的其他历史性权利，实践中相关国家的主张是否符合国际法，这些围绕历史性权利展开的问题都可能成为国际争端的触发点。

历史性权利在海洋划界中也具有重要作用。《公约》第 15 条明确规定如果存在历史性权利或其他特殊情况，则不应按照“等距离中间线”原则划定领海界线。对于专属经济区和大陆架划界，《公约》第 74 条和第 83 条虽未明确写入“历史性权利”，但在具体划界实践中相关国家的历史性权利或利益可以成为具体划界时所应当进行考量的若干因素之一。[28] 在以往的海洋划界实践中，已经存在一些判例将历史性权利作为划界衡平考量因素之一，比如 1982 年“突尼斯—利比亚大陆架案”[29] 和 1998 年“厄立特里亚—也门仲裁案”[30]。因此，围绕历史性权利产生的争议也可能成为错综复杂的海洋划界争端的一个部分。

一国所主张的历史性权利，往往不仅会影响邻国的利益，还会影响其他国家的利益。比如，某一沿海国主张某个海湾为其历史性海湾，如果该主张成立，就将意味着其他所有国家的船舶都不能享有无害通过权。如若这样的争端必须强制性地提交第三方解决程序，可能会产生就同一问题在沿海国与不同国家间进行往复循环诉讼或仲裁的现象：由于国际法庭或仲裁庭的裁判结果只能约束该争端的当

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26 Juridical Regime of Historic Water Including Historic Bays – Study Prepared by the Secretariat, UN Documents, A/CN.4/143, 9 March 1962, para. 34.

27 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。

28 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。

29 Continental Shelf Case (Tunisia v. Libya), Judgment of 24 February 1982, *ICJ Reports*, 1982.

30 Eritrea-Yemen Arbitration, Award, Phase I: Territorial Sovereignty and Scope of Dispute, Chapter IV – Historic Title and Other Historical Considerations, 9 October1998.

事方，[31] 主张历史性海湾的沿海国仍可能就同一问题与其他国家产生争端，进而再次提交强制解决程序，如此往复，争端将得不到最终解决。不仅是历史性海湾，历史性群岛水域或历史性内水等争端也会产生同样的问题。此外，与海洋划界相关的历史性权利争议，由于事实上构成海洋划界争端的一部分，也同样不适合一律提交强制性的第三方解决程序。

3. 强制调解

根据《公约》第 298 条第 1(a)(1) 项，海洋划界和历史性权利争端均可基于缔约国在任何时候的声明而排除在强制性国际司法或仲裁程序之外，但如果符合以下三项条件，则必须提交《公约》附件五第二节规定的强制调解程序：(1) 争端发生在《公约》生效之后；(2) 经争端各方谈判仍未能在合理期间内达成协议；(3) 不属于“必然涉及同时审议与大陆或岛屿陆地领土的主权或其他权利有关的任何尚未解决的争端”之情况。

对于第一项条件，一般认为相关国家的相反观点明确形成之时即为争端发生之时。在实践中，这个问题取决于个案中相关国家首次正式对外提出不同主张的具体事实。如果海洋划界或历史性权利争端发生在《公约》生效日即 1994 年 11 月 16 日之前，则不必适用强制调解程序。

按照第二项条件，只有在各方未能于合理时间内达成协议的情况下才可提交强制调解，这实际上是对以协议方式解决争端这一基本原则的重申。但何谓“合理期间内”，则是一个需要解释的问题。国际法院在 1969 年“北海大陆架案”中曾指出，对于海洋划界，国家“有义务为达成协议之目的而进行磋商，而非仅仅是走完一个形式上的磋商程序。”[32] 如果相关事实证明双方无意达成任何协议，所进行的磋商仅仅停留在形式上，则可以认为已满足“合理期间”这一条件。当然，如果一方拒绝协商，连形式上的磋商程序也不存在，无疑也属于“未能在合理期间内达成协议”的情况。

第三项条件要求不能同时涉及敏感的领土主权争端。由于国家对海洋的领有或管辖权都是以陆地为基础的，与争议海域相涉的大陆领土争端如果尚未解决，将会影响到海洋划界的结果乃至历史性权利的归属。不仅是大陆争端，岛屿领土的主权争端也将对海洋划界产生重大影响。《公约》第 121 条规定，除了不能维持人类居住或其本身的经济生活的岩礁，岛屿可以拥有相应的专属经济区和大陆架，岛屿主权归属的重要性不言而喻。鉴于领土主权争端在国际关系中的高度敏感性，如果这类争端将对海洋划界结果或历史性权利归属产生决定性影响，那么

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31 《联合国海洋法公约》第 296 条第 2 款，以及《国际法院规约》第 59 条、《国际海洋法法庭规约》第 33 条、《联合国海洋法公约》附件七《仲裁》第 11 条、附件八《特别仲裁》第 4 条（比照适用附件七的规定）。

32 North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), *ICJ Report*, 1969, para. 85.

在前者解决之前就不宜将后者提交任何具有强制性质的程序，包括强制调解程序。然而，仍有可能存在两种较为特殊的例外情况，即划界各方一致同意在划界中对存有主权争议的岛屿赋予零效力（即该岛屿不享有专属经济区和大陆架），[33] 或者在该划界阶段只将海上界线划至争议领土可能发生划界效力的区域之外。[34] 在这两种情况下，由于划界争端将不会“必然涉及同时审议”尚未解决的领土争端，即使有关领土争议依然存在，也不妨碍将划界争端提交至强制调解程序。

在同时满足上述三个条件的情况下，如果当事一方将争端提交《公约》附件五第二节的调解程序，另一方有义务接受这种强制调解。[35] 调解委员会的职能是“听取争端各方的陈述，审查其权利主张和反对意见，并向争端各方提出建议，以便达成和睦解决。”[36] 虽然调解委员会作出的报告仅具有建议性质而没有法律上的约束力，但它可以作为将来进一步协商的基础。《公约》规定，争端各方应以调解委员会的报告为基础，通过谈判达成协议；如果谈判未能达成协议，经彼此同意，争端各方应将问题提交国际司法或仲裁程序。[37]

然而，如果以调解委员会报告为基础的进一步谈判未能达成协议，争端各方是否有义务必须提交强制性第三方程序则可能存在争议，因为《公约》使用了看起来互相矛盾的措辞，一方面要求各方“应将问题提交”，另一方面又设置了“经彼此同意”的前提。有学者评论道，这是“整个公约中最令人感到奇怪的条款之一”。[38] 一种观点认为，《公约》除了使用“应”这一义务性用语之外，第 300 条还要求缔约国“诚意”履约，如果一方拒绝考虑提交强制解决程序，将会违反争端解决过程中的诚信义务。[39] 另一种观点认为，“经彼此同意，（争端各方）应”的用语只是为了强化这一观念，即如果缔约国已选择加以排除的话，强制性第三方仲裁或司法就不能适用于海洋划界或历史性权利争端。[40]

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33 例如，1974 年伊朗与阿联酋在大陆架划界过程中，由于波斯湾中的小岛阿布穆萨的主权在两国间存在争议，该岛在划界时被赋予零效力。参见袁古洁著：《国际海洋划界的理论与实践》，北京：法律出版社 2001 年版，第 35~40 页。

34 例如，1974 年日韩大陆架划界时，所划界限终止于两国主权有争议的独岛（竹岛）之南。参见朴椿浩编著：《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。

35 《联合国海洋法公约》附件五，第 11 条。

36 《联合国海洋法公约》附件五，第 6 条。

37 《联合国海洋法公约》第 298 条第 1(a)(2) 项。

38 Jr. John King Gamble, The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?, *Boston University International Law Journal*, Vol. 9, No. 39, 1991.

39 See e.g. Anne Sheehan, Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes, *University of Queensland Law Journal*, Vol. 24, No. 1, 2005.

40 See e.g. Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 262.

笔者赞同后一种观点。其一，从《公约》各用语间的逻辑关系看，争端各方虽然“应将问题提交”强制性解决程序，但其前提是“经彼此同意”，如果双方未能达成一致意见，就不存在“应提交”的问题。其二，这种逻辑关系还可以从《公约》第 299 条第 1 款的规定中得到印证：“根据第 297 条或以一项按照第 298 条发表的声明予以除外，不依第二节所规定的解决争端程序处理的争端，只有经争端各方协议，才可提交这种程序。”因此，《公约》提及的“诚信”义务以及义务性措辞“应”，所针对的对象应当是就提交强制性解决程序的可能性进行协商的过程，而非这种协商的结果。换言之，如果争端各方未能在调解委员会报告的基础上就实体问题的解决达成协议，至少还有义务就是否提交强制性第三方解决程序的问题“诚意”地进行磋商，但没有义务必须达成协议。如果磋商的结果是未能达成协议，双方剩余的唯一义务是根据《公约》第 283 条的规定，通过进一步谈判或其他和平方法解决争端迅速交换意见。[41]

（二）军事活动争端

《公约》意图规范的是和平时期的海洋利用问题，但这并不意味着《公约》与海上军事活动毫无关系。[42] 和平时期的海上军事活动与海军军舰的各种职能相关：首先，在国家管辖水域中的日常执法职责，通常涉及执行渔业、海关和移民方面的法律；[43] 其次，为履行其他职能做准备，海军通常在海上进行演习或武器试验；再次，海权国家利用海军为其全球军事影响力服务。[44] 国家在海上进行的各种军事活动无疑会成为各种争端的导火索，尤其是《公约》在建立起不同海域的不同制度之后，却几乎没有具体规定在不同海域中哪些军事活动可被允许，若被允许又应如何规范。例如，在根据《公约》建立起专属经济区制度之后，巴西、佛得角、印度、马来西亚、巴基斯坦和乌拉圭等国即声明，未经沿海国同意，他国不得在专属经济区内进行军事演习或放置军事装置；而一些海权国家，如德国、意大利及荷兰等，随即对这种声明表示了反对。问题的症结就在于，虽然专属经济区内航行、飞越和其他相关合法利用的自由被保留，但像武器试验这样的活动是否包括在这

41 Shabtai Rosenne and Louis B. Sohn eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, p. 134.

42 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 421.

43 但是，军舰的海上执法活动争端不属于第 298(1)(b) 条所指的军事活动争端，理由详见后文分析。

44 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 426.

些自由的范围内则并不明确。[45]

鉴于军事活动争端的高度政治敏感性，以及司法程序导致军事秘密被泄露的可能性，国家可以根据《公约》第 298 条发表声明，将其排除在《公约》第十五部分第二节的强制性争端解决程序之外。但应当注意的是，军舰或军用飞机所进行的海上执法活动不属于此处所指的军事活动。从《公约》第 298 条起草的历史看，将军事活动争端作为强制解决程序的选择性排除事项之一，在起草过程中一直是明确与海上执法活动争端相区别的。“关于争端解决的非正式工作小组”1975 年案文第 17 条第 3 款 c 项规定，一国可以声明排除“关于军事活动的争端，包括那些从事非商业性服务的政府船舶或飞机的军事活动，但是根据本公约进行的执法活动不应被视为军事活动。”[46] 在 1977 年联合国海洋法大会第 6 期会议上，一些国家对该案文提出了异议，认为它可能产生下列不公平的后果：在一国的专属经济区内，外国的军事活动将可不受第三方争端解决程序的约束，但沿海国的执法活动却受制于强制性的国际解决程序。结果，大会主席将案文进行了修正，使其“给予执法活动与军事活动相同的豁免”。[47] 根据修正后的案文，执法活动争端成为与军事活动争端相并列的可声明排除事项。[48] 在随后几期会议上，可以选择排除的执法活动争端范围，又被逐步缩小至与渔业和海洋科学研究相关的执法活动争端。[49]

（三）渔业执法活动和海洋科学研究执法活动争端

《公约》第 298 条第 1(b) 项同时规定，可以通过声明加以排除的争端类型还包括，“根据第二九七条第 2 款和第 3 款不属法院或法庭管辖的关于行使主权权利或管辖权的法律执行活动的争端”，即专属经济区内的渔业执法活动和专属经济区与大陆架上的科学研究执法活动争端。

《公约》第 297 条规定了自动例外的争端类型，包括渔业争端和海洋科学研究争端，但并非一切渔业和海洋科学研究争端都属于自动例外的范围。在渔业方面，无须声明即可排除在《公约》第十五部分第二节强制解决程序之外的，只有沿海国“对专属经济区内生物资源的主权权利或此项权利的行使的争端，包括关于其对决定可捕量、其捕捞能力、分配剩余量给其他国家、其关于养护和管理这种资

45 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 427.
46 SD. Gp/2nd Session/No.1/Rev. 5 (1975, mineo.), Art. 17(3)(c).
47 A/CONF.62/WP.10/Add.1(1977), VIII Off. Rec. 65, 70 (President).
48 A/CONF. 62/WP. 10 (ICNT 1977), Art. 297(1)(b), VIII Off. Rec. 1, 48.
49 Shabtai Rosenne and Louis B. Sohn eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, pp. 135~137.

源的法律和规章中所制订的条款和条件的斟酌决定权的争端”。[50] 而其他渔业争端，如公海渔业争端等，仍可提交强制解决程序。在海洋科学研究方面，自动例外范围也仅限于沿海国就专属经济区和大陆架上的海洋科学研究根据《公约》第 246 条“行使权利或斟酌决定权”，或者第 253 条“决定命令暂停或停止一项研究计划”的争端。[51] 属于自动例外类型的争端显然无须缔约国以声明方式加以排除，[52] 需要根据第 298 条声明排除的是与其相关的执法活动争端。

沿海国为行使其在专属经济区内对渔业资源的主权权利，可以采取包括登临、检查、逮捕在内的执法措施，确保其依照《公约》制定的法律和规章得到遵守。[53] 在检查有违法嫌疑的船舶过程中，则可能涉及紧追、扣船等具体措施。实践中，沿海国可能采取的其他渔业执法措施还包括：为过境渔船规定海道；要求渔船就进入和离开其专属经济区及其使用的路线进行报告；要求渔船过境时收起捕鱼设备等。[54] 沿海国对违法渔船的处罚“不得包括监禁，或任何其他方式的体罚”，并有义务“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”。[55] 虽然沿海国对其专属经济区内渔业资源的主权权利争端属于自动例外事项，但为保障这种权利得到实现而进行的执法活动若引发任何争端，只有通过声明方式才能加以排除。

在发生扣船的情况下，沿海国在获得适当担保后有义务迅速释放被扣留的船只和船员。[56] 如果沿海国没有这样做，船旗国可单方面将争议提交扣留国根据第 287 条接受的法院或法庭，或者提交国际海洋法法庭（不论扣留国是否接受其管辖）。[57] 但是，《公约》第 292 条下的迅速释放程序只能处理程序性问题，即释放的条件是否满足、是否应予立即释放的问题，“而不影响在主管的国内法庭对该船只、其船主或船员的任何案件的是非曲直”。[58] 由此可见，虽然沿海国在其专属经济区内对外国渔船的扣押属于专属经济区内的渔业执法活动，但对这类争端的选择性排除声明要受到第 292 条迅速释放程序规定的限制，有关船舶及船员是否应予立即释放的争端仍然属于第三方强制解决的事项。

《公约》没有任何条文规定与海洋科学研究有关的执法活动，但与渔业执法活动一样，沿海国为了使其批准或拒绝某项科学研究申请的斟酌权得到落实，或

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50 《联合国海洋法公约》第 297(3)(a) 条。
51 《联合国海洋法公约》第 297(2)(a) 条。
52 但其中一部分须提交强制调解程序，参见《联合国海洋法公约》第 297(2)(b)、(3)(b) 条。
53 《联合国海洋法公约》第 73 条第 1 款。
54 Burke William T., *New International Law of Fisheries: UNCLOS 1982 and beyond*, Oxford: Clarendon Press, 1994, pp. 315~335.
55 《联合国海洋法公约》第 73 条第 3 款、第 4 款。
56 《联合国海洋法公约》第 73 条第 2 款。
57 《联合国海洋法公约》第 292 条第 1 款。
58 《联合国海洋法公约》第 292 条第 3 款。

使其暂停或停止某项研究计划的决定得到执行，也可以按照其国内法采取驱逐、逮捕、处罚等执法措施。由这些执法措施引起的争端，缔约国可以选择发表声明加以排除，且排除的效果也仅适用于沿海国，而不适用于对方当事国。如果这些执法措施涉及对船舶的扣押，则如前所述，第 292 条有关船舶迅速释放争端强制解决的规定仍然适用。

特别应当注意的是，缔约国声明排除的渔业执法和海洋科研执法争端都仅能对沿海国产生法律效力，而不适用于船旗国和其他非沿海国。根据《公约》第 297 条第 2 款和第 3 款的规定，无论是渔业争端还是海洋科研争端，都只有“沿海国”一方“无义务同意”提交强制解决程序。[59] 这意味着，第 297 条的“自动例外”只是针对沿海国而言的，对于非沿海国的另一当事方而言，这些争端的解决程序仍然是强制性的。所以相应的，第 298 条规定的排除事项——“根据第 297 条第 2 款和第 3 款不属法院或法庭管辖的关于行使主权权利或管辖权的法律执行活动的争端”——也只能针对沿海国，而不适用于非沿海国。这样，在任何一方发表过声明的情况下，若船旗国或其他非沿海国的当事方意欲提交强制解决程序，沿海国无义务同意;但若是沿海国愿意提交强制解决程序，对方国家则有义务接受这种程序。

（四）正由联合国安理会执行《联合国宪章》所赋职务的争端

为了避免与联合国安理会维持国际和平与安全的行动相冲突，第 298 条第 1(c) 项规定缔约国可以发表声明，对于正由联合国安理会执行《联合国宪章》所赋职务的争端，不接受《公约》第十五部分第二节的强制解决程序。《联合国宪章》规定，如果当事国间争端之继续存在足以危及国际和平与安全的维持，“安全理事会在任何阶段，得建议适当程序或调整方法”。[60] 该条表明，对于如何解决一项国际争端，安理会仅有“建议”权而无决定权。可见，除非当事国自行决定遵从安理会对争端解决方式的建议，争端解决方式的选择实际上与安理会在职权范围内的行动并不会必然产生冲突。因此，《公约》仅将此种类型的争端规定为选择性排除事项，而非自动例外事项。当事国为了避免将来对安理会建议的遵从与其在《公约》下的义务相冲突，可以选择将此类型争端以声明方式排除出《公约》下的强制解决程序。但是，在实践中安理会也可能事后决定将某一争端事项从其议程中删除，或者鼓励争端各方用《公约》规定的方法解决，在这两种情况下，缔约国针对此类争端作出的排除性声明的效力就将终止。[61]

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59 《联合国海洋法公约》第 297 条第 2(a)、3(a) 款。
60 《联合国宪章》第 36 条第 1 款。
61 《联合国海洋法公约》第 298 条第 1(c) 款但书部分。

四、中国发表的排除性声明对中国当前所涉海洋争端解决途径的实质影响

（一）中国周边海域的划界和历史性水域争端

中国是一个海洋地理相对不利的国家，其专属经济区与大陆架几乎全部与邻国相连接，均存在需要与邻国划界的问题。在黄海，需要与朝鲜和韩国划界；[62] 在东海，除了与日本之间复杂的划界争端外，在东海北部与韩国也存在划界问题；在南海，由于存在岛屿主权争端，划界问题更为复杂，所涉国家包括越南、菲律宾、马来西亚、文莱、印尼，除划界争端外还存在历史性水域争端。

这些海洋争端，尤其是双方立场差异较大的中日东海划界以及情况复杂的南海划界，在久拖不决的情况下，是否有可能被其他当事国诉诸《公约》机制下的强制解决程序呢？根据前述分析，在中国已经根据《公约》第 298 条发表声明的情况下，只要中国政府不同意，这些争端都无法提交至任何国际法庭或仲裁庭，但是仍不能排除提交至《公约》附件五第二节强制调解程序的可能性。涉及海洋划界或历史性权利的争端，是否须提交强制调解取决于个案是否满足前述提交该程序的三个条件。只要任何一个条件得不到满足，当事国即可拒绝提交该程序。

1. 中韩黄海及东海东北部划界

中国与韩国在黄海和东海东北部面临专属经济区和大陆架划界问题。两国从 1996 年起开始进行海洋法磋商，同时协商专属经济区划界和大陆架划界问题，截止 2007 年 11 月共进行了 11 次磋商。除了在 2005 年 12 月举行的第十次磋商中就不涉及第三方主张的第一阶段划界对象海域的范围达成初步一致以外，对于划界的其他实质性问题尚未取得结果。[63] 对于划界原则，中国主张在考虑一切相关因素的情况下按“公平原则”划界，而韩国则主张所谓的“中间线原则”。据韩联社报道，在 2006 年 12 月举行的第十一次磋商中，韩国代表团仍然提出“等距离”原则，即按照中韩两国海岸线的中间线为界，划分两国专属经济区，而中国则在会谈中继续主张在划分专属经济区时考虑总的海岸线长度和沿海居民数量等因素，与韩国的主张存在分歧，双方之间的谈判很难取得进展。[64]

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62 由于朝鲜至今尚未批准加入 1982 年《联合国海洋法公约》，中朝黄海划界争端的解决程序不受公约机制的约束，因此不纳入本文讨论的范围。

63 《外交部条约法律司司长谈外交中的海洋工作》，下载于 http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/wjzdtyflgz/zgzhyflydgz/t255489.htm，2007 年 11 月 10 日。

64 《韩国媒体关注中韩海上专属经济区划界》，载于《国际先驱导报》2006 年 12 月 8 日第 225 期，第 2 版。

由于中韩两国都根据《公约》第 298 条发表过排除性声明，[65] 除非双方另有协议，划界争端将不会提交任何国际法庭或仲裁庭。但是，如果两国的争端久拖不决，将来是否存在进入强制调解程序的可能性呢？从目前两国磋商的进程看，将来因为分歧过大而导致磋商程序终止或仅仅停留在形式上的可能性并不能完全排除。一旦这种情况发生，经一方请求后是否应提交强制调解程序，取决于双方是否存在与划界相关的未决领土主权争议，以及争端最初发生是否是在 1994 年 11 月 16 日《公约》生效之前。对于前者，中韩两国间并不存在任何领土主权争议。近年来两国确实在位于东海北部的“苏岩礁”问题上存在争端，[66] 但苏岩礁仅是一块位于水下 4.6 米的暗礁，不属于任何一国的陆地领土，在海洋划界中也不具有任何效力，因此不能改变双方不存在领土主权争端的事实。中国外交部发言人也于 2006 年 9 月 14 日发表讲话明确指出，苏岩礁是位于东海北部的水下暗礁，中国与韩国在此不存在领土争端。[67] 那么余下的问题便是，中韩海洋划界争端是否发生于《公约》生效之前？

争端发生的时间取决于当事国的相反立场正式、明确形成之时。不少事实表明，在大陆架问题上，中韩双方的对立立场在 1994 年之前就已经确立了。韩国早在 1952 年即由当时的总统李承晚发布《关于毗连海域主权的总统声明》，对整个朝鲜半岛周围的大陆架提出主权要求。1970 年韩国又发布《海底矿物资源开发法》，同年颁布实施该法的 5020 号总统令，规定设立 7 个海底矿区。其中，在黄海的第一、二、三矿区，位于东海北部边缘的第四矿区以及第七矿区的西界大致是

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65 韩国于 2006 年 4 月 18 日，根据《联合国海洋法公约》第 298 条发表声明，排除第 298 条第 1 款 (a)(b)(c) 项所述事项进入公约第十五部分第二节规定的强制程序。联合国海洋事务和海洋法处，下载于 http://www.un.org/Depts/los/convention_agreements/convention declarations.htm，2007 年 10 月 2 日。

66 苏岩礁位于中国东海北部，在江苏南通和上海崇明岛以东约 150 海里，距离我国舟山群岛最东侧的童岛 133 海里，是江苏外海大陆架延伸的一部分，地理位置北纬 32°07′22.63″，东经 125°10′56.81″，是一块水下暗礁，历史上一直是中国渔民的传统渔场，位于中韩专属经济区主张重叠的海域。韩国从 2000 年下半年开始，不顾中国政府的多次交涉，投资 230 多亿韩元（约 2400 万美元）在苏岩礁打桩兴建了一座相当于 15 层楼高的巨大建筑物，取名为“韩国离於岛综合海洋科学基地”，并于 2003 年 6 月竣工交付使用。这个基地上建有直升机停机坪、卫星雷达和码头，并派 8 名常驻研究人员，15 天轮换一次。韩国政府坚持认为苏岩礁离韩国更近，应属韩国。参见《韩国媒体关注中韩海上专属经济区划界》，载于《国际先驱导报》2006 年 12 月 8 日第 225 期，第 2 版。

67 《2006 年 9 月 14 日外交部发言人秦刚在例行记者会上答记者问》，下载于 http://www.mfa.gov.cn/chn/xwfw/fyrth/t271883.htm，2006 年 11 月 10 日。

中韩两国的中间线。[68] 1973 年初，韩国当局批准一艘由美国海湾石油公司租用的巴拿马海底石油钻探船和几艘辅助船，在其宣布的矿区海域进行了一系列钻探活动。对此，中国外交部在当年 3 月 15 日发表声明表示了抗议："中国沿海海域的海底资源，属中国所有，关于中国同邻国在黄海和东海的管辖范围如何划分的问题，迄今尚未确定。目前，南朝鲜当局，公然单方面引进外国石油公司在上述地区进行钻探活动，对于这种作法，可能造成的后果中国政府保留一切权利。"[69] 1974 年 1 月 30 日韩国和日本签订《日韩共同开发大陆架协定》，在东海东北部片面地划了大面积的大陆架作为日韩"共同开发区"，并于 1980 年 5 月进行了钻探试采。对此，中国政府先后于 1974 年、1977 年、1978 年、1980 年就《日韩共同开发大陆架协定》的签订、批准、互换及钻探试采一事多次发表声明："根据大陆架是陆地领土自然延伸的基本原则，中华人民共和国对东海大陆架拥有不容侵犯的主权权利。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。日本政府背着中国同南朝鲜当局签订'协定'，片面划定所谓'共同开发区'，这是侵犯中国主权的行为，对此，中国政府绝对不能同意。"[70]

从这些事件可以看出，至少在 20 世纪 80 年代之前，中韩两国对黄海和东海东北部大陆架的对立主张就已经正式确立了，韩国是以勘探开发以及与日本签订条约等采取实际行动的方式表明其对黄海及东海大陆架的主权要求，而中国则是以发表抗议声明的方式正式表达了相反的立场。因此，在大陆架划界问题上，由于争端发生的时间条件得不到满足，即使将来双方谈判破裂或流于形式，争端也无须提交《公约》附件五第二节的强制调解程序。

然而，对于专属经济区，却没有明显证据表明双方的对立主张形成于 1994 年之前。由于专属经济区制度是在第三次联合国海洋法会议之后才出现的一种新制度，各国对专属经济区的划界主张出现得相对较晚。而且通常认为，专属经济区并非沿海国的固有海域，需经过宣布之后才存在。中韩两国有关建立专属经济区的立法分别于 1998 年和 1996 年公布并生效，而且韩国的《专属经济区法》在划界问题上仅规定"在国际法基础上以协议划定"，[71] 未提出具体的划界原则。因此，中韩间的专属经济区划界争端如果在久拖不决的情况下，经任何一方的要求均可提交强制调解。然而，从实践角度看，这种情况却并不太可能发生。其一，目前双方的大陆架划界和专属经济区划界是放在一起进行谈判的，极有可能划同一条界线，这也是国际海洋划界的普遍做法。如果大陆架划界不提交强制调解，也不太可能单独将专属经济区划界提交强制调解。其二，两国已于 2000 年签署了《中华

68 高健军著：《中国与国际海洋法》，北京：海洋出版社 2004 年版，第 93 页。
69 干焱平著：《海洋与中国未来概论》，北京：海洋出版社 2001 年版，第 23~24 页。
70 程晓霞主编：《国际公法学习参考资料》，北京：中央广播电视大学出版社 1985 年版，第 237~238 页。
71 Exclusive Economic Zone Act of Republic of Korea, Art. 2(2).

人民共和国政府和大韩民国政府渔业协定》，作为正式完成划界之前的临时安排。该协定设立的两国共同管理的“暂定措施水域”大致覆盖了两国在黄海和东海的争议海域，且在“暂定措施水域”两侧还分别划定了逐步过渡为专属经济区的“过渡水域”。[72] 协定的存在为协议解决专属经济区划界问题提供了良好条件，提交第三方强制调解的可能性并不大。

2. 中日东海划界

中国与日本在东海面临大陆架和专属经济区的划界。两国从 1995 年开始进行海洋法磋商，并于 1997 年签订了《中华人民共和国和日本国渔业协定》，对渔业问题作了划界前的临时安排。针对东海大陆架上的油气田开采问题，两国从 2004 年 10 月开始进行专项磋商，截至 2007 年 11 月，短短 3 年间共进行了 10 次磋商。在划界问题上，日方主张所谓的“中间线原则”，而中方则一贯坚持“自然延伸原则”。为缓和矛盾，中国提出在东海地区“搁置争议、共同开发”的主张，但从目前的磋商情况看，双方对共同开发的海域对象存在较大分歧，谈判仍很艰难。[73]

与上述中韩划界争端一样，在中国发表排除性声明之后，除非取得中方同意，中日间的东海划界争端将不可能被提交任何国际法庭或仲裁庭解决。对于是否可能提交强制调解的问题，也面临着大陆架争端和专属经济区争端的不同情况。就大陆架而言，虽然双方的划界立场差距更大、谈判破裂的可能性也更大，但由于双方在东海同时存在钓鱼岛列屿的领土主权争议，且划界争端发生在《公约》生效之前，所以仍无须提交强制调解。

钓鱼岛列屿主权争议的存在使得划界争端与对未决领土问题的审查相关联。钓鱼岛列屿（日本称“尖阁列岛”）由钓鱼岛、黄尾屿、赤尾屿、北小岛、南小岛等 11 个岛礁组成，位于冲绳海槽西北侧，距中国台湾基隆市东北 190 公里。由于钓鱼岛列屿位于中国所主张的大陆架上，如果其主权归属日本，而在未来的东海大陆架划界安排中被给予完全效力的话，中国的大陆架将减少约 3.6 万平方公里，和一个台湾岛的面积相仿。[74] 因此，其主权的归属问题将直接影响划界的结果。然而，这种影响并不是绝对的，在下列任何一种情况下钓鱼岛列屿问题将不会影响划界结果：一是双方事先达成协议，该阶段的划界范围止于争议领土可能对划界产生影响之处，即将因岛屿争议而形成的争议海域留待将来与领土争端一并解决；二是双方在划界过程中对钓鱼岛列屿不享有专属经济区和大陆架达成共识，并

72 《中华人民共和国政府和大韩民国政府渔业协定》第 7 条和第 8 条。

73 《苦谈三年分歧依旧，中日东海磋商求解》，载于《国际先驱导报》2007 年 10 月 15 日第 305 期，第 5 版。

74 傅崐成：《中国周边大陆架划界的方法与问题》，载于《中国海洋大学学报（社会科学版）》2004 年第 3 期。

在划界安排中赋予其零效力。[75] 如果出现这两种情况之一，不必然涉及未决领土主权争议这一条件便可得到满足。

即使出现上述划界与领土争议相脱钩的情况，两国的大陆架划界争端仍无须提交强制调解，因为争端发生时间早于《公约》生效日。在前述 1974 年《日韩共同开发大陆架协定》中，日本单方面将其划定的中日假想中间线作为开发区朝向中国一侧的界限，只留给中国 140~180 海里宽的大陆架。[76] 如前所述，中国政府对此多次表示抗议，并声明了中方在东海大陆架问题上一贯坚持的“自然延伸原则”。日本驻华使馆还曾于 1982 年 4 月 16 日向中国交通部递交过一份地图，明确提出以“中间线”的划界方法来划分日中之间的海洋界限。[77] 这些事件表明，双方大陆架争端发生的时间远远早于《公约》生效日。

然而，与中韩专属经济区争端相似，尚无明显证据表明中日专属经济区划界争端发生于《公约》生效之前。中日两国曾于 20 世纪 50 年代发生过大规模渔业争端，随后经由民间渔业谈判签订了一系列民间渔业协定，在 1972 年邦交正常化后又签署了正式的渔业协定，但这些协定的法律依据都是领海外公海捕鱼自由的传统国际法原则。从这些协定可以看出，尽管在 70 年代后，国际社会关于 200 海里专属经济区的法律制度已处在形成过程中，但中日双方都采取了继续适用公海捕鱼自由的传统国际海洋法态度。[78] 日本于 1977 年公布的《关于渔业水域的临时措施法》虽宣布建立宽度为 200 海里的“渔业水域”，但同时宣布该“水域”不扩及日本海西部和东海。[79] 自《公约》生效之后，中日两国才正式建立了各自的专属经济区制度。虽然两国的《专属经济区和大陆架法》分别表明了各自的专属经济区划界立场（中国为“公平原则”，日本为“中间线原则”），[80] 但两部法律的公布和生效时间分别为 1998 年和 1996 年，晚于《公约》生效的 1994 年。

同时，一如前文对钓鱼岛列屿主权争议与大陆架划界之关系的分析，在领土争议与划界问题相脱钩的两种情况下，专属经济区划界也不必同时审议未决领土争议。因此，仅从法律角度而言，在专属经济区划界问题上，如果争端在合理时间

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75 《联合国海洋法公约》第 121 条规定：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。但是，对于像钓鱼岛列屿中最大的钓鱼岛这样的岛屿，虽无人居住但存在淡水资源，是否属于“不能维持人类居住或其本身的经济生活的岩礁”，目前尚存争议，有待双方协商解决。

76 逯真林、赵新主编：《中国海军与海洋法》，北京：海军出版社 1990 年版，第 79 页。

77 张天飞：《国际法院的海域划界判例对中国与相邻和相向国家海洋划界的启示》（硕士学位论文），吉林：吉林大学 2007 年版，第 20 页。

78 张良福：《中国与海洋邻国初步建立新型渔业关系》，载于《中国海洋法学评论》2005 年第 2 期。

79 张良福：《中国与海洋邻国初步建立新型渔业关系》，载于《中国海洋法学评论》2005 年第 2 期。

80 《中华人民共和国专属经济区和大陆架法》第 2 条、《日本国专属经济区和大陆架法》第 1 条、第 2 条。

内未能解决，被对方提交强制调解程序的可能性是存在的。但是从日本方面目前的划界立场看，这种情况却不太可能发生。其一，日本一直坚持就专属经济区和大陆架划同一条界线，二者同时解决，如果大陆架划界无法提交强制调解，也不可能提出单独将专属经济区划界提交该程序。其二，日本为了绕开冲绳海槽对其划界的不利影响，一直主张目前处于其实际控制之下的钓鱼岛列屿可拥有相应的专属经济区和大陆架，并在划界中赋予其全效，以便跨过冲绳海槽在东海大陆架上主张权利。在这种情况下日方是不太会愿意将钓鱼岛列屿问题与划界脱钩的。更何况，即使日方愿意将二者脱钩，还必须取得中国的同意。所以，日本单独将专属经济区划界提交强制调解的可能性并不大。

3. 南海划界和历史性权利争端

中国在南海面临的划界问题更为复杂，在西部涉及与越南划界，在东部需与菲律宾划界，在南部则面临分别与马来西亚、印度尼西亚和文莱划界。由于在西沙和南沙群岛与上述国家同时存在岛屿领土主权争议，中国与这些国家之间的海洋划界谈判一直难以展开。目前仅在北部湾海域与越南签订了《中越关于两国在北部湾领海、专属经济区和大陆架的划界协定》。由于条件尚未成熟，中国在南海其他海域的划界问题上未提出具体主张，只是表明了“搁置争议、共同开发”的争端解决方针。此外，中国曾于 1947 年公布了一份《南海诸岛位置图》，图中包括一条 U 字形断续疆界线，称之为“U 形线”，这条线被视为中国人民对南海“历史性水域”的主张，中国在其中应享有诸如捕鱼、航行管制等历史性权利。[81] 这条线在 20 世纪 70 年代后期之前，并未受到南海周边地区各国的挑战，在南海地区发现海底石油之后，周边国家才开始反对该线。此后，中国在南海地区与周边各国便出现了历史性权利争端。

对于南海地区的海洋划界和历史性权利争端，在中国发表排除性声明之后，除非另有协议，已排除了强制提交任何国际法庭或仲裁庭解决的可能性。同时，由于必然涉及未决领土主权争议，而且这些领土争议所涉范围广、情况复杂，不可能与划界问题脱钩，所以也不可能提交强制调解程序，一切将留待双边或多边谈判解决。然而，目前的实际情况是，部分南海的周边国家对于资源开采行动的兴趣，远远比对于划界谈判的兴趣大得多。为了解除南海潜在冲突的危险，南海周边各国可以有两个选择。第一种选择不需要任何划界努力，借由武力强制或者借由相互邀约，共同参加没有内部分界线的区域开发计划。这样的做法不需要很多的法律努力，但需要很高的政治智慧。第二种选择则需要进行划界工作，不论达成协议采取临时措施，或达成最终的衡平划界解决，都需要细密的划界努力。[82]

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81 傅崐成：《中国在南海的历史性水域与台湾的法律立场》，载于傅崐成著：《海洋管理的法律问题》，台北：台湾文笙书局 2003 年版，第 466~526 页。

82 傅崐成：《中国周边大陆架划界的方法与问题》，载于《中国海洋大学学报（社会科学版）》2004 年第 3 期。

（二）与中国有关的军事活动争端

如前文所分析，《公约》没有对具体海域中军事活动的合法性问题作出明确规范，这使得国家的海上军事活动成为最易诱发争端的领域之一。海上强国的军舰和军用飞机每天在世界各地的不同海域中执行着各种各样的军事任务，包括兵力投放、获取军事情报信息、显示武力和实行战略威慑等等。这些活动自然会遭到沿海国家的强烈反对，并采取相应的对抗措施。中国与这些海权国家尤其是美国，在中国近海也经常发生这样的摩擦，例如 1994 年中美海军黄海“对峙”事件、2001 年南海上空中美“撞机”事件、2002 年美国“鲍迪奇”号军用测量船闯入黄海事件等等。随着美国即将批准《公约》，[83] 将来中美之间海上军事争端的解决程序也将受到《公约》机制的约束。

在中国发表排除性声明之后，与中国有关的军事活动争端将不受《公约》强制解决机制限制，不必进入第十五部分第二节规定的国际司法或仲裁程序。然而，由于国家的海上军事活动往往是以军舰的海上航行或军用飞机的海上飞越活动为载体的，因此在具体个案中，中国与军舰或军用飞机所属国的争端究竟是属于军事活动争端还是航行或飞越权利争端，可能会存在争议。

实践中存在两种典型的情况。一种是外国军用船舶或飞机在通过中国的专属经济区或其上空时从事军事侦察、监听等活动所产生的争端；另一种是外国军舰在我国领海的无害通过权争端。在前一种争端中，中国方面往往是指责外国军用船舶或飞机的军事活动对中国国家安全造成了威胁，而对方当事国则主张中国方面的跟踪、拦截行动使其军用船舶或飞机的自由航行、飞越权受到了侵犯，双方对争端的定性存在差异。以“鲍迪奇”号事件为例，中国政府当时向美国国务院提出外交照会，抗议其海洋测量船侵入中国黄海专属经济区海域，从事监听、侦察军事等活动；而美国国防部的某些官员则指责中国的抗议“很无理”，因为“鲍迪奇”号是在中国海岸以外大约 100 公里的“公海”上作业，它应享有航行自由权。[84] 在中美“撞机”事件中，双方的对立主张也与此类似。后一种争端则是由《公约》本身规定的

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83 美国参议院外交关系委员会已于 2007 年 10 月 31 日以 17 票对 4 票决定将《联合国海洋法公约》提交参议院全体会议批准。See Jr. Joseph R. Biden, Opening Statement: Senate Foreign Relations Business Considers the Convention on the Law of the Sea, at http://biden.senate.gov/newsroom/details.cfm?id=286463&&, 5 November 2007.

84 丁成耀：《从国际法角度看美国测量船闯入中国专属经济区事件》，载于《华东政法学院学报》2003 年第 2 期。

模糊性引起的。[85] 一方面，中国认为："《联合国海洋法公约》有关领海内无害通过的规定，不妨碍沿海国按其法律规章要求外国军舰通过领海必须事先得到该国许可或通知该国的权利。"[86] 另一方面，德国、意大利等海上军事强国则在加入《公约》时发表声明指出，《公约》的任何规定，都不得认为授权沿海国把任何类别的外国船舶的无害通过权至于需要事先同意或通知的地位。英美等国也曾表达过类似的立场。[87] 由于各方立场的明显对立，将来在中国领海发生外国军舰通过权争端的可能性是存在的。而这种争端也面临着是属于军事活动争端还是航行权利争端的定性问题。

这些争端的定性对于争端解决的程序而言具有重要意义，因为当事国的声明可以将军事活动争端排除强制解决程序，却不能排除航行或飞越权利争端。尤其是《公约》第 297 条第 1 款明确规定，关于在专属经济区内行使航行、飞越等自由权的争端，必须提交《公约》第十五部分第二节规定的强制程序。

实际上，涉及军舰和军用飞机航行及飞越权利的争端，并不能排除其作为军事活动争端的根本性质。相反，军舰和军用飞机之所以在世界各地的不同海域中航行或飞越，正是为了执行其军事任务。为了履行其威慑或保护任务，这些军事力量必须具备在全球各海域中持续出现或迅速移动的能力。[88] 航行或飞越与执行军事任务之间是手段与目的的关系，手段服务于目的，行为的性质应由其目的而非手段来决定。因此，只要这些军舰或军用飞机不是被用于商业目的，其航行或飞越活动仍然是军事活动的组成部分，由此而产生的争端仍然属于可以由声明加以排除的军事活动争端。如果已有初步证据证明这些军舰或飞机在航行或飞越过程中从事军事侦察、探测或监听等活动，则其军事活动的性质就更加显而易见。至于《公约》第 297 条第 1 款的规定，应当理解为仅仅针对非军用船舶或飞机在专属经济区内的航行或飞越自由权争端。

此外，《公约》第 298 条第 1(b) 项虽指明军事活动的从事主体不仅限于军舰和军用飞机，还包括从事非商业服务的政府船只和飞机，但该条文的列举并未穷尽，还有一种情况也应纳入军事活动争端的范畴：即使进行航行或飞越的船舶或飞机本身是民用船舶或飞机，但如果争端发生时，其所进行航行或飞越活动是为执行军事任务，或者在从事商业活动的同时也被用于搜集军事情报等军事目的，那

85 有关《联合国海洋法公约》对领海无害通过权适用对象之规定的模糊性问题，参见赵建文：《论〈联合国海洋法公约〉缔约国关于军舰通过领海问题的解释性声明》，载于《中国海洋法学评论》2005 年第 2 期。

86 中国在批准《联合国海洋法公约》时发表的声明，参见《全国人民代表大会常务委员会关于批准〈联合国海洋法公约〉的决定》，1996 年 5 月 15 日。

87 赵建文：《论〈联合国海洋法公约〉缔约国关于军舰通过领海问题的解释性声明》，载于《中国海洋法学评论》2005 年第 2 期。

88 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 262, note 288.

么这种航行或飞越就具有了军事活动的性质，亦属于中国政府已经声明排除的争端。

（三）中国与邻国在专属经济区内的渔业执法争端

与前述各类争端不同，中国与邻国间的渔业执法纠纷既发生在中国的专属经济区，又发生在他国的专属经济区以及两国有争议的管辖海域。其中，又以后者的问题更为突出，主要表现在中国渔船在这些海域屡遭他国执法当局逮捕、扣押。这些渔船遭扣的原因很多，有的是由于机械故障或其他不可抗力因素而误入他国专属经济区，有的是未获执照而擅入他国专属经济区偷渔，有的是因为在有争议的海域作业，还有的仅仅是因为航行过程中途经沿海国专属经济区就遭到逮捕。不论中国渔船的行为是否违法在先，沿海国的渔业执法措施都有可能对中国渔船的合法权利造成侵害。这主要表现在以下几个方面：[89] (1) 沿海国在证据不足的情况下，对过境航行的中国渔船采取查扣措施；[90] (2) 沿海国在专属经济区中对中国渔船采取管制措施时，过度使用武力；[91] (3) 沿海国对中国渔民采取强制措施后，怠于通知或拖延对渔民的羁押期限。[92]

对于上述严重侵害中国渔民权利的争端，中国政府除了通过外交途径加以解决外，在外国当局拒不释放被扣船舶和渔民的情况下，还可以考虑根据《公约》第 292 条，向国际海洋法法庭或扣留国根据第 287 条接受的其他法院或法庭，申请船只和船员的迅速释放。同时，由于根据第 292 条提起的船只和船员迅速释放案

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89 李毅：《与中国有关的专属经济区渔业争端及其解决途径之思考》，载于《东北亚论坛》2007 年第 2 期。

90 例如，2004 年 9 月 30 日，浙江某公司冷藏运输船途经俄罗斯专属经济区时，被俄方以涉嫌非法捕捞为由予以扣留。中国驻哈巴罗夫斯克总领事馆获悉后立即与俄方交涉，指出该船属于运输船，相关手续齐备，且船上并无捕捞工具，不可能进行非法捕捞，在俄专属经济区属无害通过。俄方经进一步调查得出非法捕捞不能成立的结论后，于 10 月 9 日无条件释放了该船。

91 例如，2005 年 9 月 1 日，一艘中国“福远渔 1320 号”渔船在印尼巴布亚岛的阿拉夫拉水域遭印尼海军追赶和炮击，造成中方船员 1 死 2 伤。据调查，“福远渔 1320 号”渔船所持有的中国农业部推荐函及在印尼海域捕鱼的许可证均已过期，其有关证件虽已于 2005 年 6 月中旬寄给印尼方代理机构，但因未及时向印尼政府交纳税金，代理机构并未为其办妥在印尼海域作业的延期手续。

92 例如，2002 年 1 月 31 日至 2 月 6 日，中国海南省的五艘渔船因误入菲律宾海域捕鱼，被菲海岸警卫队扣留，后来又有一艘来自广东台山的渔船也在同一海域被菲方扣押。包括 14 名未成年人在内的 136 名中国渔民被关进了巴拉望省公主港市监狱。经中方一再与菲律宾官方交涉，至 2002 年 7 月，中国驻菲律宾大使馆和菲律宾司法部长终于达成了释放中国渔民的“一揽子框架协议”，但菲方随后又以一些议员及环保组织反对为由，单方面推翻“协议”，提出附带政治色彩的进一步要求。在中国渔民接受没收渔船和罚款的情况下，菲方仍然拖延羁押时间，直至 10 月 5 日，这些渔民才最终全部获释回国。获释回国的中国渔民虽作为被告参与了诉讼，但菲方烦琐、冗长的低效率处理程序也使他们的合法利益受到了损害。

件不受排除性声明限制，中国政府也应做好将来作为被告应诉的准备。不过，第 292 条的诉讼只解决是否应迅速释放这一程序问题。就争端的实体问题，除非双方另有协议或属于后文所述的双重性质情况，中国所作的排除性声明使得船旗国一方无法将其提交国际法庭或仲裁庭，争端的解决将依赖双边谈判等外交途径。

实践中，由渔业执法活动引起的争端也存在需要定性的问题，主要体现在沿海国在专属经济区内的渔业执法活动可能与他国渔船的自由航行权相冲突。例如，中国渔船为通过之目的在外国专属经济区内享有自由航行的权利，而外国当局针对中国的过境渔船采取诸如登临、检查、逮捕等渔业执法措施，就会侵害这种权利。实际上这类事件已多次发生。但由此引发的争端是属于渔业执法活动争端，还是属于专属经济区内航行自由权的争端，则可能会存在不同看法。比如，一艘中国渔船在航行通过某国专属经济区时，被沿海国执法部门认定存在偷渔行为而遭逮捕，双方发生争端。沿海国可能认为这是专属经济区内渔业执法活动的争端，而中国方面则可能认为沿海国滥用执法权侵害了中国渔船的自由航行权，因此主张属于航行自由争端。反过来，若在中国的专属经济区发生了中国执法机关扣押外国渔船的事件，中外双方的立场又可能发生换位。在相关事实尚不明确之前，应当承认这种争端兼具渔业执法与航行权利两类争端的双重性质。然而，争端的定性对其解决程序具有重要意义：争端若属于前者，中国发表的声明已排除了船旗国一方提交第三方强制解决的可能性；若属于后者，则按照《公约》第 297 条第 1 款之规定，在合理时间内未能解决的情况下可经任何一方请求提交强制解决程序。《公约》没有对第 297 条和第 298 条之间的关系作出解释，因此在两者发生冲突的情况下如何处理并不明确。但为了解决相关国际争端解决机构的管辖权问题，又必须要对争端类型作出定性。

笔者认为，对于此类争端的定性，应区分不同情况处理。一种情况是外国有关专属经济区的立法本身违反了《公约》的规定，单方面剥夺了他国渔船正常应当享有的自由航行权。比如，菲律宾 1998 年修订的现行渔业法规定，禁止任何外国个人、企业和团体在菲律宾水域捕鱼或行驶任何种类的渔船、并规定只要外国渔船出现在菲律宾领海或专属经济区内，无论其被发现时是否正在捕鱼，或船上是否有渔获物，一律被视为偷捕。[93] 这种情况下渔业执法机关采取措施引起的争端应定性为航行权利争端，因为争端的焦点并非执法措施本身是否合法、得当，而是剥夺外国渔船自由航行权的立法是否违法了《公约》的规定。因此，此种争端属于第 297 条第 1 款所规定的争端类型，可以经争端一方请求提交导致有拘束力裁判的强制程序。

另一种情况是执法所依据的法律规章虽符合《公约》规定，但执法机关在具体

93 李毅：《与中国有关的专属经济区渔业争端及其解决途径之思考》，载于《东北亚论坛》2007 年第 2 期。

执法过程中违法或不当采取措施引起争端。这种情况较为复杂，从善意解释《公约》的角度，应对不同定性可能造成的后果加以考量。实际上，无论将其定性为哪种争端类型，都可能出现当事国滥用权利的情况。若定性为执法活动争端，沿海国可能利用其排除性声明作为保护伞，拒绝将其滥用执法权干扰或阻碍他国船舶航行自由的行为提交国际机构审查；若定性为航行自由权争端，则船旗国可能利用提交国际法庭或仲裁庭相要挟，迫使不愿第三方介入的沿海国放弃对船旗国船舶的偷渔行为采取正当的执法措施。然而，《公约》第 294 条有关法庭或仲裁庭“初步程序”规定的存在，将会有效防止上述后一种情况即船旗国滥用权利的发生。该条专门针对第 297 条第 1 款所指的争端（包括专属经济区内的航行自由权争端）规定，法院或法庭在进行实体审理前应当经一方请求或主动决定，所诉权利主张是否构成滥用法律程序，或者根据初步证明是否有理由，如果认为该项主张构成滥用法律程序或者根据初步证明并无理由，即不应对该案采取任何进一步行动。[94]《公约》规定这一条文的目的，正是为了防止沿海国在专属经济区内主权权利的行使受到他国滥用法律程序行为的侵扰。[95] 鉴于船旗国滥用权利的行为会受到第 294 条这一“安全阀”的限制，而沿海国对权利的滥用则没有相应的条款可以制约，笔者倾向于将这种双重性质的争端定性为可以提交国际法庭或仲裁庭强制解决的航行自由权争端。

若如此定性，虽然会使中国所作的排除性声明在这类争端上不具效力，但实际上在争端解决过程中对中国更有利。在这类争端中，大多数情况是中国渔民处于受害者的弱势地位，中国是船旗国一方。如前文分析，即使将争端定性为渔业执法活动争端，中国的排除性声明也只对沿海国有效，作为船旗国的中国一方仍然受制于《公约》的强制性争端解决程序。而反过来，将争端定性为航行自由权争端却有利于作为船旗国的中方有效解决争端。实践中，处于优势地位的外国当局常常故意拖延争端的处理，或者对中方的合法要求不予理会，令中国渔民的权益遭到更大侵害。对此，中方可以在外交交涉中适时作出可能提交国际仲裁强制解决的表示，[96] 向对方合理施压，促使外国当局尽快地妥善解决问题。自知理亏的外国当局自然不会乐意看到争端被提交至国际机构解决，更不用说主动提交了，所以最终是否提交国际仲裁则完全由中方决定。当然，如果争端真的由中国提交国际仲裁法庭，根据《公约》第 288 条第 4 款之规定，仲裁法庭有权自行决定其是否对具体个案拥有管辖权。因此，对争端类型定性的最终权力属于受理该案的仲

94 《联合国海洋法公约》第 294 条第 1 款。

95 Shabtai Rosenne and Louis B. Sohn eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, pp. 76~77, 101.

96 由于中国没有对《联合国海洋法公约》第 287 条规定的争端解决机构作出选择，任何争端只能提交起剩余备用作用的附件七仲裁庭。

裁法庭。

对于中国当前所涉的上述三大类海洋争端，如果中国政府在个案中自愿与对方当事国达成协议，也并不妨碍将任何属于声明排除范围内的争端提交国际法庭、仲裁庭或强制调解。[97] 因此可以说，对于这些争端而言，按照何种程序解决争端的主动权很大程度上掌握在中国政府手中。

五、结　论

中国根据《公约》第 298 条发表排除性声明，其法律效果并非简单地用“排除”一词就能解释，其中蕴涵的法律意义丰富而复杂。总结而言，首先，作出声明并不意味着声明下的争端不再受制于任何强制性解决程序，在符合一定条件的情况下一些类型的争端须进入强制调解程序，而一些程序性事项仍然受制于国际法庭的强制管辖。中韩、中日专属经济区划界争端，至少在技术上还存在提交《公约》附件五第二节强制调解程序的可能性；[98] 而与渔业执法和海洋科研执法有关的船舶和船员迅速释放争端，则须接受国际海洋法法庭的强制管辖。[99] 其次，对于渔业执法和海洋科研执法活动争端，排除性声明只对沿海国具有法律效力，而不适用于对方当事国。如果沿海国意欲提交强制解决程序，而中国是另一方当事国，则中国的排除性声明将不能阻却这种强制程序的适用。[100] 最后，由于海洋争端的复杂性，许多争端面临着如何定性的难题，而定性的结果对争端解决的程序至关重要。中国所涉的军事活动争端以及渔业执法活动争端中，都面临着与航行自由权争端竞合的问题，如果提交至国际法庭或仲裁庭，对其定性的最终权力属于案件的受理机构。[101]

针对根据第 298 条发表的排除性声明所产生的不同法律效果，中国政府在将来处理海洋争端时应当采取不同的策略。

其一，对于那些已由声明排除的争端，中国自然应坚持通过和平协商方式解决争端的基本立场；在双方立场差异过大一时无法解决的情况下，可考虑运用“主权在我、搁置争议、共同开发”等灵活方法。

其二，对于可能被提交强制调解的专属经济区划界争端，如果对方意欲提交而中国并不希望进入该程序，可考虑在谈判中采用专属经济区与大陆架一并划

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97 《联合国海洋法公约》第 298 条第 2 款规定：根据第 1 款作出声明的缔约国，可随时撤回声明，或同意将该声明所排除的争端提交本公约规定的任何程序。

98 具体论述请参见本文第三部分第（一）节第 3 项，以及第四部分第（一）节第 1 项、第 2 项。

99 具体论述请参见本文第三部分第（三）节第 4 段。

100 具体论述请参见本文第三部分第（三）节第 6 段。

101 具体论述请参见本文第四部分第（二）节、第（三）节。

界、领土主权争议与划界同时解决等立场，排除其进入强制调解的可能性；如果基于实体问题的考虑不宜采用上述立场，则应认真研究《公约》附件五第二节，为进入这一程序做好准备。

其三，对于涉及双重性质的争端，基于尽可能排除强制解决程序的立场，中国应主张将同时涉及航行和飞越自由权和军事活动的争端定性为军事活动争端；但在中国渔船屡遭无理扣押的渔业执法领域，又适宜主张将同时涉及渔船航行自由权和渔业执法活动的争端定性为航行自由权争端，以便利用国际争端解决机构的强制管辖权向对方合理施压。

其四，对于中国渔船为受害方的船舶及船员扣押争端，应积极考虑运用《公约》第 292 条的迅速释放程序解决争端。

其五，对于声明所不能排除的争端，应与对方积极磋商，争取利用双边协商的方式加以解决；由于中国没有对第 287 条规定的争端解决机构作出选择，争端对方一旦提交强制解决程序将只能进入《公约》附件七的仲裁程序，因此必须对该仲裁程序进行认真研究，为将来可能发生的国际仲裁做好准备。

外国军舰在领海的法律地位

田士臣 *

内容摘要: 军舰作为国家机关在外国领海享有国家管辖豁免,由此与沿海国在领海的管辖权形成冲突,这种冲突的解决涉及国际法和国内法两个层面对外国军舰在领海内法律地位的规范。在国际法层面,首先应考虑军舰的船旗国和沿海国之间是否有规范军舰法律地位的条约;在没有特别条约的情况下,应考虑一般承认的国际公约的规定。在国内法层面,关于领海内外国军舰的权利和义务,应考虑沿海国根据《联合国海洋法公约》和其他国际法规则所制定的国内法。

关键词: 军舰 领海 法律地位 《联合国海洋法公约》

一、引 言

武装部队作为国家机关代表着一个国家的主权权力。一国的军队在和平时期合法出现在另一国家的陆地领土上,无论是为了过境、驻扎或其他军事合作活动,都必须经过该国的同意,由该接受国与派遣国签订《部队地位协定》。但是,同样是国家机关,作为一国海上武装力量组成部分的军舰与陆军和空军部队不同,海军军舰经常可以出于各种理由经过外国领海和进入外国港口,而且不需要与沿海国签订部队地位协定。[1]

由于军舰作为国家机关享有主权豁免,这样就会产生沿海国领海主权和军舰的船旗国管辖豁免之间的冲突和矛盾。对于陆上武装部队而言,这种冲突和矛盾往往通过当事国签署双边或多边的《部队地位协定》来解决。在协定规定也适用

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* 田士臣,法学硕士,海军军事学术研究所海上安全政策研究室助理研究员。本文仅代表作者本人学术观点,不代表作者所在机构的立场和观点。

1 海军具有的这种优越性,除了其自身的机动性和海洋的物理流动性外,主要是因为海军在沿海国领海享有无害通过权,而且,在没有特别禁止的情况下还可以进入一国内水港口。尽管这种无害通过的权利并没有形成习惯国际法,且许多沿海国规定这种权利的行使须经事先批准或通报,但在沿海国立法没有上述限制性规定的情况下,其领海对任何国家的军舰都是开放的。沿海国港口的法律地位虽然是沿海国内水,只要没有特别的国际条约或沿海国特别法律禁止驶入,对各国军舰也是开放的。海军军舰在领海的无害通过权和在没有禁止条件下可以进入内水港口的权利,空军和陆军是没有的。除非经沿海国同意,外国的陆军和空军是没有权利进入其他国家的领海和领空的。

于海军的情况下，上述沿海国领海主权和军舰的船旗国国家管辖豁免之间的冲突和矛盾也就不存在。但是，由于外国军舰进入沿海国领海往往不需要签署协议，也就不存在可以适用于海军的《部队地位协定》。因此，如何对待领海内的外国军舰就成了沿海国必须解决的问题。实践中，已经形成了一些关于领海内外国军舰法律地位的习惯法规则。但是，军舰船员登陆后的法律地位仍然是不确定的，[2] 这不在本文的讨论范围之内。国际法在承认外国军舰在沿海国领海内具有特殊法律地位的同时，对沿海国在领海内的管辖权也作出了规定。特别是 1982 年《联合国海洋法公约》对领海内外国军舰可适用的规则作出了规定，为沿海国制定关于领海内外国军舰地位的国内立法提供了依据。因此，关于外国军舰在沿海国领海的权利和义务，既应考虑国际条约法和国际习惯法的规定，也应考虑沿海国国内立法的规定。

二、关于领海内外国军舰法律地位的条约法规则

（一）通过签署《部队地位协定》规范外国军用船舶在领海的法律地位

国家之间缔结《部队地位协定》早已成为普遍的国家实践，[3] 目的通常是为了促进国际军事安全合作，落实国防合作安排。如果外国军舰作为客军的一部分访问沿海国内水港口或通过其领海，或长期在沿海国驻泊，通常情况下，军舰的地位完全适用相关国家签订的《部队地位协定》。《部队地位协定》是派遣国与接受国之间签订的调整经接受国同意在其境内执行职务的派遣国武装部队的地位的国际条约。《部队地位协定》对接受国和派遣国之间管辖权的划分、民事求偿等问题已经作出了明确规定，因此，除非有完全相反的规定，该部队地位协定完全适用于作为客军组成部分的派遣国海军部队。以《中华人民共和国和俄罗斯联邦关于举行联合军事演习期间其部队临时处于对方领土的地位的协定》为例，如果中俄双方的军用船舶作为联合军事演习部队组成部分临时进入对方领海，其在对方领海的地位以及舰员上岸后的地位则完全适用上述协定的有关规定。又如，美国与日本、

2 国际法研究院于 1898 年通过了《关于船舶及其船员在外国港口的法律地位的规则》，其中第 8 条至第 24 条是关于军舰在外国领水内的地位。1928 年又通过一个类似的规则，其中第 10 条至第 26 条是关于和平时期军舰及船员在外国港口的地位问题。这些规定反映了当时的国际法规则。见［英］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 603 页。

3 北约集团国家于 1951 年签署了《北大西洋公约组织武装部队地位协定》。北约扩大后，和平伙伴关系成员国又于 1995 年再次签署部队地位协定。前华约集团国家也都与前苏联缔结了部队地位协定。二战后，美国与日本、韩国、澳大利亚、菲律宾等多个盟国或非盟国国家缔结了部队地位协定。

韩国等多个国家签署了《部队地位协定》，对于根据《部队地位协定》驻泊东道国的美国军用船舶，其在东道国领海的地位以及舰员上岸后的地位也适用部队地位协定的有关规定。

（二）1982 年《联合国海洋法公约》对领海内外国军舰法律地位的规定

1982 年《联合国海洋法公约》规定了各种海域的法律地位以及开发和利用海洋的各种活动应遵守的规则和制度，其中也包括领海内外国军用船舶地位的法律规则。

1. 一般规定

关于领海内外国军舰法律地位的规则主要规定于《联合国海洋法公约》第二部分第三节“领海的无害通过制度”，[4] 其中许多条款对外国军舰在沿海国领海的权利和义务作出了规定。特别是 C 分节“适用于军舰和其他用于非商业目的的政府船舶的规则”，对军舰的定义、军舰对沿海国法律和规章的不遵守、船旗国对军舰或其他用于非商业目的的政府船舶所造成的损害的责任、军舰和其他用于非商业目的的政府船舶的豁免权等作出了明确规定。囿于篇幅，笔者不再做详细的阐述。

2. 领海海峡通过制度对领海内外国军舰法律地位产生的影响

领海海峡作为沿岸国的领海水域，具有与领海相同的法律地位。但是，因领海海峡两端连接海域的法律性质、沿岸情况和通过海峡进行国际航行的船舶的密度不同，领海海峡区分不同情况适用无害通过制度和过境通行制度，对军舰的航行权利产生了直接的影响。

（1）通过实行无害通过制度的领海海峡

连接公海或专属经济区一部分和一国领海的领海海峡实行无害通过制度。这种海峡就是《联合国海洋法公约》第 45 条规定的所谓“死胡同”海峡，主要包括蒂朗海峡、赫德哈伯航道、巴林—沙特阿拉伯航道、乔治亚海峡以及洪都拉斯海湾。如果领海海峡由海峡沿岸国的一个岛屿和该国大陆形成，而且该岛向海一面有在航行和水文特征方面同样方便的一条穿过公海，或穿过专属经济区的航道，也适用无害通过制度。[5] 以上海峡中的无害通过不应停止，潜艇在通过此种领海海峡时应浮出水面航行，军舰在通过上述 2 种领海海域的时候，应遵守《联合国海洋法公约》关于无害通过制度的相关规定。

（2）通过实行过境通行制度的领海海峡

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4 1982 年《联合国海洋法公约》第 17 条至第 32 条。
5 1982 年《联合国海洋法公约》第 38 条第 1 款。

连接公海或专属经济区的一部分和公海或专属经济区的另一部分用于国际航行的领海海峡实行过境通行制度，过境通行制度适用于包括军用舰机在内的所有船舶和飞机。《联合国海洋法公约》并没有对“用于国际航行的海峡”下一个明确的定义。按照国际法院在“科浮海峡”案中的判决，决定国际海峡性质的不是海峡的通过量或海峡对于国际航运的重要性，而是主要取决于它连接公海两部分的地理状况以及用于国际航运的事实。过境通行是船舶和飞机在遵守有关国际法和海峡沿岸国有关法律和规章的前提下，为继续不停和迅速过境的目的而行使航行和飞越自由。只要船舶以通常方式过境，就不应受阻碍，也就是说，潜艇可以在水下航行、舰队可以编队航行，因为这是它们的通常方式。在享有航行和飞越自由的同时，过境通行的船舶和飞机也要遵守《联合国海洋法公约》为其规定的义务，并遵守海峡沿岸国根据《联合国海洋法公约》和其他国际法规则制定的国内法规定。

3. 群岛海道通过制度对领海内外国军舰法律地位产生的影响

在一般情况下，军舰在群岛国领海的法律地位适用无害通过制度的有关规则。但是，群岛国可指定适当的海道和其上的空中航道，称为群岛海道，以便外国船舶和飞机继续不停和迅速通过或飞越其群岛水域和邻接的领海。包括军用舰机、潜艇在内的所有船舶和飞机均享有在这种海道和空中航道内的群岛海道通过权。这种海道和空中航道应穿过群岛水域和邻接的领海，并应包括用作通过群岛水域或其上空的国际航行或飞越的航道的所有正常通道。因此，在群岛海道穿过的群岛国领海水域内，外国军舰的地位适用群岛海道通过制度的相关规则。[6]

（三）其他条约对领海内外国军舰法律地位的影响

海岸相向或相邻的沿海国对于彼此之间相向或相邻的领海海域、尤其是特定海峡内的海域可能具有特殊的安全利益，相关当事国通常会签署特别的条约来规定该海域的航行通过制度，这对外国军舰在该海域的通行权利将产生影响。《联合国海洋法公约》第 35 条特别规定，某些海峡的通过已全部或部分地规定在长期存在、现行有效的专门关于这种海峡的国际公约中，对于这种已经有专门条约规范的海峡，不适用过境通行制度。因此，尽管海峡可能在沿海国领海海域之内，外国军舰通过此种海峡应遵守专门条约的相关规定。比如，国际社会一般公认在土耳其欧亚两部分之间连接马尔马拉海与爱琴海的达达尼尔海峡和博斯普鲁斯海峡适

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6 “群岛海道通过权”是指按照《联合国海洋法公约》的规定，专为在公海或专属经济区的一部分和公海或专属经济区的另一部分之间继续不停、迅速和无障碍地过境的目的，行使正常方式的航行和飞越的权利。这种海道和空中航道应以通道进出点之间的一系列连续不断的中心线划定，通过群岛海道和空中航道的船舶和飞机在通过时不应偏离这种中心线 25 海里以外，但这种船舶和飞机在航行时与海岸的距离不应小于海道边缘各岛最近各点之间的距离的 10%。

用 1936 年《蒙特利尔公约》的规定，其中包括许多军舰在平时和战时通行权利的规定；[7] 在南美洲大陆南端和火地岛等岛屿之间、沟通太平洋和大西洋之间的麦哲伦海峡，由《阿根廷与智利边界条约》第 5 条调整。

三、关于领海内外国军舰法律地位的习惯国际法规则

不管是在公海、外国领海或内水，军舰都具有特殊的法律地位，并且形成了一些习惯国际法规则。[8] 军舰法律地位的特殊性表现为其享有的特权和豁免。[9] 首先，军舰属于国家财产，不能成为任何司法执行的对象，免于逮捕或扣押。其次，军舰具有国家领土的属性，经常从法律拟制的角度被称为“船旗国浮动的领土”，享有不受船旗国以外任何其他国家管辖的豁免权。警察和港口机构或沿岸国的任何官员，只有在军舰指挥官的允许下才能登船。军舰所载的人和物是在军舰所属国的专属管辖之下，即使在外国领水或内水也是如此。舰上服务人员在舰上的犯罪行为，专属于舰长和船旗国当局的管辖。最后，军舰是国家机关，其行为属国家行为，享有本国的不受其他国家管辖的主权豁免。军舰不能被要求登临搜查或检查。军舰应按《联合国海洋法公约》的规定遵守沿海国的交通管制以及对排污、卫生、检疫等的规定，但即使军舰违反了这些规定，沿海国所能采取的措施也只能是要求该军舰离开其领海。

四、关于领海内外国军舰地位的国内立法

如前所述，外国军舰在沿海国领海具有特殊的法律地位，享有国家主权豁免，但是，这并非意味着外国军舰在沿海国领海可以不受任何沿海国国内法管辖而任

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7 Jia Bingbing, *The Regime of Straits in International Law*, New York: Oxford University Press, 1998, pp. 110~115.

8 考查领海内外国军舰法律地位习惯国际法规则的意义在于：一方面，国际习惯法适用于所有国家，无论沿海国或军舰船旗国是否为某条约的当事国；另一方面，习惯与条约是并存的，即使一项条约法规范与习惯法规范具有完全相同的内容，将习惯法规范并入条约法并不排除习惯法规范独立的可适用性。

9 [英] 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 589 页；龚刃韧：《国家豁免问题的比较研究：当代国际公法、国际私法和国际经济法的一个共同课题》，北京：北京大学出版社 2005 年版，第 19、295 页；2004 年《联合国国家及其财产管辖豁免公约》第 21 条。

意行事，只是外国军舰享有司法豁免的民事或刑事案件一般通过外交途径解决。[10] 1982 年《联合国海洋法公约》在承认军舰等政府船舶享有豁免权的同时，也对沿海国在领海内制定法律法规和行使管辖权做了详细的规定。根据《联合国海洋法公约》和其他国际法规则关于领海内沿海国管辖权的有关规定，沿海国制定了各种法律法规来规范领海内外国军用船舶的权利和义务。

（一）沿海国关于领海内外国军舰地位立法的主要模式

沿海国关于领海内外国军舰的立法涉及许多方面，有的规定于统一的立法文件，有的散见于不同的立法之中。对各沿海国的实践考查表明，沿海国关于领海内外国军舰地位的立法模式主要有以下几种：（1）制定以“客军法”为名称的国内立法，执行对外签署的部队地位协定，同时规定“客军法”同样适用于客军的海军舰艇和海军人员，这主要是英联邦成员国的实践。（2）制定关于和平时期军用舰机进入沿海国及进入批准程序的专门立法。[11]（3）在其他国内立法中作出关于领海内外国军舰地位的具体规定，通常是规定在统一的海洋法典、关于国边境管理的立法或关于领海的立法中，[12] 还有些规则包含在各国签署或批准 1982 年《联合国海洋法公约》时所作的保留或声明中。

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10 对外国军舰享有的特权和豁免至少有以下几方面的限制：首先，军舰享有的特权和豁免主要适用于和平时期，并不适用于两国处于交战状态的情况，在战时军舰是当然的军事目标，可以进行武力攻击。其次，对军舰特权和主权豁免的尊重主要适用于军舰合法进入一国领海的情况，对于非法入侵的军舰则另当别论。最后，对军舰违反沿海国法律所导致的沿海国的损失船旗国应承担国际责任。参见田士臣：《从伊朗扣押英国水兵事件看中国对其领海内的外国军用船舶的管理》，载于《中国海洋法学评论》2007 年第 1 期。

11 Examples of such type of national legislation practice may include Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, Decree No. 55/CP of October 1, 1996 of the Government on the Activities of Foreign Warships Visiting the Socialist Republic of Vietnam Clearance Procedures for Visits to United States Ports by Foreign Naval and Public Vessels, Indonesian Government Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes, 28 June 2002, etc.

12 在综合性海洋法典中作出规定的如 1987 年 7 月 23 日南斯拉夫《沿岸海域和大陆架法》、2000 年 1 月 28 日保加利亚《海洋空间、内陆水道和港口法》、1994 年克罗地亚《海洋法典》、1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》、1999 年 3 月 16 日塞舌尔《海洋区域法》、2001 年 3 月 3 日斯洛文尼亚《海洋综合法》、1990 年 8 月 7 日罗马尼亚《罗马尼亚内水、领海和毗连区法律制度法》等，多为东欧国家；在国边境管理立法中作出规定的如 1991 年 11 月 4 日《乌克兰国家边境法》、1992 年 6 月 25 日立陶宛《立陶宛共和国国家边境法》、1993 年 4 月 1 日俄罗斯《俄罗斯联邦国家边境法》等，多为前苏联共和国；在领海立法中作出规定的国家非常多，不再列举，但多为原则性规定。

（二）沿海国关于领海内外国军舰地位立法的主要内容

沿海国制定的关于领海的法律和规章，有的专门规范了外国军舰在其领海的法律地位，有的则适用于包括军舰在内的所有船舶，下文重点讨论与领海内外国军舰法律地位有直接关系、直接影响到外国军舰在领海的权利和义务的规则。

1. 军舰进入或通过领海的批准、通报制度和无害通过制度

外国军舰能否通过或进入沿海国领海与外国军舰在沿海国领海是否享有无害通过权通常被认为是一个问题，但实际上并非如此。前者是指外国军舰进入或通过沿海国领海是否需要沿海国批准或向沿海国通报，后者是指外国军舰按照无害通过制度的规定通过领海的权利。对于须经批准才能进入沿海国领海的外国军舰和无须批准可自由出入沿海国领海的外国军舰，其遵守的无害通过制度是相同的。

关于外国军舰进入沿海国领海是否须经批准或向沿海国通报，1982 年《联合国海洋法公约》没有作出明确规定，也不存在统一的国家实践，更谈不上形成习惯法规则。对各沿海国立法的考查表明，实践中主要有以下 3 种做法：（1）外国军舰进入或通过其领海须经事先批准，[13] 批准的国家机关通常是国防部、外交部或交通部，请求批准的时间并无统一规定。（2）外国军舰进入其领海须向其通报，[14] 受理通报的机关为外交部或国防部，通报的时间通常为提前 24 小时或提前 3 天，通报的内容包括船舶名称、类型、官方船舶登记号、通过目的、通过路线和日程安排等。[15]（3）外国军舰可以自由进入或通过其领海，无须批准或通报。[16]

关于无害通过制度的规定，包括什么是无害通过、船舶在行使无害通过权时应遵守的义务、对船舶违反无害通过制度采取的措施等，各沿海国立法基本上都是重复《联合国海洋法公约》的相关规定，此处不再赘述。

2. 领海内的海道和分道通航制

沿海国考虑到航行安全认为必要时，可要求行使无害通过其领海权利的外国船舶使用其为管制船舶通过而指定或规定的海道和分道通航制。这是 1982 年《联

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13 1992 年《中华人民共和国领海及毗连区法》第 6 条、孟加拉《1974 年领水与海洋区域法》第 3 条、也门 1977 年 12 月 17 日《关于领海、专属经济区、大陆架和其他海洋区域的第 47 号法令》第 7 条、1983 年圣文森特和格林纳达《海洋区域法》第 10 条、叙利亚 2003 年 11 月 8 日《第 28 号法律》第 9 条、1999 年塞舍尔《海洋区域法》（1999 年第 2 号法令）第 16 条、《1996 年 6 月 3 日关于外国军用舰机进入瑞典领土的公告》第 4 条、塞拉利昂 1996 年《海洋区域（建立）法令》第 5 条、1970 年苏丹《领海与大陆架法》第 8 条、1990 年 8 月 7 日《罗马尼亚内水、领海和毗连区法律制度法》第 21 条。

14 2002 年 12 月 18 日第 17803 号总统令修订韩国《领海与毗连区法实施法令》第 4 条；1994 年克罗地亚《海洋法典》第 23 条；1987 年 7 月 23 日南斯拉夫《沿岸海域和大陆架法》第 17 条。

15 韩国受理通报的机关为外交通商部，要求通报时间为进入领海前至少 3 天；克罗地亚受理通报的机关为外交部，要求通报时间为进入领海前至少 24 小时；前南斯拉夫受理通报的机关为联邦行政机关，要求通报时间为进入领海前 24 小时。

16 美国、俄罗斯等海洋强国都持这种主张。

合国海洋法公约》第 22 条的规定，主要目的是为了保障船舶的航行安全，保护海洋生态环境，并应在“航海通告”中予以公布。许多国家的国内立法作出了类似规定，[17] 有的还明确将其适用于军用船舶。[18]

3. 停船和下锚

《联合国海洋法公约》关于无害通过制度的规定要求通过应迅速不停和继续进行，同时也规定了可以停船和下锚的例外，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。[19] 各沿海国国内立法的规定基本上是《联合国海洋法公约》相应条款的重复，[20] 但有的国家对停船和下锚的例外规定并不包括救助遇险或遭难的人员、船舶或飞机的情况，而且要求立即以所有可能的方式向最近的港口主任报告。[21]

4. 领海内潜艇的特殊规则

1982 年《联合国海洋法公约》第 20 条规定：“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。”该规则当然适用于属于军舰的潜艇，许多国家的国内立法对此作了类似规定。[22] 但对于违反此项规则的潜艇应采取什么措施，各国在立法实践中通常并不予以特别明确。如果由于损害而不能浮出海面，通常要求潜艇以任何可能的方式发出信号。

5. 沿海国的保护权

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；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；这种停止仅应在正式公布后发生效力。这就是《联合国海洋法公约》第 25 条规定的沿海国的保护权。许多国家的国内立法对沿海国的保护权作出了类似规定或制定了更为详

17 1994 年克罗地亚《海洋法典》第 25 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 13(5) 条。

18 1987 年 7 月 23 日南斯拉夫《沿岸海域和大陆架法》第 20 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 13(4) 条。

19 1982 年《联合国海洋法公约》第 18 条。

20 1994 年克罗地亚《海洋法典》第 22 条；1987 年 7 月 23 日南斯拉夫《沿岸海域和大陆架法》第 17 条；2001 年斯洛文尼亚《海洋法典》第 14 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 10(2) 条。

21 2000 年 1 月 28 日保加利亚《海洋空间、内陆水道和港口法》第 28 条。

22 1994 年克罗地亚《海洋法典》第 29 条；2000 年 1 月 28 日保加利亚《海洋空间、内陆水道和港口法》第 25 条；1987 年 7 月 23 日南斯拉夫《沿岸海域和大陆架法》第 21 条；叙利亚 2003 年 11 月 8 日《第 28 号法律》第 9 条；1999 年塞舍尔《海洋区域法》（1999 年第 2 号法令）第 16 条；2001 年斯洛文尼亚《海洋法典》第 19 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 13(3) 条；1990 年 8 月 7 日《罗马尼亚内水、领海和毗连区法律制度法》第 22 条。

细的规定，[23] 有权决定采取这种措施的国家机关通常为外交部、国防部、交通部、内政部、总统或由上述机关协商决定，上述机关还有权规定哪些国家的船舶在什么样的条件下可以从暂停无害通过的区域中通过，上述决定应在“航海通告”中予以公布。如果沿海国在国内立法中作出了这样的规定，在领海的外国军舰应尊重沿海国根据上述规定采取的措施。

与沿海国保护权密切相关的是军事禁区和禁航区制度。[24] 军舰禁区和禁航区都是国内法上的称谓，设立军事禁区和禁航区的国际法依据都是《联合国海洋法公约》第 25 条第 3 款。两者的区别主要是：军事禁区侧重于保护沿海国的军事安全，禁航区侧重于该海域的航行安全。例如，《中华人民共和国军事设施保护法》第 7 条规定：“国家根据军事设施的性质、作用、安全保密的需要和使用交通的需要，划定军事禁区、军事管理区。”按《中华人民共和国军事设施保护法》第 8 条和第 9 条规定的军事禁区和军事管理区的确定和范围划定，水域军事禁区、军事管理区的范围由军区和省、自治区、直辖市人民政府共同划定，或者由军区和省、自治区直辖市、人民政府、国务院有关部门划定。特别重要的水域军事禁区的范围，由国务院和中央军事委员会划定。《中华人民共和国海上交通安全法》第 21 条规定：“在沿海水域划定禁航区，必须经国务院或主管机关批准。但是，为军事需要划定禁航区，可以由国家军事主管部门批准。”

6. 领海内同一国籍的军舰的数量

对领海内同一个外国国家的军舰的数量作出限制，最初是海战法的一项规则，[25] 目的是限制交战国在同一中立国港口内军舰的数量。这一规则现在被扩展适用于平时，规定在许多国家的立法中。[26] 一般规定，不得有超过 3 艘同一国籍的军舰同时穿过沿海国的领海。

7. 外国核动力船舶和载运核物质或其他本质上危险或有毒物质的船舶

外国核动力船舶和载运核物质或其他本质上危险或有毒物质的船舶，在行使无害通过领海的权利时，应持有国际协定为这种船舶所规定的证书并遵守国际协定所规定的特别预防措施。[27] 由于大部分核动力船舶都是军舰，《联合国海洋法公约》的该条规则通常情况下也适用于军舰。出于保护海洋环境、维护海洋安全、执

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23 2000 年 1 月 28 日保加利亚《海洋空间、内陆水道和港口法》第 22 条；1994 年 4 月克罗地亚《海洋法典》第 30 条；1987 年 7 月 23 日南斯拉夫《沿岸海域和大陆架法》第 22 条；叙利亚 2003 年 11 月 8 日《第 28 号法律》第 12 条、第 13 条；1999 年塞舍尔《海洋区域法》（1999 年第 2 号法令）第 16 条；2001 年斯洛文尼亚《海洋法典》第 20 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 12(2) 条。

24 1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 15 条。

25 1907 年《关于海战中中立国权利义务的海牙公约》（即 1907 年海牙第十三公约）第 15 条。

26 1994 年克罗地亚《海洋法典》第 27 条；1987 年 7 月 23 日南斯拉夫《沿岸海域和大陆架法》第 20 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 13(2) 条。

27 1982 年《联合国海洋法公约》第 23 条。

行国家核政策的目的，许多沿海国都对此类船舶作出了规定，[28] 除重复《联合国海洋法公约》规定外，有的国家还要求此类船舶在通过时使用特别规定的航道、遵守该海域的分道通航制度、满足与保障航行安全和防止海洋环境污染有关的条件、给予事先通知、获得批准等。[29]

8. 遇险进入权和救助进入权

遇险进入权是指船舶或飞机在遇险的情况下可以不经沿海国同意进入其领海领空的权利。救助进入权是指船舶或特定条件下的飞机为真诚救助海上遇险或遇难者的目的可以不经沿海国同意进入领海实施紧急救助的权利。[30] 这 2 种权利是在紧急状态下可以不经沿海国同意进入其领海的例外情况，在国内立法中明确规定遇险进入权和救助进入权的国家并不多见。[31]

9. 外国军舰对沿海国法律规章的不遵守

1982 年《联合国海洋法公约》第 30 条规定了沿海国对不遵守其法律规章的外国军舰可以采取的措施，即如果任何军舰不遵守沿海国关于通过领海的法律和规章，而且不顾沿海国向其提出遵守法律和规章的任何要求，沿海国可要求该军舰立即离开领海。许多国家的国内立法以此为依据制定了更为详细的规则。[32] 在立法实践中，可以采取措施的情况除了违反沿海国关于无害通过制度的法律规章外，还包括违反关于防止海上碰撞的公认国际法规则。要求外国军舰离开的执法机关包括警察、军队和其他授权机关的船舶和飞机。对违法外国船舶可以采取的措施是要求其离开沿海国领海，对于拒不离开者可以采取的措施一般不予规定。[33]

10. 船旗国对军舰所造成的损害的责任

1982 年《联合国海洋法公约》第 31 条规定，对于军舰不遵守沿海国有关通过领海的法律和规章或不遵守本公约的规定或其他国际法规则，而使沿海国遭受的任何损失或损害，船旗国应负国际责任。由于《联合国海洋法公约》没有明确规定承担这种国际责任的形式，在国内立法实践中，有的规定军舰的船旗国应承担赔

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28 2000 年 1 月 28 日保加利亚《海洋空间、内陆水道和港口法》第 24 条；1994 年克罗地亚《海洋法典》第 28 条；1987 年 7 月 23 日南斯拉夫《沿岸海域和大陆架法》第 20 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 13(4) 条。

29 叙利亚 2003 年 11 月 8 日《第 28 号法律》第 9 条；1999 年塞舍尔《海洋区域法》（1999 年第 2 号法令）第 16 条；2001 年斯洛文尼亚《海洋法典》第 18 条。

30 “2.3.2.5 Assistance Entry”, from The Commander’s Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1.

31 《1996 年 6 月 3 日关于外国军用舰机进入瑞典领土的公告》第 20 条；1999 年 5 月丹麦《关于外国军用舰机和平时期进入丹麦领土的法令》第 3 条和第 5 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 9 条。

32 2000 年 1 月 28 日保加利亚《海洋空间、内陆水道和港口法》第 35 条；1994 年克罗地亚《海洋法典》第 29 条；2001 年斯洛文尼亚《海洋法典》第 21 条；1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 19 条；1990 年 8 月 7 日《罗马尼亚内水、领海和毗连区法律制度法》第 23 条。

33 1998 年 7 月 16 日《俄罗斯联邦内水海域、领海和毗连区法》第 19(3) 条规定，对于使用武力的外国军舰可以采取反制措施。

偿责任，[34] 有的作出了与《联合国海洋法公约》相同的规定。[35]

五、结　论

按照特别法优于普通法的原则，从国际法层面考查外国军舰在领海的法律地位，首先应考虑军舰的船旗国和沿海国之间是否有规范军舰法律地位的条约，实践中通常由当事国之间签订的《部队地位协定》来规范；在没有特别条约的情况下，应考虑一般承认的国际公约的规定，其中 1982 年《联合国海洋法公约》从多个方面规范了外国军舰在沿海国领海的法律地位；对于特定领海海域内外国军舰的法律地位，应考虑关于该海域的长期存在、现行有效的专门条约的规定。从国内法的角度看，关于领海内外国军舰的权利和义务，应考虑沿海国根据《联合国海洋法公约》和其他国际法规则所制定的国内法。

34　2000 年 1 月 28 日保加利亚《海洋空间、内陆水道和港口法》第 36 条。
35　1990 年 8 月 7 日《罗马尼亚内水、领海和毗连区法律制度法》第 24 条。

国际海底区域遗传资源管理法律问题

江家栋 *

内容摘要: 随着生物技术的进展，国际社会对国际海底区域遗传资源的竞争日益激烈。尽管当前国际公约尚未对“区域”遗传资源的法律地位作出明确规定，但基于《联合国海洋法公约》的目的，该遗传资源也应适用“人类共同继承财产”原则，从而对“区域”遗传资源的利用进行适度限制。在该问题上，应充分发挥国际海底管理局的作用，并在此基础上对“区域”遗传资源及相关活动进行管理和进一步谈判。同时，我国应加强对该问题的重视与研究，大力开展双边和多边合作，以便将来在“区域”遗传资源的开发和利用领域占有与我国地位相称的一席之地。

关键词: 国际海底区域　遗传资源　联合国海洋法公约　人类共同继承财产

21 世纪是海洋世纪，海洋资源的开发和利用已成为世界各海洋大国竞争的焦点之一，国际海底区域（以下简称“区域”）遗传资源也顺势成为世人关注的热点。“区域”遗传资源的研究和利用，对于揭示生命起源的奥秘，探究海洋生物与海洋环境相互作用下特有的生命过程和生命机制，发挥其在工业、医药、环保和军事等方面的用途，具有十分重要的意义。毋庸置疑，“区域”遗传资源的开发和利用将在本世纪成为现实。

随着社会、经济和科学技术的不断发展，人类的多种活动，如海洋科研、深海勘探与采矿、生物取样与勘探以及旅游观光活动等，已经对“区域”遗传资源所处的生态系统造成了危害。随着对“区域”遗传资源商业性开发和利用的实现，还将会涉及对遗传资源的获取和惠益分享、技术转让和知识产权保护等问题。因此，“区域”遗传资源的管理问题日益受到国际社会的关注。

一、深海海床遗传资源概述

1982 年《联合国海洋法公约》（以下简称“《海洋法公约》”）并未对“遗传资源”的概念作出界定，但《生物多样性公约》作出了间接定义。根据《生物多样性公约》

* 江家栋，法学硕士，公安海警高等专科学校教师，主要研究方向为国际海洋法、海洋执法管理。

第 2 条，生物资源包括“对人类具有实际或潜在用途或价值的遗传资源、生物体或其部分、生物种群或生态系统中任何其他生物组成部分”，遗传资源则被界定为“具有实际或潜在价值的遗传材料”，遗传材料被界定为“来自植物、动物、微生物或其他来源的任何含有遗传功能单位的材料”。也就是说，遗传资源是指来自植物、动物、微生物或其他来源的具有实际或潜在价值的任何含有遗传功能单位的材料，属于生物资源的一种。人们从遗传领域最近的进展得知，遗传资源包括植物种子、动物配子、插枝或生物个体以及从植物、动物或微生物中提取的 DNA，诸如染色体或基因，从其遗传特性来看，它们对人类具有实际或潜在的价值。[1]“区域”遗传资源是“区域”生物资源的一种，国际海底管理局法律和技术委员会副主席弗里达•玛丽亚•阿马斯•普菲尔特尔女士认为，“区域”生物资源是指：“在国家管辖之外的海床上或海床下不能移动或其躯体须与海床或底土保持接触才能移动的生物。”[2]

有些科学家根据对特定深海海床生态系统进行的分析预测，整个深海海床可能蕴藏着数百万个物种，而其中大约有 60% 的深海海床位于国家管辖之外的“区域”。[3] 而深海海床遗传资源与深海矿物资源所处的环境紧密联系，不可分离。但随着科学技术的不断发展，已有多种人类活动可能对深海生态系统造成危害，其中包括海洋科研、深海勘探与采矿、生物取样与勘探以及旅游观光活动等。

首先，海洋科学研究对于了解海洋生态系统、发现如何可持续地利用生物资源，以及评估其他海洋活动的影响都是必要的。不过，如果不谨慎地进行，科学研究本身便可能对海洋的生物多样性和生态系统造成不利影响。据联合国秘书长 2003 年有关海洋问题的报告称，在热液喷口进行海洋科学研究的影响可能导致生物生活环境损失和有机体死亡，其原因包括：进行地质调查或化学取样而移动烟囱和岩石；噪音、光线以及使用载人潜水器或因使用推进器而对动物群落造成损害等。[4]

其次，就深海勘探与采矿而言，国际海底管理局确定了 3 类可能对环境造成影响的活动：(1) 勘探有商业价值的矿床；(2) 商业采矿系统的小规模试验和原型

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1 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, paras. 5~6.

2 Frida M. Armas-Pfirter, Legal Implications Related to the Management of Seabed Living Resources in the Area under UNCLOS, at http://www.globaloceans.org/globalconferences/2006/pdf/FridaArmas-Pfirter.pdf, 12 December 2006.

3 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 13.

4 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/58/65, 3 March 2003, para. 195.

试验；(3) 在国际海底区域内进行的冶金工艺流程试验。[5] 多金属结核勘探活动预计不会对海盆环境的生物多样性造成严重损害，勘探富钴结壳对海山生物群落的环境影响尚难预料，但勘探多金属硫化物可能会产生较勘探多金属结核更为严重的环境问题。

再次，无论是出于海洋科研的需要还是出于商业目的，生物取样和勘探都是开展深海海床探索活动的一种主要方法。大量的生物取样和大规模的勘探活动将对热液喷口和海山的生物群落产生直接的负面影响，从而可能导致某些生物难以继续生存，同时，在独特的生存环境中取样可能会间接地引入外来物种，造成原有物种的最终消失。

最后，旅游观光活动也可能对深海海床造成负面影响。深海热液喷口生态系统壮观无比，烟囱状的喷口涌喷热液，属极端环境，周围动物物种前所未见，已引起公众的广泛兴趣。[6] 一些商业机构试图用其作为让公众了解地球演化进程及科学家工作方式的观光旅游场所。目前已有俄罗斯和平号载人潜水器用于海底热液喷口旅游观光的商业运营。由于没有法律约束，目前进行此类活动无须任何国际机构批准，一旦形成规模，无疑将扰乱热液喷口生物群落的正常生活。[7]

总之，深海海床是这个星球上最富饶，但同时也是最不为人知的生态系统之一。[8] 随着新的技术和技巧的发展，科学家必须调整他们对待海洋生态系统的运行和功能的思维。同时，由于深海生物多样性方面的知识极为有限，无法估计任何区域物种的数量，也无法预测这些物种所占据的地理范围。因此，必须努力了解这些生态系统，以促进对这些生态系统的养护和可持续利用。

二、“区域”遗传资源管理的现有国际法律框架及其局限

由于在国家管辖地区以外发现高度复杂多样的生态系统，加上在生物技术领域取得的进展，国际上对国家管辖范围以外深海生物遗传资源的兴趣以及与此相关的活动日益增多。因此，从法律角度加强对这些遗传资源的管理也被国际社会提上了议事日程。

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5 金建才：《深海底生物多样性与基因资源管理问题》，载于《地球科学进展》2005 年第 1 期。

6 International Seabed Authority, Summary Presentations on Polymetallic Massive Sulphide Deposits and Cobalt-rich Ferromanganese Crusts, ISBA/8/A/1, 9 May 2002, para. 19.

7 金建才：《深海底生物多样性与基因资源管理问题》，载于《地球科学进展》2005 年第 1 期。

8 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/54/429, 1999, para. 509.

（一）“区域”遗传资源管理的现有法律框架

1.《海洋法公约》

1982 年《海洋法公约》为与海洋相关的一切活动确立了法律框架，以便利国际交通，促进海洋的和平用途、海洋资源公平有效的利用与海洋生物资源的养护，以及海洋环境的研究、保护和保全。尽管《海洋法公约》没有明确处理与生物遗传资源有关的问题，但其管辖框架和一般原则也应适用于“区域”中遗传资源的管理。

《海洋法公约》在制定一整套关于海洋活动的规则时，把海洋空间按横向和纵向划分成许多区域。从横向来看，根据基线向海洋方向的延伸，可分为内水、领海、专属经济区等国家享有绝对主权或主权权利的区域，以及超出国家管辖范围的 2 个区域，即公海和国际海底区域。

在公海领域，《海洋法公约》规定公海对所有国家开放，实行公海自由（第 87 条），但须适当顾及其他国家行使公海自由的利益。公海自由还必须在《海洋法公约》所规定的条件下行使，其中包括关于生物资源的养护和管理的条款（第七部分第二节），关于海洋环境的保护和保全的一般义务（第十二部分）等。

关于国际海底方面，《海洋法公约》第十一部分及 1994 年协定规定，“区域”及其资源[9]为人类的共同继承财产。国际海底管理局是缔约国组织和控制“区域”内活动，特别是管理“区域”资源以及分享由有关活动产生的收益的组织。

关于在国家管辖范围以外地区进行海洋科学研究方面，《海洋法公约》第十三部分规定了进行此类活动的框架，特别是其第 257 条规定所有国家和国际组织均有权在公海进行海洋科学研究。其第 143 条和第 256 条则规定，“区域”内海洋科学研究，须按照第十三部分规定专为和平目的并为全人类的利益进行。各国可在“区域”内进行研究，但应确保在适当情形下通过国际海底管理局或其他国际组织，为了发展中国家和技术较不发达国家的利益发展各种方案，并传播所得到的研究和分析结果，以促进国际合作。

《海洋法公约》还一般性地要求各国养护和管理其国家管辖范围内和以外区域的海洋生物资源（第 61 条至第 67 条和第 116 条至第 119 条），保护和保全海洋环境（第 192 条至第 237 条）。各国有义务采取一切必要措施，防止、减少和控制任何来源的海洋环境污染。各国采取的这些措施，必须包括为保护和保全稀有或脆弱的生态系统，以及衰竭、受威胁或有灭绝危险的物种和其他形式的海洋生物的生存环境，而很有必要的措施（第 194 条第 5 款）。各国有义务采取措施以防止由于在其管辖或控制下使用技术而造成的海洋环境污染，或由于故意或偶然

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9 根据《海洋法公约》第 133 条，“区域”内的资源是指区域内在海床及其下原来位置的一切固体、液体或气体矿物资源，其中包括多金属结核。

在海洋环境某一特定部分引进外来的或新物种致使海洋环境可能发生重大和有害的变化（第 196 条第 1 款）。

在有关“区域”内活动的环境方面，《海洋法公约》第 145 条规定，必须采取必要措施，以确保切实保护海洋环境，不受“区域”内活动可能产生的有害影响。国际海底管理局理事会有权发布紧急命令，包括停止或调整作业的命令，以防止“区域”内活动对海洋环境造成严重损害（第 162 条）。而且，在有重要证据证明海洋环境有受严重损害之虞的情形下，理事会可以不批准开发某些区域。法律技术委员会亦应就此类问题向理事会提出建议（第 165 条）。

2.《生物多样性公约》

《生物多样性公约》也对国家管辖范围以外海底生物多样性的养护和可持续利用作出了规定，相关规则也可适用于“区域”遗传资源的管理。根据《生物多样性公约》第 3 条的规定，就以下 3 个具体目标而言，该公约与《海洋法公约》互相补充：养护生物多样性，可持续利用生物多样性的组成部分以及公正合理地分享利用遗传资源所产生的惠益，包括通过适当获得遗传资源、适当转让相关技术（但须考虑到对资源和技术享有的各种权利）以及适当提供资金等方法。[10]

《生物多样性公约》对其管辖权适用做了重要区分：一个是“生物多样性组成部分”与“活动和进程”之间的区别，另一个是国家管辖范围之内地区和界限以外地区之间的区别。[11] 在国家管辖以内的区域，《生物多样性公约》既适用于生物多样性的组成部分，也适用于国家管辖或控制下开展的进程和活动。但在国家管辖范围以外地区，按第 4 条的规定，《生物多样性公约》仅仅适用于在缔约方管辖或控制范围内开展的可能对生物多样性产生不利影响的活动和进程，这意味着《生物多样性公约》不适用于国家管辖范围以外海洋生物多样性的组成部分。尽管如此，根据第 5 条，《生物多样性公约》的缔约国必须直接合作，或通过主管国际组织合作养护和可持续利用国家管辖范围以外的生物多样性。

对于《生物多样性公约》的第 2 个目标，其第 2 条把“可持续利用”界定为“使用生物多样性组成部分的方式和速度不会导致生物多样性的长期衰落，从而保持其满足今世后代的需要和期望的潜力”。该定义的 2 个因素，即资源利用的方式和资源利用的速度，相互依存，资源利用的速度在很大程度上取决于资源的用途。[12]

《生物多样性公约》的第 3 个目标是公平合理地分享由利用遗传资源而产生的惠益。除知识和财政贡献得到公平考虑和奖励外，利益分享的目标之一是为生

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10 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 185.

11 《国家管辖海域外生物多样性管理问题政策和法律框架》，下载于 http://china-isa.jm.china-embassy.org/chn/hdxx/P020070115223111563710.pdf，2007 年 1 月 9 日。

12 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/59/62/Add.1, 18 August 2004, para. 255.

物多样性的养护和可持续利用制定奖励措施。利益分享特别关系到各国由于科技局限而无法随时得到、但具有巨大潜在科学和经济价值的深海海床遗传资源。在通过知识产权对私人数据和产权利益加以保护的同时，也应该通过促进科学知识在私人利益和全人类利益之间保持平衡。[13] 在技术（包括生物技术）的获取和转让方面，缔约国必须提供和（或）便利有关养护和可持续利用生物多样性、或利用遗传资源，技术的取得和转让应按公平和最有利条件向发展中国家提供（第 2 条和第 16 条）。关于生物技术的处理及其惠益的分配，应采取措施，让提供遗传资源的国家切实参与生物技术研究活动，并且在公平公正的基础上，优先给予这些国家取得基于其提供的遗传资源的生物技术所产生的成果和惠益（第 19 条）。

3. 与知识产权有关的各项公约和条约

就知识产权保护而言，生命科学领域专利权保护力度的增大已引起诸多关注，相关国际组织已就“区域”遗传资源制度和知识产权制度的关系开展了研究。

(1) 世界知识产权组织的相关公约

世界知识产权组织拥有 180 个会员国，负责管理涉及知识产权保护不同方面的 23 个国际条约。使国际专利保护进入运作的主要国际文书是《专利合作条约》，它允许通过提出国际专利申请，在许多国家同时为一项发明申请专利保护。根据该条约提出专利申请的情况在国际知识产权制度中日益增多。《专利法条约》是另一项相关文书，旨在统一并简化国家和区域专利申请和专利权方面的手续，从而使这些手续更加方便用户。

披露发明是授予专利权的必要条件。对发明作出适当的披露，意味着必须提供足够的细节，以便内行人可以重复取得发明的效果。涉及微生物或微生物使用的发明无法以书面形式披露，只能通过将微生物样品保存在专门机构的方式予以披露。《国际承认用于专利程序的微生物保存的布达佩斯条约》（以下简称“《布达佩斯条约》”）规定，假如必须要有保存物才能满足专利法对涉及微生物或微生物的使用所规定的说明要求，则应在国际保存机构保存微生物。[14] 保存可以确保发明人以外的个人为了测试或实验的目的、或为了在专利失效后进行商业利用的目的获取微生物。允许或要求为了符合专利程序的目的而交存微生物的会员国，必须对为此在国际保存机构保存的微生物给予承认，而不论保存机构的地点在何处。《布达佩斯条约》没有对“微生物”一词作出明确界定，因此可以对这一词作出广义解释。根据以往的解释，微生物是指为申请专利，特别是有关食物和药品

13 《国家管辖海域外生物多样性管理问题政策和法律框架》，下载于 http://china-isa.jm.china-embassy.org/chn/hdxx/P020070115223111563710.pdf，2007 年 1 月 9 日。

14 截至 2005 年 1 月，共有 36 家此种机构：7 家设在英国；俄罗斯和韩国各有 3 家；中国、意大利、日本、波兰和美国各有 2 家；澳大利亚、比利时、保加利亚、加拿大、捷克共和国、法国、德国、匈牙利、拉脱维亚、印度、荷兰、斯洛伐克和西班牙各有 1 家。

领域的专利，而必须交存以满足披露发明的规定的基因材料。[15]

(2) 世界贸易组织的《与贸易有关的知识产权协定》（以下简称“《知识产权协定》”）

《知识产权协定》规定了知识产权保护的最低标准，其目标包括减少国际贸易中的扭曲和障碍，促进知识产权的有效和充分保护，确保强制执行知识产权的措施和程序本身不会成为合法贸易的障碍等。其第 7 条明确阐明，知识产权的保护和强制执行应有利于促进技术创新，有利于技术转让和传播，有利于技术知识的创造方和使用方之间的互利互惠并促进社会和经济福利，有利于权利和义务的平衡。其第 27 条第 3(b) 款规定，成员可以将微生物以外的植物和动物以及非生物和微生物以外生产的植物或动物等基本生物方法排除在专利范围之外。[16] 根据《知识产权协定》第 28 条，专利赋予专利权人专有权利，第三方未经专利权人许可，不得制造、使用、提供销售、销售，或为了这些目的进口专利产品；不得使用专利方法；不得使用、提供销售、销售，或为了这些目的进口依照该专利方法直接获得的产品。专利权人还有权转让或以继承方法转移专利，签订许可证合同。第 29 条还规定专利申请人必须以足够清楚与完整的方式披露其发明，以使同一技术领域的技术人员能够实施该发明，并可要求专利申请人在申请日或优先权日指明发明人所知的最佳实施方案。

（二）现有国际法律框架的局限性

1.《海洋法公约》与《生物多样性公约》的局限性

2003 年 3 月，《生物多样性公约》秘书处与联合国海洋事务与海洋法司协作编写的一份研究报告指出，尽管《海洋法公约》与《生物多样性公约》2 项公约的条款在养护和可持续利用海洋和沿海生物多样性方面是互补的并相互支持，但在涉及“区域”遗传资源的商业性活动方面，存在重大的法律空白。[17] 一方面，在第三次联合国海洋法会议讨论“区域”制度时，人类对“区域”遗传资源的情况、分布范围及其价值几乎没有认识，《海洋法公约》的“区域”制度也就并未涉及与深海海床生物遗传资源有关的活动。各国对依照《海洋法公约》规定，国家管辖范围以外深海海床遗传资源究竟属于“区域”制度范畴，还是属于公海制度范畴的问题，

15 《国家管辖海域外生物多样性管理问题政策和法律框架》，下载于 http://china-isa.jm.china-embassy.org/chn/hdxx/P020070115223111563710.pdf，2007 年 1 月 9 日。

16 《知识产权协定》要求在其生效 4 年后，审查第 27 条第 3(b) 款的规定。目前，这一审查正在进行中。

17 CBD Secretariat, Study of the Relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with Regard to the Conservation and Sustainable Use of Genetic Resources on the Deep Seabed, UNEP/CBD/SBSTTA/8/INF/3/Rev.1, 22 February 2003, para. 9.

争论日益激烈。另一方面，尽管《海洋法公约》确认了国家和国际组织在公海和“区域”内进行海洋科学研究的权利，却没有对“海洋科学研究”一词作出界定，因此很难对海洋科学研究活动和涉及遗传资源的商业活动（通常称为“生物勘探”）作出明确区分。此外，《生物多样性公约》规范资源获得和利益共享的条款也仅适用于在国家管辖领域发现的海洋生物资源（第 15 条）。但在国家管辖范围以外区域海洋生物多样性的组成部分，该公约并不适用。由于缔约方对国家管辖范围以外地区的资源没有主权或管辖权，它们对这些地区的生物多样性具体组成部分的养护和可持续利用没有直接义务。显然，目前还没有一个国际机构具有监管“区域”内生物资源有关活动的明确责任。

2.《海洋法公约》与《生物多样性公约》之间的冲突

尽管《海洋法公约》与《生物多样性公约》为获取和管理深海生物资源创设了相互补充的制度，但在具体制度方面却存在冲突。2 部公约都要求各国在生物资源的养护上开展合作，都规定对国家管辖以外区域中的生物资源进行海洋科学研究的自由，并号召国际信息共享。[18] 然而，这 2 部公约在管理生物资源方面采取了不同的方法：《生物多样性公约》明确规定了试图养护遗传资源的多样性，而《海洋法公约》所规定的养护限于物种或特定种群；[19]《生物多样性公约》采用“生态系统”的方法进行养护，并在序言部分试图对“健康”的生态系统进行定义，而《海洋法公约》并未采用生态系统方法；《生物多样性公约》中包含了预警原则，而《海洋法公约》中却未规定。[20] 这些都可能导致在公约的适用和解释上产生矛盾，并引起发生冲突时何者优先适用的问题。

这 2 部公约的缔约方的权利和义务之间如果发生冲突，那么《维也纳条约法公约》的解释规则将为冲突的解决提供指导。在条约必须信守的原则下，条约缔约国必须善意履行条约义务。在条约规定模糊不清的情况下，条约应就其用语按照上下文并参照其目的和宗旨所具有的通常意义，善意地予以解释。当一条约订明其不应被视为同先订条约不相容时，则先订条约的规定应居优先。据此，基于《海洋法公约》第 311 条第 2 款和《生物多样性公约》第 22 条的规定，[21] 可以认为《海洋法公约》可优先适用于《生物多样性公约》。

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18 《海洋法公约》第 87 条第 1 款第 f 项、第 143 条及第十二部分；《生物多样性公约》第 5、17、18、22 条。

19 《海洋法公约》第 119 条第 1 款第 b 项，第 119 条第 2 项。

20 但《执行 1982 年 12 月 10 日〈联合国海洋法公约〉有关养护和管理跨界鱼类种群和高度洄游鱼类种群之规定的协定》第 5 条、第 6 条，以及国际海底管理局《“区域”内多金属结核探矿和勘探规章》第 31 条明确采用了预警方法。

21 《海洋法公约》第 311 条第 2 款规定：本公约应不改变各缔约国根据与本公约相符的其他条约而产生的权利和义务，但以不影响其他缔约国根据本公约享有其权利或履行其义务为限。《生物多样性公约》第 22 条规定：1. 本公约的规定不得影响任何缔约国在任何现在国际协定下的权利和义务，除非行使这些权利和义务将严重破坏或威胁生物多样性；2. 缔约国在海洋环境方面实施本公约不得抵触各国在海洋法下的权利和义务。

但是从《生物多样性公约》签订到现在为止所采取的行动来看，在深海生物资源方面，该公约缔约国大会并未将《生物多样性公约》视为是《海洋法公约》的附属公约。在 1996 年提交给联合国海洋事务与海洋法司的一份工作报告中，《生物多样性公约》秘书处宣称，“《海洋法公约》或者人类共同继承财产原则是否适用于，或者更进一步说，如何适用于深海海床的遗传资源，这仍不明确”，并要求“对如何最好地利用这些资源进行更深入的研究”。[22] 这份报告明确提倡对“区域”遗传资源的获取进行控制，尽管《海洋法公约》和《生物多样性公约》都未对这种控制进行授权。[23]《生物多样性公约》秘书处和联合国海洋事务与海洋法司之间的正式会谈开始于 1999 年 3 月，其中就包含深海生物勘探问题。

1999 年，联合国大会通过决议试图为国际海洋问题的合作创设一项新程序，其实这项程序已由可持续发展委员会于 1997 年提出，即“由可持续发展委员会就《21 世纪议程》所述的海洋环境的所有方面及其相关问题，以《海洋法公约》为全面的法律框架，进行定期的政府间审查”。[24] 现在，联合国大会作为对海洋事务和海洋法具有主管权的全球机构，在统一的议程下对可持续发展委员会的审查结果与联合国秘书长关于海洋和海洋法的年度报告进行审议。由此可见，《海洋法公约》与《生物多样性公约》之间将会产生的冲突及其执行情况，由联合国大会、联合国秘书长与可持续发展委员会三者来共同明确，并提出解决方案。

三、“区域”遗传资源的法律地位及其引发的问题

与国家管辖以外的深海海床矿物资源相比，“区域”遗传资源具有以下 3 个独特的特点：(1) “区域”矿物资源是一种现场的有形资源，未来的开发将是实时实地的公开活动；而“区域”遗传资源是一种后成资源，一旦采集到所需的生物样品，遗传资源开发的后期工作可全部在实验室完成，其开发活动一般是异时异地秘而不宣地进行。[25] (2) 遗传资源的开发与应用受国际专利法的保护，谁使用生物技术首先从生物样品中提取出遗传资源，谁就拥有了专利优先权。(3) 遗传资源的保存跨越了生命体与非生命体的界限。由于“区域”遗传资源的上述特性，管理这一资源所面临的首要问题就是其法律地位的确定。

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22 CBD Secretariat, Bioprospecting of Genetic Resources of the Deep Sea-Bed, UNEP/CBD/SBSTTA/2/15, September 1996, para. 2.

23 CBD Secretariat, Bioprospecting of Genetic Resources of the Deep Sea-Bed, UNEP/CBD/SBSTTA/2/15, September 1996, para. 6.

24 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/54/429, 30 September 1999, para. 5.

25 金建才：《深海底生物多样性与基因资源管理问题》，载于《地球科学进展》2005 年第 1 期。

（一）“区域”遗传资源的法律地位

笔者认为，“区域”遗传资源的法律地位必然受到“区域”本身法律地位的影响，因此，有必要明确现有国际公约中所确立的“区域”及其资源的法律地位。根据《海洋法公约》第 136 条的规定：“‘区域’及其资源是人类的共同继承财产。”《海洋法公约》第 137 条和 1994 年协定则对“区域”及其资源的法律地位作了进一步说明。

既然《海洋法公约》第十一部分和 1994 年协定为“区域”及其资源创设了“人类共同继承财产”制度，那么接下来就应当分析何种资源将适用此项制度。《海洋法公约》第 133 条规定：“‘资源’是指‘区域’内在海床或其下原来位置的一些固体、液体或气体矿物资源，其中包括多金属结核。”与第四部分（大陆架）中“自然资源”的定义相比，[26] “区域”中资源的定义的范围要小得多，除了矿物没有提及其他的非生物资源，也没有提及“定居种”生物和其他种类的生物资源，且这 2 个条款的定义中均未提及遗传资源。因此，从第 133 条的条文本身来看，“资源”不包含海洋生物资源的意思十分明确，且该条文又缺少像第 87 条中所含有的“除其他外”的扩展性措辞。因此，根据条约法“明示其一，即排斥其他”的解释原则，无法直接得出“区域”遗传资源可适用“人类共同继承财产”制度的结论。

1. 有关“区域”遗传资源法律地位的争论

由于在国家管辖以外发现了高度复杂多样的生态系统，加上在生物技术领域取得的进展，因此，对国家管辖以外遗传资源的兴趣以及与此相关的活动日益增多。加之现有国际文件在这方面的法律空白，各国对“区域”遗传资源法律地位的辩论日益激烈。

77 国集团和中国认为应优先考虑“人类共同继承财产”原则，强调“区域”遗传资源开发所得利益不得优先分配给经济和技术发达国家，而应通过建立新的国际法律机制使发展中国家能够分享这一利益；在具体做法上，一些发展中国家主张利用和扩大国际海底管理局的职能，而另一些国家则认为应同时考虑制定新的法律框架。[27]

而美国、日本明确反对将《海洋法公约》第十一部分适用于“区域”遗传资源，认为《海洋法公约》中有关“区域”资源的定义十分明确，“人类共同继承财产”制度仅适用于矿物资源，主张这些遗传资源的活动应遵循公海自由原则。欧盟认为

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26 《海洋法公约》第 77 条第 4 款规定：“本部分所指的自然资源包括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，即在可捕捞阶段在海床上或海床下不能移动或其躯体须与海床或底土保持接触才能移动的生物。”

27 《国家管辖范围以外海洋生物多样性养护与可持续利用问题非正式工作组会议若干热点议题》，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t240388.htm，2007 年 6 月 16 日。

“区域”遗传资源不属于国际海底管理局的职能范围，同时也表示公海渔业制度不适用于这些遗传资源，强调需要研究与澄清这些遗传资源的法律地位问题，主张应采用预警原则和生态系统方式确保有效的海洋环境管理。[28]

对于上述问题，各国就各自立场在 2006 年 2 月召开的“国家管辖范围外海洋生物多样性保护与可持续利用问题非正式工作组会议”上进行了激烈争论。与会者认为 1 周会议远不足以就此问题得出结论，因此倾向于将原则及法律地位问题的争论搁置一边，而将注意力集中于寻求注重实效的方法上。[29] 在该问题上观点相左的美国与墨西哥都表示认同这一做法。欧盟试图提出折衷办法，表示可以先出台一份“区域”遗传资源活动的操作指南。美国、加拿大提议先出台一部规范海洋科学研究的行为守则，以避免对海洋生态系统产生负面影响。联合国秘书长则在一份报告中指出，应根据《海洋法公约》所载的一般原则，阐明这些资源的法律地位。[30]

2. 从《海洋法公约》的一般原则看“区域”遗传资源的法律地位

尽管单从条约文本看，《海洋法公约》第十一部分的“人类共同继承财产”制度目前并未涵盖生物资源，但也有些学者认为依照《维也纳条约法公约》中的解释规则，可以对条约按照上下文并参照其目的和宗旨进行分析。

根据《维也纳条约法公约》第 31 条第 2 款的规定，就解释条约而言，上下文是指连同该条约的序言和附件在内的约文。《海洋法公约》的序言有助于对第十一部分“人类共同继承财产”制度作出扩大性解释。序言提及，“有需要通过本公约，在妥为顾及所有国家主权的情形下，为海洋建立一种法律秩序，以便利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”，“考虑到达成这些目标将有助于实现公正公平的国际经济秩序，这种秩序将照顾到全人类的利益和需要，特别是发展中国家的特殊利益和需要”。从其序言来看，《海洋法公约》确实是将“区域”内的矿产资源纳入“人类共同继承财产”制度。另外，序言中还“希望以本公约发展 1970 年 12 月 17 日第 2749 (XXV) 号决议所载各项原则，联合国大会在该决议中庄严宣布，除其他外，国家管辖范围以外的海床和洋底区域及其底土以及该区域的资源为人类的共同继承财产，其勘探与开发应为全人类的利益而进行，不论各国的地理位置如何”。但在此处，序言也没有对“资源”进行定义或限制。

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28 《国家管辖范围以外海洋生物多样性养护与可持续利用问题非正式工作组会议若干热点议题》，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t240388.htm，2007 年 6 月 16 日。

29 《国家管辖范围以外海洋生物多样性养护与可持续利用问题非正式工作组会议若干热点议题》，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t240388.htm，2007 年 6 月 16 日。

30 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 201.

根据《维也纳条约法公约》第 32 条的规定，在适用第 31 条所得到的意义或者按照第 31 条作出的解释不明或难解时，为了确定该用语的意义，得使用补充的解释资料，包括该条约的准备资料及其缔结的情况在内。

第三次联合国海洋法会议的记录和文件表明，在海床资源这一问题的讨论中，有 2 种主要观点。第一，生产国、出口国和一些进口商着重强调矿物的经济价值，将对海床资源制度的讨论集中于采矿活动。第二，一些国家试图创设与深海海床生物资源制度相似的上覆水体中的生物资源制度。许多代表团试图防止捕鱼自由制度受到影响，因此他们反对将这些生物资源纳入“人类共同继承财产”制度。[31] 可见，这些国家倾向于认为海床资源应包括生物资源和非生物资源。然而，不论是第三次海洋法会议的谈判，还是海床委员会的工作报告，都没有提到这些“‘区域’中的定居物种”应该被包括在公海制度之中。他们认为，在大陆边之外不可能存在与经济利益有关的生物资源。因此，对这些物种进行立法没有什么实际意义。

经过各国激烈的谈判，直到 1975 年的第三次会期，“资源”才被定义为当地资源。该定义不同于“矿物资源”的定义，后者包括不同种类的矿物。这 2 个用语都是依照其文本的目的而进行定义的。在第四次会期上，美国在一份改善建议中认为，“资源”应被限制在当地矿物资源内。然而，这个定义的范围同时也受“为了本部分的目的”的限制，也就是受到“区域”制度的目的的限制。事实上，在 1976 年的第四次会期上，“资源是指当地的矿物资源”这一定义已经得以确定，并在第十次会期上被最终写入《海洋法公约》。[32]《海洋法公约》第 133 条明确规定了该条款是“为了第十一部分的目的”而适用的。在第 133 条的准备资料中，其他资源也被明确提及。但是，当时大会以所掌握的有用信息稀少为由，决定不将其他资源包括在内，且不对“资源”概念做出限制，最终只是特别提及多金属结核。[33]

可见，当 1977 年热液喷口及其生态系统被发现时，为配合随后即将成为《海洋法公约》第十一部分的适用而制定的“资源”的定义，已经得到采用。尽管热液喷口及其生态系统被发现后，《海洋法公约》的谈判还继续进行了 5 年时间，但不得不承认的是，要求各国代表对已达成一致的协议重新进行谈判是不可能的。另

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31 Frida M. Armas-Pfirter, The Management of Seabed Living Resources in “the Area” under UNCLOS, at http://www.estig.ipbeja.pt/~ac_direito/F.Armas(reeil1).pdf, 11 February 2007.

32 Frida M. Armas-Pfirter, The Management of Seabed Living Resources in “the Area” under UNCLOS, at http://www.estig.ipbeja.Pt/~ac_direito/F.Armas(reeil1).pdf, 11 February 2007. 第一委员会的主席介绍了这一公约文本，并做了解释性的说明，提到由于技术和法律的原因，一般意义上的“资源”和“矿物资源”经常是可以互换的，但这在处理技术性问题时会导致混淆。

33 Armas-Pfirter, Frida. M, The Management of Seabed Living Resources in “the Area” under UNCLOS, at http://www.estig.ipbja.Pt/~ac_direito/F.Armas(reeill).pdf, 11 February 2007.

外，要让新的科技知识及与之相适应的法律和规范得到各方谈判者的理解，并纳入正在进行的谈判之中，也十分困难。所以，《海洋法公约》的“区域”制度中并未涉及深海海床生物资源及与之相关的活动。

3. 小结

在分析了《海洋法公约》相关条款和目前所掌握的深海海床生物资源相关信息之后，笔者认为，基于第十一部分的目的，“区域”的资源应从更宽泛的范围上进行考虑，应包括矿物资源和生物资源，即“区域”遗传资源也应适用“人类共同继承财产”原则。

第一，“人类共同继承财产”原则要求任何国家不应对“区域”的任何部分或其资源主张或行使主权权利。遗传资源因包含遗传的功能性单位而对生物多样性具有本质的作用，所以就算是生物实体属于私人所有，其所包含的遗传信息也因具有公共利益而应被视为“人类共同继承财产”，更何况“区域”的生物资源本身就不处于任何国家的主权之下。

第二，作为“人类共同继承财产”的“区域”及其资源被视为一个整体，通过一个机构或者组织，由国际社会进行管理，例如国际海底管理局管理“区域”的矿物资源，若生物遗传资源也适用这一制度，将使得国际海底管理局能以一种宽泛统一的方式来综合管理生物资源和矿物资源。这是十分重要的，因为深海海床遗传资源与深海矿物资源所处的环境紧密联系，勘探和开发矿物资源的同时必然会对遗传资源产生影响，反之亦然。通过同一个机构来管理所有的资源以及直接或间接影响这些资源的活动，不但可以避免不同机构的管辖权冲突和重复管理，而且将使得管理活动更加有效。

第三，“人类共同继承财产”原则要求开发利用共同继承财产的利益应为了全人类的利益进行公平分配。《海洋法公约》规定了从“区域”内获取的惠益的分享制度，这不仅包括了从深海采矿活动中获得的经济利益，而且还包括了从开发活动中获得的其他利益，比如技术转让和出于发展中国家利益的特殊考虑对其人员进行的能力训练。由于国家之间在经济和技术上的差距，发展中国家不能与发达国家在平等的条件下开发这些有珍贵应用价值的“区域”遗传资源。因此，应适用“人类共同继承财产”制度中的惠益分享方式，使所得收益为全人类的利益进行公平分配。不过，考虑到矿物资源与生物资源的不同，不宜照搬《海洋法公约》的现有规定，而应按照遗传资源的特性为其惠益分享制定一个新模式。

总之，“人类共同继承财产”原则对“区域”遗传资源的利用进行了 2 方面的重要限制：首先，国际社会的所有国家都对该资源享有权利；其次，开发活动必须考虑其对国际社会及其成员的影响。这在相互依赖的当代国际社会，对如何更好地养护和可持续利用这些生物遗传资源具有十分重要的意义。

（二）“区域”遗传资源的法律地位引发的相关问题

虽然笔者认为“区域”遗传资源应适用“人类共同继承财产”制度，但毕竟国际公约尚未对其法律地位作出明确规定，是采用与公海生物资源类似的制度，还是采用“人类共同继承财产”制度，这只能由《海洋法公约》缔约方进一步谈判才能确定。[34] 在“区域”遗传资源法律地位不明的情况下，围绕着这些遗传资源开展的勘探和开发活动的性质也难以确定，由此引发不少法律问题。

1. 海洋科学研究与生物勘探的区分

尽管目前国际条约并没有对海洋科学研究和生物勘探进行定义，但对上述概念作出界定对于确立适用于与“区域”遗传资源有关活动的法律制度具有十分重要的意义。

《海洋法公约》和《生物多样性公约》均没有使用或界定“生物勘探”一词。但国际海底管理局拟定的《“区域”内多金属结核探矿和勘探规章》中提及，“探矿”是指在不享有任何专属权利的情况下，在“区域”内探寻多金属结核矿床，包括估计多金属结核的成分、大小和分布情况及其经济价值。[35] 尽管该定义只适用于矿物资源，但该定义中隐含的原则也可适用于深海遗传资源。《生物多样性公约》秘书处也在一份大会报告中提到，“生物勘探”通常是指为寻找具有商业价值的遗传和生化资源而进行的各种探索生物多样化的活动，也是指从生物圈收集遗传资源分子构成的信息，以用于开发新商业产品的过程。[36] 联合国大学高等研究所关于生物勘探的报告指出，生物勘探定义的可能内容包括：以商业或工业开发为目的，对遗传资源进行系统的搜寻、收集或抽样；对具有商业用途的化合物进行筛选、分离或定性；测试和试验；为了商业目的进一步运用和开发分离化合物，包括大规模汇集和开发规模培育技术，为获准商业销售而进行试验。[37] 还有人建议，也可以将初期的研究和资料收集阶段称为“生物发现”，而生物勘探这一词可以包括此后为

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34 United Nations University Institute of Advanced Studies, Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects, June 2005. p. 30.

35 International Seabed Authority, Decision of the Assembly Relating to the Regulation on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6A/18, October 2000, Regulation 1(3)(e).

36 CBD Secretariat, Progress Report on the Implementation of the Programmes of Work-Information on Marine and Coastal Genetic Resources Including Bioprospecting, UNEP/CBD/COP/5/INF/7, May 2000, para. 6.

37 United Nations University Institute of Advanced Studies, Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects, June 2005. p. 15.

了进一步调查和最终进行商业应用的目的进行的资源收集阶段。[38]

《海洋法公约》第十三部分虽然规定了开展“海洋科学研究”的制度，但没有对这一词作出界定。在沿海国是否允许其他国家或国际组织在其专属经济区和大陆架上进行海洋科学研究方面，《海洋法公约》第 246 条对 2 种科学研究，即“增进关于海洋环境的科学知识以谋全人类利益”的科学研究和“与自然资源的勘探和开发有直接关系”的科学研究，做了不同的规定。虽然这不适用于国家管辖之外海域的科学研究，但由于在实践中难以区分这 2 种科学研究，《海洋法公约》的起草者增加了一个条款：“各国应通过主管国际组织设法促进一般准则和方针的制定，以协助各国确定海洋科学研究的性质和影响。”[39] 不过，这些准则和方针目前也尚未制定。《生物多样性公约》秘书处和联合国海洋事务与海洋法司的一份报告提到，“由于缺少一个正式的定义，海洋科学研究可被认定为，包括旨在增进人类在环境方面的知识而进行信息、数据或样品的收集和分析，并且不以经济获益为目的的活动”。[40]

《海洋法公约》在第十三部分明确规定了海洋科学研究的制度，有关“区域”遗传资源的科学研究自然适用这一部分的规定。但对于涉及这些遗传资源的商业活动，例如生物勘探，《海洋法公约》却没有明确规定。笔者认为，科学研究可以分为非商业目的的科学研究（或称为“纯科学研究”）和商业目的的科学研究（或称为“应用性科学研究”），[41] 而在海洋环境中的生物勘探可被视为应用性科学研究的一种形式。二者具有相同的客体，例如生物物种的取样，所以这 2 种活动之间的区别主要在于其意图和目的上，即如何使用与这些活动有关的知识和结果，而不在于活动本身的实际性质。[42] 因此，“区域”遗传资源的海洋科学研究必须遵守《海洋法公约》第十三部分所载的一般原则。[43] 同时，海洋科学研究是《海洋法公约》第 87 条和第 257 条规定的一种公海自由，但以遵守第十二部分的一般原则为前提。根据《海洋法公约》第 143 条和第 256 条，“区域”内海洋科学研究，须按照第十三部分规定专为和平目的并为全人类的利益进行。国际海底管理局可进

38 Food and Agriculture Organization of the United Nations, Deep Sea 2003, an International Conference on Governance and Management of Deep-sea Fisheries, Fisheries Report No. 722, 2005.

39 《海洋法公约》第 251 条。

40 CBD Secretariat, Study of the Relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with Regard to the Conservation and Sustainable Use of Genetic Resources on the Deep Seabed, UNEP/CBD/SBSTTA/8/INF/3/Rev.1, February 2003, para. 47.

41 United Nations University Institute of Advanced Studies, Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects, June 2005, p. 15.

42 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 202.

43 《海洋法公约》第 240 条至第 242 条、第 244 条第 1 款。

行有关“区域”及其资源的海洋科学研究，并可为此目的订立合同。管理局还应促进和鼓励在“区域”内进行海洋科学研究，并应协调和传播所得到的这种研究和分析的结果。《海洋法公约》各缔约国可在“区域”内进行海洋科学研究，并促进“区域”内海洋科学研究方面的国际合作。各缔约国尤其要参加国际方案，并鼓励不同国家的人员和管理局人员合作进行海洋科学研究；确保在适当情形下通过管理局或其他国际组织，为了发展中国家和技术较不发达国家的利益发展各种方案，以期加强它们的研究能力，在研究的技术和应用方面训练它们的人员和管理局的人员，促进聘用它们的合格人员从事“区域”内的研究。各缔约国还必须通过管理局，或适当时通过其他国际途径，切实传播所得到的研究和分析结果。

2.“区域”遗传资源的获取和惠益分享的问题

遗传资源获取和惠益分享是《生物多样性公约》的 3 大核心目标之一。遗传资源获取与惠益分享是 2 个相互作用、紧密相关的问题，是《生物多样性公约》所确定的基本交换关系：遗传资源提供国允许其他国家及其生物技术公司获取和利用其遗传资源，作为对价或交易条件，该遗传资源的利用者必须确保提供者公平合理地分享由利用该遗传资源而产生的各项惠益。[44] 也就是说，获取是分享的前提和基础，分享是获取的结果和要求。

尽管《生物多样性公约》中的条款鉴于其管辖范围对遗传资源的获取、技术转让、技术和科学合作、供资以及生物技术的处理作了规范，[45] 但这些规范资源获取和惠益分享的条款仅适用于在国家管辖的领域发现的海洋生物资源，而不适用于“区域”中的遗传资源。《生物多样性公约》缔约国会议制定的《关于获得遗传资源和公正、公平地分享其利用所产生的惠益的波恩准则》（以下简称“《波恩准则》”），也仅适用于在国家管辖地区内发现的海洋遗传资源。且该准则属自愿性质，仅为政策制定者以及遗传资源的利用者和提供者提供指导，不具有强制力。这些准则适用于《生物多样性公约》所涵盖的遗传资源以及这些资源的商业利用及其他利用所产生的惠益，但人类遗传资源除外。

可见，关于“区域”遗传资源的获取和惠益分享，国际社会对此并没有作出规定。这些生物遗传资源不处于任何国家的主权之下，其获取和惠益分享方式不同于《生物多样性公约》的规定；《生物多样性公约》并没有对“获取”和“惠益分享”进行界定，《生物多样性公约》历次缔约国大会以及《波恩准则》也没有对此进行说明。随着深海生物资源开发活动的不断发展，这一问题亟待国际法的规制。

3.“区域”遗传资源技术转让和知识产权的问题

对于生物开发中依靠现代知识实现的任何技术进步和创新，都可以通过专利

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44 秦天宝著：《遗传资源获取与惠益分享的法律问题研究》，武汉：武汉大学出版社 2006 年版，第 346 页。

45 《生物多样性公约》第 15 条到第 21 条分别论及遗传资源的获取、技术转让的获取、资料交流、技术和科学合作、生物技术的处理和惠益分享、财政资源和财政机制。

或其他形式的知识产权而获得保护。这对“区域”遗传资源的开发而言，也不例外。在“区域”生物遗传资源获取和惠益分享的过程中，为了公平合理地分享惠益，必须确认和保护遗传资源利用者在生物开发和技术转让过程中的贡献，对其权利进行平衡。

根据《海洋法公约》第十四部分规定的一般原则，各国应直接或通过主管国际组织进行合作，以期促进按照公平合理的条款和条件来发展和转让海洋科学和海洋技术。这一工作的开展尤其要惠及发展中国家。各国还应尽力促进有利的经济和法律条件，以便在公平的基础上为所有有关各方的利益转让海洋技术（第 266 条）。《海洋法公约》还鼓励各国设立国家和区域海洋科学和技术研究中心，特别是在发展中沿海国设立，并加强现有的研究中心，以推进海洋科学研究（第 275 条第 1 款）。这种区域性中心将在海洋科学和技术研究的各方面，特别是在海洋生物学包括生物资源的养护和管理方面提供训练和教育方案（第 277 条）。《海洋法公约》第 267 条认识到，在促进海洋技术的开发和转让时，应适当顾及一切合法利益，包括海洋技术的持有者、供应者和接受者的权利和义务。《海洋法公约》第 144 条、第 170 条特别提到“区域”问题，要求国际海底管理局取得有关“区域”内活动的技术和科学知识，鼓励向发展中国家和企业部转让技术。

在技术（包括生物技术）的获取和转让方面，《生物多样性公约》各缔约国必须提供和（或）便利有关养护和可持续利用生物多样性、或利用遗传资源的技术的获取和转让（第 2 条，第 6 条第 1 款）。技术的取得和向发展中国家转让，应按公平和最有利条件提供，若技术属于专利和其他知识产权的范围时，这种取得和转让所根据的条件应承认且符合知识产权的充分有效保护（第 16 条第 2 款）。第 19 条论述了生物技术的处理及其惠益的分配，其中规定应采取措施，让提供遗传资源的国家切实参与生物技术研究活动，并且在公平、公正的基础上，优先给予这些国家取得基于其提供的遗传资源的生物技术所产生的成果和惠益。《波恩准则》还强调，惠益分享和技术转让与相关知识产权制度必须相辅相成。

与此同时，生命科学领域专利权保护的增多已引发诸多关切。例如，给予遗传材料以专利保护是否在道德上合乎道理；遗传材料的“鉴定、离析或提纯”究竟是符合“创造性步骤”这一标准，还是仅仅是用来确定专利权资格的发现；申请专利的发明是否符合可供工业应用的标准；允许涵盖范围广泛的专利申请所造成的影响；给予生物和遗传材料以专利资格所基于的经济证据及其对科研竞争和创新的影响；公共卫生、农业、开发、科学研究、工业和贸易的专利保护申请大幅增加所产生的影响，等等。[46] 相关国际组织已就《生物多样性公约》下的遗传资源制度

46 CBD Secretariat, Global Status and Trends in Intellectual Property Claims: Genomics, Proteomics and Biotechnology, UNEP/CBD/WG-ABS/3/INF/4, February 2005, p. 20.

和知识产权制度的相互关系开展了一系列活动。[47]

总之，知识产权保护是鼓励研究、开发、应用和转让新技术所必需的激励机制。在生物技术时代，更需要强有力的知识产权保护以激励生物技术产业从事艰辛的研究和开发活动。[48] 但在知识产权不断扩张和加强的国际背景下，知识产权很容易成为对遗传资源收益进行公平合理分享的桎梏。对于“区域”遗传资源而言，因其所处位置的特殊性，尽管只有遗传资源利用者，而不存在遗传资源提供国，但现行知识产权制度对与遗传资源有关的知识成果的过度保护，不利于“区域”遗传资源开发所得收益为全人类的利益进行公平分配。当然，拒绝遗传资源利用者主张知识产权并不是最佳解决方案，也不利于国际社会的共同和长远利益。因此，合理的解决方法应当是允许开发者主张知识产权，充分发挥知识产权带来的积极作用，同时通过各种合法手段对其进行限制和制衡。在“区域”遗传资源的潜在价值越来越凸显的今天，如何更好地发挥知识产权在开发这些资源中的积极作用，又是国际社会需要努力解决的一个重要议题。

四、“区域”遗传资源管理制度的完善

21 世纪是海洋世纪，海洋将成为开发新资源的主战场，而“区域”遗传资源已成为世人最为关注的新资源之一。但在目前情况下，国际社会还尚未确定“区域”遗传资源的法律地位，在涉及该资源的商业活动方面也存在重大的法律空白。鉴于“区域”遗传资源日趋重要，国际社会必须完善这一问题，并且这几年也一直在努力。

（一）国际社会在完善“区域”遗传资源管理制度方面的活动

海洋事务一直在联合国的工作中占有重要位置。除了《海洋法公约》、《生物多样性公约》等在联合国支持下通过的各种文件之外，联合国大会和其他联合国机构多年来还通过了大量有关海洋环境和生物多样性的决定，如《关于环境与发展的里约宣言》、《21 世纪议程》等。近年来，大会通过 1999 年 11 月 24 日第 54/33 号决议所确立的非正式协商进程等方式，已经探讨了海洋和海洋法的议程项目中有关海洋生态系统和生物多样性的养护和可持续利用的问题，“区域”中的相关问题自然也包括在内。大会还设立了不限成员名额非正式特设工作组，

47 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, paras. 273, 301~304.

48 秦天宝著：《遗传资源获取与惠益分享的法律问题研究》，武汉：武汉大学出版社 2006 年版，第 494 页。

研究国家管辖范围以外区域的海洋生物多样性的养护和可持续利用的相关问题，并在秘书长根据大会第 59/24 号决议第 74 段所载要求而编写的报告（A/60/63/Add.1）中提出，国际社会现在应该参照《海洋法公约》规定的一般原则，更加深入地探讨与国家管辖范围以外区域海洋生物多样性的养护和可持续利用有关的各种复杂问题，并在必要时加以澄清。2006 年 2 月，工作组在联合国召开会议，在会议报告的附件中载列了工作组共同主席拟订的趋势摘要以及各代表团提议今后进行的具体研究项目清单。[49]

《生物多样性公约》缔约方会议也进行了大量的工作。关于国家管辖范围以外深海海床遗传资源的养护和可持续利用问题，《生物多样性公约》缔约方会议审议了科学、技术和工艺咨询附属机构的工作，请秘书处与缔约方和其他政府及相关国际组织协商，收集关于国家管辖范围以外地区深海海床遗传资源的识别、评估和监测方法的信息；收集并综合关于其现状和趋势的信息，包括确定这些遗传资源面临的威胁和保护这些资源的技术选择。缔约方会议还请各国找出自己管辖或控制范围内可能对国家管辖范围以外的深海海底生态系统和物种造成严重不利影响的活动和进程，以执行《生物多样性公约》第 3 条。关于获得遗传资源和惠益分享问题，2000 年《生物多样性公约》缔约方会议相继设立了不限成员名额特设工作组（获取和惠益分享问题工作组）、通过了《波恩准则》和第 VII/19D 决议，拟通过谈判建立一个关于遗传资源获取和分享惠益的国际机制。

世界知识产权组织作为负责促进和保障知识产权的专门机构，已经审议了与遗传资源有关的知识产权问题。1998 年，环境规划署和世界知识产权组织共同编制了一份研究报告，说明知识产权在分享使用生物资源取得的惠益方面的作用。2000 年，世界知识产权组织大会设立了知识产权与遗传资源、传统知识和民间文学艺术政府间委员会，负责处理各种与知识产权和遗传资源之间相互作用有关的问题。应 2002 年第六次《生物多样性公约》缔约方会议的邀请，世界知识产权组织编制了一份技术研究报告，说明有关遗传资源和传统知识的专利公布规定。[50] 应 2004 年第七次《生物多样性公约》缔约国会议的邀请，世界知识产权组织审查了取得遗传资源与知识产权申请中有关公布的规定的相互关系。

另外，2001 年《多哈宣言》指示《知识产权协定》理事会在审查《知识产权协定》第 27 条第 3 款第 b 项时，审议《知识产权协定》和《生物多样性公约》之间的关系。2002 年，世贸组织秘书处编制了一份摘要，载列各国代表团在理事会会议中就《知

49 United Nations, Report on the Work of the United Nations *Ad Hoc* Open-ended Informal Working Group to Study Issue Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, A/61/65, March 2006, Annex I, Annex II.

50 CBD Secretariat, Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge, UNEP/CBD/WG-ABS/2/INF/4, December 2003.

识产权协定》和《生物多样性公约》之间关系提出的问题和发表的意见。在理事会进行讨论时，提出了下列议题：如何适用《知识产权协定》中有关申请生物发明专利的规定，包括生命形式可以获得专利的程度，如何共同执行《知识产权协定》和《生物多样性公约》和应否修改《知识产权协定》以避免可能发生的冲突，专利是否应公布遗传材料的来源，以及使用遗传材料以前必须得到何种形式的核准。[51]

上述国际社会在“区域”遗传资源管理制度完善方面已经和正在采取的行动，可归结为以下几点：(1) 在联合国及有关国际机构内，提高成员国对深海生态系统和生物多样性所遭受的威胁和风险的认识，通过宣传提高公众对海洋生物多样性及其重要性的了解，使其明了从养护和可持续利用国家管辖以外的海洋生物多样性中得到的惠益；(2) 在现有的国际条约内，考虑作出适当安排，确保公平公正地获取海洋遗传资源和分享开发这些资源所产生的惠益；(3) 加强各有关机构之间的合作和协调，作出可能的临时安排，对那些影响国家管辖之外地区海洋生物多样性的部门活动，争取改善其管理，包括加强有关部门组织和区域组织的管理及其问责机制；(4) 在现有国际法基础上，鼓励相关国家制定、执行保护和可持续利用海洋生物多样性的行动方案；(5) 鼓励发挥非政府组织与科研机构的作用，建立自我约束机制，开展科研合作，在诸如标准、样品交换等问题上发挥科学家及科研机构的作用。

（二）完善“区域”遗传资源管理的几种途径

考虑到目前“区域”遗传资源管理制度上的不足，以及国际社会在“区域”遗传资源管理制度完善方面已经和正在采取的行动，笔者认为可以从以下 3 种途径完善“区域”遗传资源管理：

第一，制定一部可用于确定和保护国家管辖范围以外地区的所有脆弱生态系统的国际条约，其中包括“区域”。鉴于现有条约和机制大多只规定部门管理的做法，尚无明确的机制和政策推动合作与协调以保护某些敏感海洋生态系统，因此，可以制定一部新的国际条约作为管理“区域”遗传资源的一项中长期措施，从而为加强合作，综合养护和管理“区域”遗传资源创造必要的法律框架，这将有助于克服目前国际监管框架的支离破碎和部门间各自为政的现状。这一新的条约的首要目的是确定“区域”遗传资源的法律地位和开发利用该资源应遵循的原则。由于“区域”生物资源的特性，《海洋法公约》中的“人类共同继承财产”原则与公海自由原则均可为确定这些生物资源的法律地位提供借鉴。其次是在联合国框架内利用现有条约发展新的条约，执行《海洋法公约》和《生物多样性公约》有关海洋环境

51 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 304.

保护的协定方式，制定管理和保护国家管辖范围以外地区的所有脆弱生态系统的国际条约。在具体规定上，可以借鉴这 2 部公约的某些共同原则和概念，如国家应承担的责任、生态系统方式、建立海洋保护区、信息交换、环境影响评估、可持续利用、公正和公平地分享惠益等。[52]

第二，考虑有关协调机制和现有条约及其他有关国际文书的可适用性，协调有关国际组织和开展研究的相关国家采取行动。由于出台一部新的国际条约将会是一个漫长的过程，目前较为现实的考虑是如何更好地适用现有相关国际文件，包括这些文件提供的原则和手段，如审慎方法和生态系统方法等，以解决管理“区域”遗传资源问题。这是短期内可能采取的加强管理“区域”遗传资源的措施。在这方面的首要任务是敦促有关国家采取行动，规范其科研人员在“区域”的行为。其次是必须改善国际组织之间以及各国主管部门之间的协调与合作，各国应履行《海洋法公约》规定的合作义务，进一步合作制定责任规则，包括对危害脆弱的深海生态系统的各种活动制定严格责任规则。[53]

第三，鼓励国际科学界制定行为守则，规范具备活动能力的机构和个人在“区域”的活动。这与国际社会开展立法和政府间机构的协调并行不悖。国际科学界正在实践和发展自愿行为守则，以期减少科学研究可能造成热液喷口地区潜在利用的冲突和对生物种群的威胁。相应的可能措施是建立国际科学界一致认可的深海海床生物多样性甄别标准和确立自愿的国际样品交换协议。[54] 这些措施既可约束目前由于法律空白造成的深海海床、特别是热液喷口区的过度勘探，也可为新条约的制定与形成提供实践。

值得注意的是，应当充分发挥国际海底管理局在完善“区域”遗传资源管理制度方面的作用。面对“区域”内非生物和生物资源共存造成的挑战，我们必须建立一个在保护生态系统的同时又能可持续地开发利用这 2 种资源的制度，这也为管理局在管理“区域”矿物资源的同时，利用其保护“区域”环境的责任，扩大对“区域”生物资源的管理提供了契机。尽管由于“区域”生物资源的特性与法律地位尚不明确，使管理局目前难以在“区域”遗传资源的开发和利用问题上有所作为，但根据《海洋法公约》第 143 条、第 145 条和第 162 条第 2 款第 x 项，没有理由认为管理局无权制定保护“区域”生物多样性的有关规定，也没有理由说明管理局不

52 金建才：《深海底生物多样性与基因资源管理问题》，载于《地球科学进展》2005 年第 1 期。

53 United Nations, Report on the Work of the United Nations *Ad Hoc* Open-ended Informal Working Group to Study Issue Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, A/61/65, March 2006, paras. 51~53.

54 林乡：《关于公海“区域”中生物基因资源的勘探和开发问题》，载于《国际海底》2002 年第 2 期。

该制定有关标准，以划定深海海床特别敏感区域作为环境参照区等保留区域。[55]

事实上，根据《海洋法公约》第 165 条第 2 款第 e 项，近 10 年来，管理局已举办了一系列与深海海床环境和资源相关的研讨会，提供了最新获得的有关深海领域资源与生态系统的科学信息，使管理局制定的有关“区域”活动的规章和指南具有客观的科学依据。[56] 在管理局制定和通过的《“区域”内多金属结核探测和勘探规章》中，已经包含有保护和保全海洋环境使之免受“区域”活动有害影响的条款，并由法律技术委员会发布相关环境指南。《规章》条款要求承包者在勘探阶段收集环境数据和建立环境基线，以测定勘探活动对海洋环境的影响，并为此制订环境监测方案和建立报告制度。承包者还被要求与管理局合作以制订与执行深海环境监测方案。管理局目前正在审议探测和勘探多金属硫化物和富钴结壳的规章，通过订立这些规章，管理局正在建立框架，以便切实管理“区域”内的活动对海洋环境及其生物多样性造成的威胁。[57]

五、我国参与“区域”遗传资源开发和利用的现状与对策

随着海洋科技和生物技术的发展，“区域”及深海海床科学研究和开发活动呈现出资源与环境评价相互关联、矿物资源与生物资源同为对象、各种不同学科彼此交融、制度规则正在酝酿发展的局面。在技术日新月异的当代，一个国家仅对“区域”矿物资源加以关注和了解，而不关注和了解同一环境中的生物资源，缺乏对其存在环境及生物多样性的认识，将难以保持在“区域”活动中的前沿地位，也将失去在“区域”事务中的有利地位。

（一）我国参与“区域”遗传资源开发和利用的现状

迄今，我国在“区域”资源方面进行的相关活动主要有：与管理局签订了多金属结核勘探合同，拥有一块具有专属勘探权的多金属结核矿区；对多金属硫化物进行了资料收集与分析；开展了富钴结壳的资源调查。从管理局的角度看，我国是多金属结核勘探合同承包者，是在富钴结壳方面开展了研究与调查的主要国家，但

55 金建才：《深海底生物多样性与基因资源管理问题》，载于《地球科学进展》2005 年第 1 期。

56 《国际海底管理局秘书长南丹在国家管辖范围外海洋生物多样性保护与可持续利用问题非正式工作组会议上的发言摘要》，下载于 http://china-isa.jm.china-embassy.org/chn/hdxx/t236720.htm，2007 年 9 月 30 日。

57 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 283.

尚未列入已开展多金属硫化物调查的国家之列。[58] 尽管我国在开展矿物资源调查的同时，也进行了有关环境资料数据的收集与生物样品的采集，但总体上我国的深海生物研究还刚刚起步，由于受到勘探技术及样品采集技术的限制，目前我国进行深海生物研究的力量还很薄弱，除了在工作程度与规模范围上难以与西方国家相比，在方法与系统性方面也不适应当前国际社会通行的做法。[59]

我国在深海生物研究方面还存在诸多不足，其中包括对深海生物资源和生物多样性调查与了解程度的不足，技术装备及人才方面薄弱，以及对国际法研究投入不足等问题，这些导致了我国在有关条约、规则制度的参与和影响力方面还相当有限。例如，规范热液喷口区研究与取样活动的《可持续利用热液喷口场址的行为守则草案》的酝酿、制度建构阶段到目前即将进入的执行阶段，均是少数西方国家凭借自身科技优势为主导。[60] 这些行为守则既可看成是保护深海海床生物多样性的大势所趋，也可看成是发达国家在完成深海海床遗传资源研究所需的生物样品采集以后，为确保在该领域的科技优势和经济利益，为后来者设置的门槛。

上述不足，进一步导致了我国在深海活动方面的诸多不利：首先，在目前国际关注的深海热液喷口生物勘探和取样方面，随着时间的推移，我国将面临越来越大的禁采和限采压力，采集深海海床遗传资源研究所需的生物样品可能变得日益困难。其次，作为一个在国际多边事务中日益重要的大国，我国在有关“区域”生物多样性保护和分享利用遗传资源所带来的利益问题上，如果没有具体的观点和提案，既不利于树立重视深海环境问题的外交形象，也不利于分享在“区域”遗传资源利用方面的实际利益。最后，我国参与管理局内部的国际合作项目与研讨的能力不足，在制定有关新资源的规章时缺少应有的发言权。对于我国目前已有的多金属结核专属勘探权，我们也难以评估资源开发的经济性和技术系统的有效性。

（二）我国参与“区域”遗传资源开发和利用的对策

1. 关注国际法发展趋势，加强对有关规章的研究

在全球范围内，密切关注国际海洋法的发展趋势，组织法律界人士跟踪有关动向，开展调研工作，积极参与联大决议和有关深海海床生物多样性实质性方案的起草与讨论。在管理局内，针对目前正在制定的深海海床新资源有关规则，加强预研工作，关注有关环境与“区域”生物多样性保护的规定，对海洋科学研究行

58 International Seabed Authority, Consideration Relating to the Regulation for Prospecting and Exploration for Hydrothermal Polymetallic Sulphide and Cobalt-rich Ferromanganese Crusts in the Area, ISBA/7/C/2, May 2001, paras. 6~7.

59 杨晓光、樊杰：《我国深海资源产业化模式及其对策研究》，载于《矿业研究与开发》2004 年第 1 期。

60 中国常驻国际海底管理局代表处：《管理局争取“区域”生物多样性与基因资源的主导地位》，载于《国际海底信息》2003 年第 12 期。

为和生物勘探行为进行界定，并尽可能与管理局一起发展行为守则。在科学界，我国应在积极参与大洋中脊计划[61]和深海钻探计划研究工作的同时，密切关注大洋中脊计划行为守则的发展，鼓励我国科研人员积极参与，特别是参与有关标准的制定工作。

2. 采取深海海床矿物资源与生物资源并重的方针

在以往工作基础上，及时将“区域”工作重点转向多金属硫化物及同一环境下的深海热液喷口区生物资源调查，同时关注多金属结核海盆区和富钴结壳海山区的生物多样性调查研究。未来计划应将开展热液区生物资源的研究开发列为重点，积极融入当代深海科学发展的前沿领域，根据工作基础开展若干国际前沿领域的研究。

3. 加快进入深海热液喷口区开展研究工作的能力建设

采取长期与短期能力建设相结合的方针，在加强深海海床生物资源研究开发基地建设、稳妥发展我国载人潜器的同时，应通过多种途径，解决我国在深海热液喷口区的生物样品采集能力问题。还应将人力资源的开发列为重要的能力建设，既应考虑我国在深海前沿领域研究开发的能力，也应关注我国参与和影响国际条约与规则制定的能力建设，确保我国以强大的技术与人才实力支持深海海床资源的研究与开发。[62]

4. 加强我国深海资源开发产业化模式经营

进一步规范和强化中国大洋协会组织团结社会各界力量参与我国“区域”研究开发活动的优势，注重深海资源开发产业化与国家海洋发展战略、国家高技术发展计划等重大方案的配合与衔接，实现战略目标的融通和工作计划的相互协作；通过专家咨询机制，在外交、投资、资源、科学技术规划等方面使其切实发挥政府在“区域”方面决策的参谋助手作用，促进决策的民主化和战略规划的科学性。同时，以发展深海通用技术为先导，逐步建立和完善深海海床矿物资源和遗传资源的勘探与开发综合技术体系，开发和改善多种深海资源勘探、开发与加工技术和装备，优先完成具有商业前景的资源在商业开采前的设计、加工和深海实验研究，增强产业核心竞争力和可持续发展能力。[63]

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61 大洋中脊是产生新洋壳的地方，也是大洋真正的“宝藏”所在地。国际大洋中脊协会早在几年前就制定了 2004—2013 年研究计划，详细列明了 7 项需要重点研究关注的科学问题。

62 金建才：《深海底生物多样性与基因资源管理问题》，载于《地球科学进展》2005 年第 1 期。

63 杨晓光、樊杰：《我国深海资源产业化模式及其对策研究》，载于《矿业研究与开发》2004 年第 1 期。

六、结　语

当前，随着在生物技术领域方面的进展，国际上对“区域”遗传资源的兴趣以及与此相关的活动日益增多，从法律角度加强对这些遗传资源的管理的重要性和紧迫性日益凸显。

在“区域”遗传资源法律地位问题上，基于《海洋法公约》第十一部分的目的，该遗传资源也应适用“人类共同继承财产”原则，从而对“区域”遗传资源的利用进行 2 方面的限制：首先，所有国家平等地享有该资源的利益；其次，开发活动必须考虑其对国际社会其他成员的影响。在相互依赖的当代国际社会，该原则对如何更好地养护和可持续利用这些生物遗传资源具有十分重要的意义。

鉴于当前国际公约尚未对“区域”遗传资源的法律地位作出明确规定，是采用与公海生物资源类似的制度，还是采用“人类共同继承财产”制度，只能由《海洋法公约》的缔约方进一步谈判才能确定。因此，在这些情况下，围绕这些遗传资源开展的勘探和开发活动所引发的一些法律问题，仍需要国际社会进一步谈判加以解决。一个较为现实的考虑是明确现有条约和有关国际文书的可适用性。通过适用现有法律条文，协调有关国家采取直接措施，特别是顾及到这些国家在《海洋法公约》和《生物多样性公约》下所应承担的的义务。在这方面，应该突出国际海底管理局的重要作用，由《生物多样性公约》执行机构和国际海底管理局来负责管理“区域”遗传资源的养护和可持续利用。

我国是人口大国，也是资源消费大国，为了将来在“区域”遗传资源的开发和利用领域占有与我国地位相称的一席之地，除发展自己的调查、科研和产业体系外，还应大力开展双边和多边合作，加强这方面的人才培养，确保我国以强大的技术与人才实力支持面向“区域”多种资源研究开发的战略。

论“Precautionary Principle”一词的中文翻译

褚晓琳 *

内容摘要：目前国内学者对“precautionary principle”的翻译并不统一，存在“预防原则”、“风险预防原则”、“审慎预防原则”和“预警原则”等译法。法律术语的翻译应当严谨、准确。从“precautionary”的含义，“precautionary principle”的概念，“precautionary principle”与相关概念的区别，以及“precautionary principle”的起源这 4 个角度考察，可以看出“precautionary principle”具有针对不确定的危险应采取一种谨慎态度的意思，并与近义词“preventive principle”（预防原则）存在显著区别。而“预警原则”一词能够较为精确地反映二者的区别，突出“precautionary principle”的特点，是“precautionary principle”的较佳译名。

关键词：Precautionary principle 预警原则 Preventive principle 预防原则

“Precautionary principle”是近 20 多年环境法中最具创新性、最具影响力，且最重要的新兴概念。“Precautionary principle”最早发源于德国国内环境法，并在 20 世纪中后期在西方国家迅速发展，是指人类应更谨慎地管理关乎健康与环境的危险，不能以缺乏完整的科学数据作为拖延采取防治环境恶化的有效措施的理由。而我国国内学者对“precautionary principle”的研究较为滞后，大致始于 20 世纪末 21 世纪初。

笔者在较为全面系统地搜集分析国内有关“precautionary principle”的各种研究成果之后，发现其中存在一个问题，即国内学者对“precautionary principle”

* 褚晓琳，厦门大学法学院国际法专业博士生。

的翻译存在不同看法。有些学者将“precautionary principle”翻译为“预防原则”，[1] 有些翻译为“风险预防原则”，[2] 有些则译为“预警原则”，[3] 还有学者翻译为“审慎预防原则”。[4] 其中多数国内学者采用了“风险预防原则”的译名。如何更好地翻译“precautionary principle”，何为“precautionary principle”的最佳中文译名，是值得我们思考的问题。

法律术语翻译的首要原则应是准确，即最大限度地再现原词语的所有信息，译文应没有遗漏、添加和歧义，忠实于原词语的含义。[5] 根据准确性原则，我们可以从以下几个方面对“precautionary principle”的翻译进行研究。

一、从“precautionary”的含义来看

《布莱克法律词典》将“precaution”解释为“预先行动；先见；为防止发生损害或取得较好结果所必要的谨慎；或是先前采取的措施；为避免可能的问题、事件、

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1 将“precautionary principle”译为“预防原则”的国内研究成果有：中国科学院生命科学与生物技术局：《法国公众健康与安全方面的防范体系》，载于《生命科学研究快报》2003 年 6 月 18 日第 22 期；刘弘：《预防原则在中国与美国的比较》，载于《环境与职业医学》2004 年第 4 期；樊春良：《科学与治理的兴起及其意义》，载于《科学学研究》2005 年第 1 期；牛惠之：《预防原则之研究——国际环境法处理欠缺科学证据之环境风险议题之努力与争议》，载于《台湾大学法学论丛》2005 年第 3 期；李辉：《WTO 转基因农产品贸易争端：美国真的“胜诉”了吗》，下载于 http://www.iolaw.org.cn/showarticle.asp?id=1795，2007 年 9 月 20 日；世界科学知识与技术伦理委员会：《预防原则》，巴黎：联合国教育、科学及文化组织 2005 年版；等等。

2 将“precautionary principle”译为“风险预防原则”的国内研究成果有：胡斌：《试论国际环境法中的风险预防原则》，载于《法制与管理》2002 年第 6 期；王曦、杨兴：《论国际淡水资源利用和保护法的发展》，载于《法学论坛》2005 年第 1 期；王跃先、李宇晗：《关于我国防范外来入侵物种的立法研究》，载于《黑龙江政法管理干部学院学报》2005 年第 5 期；马缨：《科技研究管理与风险预防原则》，载于《科技管理研究》2005 年第 10 期；陈海嵩、谭英：《国际环境立法中的风险预防原则》，载于《湖北广播电视大学学报》2006 年第 7 期；朱建庚：《风险预防原则与海洋环境保护》，北京：人民法院出版社 2006 年版；等等。

3 将“precautionary principle”译为“预警原则”的国内研究成果有：俞孔坚：《可持续环境与发展规划的途径及其有效性》，载于《自然资源学报》1998 年第 1 期；傅崐成：《国际渔业管理法中的预警方法或预警原则》，载于《海洋法专题研究》，厦门：厦门大学出版社 2003 年版；张珞平、陈伟琪、洪华生：《预警原则在环境规划与管理中的应用》，载于《厦门大学学报（自然科学版）》2004 年第 8 期；肖肖：《欧盟食品安全预警原则研究》，载于《中国动物检疫》2004 第 12 期；等等。

4 将“precautionary principle”译为“审慎预防原则”的国内研究成果有：王明远：《转基因生物安全概念辨析》，下载于 http://www.biosafety.com.cn/Html/Article/TransgenicBio-Safety/ztzs/293.html，2007 年 9 月 20 日。

5 江丹：《论法律术语的特征及翻译原则》，载于《国际关系学院学报》2005 年第 3 期。

责任，或是为取得较好结果的先见”。[6] 也就是说“precaution”具有“为防止发生可能的危害而采取的一种谨慎态度，防患于未然”的意思。虽然，《布莱克法律词典》中并没有对“precautionary”作出解释，但是基于“precautionary”是“precaution”的形容词，这 2 个词语的意思应是一致的。因而，“precautionary”也具有“谨慎的、预防的”含义。

在《牛津现代法律用语词典》中，“precautionary”的含义是“具有远见性的谨慎的；预防的”。[7] 在《朗曼同义词词典》中，与“precautionary”近义的词包括“有远见的、谨慎的、慎虑的、临时的、预防的”。[8]《韦氏新大学词典》则将“precaution”的含义规定为“事先所采取的谨慎、先见；为防止危害发生或取得较好结果而事先采取的措施”。[9] 从中可以推知，“precautionary”也具有“谨慎的、预防的”含义。

根据这些词典对“precautionary”的解释，可以看出：“precautionary”含有“预防”（preventive）的意思，但又不能完全等同于“预防”。因为除了内含有预防的意思之外，“precautionary”还有针对可能的危险而在灾害发生之前事先采取措施的含义，而这是“preventive”一词所不具有的。因而，虽然“preventive”和“precautionary”词意相近，但仍存在一定差别。在翻译“precautionary principle”时，应注意以上 2 个英文单词含义的区别，并尽量体现“precautionary”的特有意思。

一些国内学者将“precautionary principle”翻译为“预防原则”，这是十分不准确的。因为“预防原则”所对应的英文词语应是“preventive Principle”，而非“precautionary principle”。此外，“风险预防原则”是对“precautionary principle”的意译，笔者认为这一译名也是不恰当的，因为，该种翻译仅是在“预防原则”一词之前加上了“风险”二字。从字面上，“风险预防原则”所能传递的信息与“预防原则”并无太大差别，没有真正体现出“precautionary”与“preventive”的重要差异。“审慎预防原则”的译法虽然较“预防原则”和“风险预防原则”的译名更好，在一定程度上体现了“precautionary”中“小心谨慎的”的含义，但仍没有反应出“precautionary”针对不确定性的危险事先预防的本质。笔者较为赞同“预警原则”

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6 《布莱克法律词典》对“precaution”解释的英文全文是“Previous action; proven foresight; care previously employed to prevent mischief or to secure good result; or a measure taken beforehand; an active foresight designed to ward off possible problems, accidents, liability, or secure good results”。参见 Henry Campbell Black, *Black's Law Dictionary,* Minnesota: West Publishing Co., 1979, p. 1059.

7 《牛津现代法律用语词典》对“precautionary”的英文解释是“suggesting or advising provident caution; or of relating to, or of the nature of a precaution”。参见［美］加纳：《牛津现代法律用语词典》（影印本），北京：法律出版社 2002 年版，第 680 页。

8 《朗曼同义词词典》所列出的“precautionary”的同义词包括“provident, prudent, wise, sagacious, provisional, preventative”。参见 Longman Group Limited, *Longman Synonym Dictionary*, Great Britain: Longman House, 1986, p. 917.

9 《韦氏新大学词典》对“precaution”的英文解释为“care taken in advance, foresight; a measure taken beforehand to prevent harm or secure good”。参见 *WEBSTER'S New Collegiate Dictionary*, Springfield: Merriam-Webster, 1996, p. 916.

的译名，其中“预”字表示“预防”的含义，而“警”则具有“警戒性的、警惕性的”的意思，表明即使对于缺乏确定性的危险也应持谨慎态度。所以“预警”二字能够较好地体现“precautionary”的内涵，同时又较为简洁。

二、从“Precautionary principle”的概念来看

对于“precautionary principle”，很难在中文中找到一个与其含义相一致的对应词，所以在翻译“precautionary principle”时一般需采取释义[10]的方法。在采用释义方法时，翻译者实际上在扮演一个起草者的角色，因而须特别慎重，应尽可能掌握第一手材料，以便正确理解源术语的真正含义。所以在确定“precautionary principle”的中文译名之前，我们应首先明确该原则的概念。

很多国际公约和国际组织决议都对“precautionary principle”作了规定。例如，《里约宣言》原则十五规定：“为了保护环境，各国应按照本国的能力广泛适用预防性措施，遇有严重或不可逆转损害的威胁时，不得以缺乏科学的充分确实的证据为理由，迟延采取符合成本效益的措施防止环境恶化。”该规定被很多学者认为是对“precautionary principle”最为权威的表述。[11]

在环境保护方面，1992 年《保护波罗的海海洋环境公约》第 3 条对“precautionary principle”作了界定：“当有合理根据认为直接或间接引入海洋环境的物质或能量可能对人类健康带来灾难、危害生物资源和海洋生态系统、损害舒适性，或者干扰海洋的其他用途，甚至在没有结论性证据证明引入和后果之间的因果关系时，缔约方也应采取预防性措施。”

1992 年《保护东北大西洋海洋环境公约》为防止废物污染和交通污染，要求各缔约方应适用“precautionary principle”，并对该原则作了规定，即“有合理理由认为直接或间接排放到海洋环境中的物质可能危害人类健康、损害生物资源和海洋生态系统、破坏环境优美或妨碍海洋的其他正当用途时，应采取预防性措施，即使关于排放物质与危害结果之间的因果关系还未形成最终的科学结论”。

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10 释义是解决缺少确切对等词的一个较为有效的方法，其是指用译入语的中性语言将源语的意图含义表达出来。

11 Simon Marr, *The Precautionary principle in the Law of the Sea-Modern Decision Making in International Law*, The Hague: Kluwer Law International, 2003, p. 2.

在生物资源养护和管理方面，1995 年《联合国鱼类种群协定》第 6 条对“precautionary principle”规定为：“会员国应通过预防性方法养护、管理并勘探跨界鱼类和高度洄游鱼类种群”，并强调“各国在资料不明确、不可靠或不充足时应更为慎重，不得以科学资料不足为由推迟或不采取养护和管理措施。”

1995 年联合国粮农组织《负责任渔业行为守则》将“precautionary principle”列为“一般原则”，并规定“各国、分区域和区域渔业管理组织，应当利用目前最佳的科学依据，普遍采取保护、管理和利用水生生物资源的预防性方法。不应当把缺乏足够的科研资料，作为推迟采取或不采取措施来保护目标物种、与之相联系的物种或对其依赖的物种以及非目标物种及其环境的理由”。

虽然各个国际条约与国际组织决议对“precautionary principle”的规定并不相同，但是这些规定均涉及“precautionary principle”的基本要素：

第一，在获得充足科学证据之前的谨慎行动：由于缺乏充足的科学资料又没有准确的模型加以参考，绝大多数有关环境的预测都具有不确定性。因而，如果根据一定的科学信息，表明可能存在某种环境危险，便应采取预防性措施，即使可能会产生一定花费。[12]

第二，严格管理：基于现有的科学知识，人类不可能预知某些活动对环境所造成的影响或危害。因而，有必要认真评估相关活动的环境影响，审慎制定环境决策，以防止人类活动对环境或资源造成危害。[13]

第三，举证责任转换：在传统环境法中，一般由主张环境保护的一方承担相关活动可能对环境造成危害的证明责任。然而，根据“precautionary principle”，举证责任将转移至行动的发起者，由他们负责证明其计划采取的行动不会对环境造成损害。

第四，比例原则下的平衡：采取“precautionary principle”必定会产生一定花费，因而需要对实施预防性措施可能产生的收益和花费进行计算和评估。也就是说，在“precautionary principle”的准备与适用过程中，应遵循比例原则和成本收益原则，从而更好地对实施预防性措施可能产生的利益和花费进行分析、比较和平衡。

第五，预留一定的环境空间：目前人类还不能确切地了解环境的容纳能力和承受水平，所以有必要留出一定的环境空间，以作为人类管理环境过程中疏漏的缓冲器。[14]

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12 Tim O’Riordan, James Cameron and Andrew Jordon eds., *Reinterpreting the Precautionary principle*, Kent: Cameron May International Law & Policy, 2002, p. 20.

13 Tim O’Riordan, James Cameron and Andrew Jordon eds., *Reinterpreting the Precautionary principle*, Kent: Cameron May International Law & Policy, 2002, p. 20.

14 Tim O’Riordan, James Cameron and Andrew Jordon eds., *Reinterpreting the Precautionary principle*, Kent: Cameron May International Law & Policy, 2002, p. 20.

从以上的分析中我们可以得出，“precautionary principle”的本质是当存在严重的或是不可恢复的危险时，即使没有充足的、确定的证据表明相关活动与危害之间的因果关系，也有必要采取措施以减少潜在的危险，并对相关措施可能的收益和花费加以考虑。就此而言，笔者认为“预警原则”一词能较为忠实地反映“precautionary principle”的精神，因为基于“预”和“警”二字，我们可以从中领会到，“针对不确定的危险谨慎采取措施，以免造成难以挽回的损害。”相对于“预警原则”，“预防原则”、“风险预防原则”和“审慎预防原则”等译名则略逊一筹，它们所反映的信息主要集中于“预防”这一含义上，而忽视了“precautionary Principle”中除了“预防”之外更关键的意思，即针对可能的危险人类应更具谨慎性和警惕性。“预警原则”中的“警”字恰好弥补了其他译名的缺陷，较为贴切地表明了“precautionary principle”的本质。

三、从“Precautionary Principle”与相关概念的区别来看

与“precautionary principle”意思较为接近的是“preventive principle”（“预防原则”，也有学者翻译为“防止原则”或“损害预防原则”，在此统称为“预防原则”），二者都具有预防损害发生的含义，然而它们却存在显著的区别。

虽然目前关于“precautionary principle”并没有清楚统一的概念，然而其核心内容是明确的，即当存在严重的或是无法恢复的环境损害危险时，不能以科学上的不确定性作为拒绝或延迟采取预防性措施的理由。而预防原则是国家开发资源主权权利和不损害国外环境责任原则的延伸，它强调了国家在行使其资源开发主权权利时不应损害国外环境，并有责任尽早地在环境损害发生之前采取措施以制止、限制或控制在其管辖范围内或控制可能引起环境损害的活动或行为。[15]

一般认为预防原则最早出现于1941年的特雷尔冶炼厂仲裁案[16]中，该案仲裁庭最终裁决认为，根据国际法原则和美国法律，任何国家都没有权利以这样一种方式使用或允许使用其领土，以致烟雾对另一个国家的领土或领土上的人或财产

15 秦天宝：《国际环境法基本原则初探》，载于《法学》2001年第10期。

16 特雷尔冶炼厂仲裁案的基本案情：特雷尔冶炼厂是加拿大哥伦比亚特雷尔附近的北美洲最大的铅锌冶炼厂，距美加边界仅10多公里。从1986年该厂建立以来，美国的农民就遭受其释放的大量硫化物的损害。初期冶炼厂业主主要通过向污染受害者支付赔偿金的形式息事宁人。然而在1925年案件重新提起，并成立了保护受害人协会。自1927年美加就此问题进行了多次外交谈判，后又交至负责两国边界问题的国际联合委员会解决，都未达成一致意见。1935年两国签署了仲裁协定。仲裁庭于1941年作出了最后裁决。参见朱建庚：《风险预防原则与海洋环境保护》，北京：人民法院出版社2006年版，第20页。

造成损害。对此，一个国家应像保护本国国民一样采取同样的预防措施。[17]

“Precautionary principle”与预防原则的本质区别在于，前者所针对的是无确凿科学证据证明的环境风险问题，而后者针对的是已经明确证实的风险。其次，二者的举证责任规定不同。根据预防原则，危险的举证责任由组织行动的一方承担，通常是环境污染的受害者。而“precautionary principle”的危险举证责任在于实施危险行动的一方。例如近期关于厦门PX 项目的争论，如果依据“precautionary principle”则应由 PX 项目建设者负责证明该项目不会对自然环境造成破坏，这样能更好地敦促项目建设者给予环境保护以较多的考虑，更有利于维护厦门优良的环境。最后，二者的国际法地位不同：由于预防原则确立较早，目前国际社会普遍公认其为国际习惯法原则；而“precautionary principle”原则提出较晚，其国际法地位还存在一定争论。[18]

所以，虽然“precautionary principle”和“预防原则”是近义词，二者都有预防危险的含义，但是它们也存在明显的差别，特别是“precautionary principle”主要应对的是目前还没有确切的科学证据证实的环境危险，而预防原则却不包括此种情况。因而在翻译“precautionary principle”时也应注意尽可能地体现其与预防原则的区别。“预防原则”、“风险预防原则”和“审慎预防原则”这些译名没有或者没有充分反应“precautionary principle”和“预防原则”的本质区别，容易令读者将二者混淆。相反，“预警原则”这一译名较好地体现了“precautionary principle”不同于预防原则的关键所在，即针对的是具有科学不确定性的风险。并且从字面上看，一个是“预警”，另外一个是“预防”，能够较为容易地将“precautionary principle”与“preventive principle”相区分，减少了读者的误解。

四、从“Precautionary Principle”的起源来看

“Precautionary principle”最早起源于 20 世纪 70、80 年代的德国国内法。1970 年《德国空气清洁法》与 1976 年德国政府法令都对“precautionary principle”作了规定。其中 1976 年德国政府法令规定：“环境政策并不能通过避免将要发生以及已经发生的危害而得以充分实现。预警性的环境政策要求以更谨慎的态度保护自然资源以及实现对它们的要求。”[19] 在德国国内法中“precautionary principle”的德语对应词是“vorsorgeprinzip”。德语单词“vorsorge”相当于英文

17 朱建庚：《风险预防原则与海洋环境保护》，北京：人民法院出版社 2006 年版，第 20 页。

18 目前学界关于“Precautionary principle”的国际法地位主要有 3 种观点：第一，认为“Precautionary Principle”，已经发展成为国际习惯法原则；第二，认为该原则还没有成为国际习惯法原则；第三，认为原则是正在形成之中的国际习惯法原则。

19 Arie Teouwborst, *Evolution and Status of the Precautionary principle in International Law*, London: Kluwer Law International, 2002, p. 17.

单词“precaution”，其所针对的是无法确定是否能够现实发生的危险。而“预防”一词在德语中的对应词是“prävention”，是指针对已经证实的危险而采取预防措施。在德国，关于“precautionary”存在一个特殊的对应词，即“vorsorge”，并且该词与“预防”一词的德语对应词，即“prävention”，是含义不同的2个词语。因而，我们在将“Precautionary principle”翻译成中文时，也应注意“Precautionary principle”最初被创立的本意，所采用的中文词语须体现“Precautionary Principle”的独特性。

“预防原则”、“风险预防原则”和“审慎预防原则”这些中文译名中都包含“预防”二字，不仅从字面上没有很好地体现出“vorsorgeprinzip”的专有性和特殊性，而且从内涵而言，也容易令人将“vorsorge”与“prävention”混为一谈。而“预警原则”一词不仅能够从字面上与预防原则区别开来，而且在内涵上，一个“警”也足以使人明晰“vorsorge”与“prävention”的差别。

五、结　论

目前国内学者对“Precautionary principle”的翻译较为混乱，出现了一些各不相同的中文译名，如“预防原则”、“风险预防原则”、“审慎预防原则”和“预警原则”等。如何更好地将“Precautionary principle”转换成中文？对此，笔者从4个方面，即“precautionary”的含义，“Precautionary principle”的概念，该原则与相关概念的区别，以及它的起源，分析得出“Precautionary principle”主要是指应更加谨慎地对待缺乏科学确定性的危险，及时采取有效的应对措施；并且适用举证责任倒置，由实施危险行动一方负责证明其活动不会对环境造成危害，因而该原则与预防原则是存在本质区别的。此外二者在“Precautionary principle”的发源地德国有着含义不同的对应词，可见该原则在设立之初便是与预防原则严格相区别的一个新的概念。

最后，笔者分析得出“预警原则”是“Precautionary principle”的较佳译名，因为其能够较为准确地体现“Precautionary principle”的内涵，并且言简意赅，使读者能够明确“Precautionary principle”和预防原则的区别，而不致将二者相混淆。

试论两岸对于台湾海峡海洋环保合作机制之构建

——以闽台合作为中心

林婉玲 *

内容摘要：鉴于台湾海峡两岸是一个生态共同体，本文首先确认了构建台湾海峡海洋环保合作机制的必要性，并对合作的可行性及意义进行了分析。在此基础上作者进一步提出对于台湾海峡海洋环保合作建制的构想，提出构建金厦海域海洋环境联合管理示范体系、建立“台湾海峡环境保护带”、设置常设的协调管理机构及成立两岸环保信息交流情报资料中心等建议。

关键词：生态共同体　台湾海峡环境保护带　台湾海峡隧道

一、海峡两岸环保合作的必要性

台湾海峡呈东北向西南走向，北通东海，南接南海，长约 200 海里，宽约 70~221 海里，平均宽度约 108 海里。其属于东海与南海交汇海域，北界为福建省北茭至台湾省富贵岛，南界为广东省南澳岛至台湾省鹅銮鼻，是珊瑚礁和红树林环境系自然分布的北界，北回归线横穿台湾海峡，具有典型的亚热带特征。受东海和南海沿岸流以及黑潮的交叉影响，台湾海峡水文状况复杂，其特殊的地理位置造就了生物多样性高丰度区，整个海峡有闽东、闽中和闽南 3 大渔场。由于海洋开发活动加剧，海洋环境恶化，环境系统功能退化。滩涂、近岸水域超容量地过度性开发利用，致使鱼、虾、贝、藻病害不断。河口港湾富营养化现象严重，养殖鱼类死亡时有发生，海峡局部水域遭受外来物种入侵。[1] 台湾海峡扼西太平洋航道的中心，是中国与太平洋地区各国海上联系的重要交通枢纽。东海和南海之间往返的船只以及从欧洲、非洲、南亚和大洋洲到中国东部沿海的船只都从这里通过，

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* 林婉玲，厦门大学法学院国际法专业硕士研究生。本文系“985 工程”哲学社会科学创新基地《厦门大学台湾研究项目》子项目《涉台法律研究》阶段性成果。

1 王淼等：《我国海洋环境污染的现状、成因与治理》，载于《中国海洋大学学报（社会科学版）》2006 年第 5 期。

从大西洋、地中海、波斯湾和印度洋到日本海的船只一般也经过这里，地理位置极为重要。台湾海峡两岸的台湾省、福建省与浙江省，地理位置都是沿海乃至四面环海，居住环境都处邻海不远地带，人类生活与海洋关系十分密切。其所共同面临的环境问题使得两岸海洋环保合作的紧迫性越来越成为两岸各界的共识。

海峡两岸同属一个生态结构，海洋生态系统是超越政治人为分界的。如果说各自发展自给自足的封闭式经济尚有一丝可能的话，意欲割裂生态系统之间的天然联系而不协作治理整个海峡的环境则必定无法实现海峡生态的良性循环。两岸的诸多地区都是人口密集之地，且在两岸人民的食物来源中，海洋生物资源占有相当重要的地位。生态退化及环境污染，特别是有害物质的污染，不仅将使浩瀚的台湾海峡变成一个巨型垃圾场，也会危及两岸人民在陆地上的健康生存。

（一）陆源污染

据媒体报道，2006 年 6 月金门“慈湖”海滩出现一条长达 2 公里多的垃圾带，从厦门漂来的废弃物让这个重要观光景点“毁容”，其中还有让人提心吊胆的针筒和药剂。而与此同时，金门城酒厂黑压压的酒糟粒也造成厦门海域的严重污染。金厦人民对两岸“小三通”期待已久，但对这种另类的“小三通”却“十分无奈”。[2] 在厦门港每天都有“环保船”捞除海上垃圾，但这种事后补救措施明显不足，而金门方面则尚无此类措施。两岸的此类“垃圾”交流已带来环保维护问题，引起了以建立“金厦共同生活圈”为施政主轴的金门“县政府”和厦门市政府的关注。

金厦海域的“另类小三通”仅是海峡两岸环保问题的一个缩影。福建省从北到南有 11 条主要河流和 50 多条小河流入海，这不但带来了大量的悬浮物，而且汇集了沿河两岸排放的工业废水、生活污水、农业污水及倾倒的固体废弃物。闽江、九龙江两大流域集中了福建的工业废水，它们都流入台湾海峡，极大地影响了入海口海域的环境质量。以二类水质标准衡量，两大江河都存在超标污染物，主要是有机物。其中闽江的福州段、九龙江的中段、晋江的入海口水质在三类以下。而对岸的台湾 100 公里以上的 6 条河流基本上都流入台湾海峡，其水质污染也十分严重。海流对于入海污染物的扩散、输送、稀释起着重要的作用，福建沿海污染物的输运，主要受浙闽沿岸流影响，其次是粤东沿岸流和台湾海峡暖流（南海水团和黑潮入侵水混合进入台湾海峡）的作用。受其影响，福建沿海污染物浓度等值线几乎与岸线平行，且浓度自沿岸向外海降低。福建沿岸强潮河口潮流为往复流，

2 《金厦海滩垃圾潮涌现另类“小三通”》，下载于 http://www.southcn.com/news/hktwma/hot/200206210713.htm，2006 年 7 月 25 日。

来回运移污染物，水质交叉恶化。这是福建省近岸海域污染较严重的原因之一。[3] 可以说预防与控制台湾海峡主要河口与港湾的环境污染迫在眉睫。

（二）船源污染：油污

福建海区大部分地区全年雾日在 20 天以上。海上以平流雾（即海雾）为主。而海雾范围广，持续时间长，能见度差，是造成船舶海上航行事故的原因之一，也是引发船舶溢油事故的重要原因之一。福建沿海是大风多发区域，也是台风多发区。据统计，近 30 年来，福建沿海的登陆和影响台风共出现 232 次，平均每年 7.7 次，其频繁程度仅次于广东和台湾，且台风活动的年际变化非常大，30 年间，有 7 年超过 10 次，1989 年达 14 次，给船舶航行安全和海域环境带来严重威胁。

海峡两岸自 1997 年 4 月试点直航以来，台湾海峡船舶航行安全和溢油事故防备是海峡两岸航运和环保界密切关注的大事，双方已多次召开学术研讨会，讨论双方在船舶海难救助及防止船舶油污方面的协作问题。由于台湾海峡是重要的国际航行海峡，有很多几万吨甚至几十万吨的油船通过，如许多日本油船往中东载油时，总是选择取道台湾海峡，因为相对海峡另一面而言海峡这一面更为安全，载油归来时更取道台湾的澎湖水域，因为此方向有黑潮助力，成为节能节时的一条捷径。但一旦发生千吨以上的灾难性船舶溢油事故，不仅会给沿海经济带来无法弥补的损失，而且有可能危及海峡两岸海洋环境，后果不堪设想。以海峡两岸如此高的航运量，其中的海洋污染风险不可低估。而一旦发生大规模船舶油污事故，将对两岸的生态环境、航运业和渔业生产造成极大危害。仅就渔业资源而言，当海域被有机物质污染时，将影响生物之生态平衡，使渔业环境恶化，影响鱼类的生长与繁殖，造成水产资源的严重损失乃至枯竭。因此制订和实施船舶溢油应急计划是非常必要和及时的。它既可为海峡两岸海洋经济的发展创造一个良好的外部环境，同时，也为台湾海峡双方船舶在海难救助和防止船舶污染水域的合作提供一种新思路。

（三）赤潮、物种破坏

台湾海峡地理位置优越，水深、洋流与水温等生态因素的多样化，使得台湾海峡生物多样性非常高，其经济价值、生态价值和美学观赏价值不可忽视。可是目前该区域海洋生物的数量和种类却急剧减少，究其原因，主要是过渔，此外还有污染、外来物种引入等。海峡西岸赤潮的发生正逐年增加，严重威胁着台湾海峡的生态环境，已成为一个不争的事实。赤潮的多发使台湾海峡生态环境的安全问题

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3 许珠华等：《福建沿岸海域赤潮发生特点及防治措施》，载于《台湾海峡》2006 年第 1 期。

日显突出、备受关注。伴随“蓝色产业”的发展和海洋开发的推进，海上的环境污染、养殖无序、捕捞过度等问题，已让台湾海峡付出了生态代价。[4] 海峡两岸有很多中大型港口，如厦门、泉州、漳州、高雄、基隆等海港，往来的外籍轮船压舱水等带来的外来赤潮生物问题也破坏了台湾海峡本海域的生态平衡，需要严格控制和深入研究。赤潮发生的次数逐年递增，范围也不断扩大，对海水养殖业、捕捞业和滨海旅游业造成的危害也越来越大。此外，水产养殖中新品种移植所带来的外来赤潮生物的传播、海平面上升所产生的环境问题也需要引起重视。

二、两岸各自环保管理现状与不足

（一）中国大陆现有机制——以福建省、厦门市为例

我国《海洋环境法》第 4 条规定：“一切单位和个人都有保护海洋环境的义务。”近年来台湾海峡沿岸各省市都加大了海洋环境的保护力度。比较典型的是福建省，2002 年其在全国率先出台《福建省海洋环境保护条例》，对涉海建设项目实施严格的海洋环境评价制度，加强海洋生态保护和海洋环境污染治理。推进海洋自然保护区建设，全省现有保护区 14 个，保护面积 18.16 万公顷，湿地保护区 39 处，保护面积 18.73 万公顷。全面监测海域水质环境，建立了 4 个赤潮监控区，监控面积 6300 平方公里，赤潮发现率达 100％；并加强对全省 45 个重点陆源排污口污染物排海的监测，初步形成了比较合理的海洋环境监测网络。[5] 值得一提的是福建省还在 2000 年提出了台湾海峡水域溢油应急计划。该应急计划确定的台湾海峡水域溢油应急指挥部总指挥由福建省副省长兼任，成员单位包括省环保局及省海上搜救中心领导小组中各有关成员。发生事故后，必须在省政府的统一领导下，以海事局为主，协调军队、交通救捞、海洋、公安、水产、港务、邮电、气象、卫生、石油等有关单位，齐心协力，才能有效地清除污染，减少损失。这说明了海洋环境保护工作是一个系统工程，各级政府在此项工作中担负着主要责任，海事部门和其他单位和个人都应承担各自的责任和义务。可以说福建省在海洋环境保护和建设方面处于中国大陆前列。

具体到城市，厦门无疑是海峡两岸的一个环保重镇。厦门拥有得天独厚的海洋环境，面向台湾海峡，海域面积 344 平方公里、海岸线长 275 公里。海洋是厦门经济发展的生命线，面对问题和挑战，厦门市政府通过经济结构的调整，制定了一系列有关保护厦门海域的法规，加大了海洋生态环境的保护和建设力度，同时

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4 《期待两岸携手“呵护”海峡生态环境》，载于《中国海洋报》2003 年 6 月 6 日。

5 下载于 http://www.fzen.com.cn/Fujian_w/news/bc/big5/20060925/fjbd105165.html，2006 年 7 月 25 日。

采取了一系列有效措施，如《厦门市人民政府关于加强环境保护促进人与自然和谐发展的实施意见》就要求建设台湾海峡近岸海域监测点，做好台湾海峡近岸海域环境监测工作;加强核辐射环境安全监管工作，提高对突发性环境污染事故的监测、应急预警和响应能力;每年从排污费安排相应的资金，不断完善环境监测、环境监察的标准化建设。[6] 2003 年 4 月在厦门创建的台湾海峡近岸海域环境监测站是台湾海峡区域内中国大陆设立的第一个近岸海域环境监测站。从兴建污水处理厂到西海域的环境综合整治，从九龙江流域综合治理到设立中华白海豚、文昌鱼、白鹭、红树林自然保护区等等，无不体现了厦门市政府对海洋环保事业的重视。

从以上可见，福建省、厦门市在海洋环境保护方面，无论是制度建设还是配套设施都比较完善，但不可否认地，就一些具体制度而言仍存在许多空白。如在油污处理方面，福建海区目前各港专职、兼职清污队伍只有 100 多人，清污设备基本上只能适用于港内小规模溢油事故，短期内也不可能筹集到大量资金配备足够的海上清污设备和大型溢油应急船。[7] 尽管厦门市政府为改善和提高厦门海域生态环境质量投入了大量的人力、物力和财力，作出了巨大的努力，使厦门海域生态环境恶化的趋势得到初步遏制。但目前不合理的开发造成的淤积现象还比较严重;污水管网建设仍然滞后，污水直排现象没有杜绝;海上垃圾和漂浮物污染仍然严重，海域环境难以全面达到功能区标准。

（二）中国台湾现有机制

中国台湾涉及海洋环境保护的法律主要有《海洋污染防治法》、《野生动物保育法》、《渔业法》、《水污染防治法》等。其中《海洋污染防治法》于 2000 年底实施，其立法宗旨为“防治海洋污染，保护海洋环境，维护海洋生态，确保国民健康及可持续利用海洋资源”。该法第 59 条区分了防止陆上污染源污染、防止海域工程污染、防止海上处理废弃物污染、防止船舶对海洋污染，加以专章规定，明定污染行为人之损害赔偿责任。其中针对重大油污事件，规定“行政院”得设立专案小组，并要求“环保署”拟订紧急应变计划，报请“行政院”核定。

根据笔者能搜寻到的资料，台湾在海洋环境保护方面所面临的问题大致可分述如下：（1）海洋环境保护缺少法源依据；（2）对海上溢油时间因应不足，执行能力薄弱，海域重大油污紧急应变计划亟待规划建立；（3）港口废污油水及废弃物收受处理设施迄未设置；（4）搁浅、废弃船舶问题；（5）海域监测人力不足，监测品质参差不齐；（6）监测数据未整合运用，预警制度亟待建立；（7）未充分利用国

6 《厦门市人民政府关于加强环境保护促进人与自然和谐发展的实施意见（试行）》（厦府 [2004]141 号）。

7 陈志武:《共同守护这片蔚蓝——浅谈台湾海峡水域溢油应急计划的制订与实施》，载于《中国水运》2000 年第 9 期。

际上有关海洋环境保护的资讯。[8]

（三）小结

从两岸各自的海洋环境管理现状来看，已经有长足的发展，但各自尚有一些不足之处，相互之间可以借鉴的空间很大，如在海洋生物多样性保护与管理的法规方面，台湾不及大陆完善，法规体系相对零散，且主管机关职权划分或合作的模式并未确立。而两岸间上升到合作管理层面的海洋环保项目更是几乎没有，更多的是管理空白所导致的消极冲突。一些众所周知的政治、政策层面的问题，使得闽台海洋环保交流与合作受到了很多限制，两地的双向交流目前尚未取得突破性进展。而两岸涉海环境科学研究滞后于海洋资源开发利用和沿海经济、社会发展水平也是造成两岸海洋环境污染和生态破坏的重要因素之一。所以有必要在加强涉海及海洋环境科学研究和技术创新的基础之上，强化两岸的海洋环境管理与合作，共同促进经济发展与海洋环境和资源承受能力的平衡及良性循环。

三、合作的可行性与意义分析

（一）一定的基础和努力

虽然前面所提政策层面的限制使两地的海洋环保双向交流目前尚未取得突破性进展。然而，从另一个角度来看，却也显示了闽台双方的环保交流与合作具有广阔空间和远大发展前景。[9] 随着近年来两岸当局的政治紧张关系趋于缓和，两岸经济交流迅猛发展，各种两岸民间沟通渠道已稳固建立，加之香港、澳门顺利回归祖国，两岸协作保护台湾海峡环境的条件日趋成熟。在两岸各自已具备一定制度基础的前提下，有关地区和各界应协力促进台湾海峡环境保护合作的实际启动，而其中官方共识和远见更是合作的关键推力。

两岸民间学术交流是目前推动两岸环保合作的主力军。如“两岸四地环境论坛”是由中国环境科学学会发起并与香港公开大学、澳门环境委员会和台湾中华绿色生产力协会共同举办的一项民间学术交流活动。而海峡两岸环境保护学术研讨会则是海峡两岸环境保护领域的有识之士与海外华人环保学会共同发起和组织

8 参考章荣茜：《海洋生物多样性保育与管理法律制度之研究》（硕士学位论文），基隆：台湾海洋大学海洋法律研究所 2001 年 6 月版，第 171~172 页。笔者对其有改动。

9 庄世坚：《关于加强闽台环境保护交流与合作的几点看法》，载于《中国环境管理》1994 年第 5 期。

的有关海峡两岸环境保护的高级学术会议。[10] 通过各种形式的论坛、研讨会，两岸专家、学者围绕两岸共同关心的环境问题各抒己见，就两岸的环境管理、环境安全与健康、水污染控制与海洋管理、环境影响评价、生态保育与生物多样性、环境科技与资源合理利用、循环经济与可持续发展等问题进行了深入探讨，并呼吁不要使海峡两岸成为环保问题的“金三角”。通过广泛交流形成的共识和建议，不仅为有关方面提供决策与技术咨询，而且为台湾海峡海洋环境保护合作的开展奠定了良好基础。

（二）因应环境保护合作区域化的国际趋势

同经济发展的全球化和区域化趋势一样，环境问题的波及影响同样呈现全球化和区域化趋势。有些环境污染源往往超越一地或一国的界限而分布在更为广阔的时空中，如有些河川流经多国境内，大气污染几乎带有全球性，等等。因此有些环境污染一经形成就蔓延至一地或一国之外，成为区域性乃至全球性环境问题。台湾海峡的环境问题就具有区域性特征，这体现在其环境污染和生态破坏是由福建、台湾等相关地区人们的经济社会活动引起的，与此相适应，防止环境污染、恢复生态平衡的措施也往往带有区域性和国际性。近来有关建立环境保护的区域组织和国际组织的主张以及论坛会议不断出现，如在亚太地区有《亚洲环境构想》，APEC 的诸次海洋综合管理论坛中海洋环境保护都是一个重点内容。在国际上有联合国国际环境组织及《21 世纪议程》等。特别是国际标准化组织发布了规范全球工业界环境行为的 ISO 14000 环境管理系列标准，使以统一标准衡量世界各国工业品的环境污染度成为可能。[11] 同时，建立区域性或国际性环境安全保障体系的呼声也日益高涨。中国大陆与中国台湾合作管理台湾海峡海洋环境问题无疑是因应这一发展趋势的必然做法。

（三）符合环保与经济竞争力相互作用的规律

当前，台湾海峡区域内各地区的经济有相当的活力，但环境保护相对落后于经济发展，而建立有利于可持续发展的闽台区域经济竞争力衡量体系就包括环境保护指标在内。因此培育和提高本区域经济竞争力，要更多地考虑环境的保护和生态平衡，特别是台湾海峡的环境保护和生态平衡。台湾海峡的环境保护和生态平衡，影响到自东海南部至南海北部及其沿岸地区的经济发展。尤其是福建、台湾、

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10 《海峡 8 期访谈纪要——老教师：台湾的环保问题及两岸环保领域的合作》，下载于 http://www.people.com.cn，2004 年 2 月 27 日。

11 金泓矾：《可持续发展与台湾海峡环境保护带》，载于《亚太经济发展与环境》1998 年第 1 期。

广东沿海和港澳地区的经济发展受到影响。然而因长期以来台湾海峡两岸关系紧张，环境保护问题得不到重视，有关地区的共同保护更谈不上。若继续任其发展，台湾海峡将成为污染海峡，不仅会影响闽台区域经济竞争力，而且也会影响周边地区的经济社会发展，以及西太平洋海域的生态平衡。[12] 由此可见，台湾海峡的环境保护问题已成为必须解决的紧迫任务。而如若两岸跨越政治上的障碍，携手开展海洋环境管理的各项工作，共同走经济发展和环境保护相结合的可持续发展道路，必将大大提高闽台区域的持久经济竞争力。

总之，福建与台湾同顶一片蓝天、同享一个海峡，经济、文化、环境各方面息息相关。随着两岸关系的密切化，各种交流交往日趋频繁，而区域的环保交流必然会走向区域的环保，闽台区域性海洋环境保护合作也是大势所趋。

四、合作机制之设想

（一）构建金厦海域海洋环境联合管理示范体系

金厦海域属于福建内海水域，对于两地经济、社会、环境的可持续发展具有举足轻重的地位，因此加强金厦海域海洋环境管理，保护好金厦海域海洋环境具有重要意义。有学者对金厦两地海洋环境管理体系互补、互动关系进行了分析，提出优化管理资源配置，构建一个两地协调的海洋环境管理体系的设想，从体制上解决分割的管理体系与统一的管理目标（金厦海域管理）之间的矛盾。笔者不敢掠美，将其设想概述如下：

首先，确立金厦海域海洋环境系统、整体管理的战略目标。其一，金厦海域是一个整体，强调金厦海域的管理是关于海域交通资源、旅游资源、生物资源和其他各类资源的整体保护、开发、利用；其二，金厦海域海洋环境保护是一个涉及周边地区的全局性课题，强调厦门、金门等地通力合作，在开发中强化对金厦海域海洋环境的整体管理与保护的力度；其三，金厦海域海洋环境保护和厦门、金门经济、社会的发展是一个统一体，强调在海域的开发中保持良好的海域环境，为两地经济、社会、环境的可持续发展提供支持。其次，明确金厦海域海洋环境联合管理的主要内容为海域管理、水道管理、排污控制。最后，致力于构建一个两地协调的海域环境联合管理体系，整合两地参与金厦海域环境管理的力量，通过优势互补实现管理资源的优化配置。其一，分别整合两地关于金厦海域海洋环境管理的力量，成立金厦海域管理专家委员会，以沟通两地管理力量、协调管理目标、促进两地海

12 金泓砜：《可持续发展与台湾海峡环境保护带》，载于《亚太经济发展与环境》1998年第 1 期。

域管理体系的协作。其二，建立两地联合环境咨询系统、环境信息服务系统和环境监测系统。建议成立由两地专家、学者和海洋环境管理人员参加的“金厦海域发展论坛”；建议两地分别建立“金厦海域海洋环境保护”网站，提供资料数据交流的平台，促进两地共享的金厦海域资源与环境信息服务系统的形成；建议成立由两地海域环境管理人员参与的海域环境监测协调机构，对两地海域环境监测与管理力量进行合理分工，为进一步构建联合的动态监测及监督、评价系统，实现优势互补提供准备。其三，逐步扩大两地在海洋环境科学技术方面的交流和其他海域管理方面的沟通与协调，不断完善金厦海域海洋环境联合管理体系。[13]

在配套法规方面，有学者主张为金厦海域海洋环境联合管理体系寻求法律依据，实现依法联合管海。一方面，通过对两地关于金厦海域管理的现有法律、法规、政策与海域环境管理体系的比较，求同存异，促进两地关于金厦海域海洋环境管理的法律的衔接与兼容；另一方面，致力于推动两地立法机构关于海域环境管理法律的修订、制定工作，制定和实施与国家法律相配套的区域管理和地方管理法规，如《厦门—金门海域开发管理法》和《金厦海域海岸带管理条例》，奠定联合管理体系的法律基础。[14]

笔者认为，构建金厦海域海洋环境联合管理体系，无论对厦门海湾型花园城市的建设以及加快金门“生态立县”的步伐，实现两门各自经济、社会、环境的可持续发展，还是对加强两门沟通、促进两门发展，都将带来极其显著的经济效益、环境效益、社会效益。据笔者所知，中华白海豚目前只有厦门鼓浪屿有救助中心，如在金门海域发现受伤或遇难的中华白海豚可送至厦门，而在渔民跨行政边界捕捞问题上金厦两地也有初步不成文的合作。就陆源污染而言，如果金厦能够共同合作，合资将厦门往金门方向的排污管道延长到台湾海峡，借黑潮动力流带走各类陆源垃圾，则前文提及的具有讽刺意味的“另类小三通”情形就不会再出现。构建金厦海域海洋环境联合管理体系特别重大的意义还在于其将在海峡两岸探索整个台湾海峡海洋环境合作管理模式的过程中，起到极佳的先锋和示范作用。在“小三通”运作良好、“大三通”呼之欲出的现阶段，金厦海域海洋环境联合管理体系的构建条件已完全成熟，而在不久的将来，其许多具体操作、制度设计都可推而广之，适用于台湾海峡两岸海洋环境保护合作体系，其运作甚至对世界其他国家和地区也具有参考价值。东亚海域海洋污染和管理项目政府间协调会议确定厦门作为项目示范区，总之，在本区域内既有需求，又有能力的可以就此先行一步，取得实效，然后使合作的成果逐步扩展和深化。

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13 陈墀成等：《构建金厦示范区海域环境联合管理体系的设想》，载于《福建环境》2003 年第 5 期。

14 陈墀成等：《构建金厦示范区海域环境联合管理体系的设想》，载于《福建环境》2003 年第 5 期。

（二）建立“台湾海峡环境保护带”

中国大陆有学者提出建立“台湾海峡环境保护带”，[15] 笔者对此主张深表赞同。依该学者观点，所谓台湾海峡环境保护带是由有关地区政府和民间共同建立的一种环境保护区，之所以称为台湾海峡环境保护带而不叫台湾海峡环境保护区，主要有 2 个方面的理由。一是台湾海峡为带状型海峡，称为“带”反映台湾海峡的这一形状特征；二是“带”表示一种松散的合作关系，不必像合作区那样建制化，更符合当前海峡两岸的实际情况。台湾海峡环境保护带由论坛型合作机构推动，由有关地区的环境管理部门和民间环境组织、企业家定期或不定期地协商有关台湾海峡的环境和生态平衡问题，讨论台湾海峡环境保护目标、环境保护和生态平衡、协调各地逐步实现既定目标。开始可以民间为主推动，并逐步转向官民相结合共同推动。由于闽台区域经济由实行不同社会经济制度的地区经济组成，并不是单一社会经济制度下的一体化经济，因此即使是论坛型合作机构，也要贯彻自愿原则，以协商一致的办法推动，才能取得预期效果。

关于建立台湾海峡环境保护带的主要内容，该学者主张要根据联合国《21 世纪议程》所提出的要求，结合台湾海峡的实际情况确定。该议程指出“海洋是一个整体，是全球生命支持系统的一个基本组成部分，也是一种有助于实现可持续发展的宝贵财富。”《21 世纪议程》针对影响海洋可持续发展问题，提出了 7 个行政领域：（1）沿海区，包括专属经济区的综合管理和可持续发展；（2）海洋环境保护；（3）可持续利用和保护公海的海洋生物资源；（4）可持续利用和养护国家管理范围内的海洋生物资源；（5）处理海洋环境管理的重大不确定因素和气候变化；（6）加强包括区域在内的国际合作与协调；（7）小岛屿的可持续发展。这些内容大部分都适合于台湾海峡的环境保护和生态平衡。除此之外，治理台湾海峡沿岸的污染也是重要内容。台湾海峡的污染主要来自陆地，目前从福建和台湾流入台湾海峡的江河污染严重，该学者主张建立台湾海峡环境保护带首先要从治理陆地污染源，特别是江河水质污染入手，而其有效途径就是通过合作研究和采取共同措施治理环境污染。[16]

笔者认为，该学者所主张建立的台湾海峡环境保护带，可以成为两岸开展海洋环境保护合作的初级形式，该主张的提出较切合目前实际。建立台湾海峡环境保护带，加强区域环境保护协作，有利于闽台两地的经济发展与环境保护，提高区域经济竞争力，使这个关系两岸经济共同发展的闽台区域经济，以经济发展与环境保护相结合的新模式，进入 21 世纪并持续快速发展。在建立台湾海峡环境保

15 金泓矾：《可持续发展与台湾海峡环境保护带》，载于《亚太经济发展与环境》1998 年第 1 期。

16 金泓矾：《可持续发展与台湾海峡环境保护带》，载于《亚太经济发展与环境》1998 年第 1 期。

护带的合作成熟至一定阶段后，则可考虑更深一步的合作，如制度化、机构化，但从政治上考虑，这两阶段合作之间所要经过的时日尚难预计。

（三）设置常设的协调、管理机构，开辟资金渠道

要利用当前的有利形势，大力加强环保交流与合作，切实解决台湾海峡地区的环境问题，就要求台湾海峡沿岸各省的政府和环境保护主管部门通力合作，通过制定两岸间的环境合作协议，拟定政经平衡的环保政策、污染防治规划，划定区域环境功能区及其适用的污染物排放标准，提出污染物总量控制目标与削减计划，来加强区域环境保护。总之，为了开展长期的、经常的、富有成效的交流与合作，建议闽台两省的环境保护机构或团体应订立协议，设置常设的统一协调与联络管理机构，并不断开辟资金渠道，筹集、设立环保交流与合作的专项基金。只有得到组织和基金的保证，闽台的环保交流与合作才能正常化，也才能妥善处理环保交流与合作中出现的诸如资金、技术转让等各种问题。

（四）成立两岸环保信息交流情报资料中心，信息共享

为了加强闽台环保交流与合作，信息交换关系不能停留在私人互赠、互换资料的阶段，而应当在今后适当的时候成立闽台环保信息交流情报资料中心，建立资料库、数据库，信息共享。通过这个固定的信息渠道，让台湾同胞把福建和大陆的环保研究最新成果、资料、图片、画册、录音带和出版物介绍到台湾。也让有关台湾环境保护的资料科技资讯和各种新闻、音像出版物在福建或通过福建在大陆及时展示和传播。这个中心又可以成为咨询服务媒体，为闽台环保和经贸交流与合作穿针引线、铺路搭桥，提供全面的信息服务。还可依托该中心成立临时专家委员会，为两岸环保合作出谋划策，提供法律、环境等方面的专业意见。

（五）主要环保合作项目

1. 油污

油污是台湾海峡环境保护的一个重点问题。闽台两省各自都有一套相关的油污控制、管理制度，建议加强协作，进行技术交流，进一步制订台湾海峡船舶溢油两岸应急协作计划。首先，可以考虑在调查与辨识风险的基础上绘制台湾海峡油污染风险水域图。至于辨识水域油污风险之基础指标，有学者认为概括有下列项目：（1）过往油轮艘数；（2）海上船舶交通情况；（3）各海域之海难事故发生率；（4）炼油厂厂址分布；（5）油货装卸作业终端站分布；（6）离岸水域中有关海洋

资源探勘或开发作业之设施或海底管线分布情况等。[17] 鉴于两岸对各自所管辖海域的油污风险情况最为熟悉，可考虑由两岸官方合作绘制台湾海峡油污染风险水域图，相互补充以趋于完善。其次，合作进行台湾海峡海上重大污染事故应急信息系统研究。两岸携手研究油轮触礁、油轮或者装有有毒化学品船只发生相撞出现溢油或者有毒化学品泄漏等重大灾害及突发事件的预警预报和应急防范措施，对可能发生的溢油或者有毒化学品泄漏部位、地点、时间建立详细的档案资料和信息库，建立事故发生的应急体系，包括救援系统、事故应急环境监测系统、应急事故防范系统。再次，建议设立溢油应急行动两岸联合专家咨询组。专家咨询组是一个非常设机构，根据事故需要，两岸可临时组建共同指挥部，由指挥部（或分指挥部）临时聘请专家组成。专家咨询组由海事、船公司、港务局、救捞、船检、环保、水产、石油化、公安消防、保险、司法、科研院所与大专院校等有关部门的专家组成，为溢油应急行动提供技术服务。专家咨询费从事故赔偿费中支付。[18] 研究建立溢油应急计算机专家系统。通过建立溢油应急计算机专家系统，实现对溢油应急行动的现代化管理。建议将闽台各自已有的实践扩大到两岸合作。最后，可研究建立两岸共同的船舶溢油损害赔偿机制和建立油污赔偿基金。可先考虑由两岸民间力量发起，由船舶所有人缴纳部分合作基金，然后逐渐上升到官方合作层面。

此外，在现阶段充分发动两岸群众，提高其抵御风险的意识，也是保护台湾海峡重要环境敏感区的有效办法。建议在海事部门的配合下，组织渔民学习防治溢油污染的技术，储备一些稻草、甘蔗渣、椰子壳、棕榈叶等吸油材料，学会制作简易围油栏，以备急用。这方面民间组织也可以起到很好的表率作用。

目前两岸各自处理船舶油污事故的主要依据有：（1）《联合国海洋法公约》、《73/78 国际防止船舶造成污染公约》、《1990 年国际油污防备、反应和合作公约》；（2）《中国海上船舶溢油应急计划》、《台湾海峡水域溢油应急计划》；（3）台湾《重大海洋油污染紧急应变计划》。[19]

2. 共同防御自然灾害

两岸可考虑合作研究建立台湾海峡环境灾害监控系统和海洋立体观测预报预警网络系统。利用“数字海洋”平台，加快建设海域空间基础地理信息系统，建立健全海洋气象、风暴潮、赤潮、海啸等海洋灾害的预警预报和防御决策系统，提高防灾减灾、应对突发事件的能力。在赤潮高发地区（如厦门）设置多个海洋水质

17 中国台湾“交通部”运输研究所委托研究计划：《建立我国海上油污染防治能力与国际合作之研究》，1997 年 11 月，第 37 页。

18 陈志武：《共同守护这片蔚蓝——浅谈台湾海峡水域溢油应急计划的制订与实施》，载于《中国水运》2000 年第 9 期。

19 郭为民、林孝鸿：《台湾海峡两岸防止船舶溢油的现状及协作的展望》，载于《安全与健康》2005 年第 8 期。

观测站及人工、自动监测站，随时了解海洋水质的污染情况，开展赤潮预报、预警和处置研究在沿海重点区域划定警戒潮位，加快灾害性天气预警系统三期工程建设，完善海洋预警预报和应急预案体系，推进防台风和海潮反馈预警系统建设。建立三都澳、闽江口、平潭沿岸、厦门、金门、高雄、基隆、马祖等近岸海域赤潮监控区，制定省、市、县三段赤潮灾害应急预案，提高赤潮灾害预警预报能力。进一步完善水生动物疫病防治和水产品质量安全检测体系，确保水产品质量安全。此外在污水处理方面，两岸各沿海城市应加快城市环境基础设施建设，尤其是城市污水管网建设，力争在较短时间内，改善和提高海域生态环境质量。

3. 生物保护

在各种各样的海洋污染中，直接受到冲击的是生活在海洋中的各种生物。台湾海峡生物资源原本丰富，珍稀物种有黑脸琵鹭、中华白海豚、文昌鱼等。其中黑脸琵鹭作为一种世界级的濒危物种，每年夏天在大连的石城岛产卵孵化，冬天则飞到台湾过冬。[20] 而近来厦金海域频频发现受伤、死亡的中华白海豚。笔者建议在台湾海峡建立生物多样性保护区网络，联合海洋环境保护方面的管理者、科学家、学者和民间环保人士组成保护区共同体。特别优先保护物种，如中华白海豚、白鹭、文昌鱼等，建立珍贵物种名单。该保护区网络评价生态系统健康状况的结构性指标，包括生物多样性状况、重要生物类群结构与数量变动（种群数量波动、优势种更替等）、特定区域代表性经济生物发生状况及品质、赤潮爆发频率等。此外可以考虑在台湾离岛，如金门、马祖建立海洋生物保育、救助中心，并可以考虑建立国家珍稀濒危海洋生物种质基因基地。

4. 台湾海峡隧道的环保问题

台湾海峡隧道的建设可行性论证问题曾是两岸不少学者关注的一个热点问题，其设想最早由清华大学工程专家吴之明教授提出。而环境污染问题是兴建大型工程要率先考虑的问题之一，许多民众担心挖凿台湾海峡隧道会造成陆地和海洋的双重污染，吴教授指出：“只要充分重视环境保护，挖凿海底隧道的整个过程对海洋及周围环境造成的影响可以降到最低限度。”这种获取土地的方式远比先要破坏绿地和树木获取土石的填海造田环保得多。我国大陆东南沿海和台湾地区人口密度都过大，在控制土地资源被污染的同时，开发土地获取新的空间已经成为客观需求。不仅如此，隧道列车投入运营后还将是一条环保通道。由于隧道列车可以载汽车通过，据推测，到 2030 年，海峡两岸及附近地区汽车拥有量将逾 1000 万辆，数量如此多的汽车如果通过隧道列车到达彼岸，可大大节约能源，达到保护环境的作用。[21] 据其估计，这条隧道长度大约 150 公里，是已经投入使用的

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20 《珍稀黑脸琵鹭，两岸明星使者》，载于《大连晚报》，下载于 http://www.fjms.net/swdyx/news.aspx?class=HYDT&id=1317，2005 年 7 月 13 日。

21 《开车过海峡：穿越台湾海峡桥隧工程构想追踪》，下载于 http://cul.book.sina.com.cn/s/2005-04-01/118773.html，2006 年 10 月 1 日。

欧洲隧道的 3 倍。其建成后无论是客运还是货运优势都十分明显，将极大地推动两岸的交流，成为两岸经济发展的一个新增长点。然而，笔者对其仍持怀疑态度，因为目前还缺乏环保专家和其他科研部门充分的科学论证，且简单地将其与其他破坏环境的方法相比较并不能使其不影响台湾海峡生态环境的说法成立，要建设这样一个影响两岸民生、环境的浩大工程实在应当慎而又慎。

（六）小结

以上只是关于台湾海峡海洋环保合作的一些初步设想，许多地方还尚待充实和完善。总而言之，两岸环保交流与合作具有很强的互补性，可在平等互利互惠基础上，互通有无，交流信息，使区域合作充满活力，沿着健康的方向持续向前发展。加强闽台之间的环保交流与合作，不仅可以维护两岸人民的共同利益，而且可扩大台湾海峡区域环境保护工作的国际影响，推动区域环境科学技术发展和管理水平提高，促进两岸环保事业的发展，优势互补，共同在世界上占有一席之地。在区域合作上要由过去不确定、松散型向建立多层次、紧密型转变。[22] 正如有学者指出的：“要保育像海洋那么深广的事物需要开阔我们的视野，加深我们的认识，更重要的是，一种随时随地采取行动的使命感。”[23] 台湾海峡两岸是一个生态共同体，更是利益共同体，台湾海峡的保护需要可持续发展观念，闽台的环保交流与合作是势在必行、时代的使然。这是一项伟大的跨世纪的区域性系统工程，只要闽台两省政府与人民携手鼎力合作，一定可以加快解决台湾海峡的环境与发展问题，这一工程也将在国际上成为一国两制下的海洋环境保护示范工程。

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22 庄世坚：《关于加强闽台环境保护交流与合作的几点看法》，载于《中国环境管理》1994 年第 5 期。

23 章荣茜：《海洋生物多样性保育与管理法律制度之研究》（硕士论文），基隆：台湾海洋大学海洋法律研究所 2001 年 6 月版，第 220 页。

海峡两岸在水下文化遗产保护方面的合作研究

李佳丽 *

内容摘要: 本文意在为两岸水下文化遗产保护方面的合作提供一个法律平台。笔者对两岸水下文化遗产保护合作的法律基础进行了分析，在此基础上提出了两岸合作的基本原则与前提，并具体讨论了两岸合作的范围与内容，进而提出了两岸水下文化遗产保护合作的方案步骤。

关键词: 水下文化遗产　保护　两岸合作

一、导　言

中国是一个有着悠久历史的文明古国，这段悠久的历史也给我们留下了丰富的文化遗产。如何保护好这份财富已成为一个摆在我们面前亟待解决的问题。而在中国面临的一系列水下文化遗产问题中，台湾海峡的水下文化遗产保护尤为棘手。这不仅源于该区域本身地理位置与水文环境带来的挑战，也源于两岸相对隔离的政治与法律现状。笔者试图从这些荆棘中探索一条可行之路，为两岸在保护水下文化遗产方面的合作提供一点建议。

二、合作的法律基础

海峡两岸在水下文化遗产保护方面进行合作并不是毫无基础的。就中国大陆方面而言，早在 1989 年国务院就通过了《中华人民共和国水下文物保护管理条例》（以下简称“《条例》”）。[1] 虽然该《条例》条目不多，却全面触及了中国水下文

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* 李佳丽，厦门大学国际法硕士研究生。本文系“985 工程”哲学社会科学创新基地《厦门大学台湾研究项目》子项目《涉台法律研究》阶段性成果。

1 《中华人民共和国水下文物保护管理条例》，下载于 http://www.chinalaw.gov.cn/jsp/jalor/disptext.jsp?recno=1&&ttlrec=1，2006 年 10 月 10 日。

物保护的方方面面。该《条例》的一大特色就是对中华人民共和国管辖水域内文物所有权的确认，[2] 以及对打捞出水的文物国家优先处理权的确认，[3] 这种特色也体现在该《条例》的上位法《中华人民共和国文物保护法》（以下简称“《文物法》”）之中。[4] 大陆采取这样一种态度并不是无迹可循的，它的产生与中国特殊的文物保护现状相关。

首先，中国拥有丰富的水下文化遗产。中国在历史上曾经是海上贸易大国，许多文物历史相当悠久，具有高度的文化与考古价值。[5]

其次，中国的水下文化遗产分布比较特别，在东南亚及韩日各国水域遗留了大批水下文化遗产。[6] 这些水下文化遗产的归属由于海洋划界的矛盾 [7] 而显得更加复杂。因此中国大陆政府采取了更加有利于将水下文化遗产归属于中国的政策。

再次，对水下文化遗产的疯狂盗窃与打捞现象比较严重，这也促使了中国采取相对安全保守的策略以便保护这些水下文化遗产。[8]

就中国台湾方面而言，早在 1982 年台湾就制定颁布了《文化资产保存法》。[9] 该法提及到水下文物的条款主要是第 17 条与第 32 条，其主要内容涉及水下文物的归属。台湾关于水下文化遗产的规定与大陆大同小异。原则性的规定，如水下文化遗产的归属、对违法行为的处理以及对待文物开发的态度上都基本一致，[10] 这也是两岸合作的基础。而不同之处主要体现在对一些具体问题的处理上。例如，

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2 《中华人民共和国水下文物保护管理条例》第 3 条规定，本条例第 2 条第 1 项、第 2 项所规定的水下文物属于国家所有，国家对其行使管辖权。

3 如第 6 条规定，任何单位或者个人以任何方式发现本条例第 2 条第 1 项、第 2 项所规定的水下文物，应当及时报告国家文物局或者地方文物行政管理部门；已打捞出水的，应当及时上缴国家文物局或者地方文物行政管理部门处理。

4 《中华人民共和国文物保护法》，下载于 http://www.chinalaw.gov.cn/jsp/jalor/disp-text.jsp?recno=1&&ttlrec=3，2006 年 10 月 10 日。

5 陈炎：《海上丝绸之路》，载于《文明》2004 年第 4 期。

6 耿昇：《2001 年海上丝路研究在中国（上）》，载于《南洋问题研究》2003 年第 1 期。

7 例如，中国与日本在东海问题上的争端，以及中国与东南亚各国在南海问题上存在的大量争端。

8 关于中国沿海水下文化遗产被盗掘的新闻经常见于报端。比较典型的请参见赵嘉斌：《“碗礁一号”沉船打捞纪实》，载于《中国文化遗产》2005 年第 6 期。

9 中国台湾《文化资产保存法》，下载于 http://db.lawbank.com.tw/FLAW/FLAWDAT01.asp?Isid=FL009589，2006 年 10 月 10 日。

10 例如，两岸都主张对各自水域内水下文物的所有权，都对文物违法行为采取较严厉的态度，都反对水下文物的商业开发。See Porter Hoagland, Managing the Underwater Cultural Resources of the China Seas: A Comparison of Public Policies in Mainland China and Taiwan, *The International Journal of Marine and Coastal Law*, Vol. 12, No. 2, 1997, pp. 265~283.

对文物的定义、[11] 对私有文物的态度等。[12]

除两岸各自的法律之外，还存在一系列涉及水下文化遗产保护的国际公约。其中影响力比较广泛的国际公约包括《联合国海洋法公约》（以下简称“《海洋法公约》”）与《保护水下文化遗产公约》（以下简称“《公约》”）。

1982 年制定的《海洋法公约》作为一部全球海洋的宪章，其直接与水下文化遗产相关的规定主要体现在第 149 条与第 303 条的规定上。

《海洋法公约》第 149 条的规定主要涉及“区域”内历史文物的处理，[13] 而第 303 条则是运用到各种海域的一般性规定，因此直接影响到本文所涉区域的水下文化遗产保护。其中第 303 条第 1 款规定了各国有义务保护水下文化遗产，并为此目的进行合作。[14] 第 2 款赋予各沿海国以更多权力以便控制在沿海国海域内水下文物的贩运。[15] 而第 3 款与第 4 款则是规定了保护水下文物的例外，即“不影响可辨认的物主的权利、打捞法或其他海事法规则，也不影响关于文化交流的法律和惯例”。[16]《海洋法公约》本身对什么是可辨认物主的权利以及什么是打捞法与其他海事法规则并没有进行清晰的界定。这种模糊性的例外引起了水下文化遗产保护的诸多争议。

这些争议也体现在联合国《保护水下文化遗产公约》的制定过程中。[17] 最终《公约》在考虑各方意见的基础上提出了妥协方案，即在严格设定限制条件的基础上允许打捞与打捞物法的适用。[18] 而将界定打捞与打捞物法的权利授予各国，从而

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11 参看《文化资产保存法》第 3 条对文化资产的定义，其规定比大陆更加详尽。

12 台湾对待私有文物的态度要比大陆宽松。See Porter Hoagland, Managing the Underwater Cultural Resources of the China Seas: A Comparison of Public Policies in Mainland China and Taiwan, *The International Journal of Marine and Coastal Law*, Vol. 12, No. 2, 1997, pp. 265~283.

13 第 149 条规定：在“区域”内发现的一切考古与历史文物，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。

14 第 303 条第 1 款规定：各国有义务保护在海洋发现的考古和历史性文物，并应为此目的进行合作。

15 第 303 条第 2 款规定：为了控制这种文物的贩运，沿海国可在适用第 33 条时推定，未经沿海国许可将这些文物移出该条所指海域的海床，将造成在其领土或领海内对该条所指法律和规章的违反。

16 第 303 条第 3 款规定：本条的任何规定不影响可辨认的物主的权利、打捞法或其他海事法规则，也不影响关于文化交流的法律和惯例。第 303 条第 4 款规定：本条不妨害关于保护考古和历史性文物的其他国际协定和国际法规则。

17 关于此项争论可以参看赵亚娟：《联合国教科文组织〈保护水下文化遗产公约〉研究》（博士学位论文），厦门：厦门大学 2005 年版，第 80~100 页。

18 《保护水下文化遗产公约》第 4 条规定：打捞法和打捞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能得到最大程度的保护。

减小了该概念的模糊性，因此更加有利于水下文化遗产的保护。同时公约弥补了《海洋法公约》第 303 条第 2 款之保护制度的不足，对毗连区内的水下文化遗产提供了全面的保护。[19]《公约》制定者突出公约实用性的做法，吸引了更多国家的参与，从而扩大了公约的适用范围。但在对待与《海洋法公约》关系的态度上，《公约》却采取了模糊的态度："本公约应结合国际法，包括《海洋法公约》，加以解释和执行，不得与之相悖。"[20] 各成员国可以依据自身情况对此得出不同的结论，因此该条款并无助于理清二者的关系。

《公约》的制定是"关于水下文化资源管理与保护的国际科技规则与标准的第一次法典化"。[21]《公约》确立了水下文化遗产的保护原则，主要有：保护公共利益原则、就地保护原则、禁止商业性开发原则、国际合作原则、适当保护或妥善保护原则、尊重国际法现状原则。[22] 为了实现这些原则，《公约》也相应地设计了一些制度，如管辖权制度、水下文化遗产的定义制度、捞救法与打捞物法适用的限制制度、水下文化遗产的扣押与处置制度以及争端解决制度等。[23]《公约》一旦生效，"将成为维护世界水下文化遗产最基本的法律工具"。[24] 不仅如此，即使对于那些没有加入《公约》的国家，公约的普遍性也会使当中的许多规则演变成国际习惯法而对这些国家产生影响。"事实上，即使是对《公约》采取弃权甚至反对行为的国家，其在《公约》通过之后制定有关沉船保护的双边、地区或多边协定时也都考虑了《公约》生效和将来批准或加入该公约的可能性并作出了一定安排，而且其技术性保护规定与《公约》也是惊人的相似。"[25] 两岸的水下文化遗产保护是一项长期事项，在可预见的将来，《公约》必定会对双方产生实际且深远的影响。在此意义上讲，两岸对水下文化遗产保护方面的合作也应该将《公约》作为一项重要的法律基础。

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19 傅崐成、宋玉祥著：《水下文化遗产的国际法保护——2001 年联合国教科文组织〈保护水下文化遗产公约〉解析》，北京：法律出版社 2006 年版，第 71 页。

20 《保护水下文化遗产公约》第 3 条。

21 Robert C. Blumberg, International Protection of Underwater Cultural Heritage, speech in the Conference on New Developments of the Law of the Sea and China, Xiamen, China, 9–12 March 2005.

22 傅崐成、宋玉祥著：《水下文化遗产的国际法保护——2001 年联合国教科文组织〈保护水下文化遗产公约〉解析》，北京：法律出版社 2006 年版，第 53 页。

23 关于以上制度的详情，请参阅傅崐成、宋玉祥著：《水下文化遗产的国际法保护—2001 联合国教科文组织〈保护水下文化遗产公约的解析〉》，北京：法律出版社 2006 年版，第 194~218 页。

24 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《厦门大学法律评论》2003 年第 2 期，第 210~230 页。

25 傅崐成、宋玉祥著：《水下文化遗产的国际法保护——2001 年联合国教科文组织〈保护水下文化遗产公约〉解析》，北京：法律出版社 2006 年版，第 63 页。

三、合作的基本原则

（一）平等协商原则

平等既是就两岸合作的主体而言，也包括合作的具体过程。就主体而言，它是指两岸合作的主体分别是中国大陆与中国台湾。[26] 其次是就具体过程来说，两岸的基本合作方式应该是平等协商，这种协商既是指事前双方以协商的方式提出水下文化遗产保护的最佳方案，也包括事后以协商方式来处理相关争端。

（二）基本目标的一致性

两岸进行合作的基本目标是明确的，即对合作区域的水下文化遗产进行保护。这一基本目标也是双方解决分歧的基础，“一致”不代表“完全相同”，事实上要求两岸在水下文化遗产保护方面取得“完全相同”的意见是不可能实现的。这一“一致”的基本目标更像是两岸合作的指南针，用来弥合两岸由于法律法规不同及保护理念不同造成的分歧。这一基本目标的一致性更多地意味着若干子目标的一致性。

1. 对水下文化遗产进行妥善或适当的保护

保护是合作的首要目标，两岸进行保护合作的一切活动都应遵循此主旨。保护在这里是指狭义上的保护水下文化遗产本身的完好无损。水下文化遗产本身具有许多价值，如考古和历史价值、经济价值、艺术价值以及文化价值等，无论是何种价值的实现都应以水下文化遗产本身的完好保存为前提。当水下文化遗产的保护与其他海洋使用方式相冲突时，实现水下文化遗产保护应作为一种基本的考量。但在实践中，这一目标能否完全达成还存在一定困难，而且在很多情况下这样的做法也是不可取的。因此当出现这种冲突时，两岸应尽量在二者之间达成平衡。《公约》对此种冲突也采取了这种平衡的态度：每个缔约国应采用它能用的最佳可行的手段防止或者减轻其管辖下的无意中影响水下文化遗产的活动可能造成的任何不

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26 这样的先例是存在的，如内地与香港、澳门之间就签订了类似协议，如《内地与香港关于建立更紧密经贸关系的安排》及其附件分别于 2003 年 6 月 29 日和 9 月 29 日由中央政府和香港特别行政区政府在香港签署；《内地与澳门关于建立更紧密经贸关系的安排》于 2003 年 10 月 17 日由中央政府和澳门特别行政区政府在澳门签署。下载于 http://www.china.org.cn/chinese/zhuanti/2004CEPA/493574.htm，2006 年 10 月 10 日。

良后果。[27] 而何为“最佳可行”，还有待于各国根据自身状况合理考量。海峡两岸也应从自身状况出发，制定出“最佳可行”的水下文化遗产保护方案。

2. 水下文化遗产归属的一致性

《海洋法公约》与《公约》都没有对水下文化遗产的所有权问题作出规定。这并不代表各国不能对水下文化遗产宣告所有权，关于此点笔者将在后面进行详细论述。实际上，两岸在此问题上都有非常明确的态度，而且这种态度基本上是相似的。[28] 这就为两岸在水下文化遗产归属方面采取相同的立场作了一个良好的铺垫。具体而言，在对水下文化遗产的归属态度上，对合作区域内可辨明物主为中国的水下文化遗产，两岸应确定其为中国所有，其后两岸可以对此水下文化遗产的归属进行进一步协商，对不可辨明物主或物主为外国所有者，两岸对此应采取一致的态度行使管辖权或与外国进行协商，这种做法有利于最大程度地维护中国水下文化遗产的所有权。当然这种做法并不是绝对的，它仍应以对水下文化遗产的保护为前提。

四、合作的对象与区域

两岸进行合作的范围主要涉及 2 个方面，即合作的对象与区域。合作的对象，简言之，即水下文化遗产。合作的区域，简言之，即台湾海峡。但这样一个范围仍然是模糊的，在两岸的具体合作过程中也会产生很多问题，有待进一步的细化。

对于水下文化遗产的定义，两岸以及《公约》对此的规定各不相同。

就大陆方面而言，《条例》第 2 条对此进行了规定：本条例所称水下文物，是指遗存于下列水域的具有历史、艺术和科学价值的人类文化遗产：

(1) 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于外国的文物；

(2) 遗存于中国领海以外依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；

(3) 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。

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27 《保护水下文化遗产公约》第 5 条。

28 如中国大陆《水下文物保护管理条例》第 3 条规定：本条例第 2 条第 1 项、第 2 项所规定的水下文物属于国家所有，国家对其行使管辖权；本条例第 2 条第 3 项所规定的水下文物，国家享有辨认器物物主的权利。中国台湾《领海及邻接区法》第 16 条规定：于领海及邻接区中进行考古、科学研究，或其他任何活动中所发现的历史文物或遗迹等，属于其所有，并得由其政府依相关法令加以处置。

前款规定内容不包括 1911 年以后的与重大历史事件、革命运动以及著名人物无关的水下遗存。

该条规定主要涉及 2 个问题：

首先，并非所有的水下文化遗产都受到《条例》保护。只有具有历史、艺术、和科学价值的人类文化遗产才因属于文物而受到保护（那么我们是否可以说不具有历史、艺术和科学价值的人类文化遗产就不受该法保护了呢?），而对于什么是文物，《条例》并无规定。条例的上位法《文物法》对此也没有概念性的规定，而是采取了列举的方式界定受保护的文物，同时把文物认定的标准与方法交由国务院文物行政部门来制定。[29]

其次，《条例》所保护的文物是有时间限制的。对于 1911 年以后的与重大历史事件、革命运动以及著名人物无关的水下遗存，不受《条例》的保护。[30] 在此什么才是重大历史事件、革命运动以及著名人物，以及什么才属于有关或无关，并没有一个清晰的界定标准。这会导致无法对 1911 年后的文物进行迅速有效的保护。

就中国台湾而言，《文化资产保存法》也没有关于水下文化遗产的定义，“采取了一个比较无效率，但是更有弹性的定义方式”，即“任何可供鉴赏、研究、发展、宣扬而具有历史及艺术价值或经‘教育部’指定之器物，都是古物”。[31] 并将古物的法律地位判断权交由“教育部”裁量。与此同时，台湾并没有像大陆一样对文物加以时间限制，因此其对文物的保护范围更加广泛。

两岸对水下文化遗产或文物定义的不同会给两岸的合作带来许多困扰。且不说那些明显被一方法律所接受而不被另一方法律接受的文物。即使面对处于双方法律保护之下的文物，两岸也会由于各自认定标准的不同而赋予其不同的保护方式。因此，确定一个双方都接受并具有较高一致性的水下文化遗产的概念范畴将会有利于双方在合作过程中减少分歧。

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29 《中华人民共和国文物保护法》第 2 条规定：在中华人民共和国境内，下列文物受国家保护：（一）具有历史、艺术、科学价值的古文化遗址、古墓葬、古建筑、石窟寺和石刻、壁画；（二）与重大历史事件、革命运动或者著名人物有关的以及具有重要纪念意义、教育意义或者史料价值的近代现代重要史迹、实物、代表性建筑；（三）历史上各时代珍贵的艺术品、工艺美术品；（四）历史上各时代重要的文献资料以及具有历史、艺术、科学价值的手稿和图书资料等；（五）反映历史上各时代、各民族社会制度、社会生产、社会生活的代表性实物。文物认定的标准和办法由国务院文物行政部门制定，并报国务院批准。

30 《中华人民共和国水下文物保护管理条例》第 2 条最后一款规定：前款规定内容不包括 1911 年以后的与重大历史事件、革命运动以及著名人物无关的水下遗存。

31 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〉签署二十周年学术研讨会论文集》（2002 年 8 月），第 159~160 页。

对于如何确定这个概念范畴有2种方案值得考虑。其一是采用《公约》的规定，对各自法律中关于水下文化遗产的规定加以修订。《公约》第1条第1款规定："水下文化遗产"系指至少100年来，周期性地或连续性地，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。[32] 该条规定对水下文化遗产的时间范围采取的是时间段的形式，比大陆的时间点在方式上更加灵活，但在实际内容上仍然是有限制的。《公约》对水下文化遗产的分类比较全面，[33] 而且由于公约的广泛适用性，可以为两岸水下文化遗产的界定提供一个较为统一的标准。另一种方式是全部吸纳两岸对水下文化遗产的规定，无论是在时间范围还是在种类上，将两岸保护范围内的水下文化遗产都列入到合作保护的视野之内。这样一种模式有利于该区域水下文化遗产保护效果的最大化，然而由于双方对水下文化遗产概念的认识不同，想要取得这种一致的态度还是存在一定难度的。

就合作的区域而言，简而言之，就是台湾海峡。但台湾海峡涉及相关的内水、领海、毗连区以及专属经济区。在此多重海域内存在几种不同的合作可能性。方案之一就是覆盖台湾海峡全部海域。实现该海域所有水下文化遗产的统一管理其实是保护的一种较好方案，然而由于海峡两岸航路不畅通以及各自管理的现状，[34] 实现该范围整合的可能性还是很低的。方案之二是在各自领海范围内的水下文化遗产仍由双方各自管理，而在专属经济区这一范围内实现跨区域的合作。这种选择比前者更符合台湾海峡的现状。即使在两岸统一之后，仍不失为一种值得选择的方案。方案之三是在水下文化遗产有较多遗存的区域建立特别保护区域。在该特别保护区域内，实现水下文化遗产保护的综合管理。该种方案可以实现水下文化遗产的重点保护，然而如何划定特别区域仍然是件困难的事。且该方案与第一种方案面临着相似的局面，即台湾海峡的管理现状。除此之外，就现阶段来讲，还存在一种应时方案，即双方不改变海峡各自管理的现状，仅在存在水下文化遗产的区域进行临时的合作，这种合作可以进行得比较深入。但该种方案与我们进行合作的最终目的仍存在很大差距，所以仅能在合作的初期采用，不宜作长久选择。

32 关于《保护水下文化遗产公约》的详文，下载于 http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html，2006年10月10日。

33 《水下文化遗产保护公约》第1条。

34 《两岸"三通"现状及面临的问题》，下载于 http://tw.people.com.cn/GB/14864/14919/2253360.html，2006年10月10日。

五、合作的前提——水下文化遗产归属的确定

其实两岸对各自领海内的水下文化遗产的归属还是比较明确的。[35] 然而对于领海以外（毗连区、专属经济区、大陆架）的水下文化遗产的归属存在诸多争议。[36] 领海以外的水下文化遗产的归属本来就是充满争议的。《公约》并没有涉及水下文化遗产的归属，[37] 公约的谈判者以“该公约是一个公法性的国际公约，所以最好不处理敏感的财产权问题”[38] 为借口回避了水下文化遗产的所有权问题。然而就现实层面来讲，水下文化遗产的归属纷争并没有因为《公约》回避的态度而有所减少。水下文化遗产的归属往往是水下文化遗产纷争的一个重要方面或者是一个重要起因，[39] 忽略这个前提谈水下文化遗产的保护往往起不到较好的效果。

水下文化遗产的归属本身也是我们进行合作的目的之一。而且，水下文化遗产归属的确定也决定了两岸在此方面进行合作的深度。因为首先，归属的确定有利于明确双方的责任。双方责任的明确对于确定合理的保护方式甚为关键，水下文化遗产的所有者相对于其他保护者将具有更为根本的责任。其次，归属的确定

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35 《中华人民共和国水下文物保护管理条例》第 3 条规定：对于遗存于中国内水、领海内的一切起源于中国的、起源国不明的和起源于外国的文物属于国家所有，国家对其行使管辖权。台湾《领海及邻接区法》第 16 条规定：其领海及邻接区中进行考古、科学研究、或其他任何活动中所发现的历史文物或遗迹等，属于其所有，并得由其政府以相关法令加以处置。

36 《中华人民共和国水下文物保护管理条例》规定对于遗存于中国领海以外依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属于国家所有。对于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。台湾《领海及邻接区法》第 16 条规定：于邻接区中进行考古、科学研究、或其他任何活动中所发现的历史文物或遗迹等，属于其所有，并得由其政府依相关法令加以处置。台湾《专属经济区与大陆礁层法》对于该问题没有相关的规定。

37 《保护水下文化遗产公约》在第 7 条规定各国拥有管理和批准开发其内水、群岛水域和领海中的水下文化遗产活动的专属权利。这种权利实际上是一种管辖权，而非所有权。在其他水域（毗连区、专属经济区、大陆架）的权利比领海内的权利狭窄得多，更不是一种所有权。

38 Roberta Garabello and Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, Leiden: Brill Academic Publishers, 2003. p. 106.

39 这方面的案例很多，比较出名的是“圣母玛丽亚解放号”事件。一艘载满大量珍宝的西班牙寻宝船沉没于美国佛罗里达附近水域，又因为船只本属法国所有，所以引来了美西法三国的争夺。下载于 http://www.people.com.cn/GB/paper68/8225/775917.html，2006 年 10 月 10 日。

直接影响双方投入的大小，这种投入既包括资金的投入，也包括人力、物力以及技术的投入。在归属不确定的情况下，双方无法确定投入量的大小，同时也不愿意做过多的投入。最后，归属的确定有利于双方在水下文化遗产的处置上达成一致的意见。所有权的确定使双方可以将更多精力放在合作保护水下文化遗产上面。

正像前文提到的那样，双方在领海内的水下文化遗产归属问题上的态度并没有太多不同。主要的不同点在于专属经济区内。就该区域来讲，其水下文化遗产主要包括 3 种类型：起源于中国的水下文化遗产、起源于外国的水下文化遗产、起源国不明的水下文化遗产。对于不同起源的水下文化遗产，我们应采取不同的政策对待。

对于虽未查清属于大陆或是台湾所有但却可以明确起源于中国的水下文化遗产，两岸应采取一致的态度，即主张其为中国所有，在归属于中国所有的前提下，两岸可再就其具体的所有权进行协商（这在前文已经提到）。对于有较大争议而无法确定归属的水下文化遗产，两岸可先搁置争议，共同保护。对于起源于外国的水下文化遗产，在起源国同意互相承认双方在对方专属经济区所属水下文化遗产的归属的前提下，可以认定该水下文化遗产归该外国所有。而对于不承认双方在对方专属经济区的归属的情况以及起源国不明的水下文化遗产，则可视为全人类共同所有的水下文化遗产而进行保护。

需要说明的是，水下文化遗产归属的划定并不等同于水下文化遗产管辖权的行使。依据“就地保护”原则，[40] 各国对水下文化遗产的属地管辖权依旧是优先的。而且管辖权与所有权的分离与《公约》的主旨并不矛盾。[41] 在不涉及所有权的前提下，管辖权制度是《公约》一项基本制度。

不仅如此，所有权的划分也不涉及两岸的政治状态，它仅仅是出于更加有利于水下文化遗产保护的目的而进行的一种处置，属于两岸所有的水下文化遗产，从根本上说仍属于中国所有。

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40 《保护水下文化遗产公约》第 2 条第 5 款规定：在允许或进行任何开发水下文化遗产的活动之前，就地保护应作为首选。

41 该公约没有规定各国享有水下文化遗产的所有权，但却规定各缔约国有权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。

六、合作的内容

（一）结构的完善

1. 合作机构的建立

两岸若要在水下文化遗产保护方面进行有效的合作，一个协调性组织的建立是必要的。至于这个协调性组织的性质及权限如何，则在很大程度上取决于两岸合作意愿的深度。但这样一个协调组织至少应该得到这样的授权：双方可以授权的管理水下文化遗产的所有权力都应该赋予该组织。这样做的目的是为了保证水下文化遗产保护的权力与职责的统一，以提高水下文化遗产保护的效率。而且随着以后两岸合作程度的加深，该机构的权力也会随之扩大。

2. 信息共享制度的建立

尽管两岸对文物的登记与分类都有相应的规定与制度，但这些制度对于水下文化遗产的保护来说还是不够的。首先，两岸并没有相应的关于水下文化遗产比较全面的资料与数据。[42] 其次，这些有限的资料也不是完全开放的，对此，两岸的沟通并不充分，这使得我们的合作难上加难。因此有必要建立两岸水下文化遗产的信息共享制度。这种信息共享制度不仅应该包括水下文化遗产的分布、状态，还应包括对水下文化遗产进行考古、挖掘、保护以及违法盗掘水下文化遗产及其法律规制的信息。这样两岸合作者不仅能够了解水下文化遗产的保护状态，也能为以后两岸的进一步合作提供依据与经验。

除此之外，该信息共享制度也可以是国际化的。《公约》中规定了合作与信息共享制度。[43] 我们可以将两岸的信息同《公约》其他缔约国进行交换，从而进一步完善两岸保护水下文化遗产的信息资源。前提是这种信息交换并不违背两岸的法律。

3. 发现报告与奖励制度以及水下文化遗产保护基金的建立

尽管两岸法律都规定了对水下文化遗产的发现报告以及奖励制度。但是这些制度的设立相对于发现者疯狂的盗掘行动来说往往力不从心，这源于水下文化遗产巨大的经济价值与政府象征性鼓励制度之间存在的巨大鸿沟。[44] 然而对这一现象目前并没有更好的解决方法。政府不可能无限制地提高水下文化遗产发现的奖金。就现阶段而言，政府资金在保护水下文化遗产方面本身都无法完全满足，更何况要拿出大笔资金来奖励众多的发现者。然而，在找到更好地的解决办法之前，

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42 相关的数据主要是针对陆上文物的，关于水下文化遗产的数据往往少之又少。

43 参见《保护水下文化遗产公约》第 19 条——合作与信息共享制度。

44 赵亚娟：《联合国教科文组织〈保护水下文化遗产公约〉研究》（博士学位论文），厦门：厦门大学 2005 年版，第 160 页。

提高奖金仍不失为一个可行的办法。至于奖金来源，笔者认为仅仅依靠政府划拨是远远不够的，可以尝试由两岸共同成立类似于“水下文化遗产保护基金”的基金，该基金可考虑由水下文化遗产的保护单位以及受益者共同集资建立。政府的资金来源可以考虑组织水下文化遗产的参观、展览，还可以从水下文化遗产保护的受益者如拍卖行等机构的盈利中抽取一定的费用，以及从对非法盗掘者的罚金中抽取一定的费用或提取一定比例的税费来投入这一基金。实际上大陆在这方面已经存在一定的政策倾斜。[45] 这一基金既可以用来奖励水下文化遗产的发现者，也可以投入到水下文化遗产的保护工作中，以补充保护资金的不足。实际上这样的制度在西欧国家早已存在。在西欧，文化遗产的保护经费来源是非常多元化的，所谓多元化，是指“文化遗产单位的管理经费，既可以来自于政府方面，又可以来自于非政府方面。就政府来源而言，既可直接来自政府的财政预算与补贴，又可来自政府的财政政策的间接支持。就非政府来源而言，既可来自于私营企业、机构、个人的捐赠，又可来自遗产单位自身的经营收入”。[46] 然而由于两岸的经济状况不同，文物管理机制的复杂性与差异性，这些制度在多大层面上能被采用以及如何采用，都有待两岸进一步商议。

除此之外，再配以严格的惩治制度，从而在两方面堵截水下文化遗产的盗掘现象。

至于水下文化遗产的发现报告制度，在前面的信息共享制度的基础上，两岸对于各自水下文化遗产的发现报告信息应及时通告给对方，从而共同制定保护方案。

4. 许可制度的建立

此处所称的许可主要是指在考古挖掘与科学研究过程中的许可制度，还包括在进行无意中影响水下文化遗产的活动时涉及水下文化遗产方面的许可。对于前者，该许可应该是一种全套的制度，包括对水下文化遗产本身的保护，文化遗产整体环境的影响，进行考古挖掘与科研的资质等等。在制定这一整套的标准时，两岸应尽量达成一致。对于后者，该许可指的是在进行其他海洋活动时，设置一定的对水下文化遗产不予破坏的标准，以作为许可的条件之一。

5. 争端解决制度的完善

在两岸进行水下文化遗产保护合作的过程中，争端的产生是不可避免的。如前所述，双方在水下文化遗产的归属问题上会产生争议，或是对双方在合作管理中的行动无法达成一致意见。对于这些争端，双方应以平等与协商的态度进行处

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45 1997 年，中国国务院发布《关于加强和改善文物工作的通知》（国发 [1997]13 号），强调将文物保护纳入财政预算。参见张文彬：《新时期中国文物管理的制度建设》，载于《中国社会科学（英文版）》2003 年第 1 期，第 334 页。

46 徐嵩龄：《第三国策：论中国文化与自然遗产保护》，北京：科学出版社 2003 年版，第 81 页。

理。

在双方协商仍无法解决的情况下，两岸可考虑将该问题提交司法解决。然而司法解决有待于双方司法关系的确立。目前，鉴于两岸司法沟通不畅的现状，希冀于通过司法来圆满地解决水下文化遗产的争端还存在一定的困难。但我们可以预见，两岸统一之后，会建立较好的司法交换体制，该问题的司法解决也会变得更为可行。

（二）内容的完善

1. 就地保护与管理

《公约》将“就地保护”原则作为水下文化遗产保护的一项基本原则，两岸也应该将这一原则作为一项合作的基本原则。这一方面是源于“深海使水下文物特别是有机物得到很好的保护。水下的泥沙无疑可以发挥遗迹、遗物的保护膜或防腐剂的作用。往往可以比地下文物保存得更好”，[47] 另一方面，任何针对水下文化遗产的活动都是对遗产的一种破坏性活动。因此“就地保护”是水下文化遗产保护的首选方式。而保护区的建立正是一种较好地实现就地保护原则的方式。

两岸在保护区或就地保护方面都有相应的规定。大陆方面的《海洋环境保护法》第 22 条规定：“具有下列条件的，应当建立海洋自然保护区：……（五）其他需要予以特殊保护的区域。”[48] 该法的注释写到：“其他需要予以特殊保护的区域包括：……（四）保护历史与考古区域。这种区域由于其历史或者考古价值而需要保护，尤其是人类海洋活动遗址和古代沉船、海难事故、古代海上战争遗迹等区域。”[49] 更为直接的规定是《条例》第 5 条：“根据水下文物的价值，国务院和省、自治区、直辖市人民政府可以依据《中华人民共和国文物保护法》第二章规定的有关程序，确定全国或者省级水下文物保护单位、水下文物保护区，并予公布。”台湾方面的《外国船舶无害通过台湾领海管理办法》第 9 条规定：外国船舶通过台湾领海时，应将渔具妥为收藏，不得置于水中。此条的规定虽为保护台湾的渔业资源而设计，但在客观上也有利于保护属于水下的文化遗产。

保护区可分为 2 种：一种是对尚未确认的水下文化遗产进行临时性保护的区域，另一种是为已确认的水下文化遗产建立永久性的保护区。虽然这 2 种保护区设立的目的不太相同，但其设立与管理都要通过两岸协调机构或两岸各自主管机构的授权，并对保护区的权限及具体管理进行进一步的协商。

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47 小江庆雄著，王军译：《水下考古学入门》，北京：文物出版社 1996 年版，第 129 页。

48 国际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：法律出版社 2001 年版，第 20 页。

49 全国人民代表大会常务委员会法制工作委员会编，张皓若、卞耀武主编：《中华人民共和国海洋环境保护法释义》，北京：法律出版社 2000 年版，第 44 页。

然而，在建立相关保护区或就地保护方面，可能还存在一些阻碍。例如《台湾渔业法》第 29 条撤销、变更或停止渔业权的情形中并无诸如文化遗产保护之类的标准。[50] 因此在渔业活动与水下文化遗产的保护出现矛盾时，相关机关根据渔业法可能并不会为水下文化遗产的保护让步。而且根据上位法优于下位法的原则，如《条例》之类的法律条文在与规定其他海洋用途的法律相冲突时，并不能优先适用。因此在建立有关水下文化遗产保护区或就地保护的相关措施时，应优先考虑在相关上位法中将保护区的建立与就地保护原则归入其中，不仅如此，其与其他海洋用途协调也应纳入其中。

在无法建立保护区的情况下，两岸也必须对就地保护的相关事项进行协商。

2. 开发

水下文化遗产的开发指以水下文化遗产为主要对象，并可能直接或间接对其造成损害或破坏的活动。[51] 水下文化遗产的开发其实涉及 2 个方面的活动，一方面包括水下考古或科研活动，另一方面包括商业性开发活动，对这 2 种不同性质的开发，应该区别对待。

(1) 水下考古与科研活动

中国大陆允许水下文化遗产开发的目的仅限于文物保护与科学研究的目的，且任何单位或者个人在大陆管辖水域进行水下文物的考古勘探或者发掘活动，都必须得到文物局的批准。外国组织与个人参与水下文物的考古勘探与开发更是要得到国务院的批准。[52] 中国台湾方面的规定也模糊得多。[53] 同时值得我们注意的是，随着中国加入《公约》，《公约》对开发的态度在很大程度上影响着两岸对水下文化遗产开发的尺度。《公约》在规定缔约国不得进行商业开发的同时，也规定不得在其条款许可范围之外授权开发专属经济区或大陆架上的文化遗产。[54] 唯一例外的是：缔约国有权依据包括《海洋法公约》在内的国际法保护其主权权利和管辖权

50 下载于 http://www.taxchina.cn/StatuteLib-statuteDetail.asp?Statuteld=260043&key，2006 年 12 月 27 日。

51 傅崐成、宋玉祥著：《水下文化遗产的国际法保护——2001 年联合国教科文组织〈保护水下文化遗产公约〉解析》，北京：法律出版社 2006 年版，第 8 页。

52 《中华人民共和国水下文物保护管理条例》第 7 条，下载于 http://210.34.12.2/cols/Web/Marine%20Law/LAW11.htm，2006 年 10 月 10 日。

53 台湾《文化资产保存法》并没有关于禁止文物开发的明确条款，仅存在一些涉及开发的态度不明显的条款，如第 10 条规定：接受政府补助之文化资产，其调查研究、发掘、维护、修复、再利用、传习、记录等工作所绘制之图说、摄影照片、搜集之标本或印制之报告等相关数据，均应予以列册，并送主管机关妥为收藏。前项数据，除涉及文化资产之安全或其他法规另有规定外，主管机关应主动公开。

54 《保护水下文化遗产公约》第 2 条第 7 款以及第 10 条第 1 款，下载于 http://portal.unesco.org/en/ev.php-URL_ID=13520&URL-DO=DO-TOPIC&URL_SECTION=201.html，2006 年 10 月 10 日。

不受干涉而禁止或授权在其专属经济区或大陆架开发文化遗产。[55] 由于《公约》禁止商业开发，这实际上是赋予了各国对专属经济区或大陆架进行考古挖掘与科研的权利。但是《公约》规定意欲开发水下文化遗产的缔约国进行水下文化遗产的开发必须与其他相关国进行协商。[56] 该条规定为缔约国水下文化遗产的开发带上了镣铐。就两岸水下文化遗产的保护而言，该种限制主要体现在 2 个方面：就能确定属于两岸所有或仅与两岸有关的水下文化遗产而言，《公约》的协调机制相当于两岸的协调，两岸所作的就是对水下文化遗产的考古挖掘与科研活动制定统一的标准，并按照该标准行动。如若不能制定统一标准，则应在同时满足双方对水下文化遗产的标准的前提下进行合作开发。对任何一方禁止的考古挖掘与科学研究，对方都应该保持合作态度。对于有第三方涉入的考古挖掘与研究，则应在与第三方充分协调的基础上进行合作，对一时无法取得一致意见的水下文化遗产应暂停搁置挖掘计划。

需要注意的是，发掘的同时也就是对遗迹的破坏。特别是对海底调查来说，无论工作慎重到什么程度都是对水下遗迹的破坏。[57] 对于考古挖掘，双方应建立相应的程序性保护措施。这种程序应包括事前的许可、事中的监督，以及事后的报告与检查。而对于程序性事项的具体操作事项，如许可标准的建立、监督的范围与方法、报告的内容与检查的方式，双方都可以进行协商。

(2) 商业开发活动

《公约》第 2 条第 7 款规定，“不得对水下文化遗产进行商业开发”，明确将禁止商业性开发确立为水下文化遗产保护的一项原则，但《公约》本身并没有对商业性开发给予明确的定义。

大陆立法对待商业性开发的态度与《公约》斩钉截铁的作风有很大不同，仅仅在水下文化遗产的发掘和打捞阶段禁止进行商业性开发。而事实上，我国的国民与悬挂我国国旗的船舶很少对水下文化遗产进行商业性打捞。除了法律的禁止之外，深海先进打捞技术的落后，资金的缺乏也使商业打捞行为较难实施。[58] 然而随着我国经济的发展，资金与技术的不足对国民商业打捞的桎梏将越来越小，我国在这方面的法律也应应时而改。

对于已经打捞出水的水下文化遗产是否进行商业性利用，大陆立法并未作出

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55 《保护水下文化遗产公约》第 10 条第 2 款，下载于 http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html，2006 年 10 月 10 日。

56 《保护水下文化遗产公约》第 10 条第 3 款，下载于 http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html，2006 年 10 月 10 日。

57 小江庆雄著，王军译：《水下考古学入门》，北京：文物出版社 1996 年版，第 142 页。

58 傅崐成、宋玉祥著：《水下文化遗产的国际法保护——2001 年联合国教科文组织〈保护水下文化遗产公约〉解析》，北京：法律出版社 2006 年版，第 225 页。

规定。[59] 台湾对商业性开发也采取了模糊的规定。

两岸的规定与《公约》的规定存在很大出入。可以预见，将来《公约》生效之后，两岸与公约的冲突在所难免。为此，两岸应及时修订各自的法律规定，以使其与《公约》的规定相吻合。同时，鉴于《公约》对于商业性开发并没有明确的定义，两岸在今后对该部分法律进行修改时应对商业性开发作出明确的定义，在作出该定义时，两岸应及时进行协商，尽量达成统一的看法。

3. 水下文化遗产的进出口

与开发相对应的是水下文化遗产的进出口问题。台湾《台湾地区与大陆地区人民关系条例规定》第 40 条规定：输入或携带进入台湾地区之大陆物品，以进口论。[60] 双方都对水下文化遗产的出口严格禁止，[61] 然而对水下文化遗产的进口却采取了放任态度。因此造成的结果可能是双方各自的水下文化遗产被输入到对方领域内。对此双方在严厉打击水下文化遗产出口的同时，对于收缴的来自于对方的水下文化遗产应及时退还给对方，并在信息共享制度中对各自失窃或流失的水下文化遗产进行登记，以便共同监督其流向。

4. 执法合作

就两岸水下文化遗产的保护合作来讲，联合对违法偷盗以及贩卖、破坏水下文化遗产行为及其行为主体进行打击是必不可少的。该合作的达成在很大程度上取决于双方海上执法组织的合作以及双方的司法协作程度。因此双方应尽快完善司法协作制度，至于海上共同执法组织是否能够建立还取决于双方的态度。

七、结　论

通过以上的论述我们可以看出，双方在此的合作领域与程度可以非常深远。但这并不代表双方在合作的最初阶段便可以达成这种效果。实际上由于两岸相对隔离的现状，在短时间内要达到这种深度的合作还是非常困难的。就目前而言，

59　傅崐成、宋玉祥著：《水下文化遗产的国际法保护——2001 年联合国教科文组织〈保护水下文化遗产公约〉解析》，北京：法律出版社 2006 年版，第 225 页。

60　陈长之、李永芬主编：《超国界法律窠编》，台北：台湾三民书局 2002 年版，第 1135 页。

61　中国台湾《文化资产保存法》第 71 条作了规定，下载于 http://db.lawbank.com.tw/FLAW/FLAWDAT01.asp?1sid=FL009589，2006 年 10 月 10 日。《中华人民共和国水下文物保护管理条例》第 10 条规定：违反本条例第 5 条、第 6 条、第 7 条的规定，破坏水下文物，私自勘探、发掘、打捞水下文物，或者隐匿、私分、贩运、非法出售、非法出口水下文物，具有《中华人民共和国文物保护法》第 30 条、第 31 条各项规定情形的，依法给予行政处罚或者追究刑事责任，下载于 http://210.34.12.2/cols/Web/Marine%20Law/LAW11.htm，2006 年 10 月 10 日。

最为可行的方案就是进行局部合作，即在双方各自主管部门的管理之下，就保护的某一方面如共同打击非法贩运，共同进行水下考古等事项进行合作。

当这些局部合作进行到一定程度时，即双方的隔离状态有了一定缓和，并在水下文物保护方面的合作有了一定经验，在双方的司法协助与了解进一步增强的基础上，就可以考虑进行整体合作。此种整体合作本身仍然是概括性的，但却给两岸的合作以统一的思考角度。例如我们可以在双方各自授权的基础上建立一个协调机构，以协调处理两岸水下文化遗产的保护问题。该协调机构可以是民间性质的，或是半官方性质的，双方可以就关键或重要问题仍保留最终的决定权，但该机构可以从整体的角度来考虑保护问题、提出建议甚至采取部分统一的行动。在此基础上两岸还可在法律层面进行合作，制定相同或相似的法律规定。

在整体合作进一步发展的程度上，在双方的政治与司法隔阂基本打破的情况下，双方可以成立一个统一管理两岸水下文化遗产的机构（甚至我们可以考虑建立一个统一管理两岸四地水下文化遗产的机构），由该机构全面处理两岸水下文化遗产管理的事务。当然该机构并没有剥夺双方各自主管机构的职权，该机构的性质可以是一个官方的协调机构。同时，我们也可预期一个两岸海上共同执法组织的建立，其职能之一可以包括水下文化遗产方面的事宜。

正如本文开头所言，中国是一个具有悠久文化历史遗迹和丰富文化遗产的国家。这些饱含人文气息与历史价值的水下文化遗产是中华民族最珍贵的财富。同样，它们的遗失与损坏也是中华民族包括整个人类社会的损失。在这个沉重的问题上，两岸放弃歧见、联手合作才是具有远见卓识的可行之道。

A Case Study: The Validity of Arbitration Clause in Bill of Lading

ZHANG Liying*

Abstract: With the development of China's foreign trade and maritime activities, there are an increasing number of disputes with regard to the conflict of arbitral jurisdictions enjoyed by one country and judicial jurisdiction by another country. Based on a brief review of China's judicial practice concerning the validity of the arbitration clause in a bill of lading (B/L), the author suggests that maritime judges should give adequate tolerance to the arbitration clause on or incorporated in the B/L, which is an appropriate method to solve jurisdictional conflicts in maritime disputes.

Key Words: Arbitration clause; Bill of lading; Conflict of jurisdictions

With the accelerated development of China's foreign trade and maritime activities, international trade and maritime disputes in China have been on the rise recently. Moreover, there are an increasing number of cases with regard to the conflict of arbitral jurisdiction enjoyed by one country and judicial jurisdiction by another country. However, due to the shortage of related experience, China still lacks complete and adequate regulations in this regard.[1] In order to protect the interests of the Chinese parties in a more effective way, most of the Chinese courts tend to insist on their own judicial jurisdiction,[2] which consequently leads to conflict of jurisdictions. Such behavior often brings about parallel litigations, and

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* ZHANG Liying, Professor and Deputy Dean, School of International Law, China University of Political Science and Law and an arbitrator of China Maritime Arbitration Commission. Prof. ZHANG's main research area and expertise include maritime law, the WTO law and international economic law.

1 There is only one article dealing with this problem, which is Article 305 of Supreme People's Court Interpretation on Certain Questions Concerning the Application of the Civil Procedural Law of the People's Republic of China 1992.

2 Zhang Xiaomei, Jurisdictions of Maritime Disputes in China, at http://www.cnki.net/oldcnki/index4.htm, 15 November 2007. (in Chinese)

thus causes negative effect on the investment climate in China.

As to the arbitration clause on or incorporated in B/L, various theories have denied its validity owing to the particularities of B/L and Charterparty. Thus, to insist on the jurisdiction of Chinese courts will be detrimental to China's opening-up as well as its foreign trade in the long run. Most of the western countries have already had a rather complete set of regulations concerning the issue of jurisdictional conflicts. This dissertation will put forward the author's opinion concerning the resolution of the conflict of arbitral and judicial jurisdictions.

I. Complexity of the Legal Relations under B/L and Conflict of Jurisdictions

The complexity of the legal relations under B/L also contributes to the large amount of conflict of jurisdictions in the maritime field. Although the validity of arbitration clause on or incorporated in B/L has been acknowledged in international practice, including China's practice, the validity of such arbitration clause may still be rejected under some circumstances. For example, since B/L only requires signature from one party, it is often regarded as null and void on the ground that it does not meet the written form requirement provided in relevant regulations. Meanwhile, if the arbitration clause in the Charterparty is not effectively incorporated into the B/L, it could not be applicable to the B/L holder. Moreover, a number of disputes arising out of reasons other than the B/L are often invoked as an defense to reject its validity, such as salvation and sub-transportation by train under the B/L, general average, personal injuries, agency and insurance issues. Such cases can be found in China. For instance, salvation may occur in connection with the B/L transportation, and then the question is whether the arbitration clause on B/L should govern the disputes arising under the salvage contract. There was a real case in which the B/L read "all disputes arising out of the B/L shall be arbitrated at London", but the Chinese party still submitted the dispute before the Chinese court, asserting that salvation shall not be considered as a dispute "arising out of the B/L", which led to the conflict of arbitral and judicial jurisdictions between two

countries.[3]

Although the Chinese courts will give full effect to the arbitration agreements, their attitude to the arbitration clause is uncertain. In most of the cases where the application of the arbitration clause on B/L is rejected, the Chinese courts tend to protect the interests of the Chinese party. Many scholars hold the view that, if a country really wants to protect its nationals in a legal case, it should respect the arbitral jurisdiction enjoyed by other countries; otherwise, one case filed before two jurisdictions actually constitutes repeated actions between the parties concerned, rather than protecting the interests of them. Currently, many Chinese courts hold the same standpoint as the American court adopted in the *Indussa* case in 1967,[4] and insist on the jurisdiction of Chinese courts regardless of the arbitration clause or forum selection clause in the B/L. As a result, some cases are entertained by Chinese courts but are initiated in other countries at the same time. Further, relevant regulations or principles are absent in China.

II. The Validity of Arbitration Clause in Bill of Lading

The conflicts between litigation and arbitration relating to transportation by sea were mainly brought about by the conflict of arbitration clause in B/L. It seems that there are not many disputes about the validity of the arbitration clause under the B/L nowadays. Nevertheless, the acceptance of the validity of such clause has

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3 *The Joanna V*. A cargo ship *The Joanna V* flying the Cyprus flag chartered by a Chinese trading company carried soybeans from San Lorenzo Argentine to a Chinese port (Ningbo). When leaving San Lorenzo, the vessel grounded, and then was salvaged under LOF 1995. The ship owner declared general average. The vessel was re-floated, but salvers requested security and the vessel was delayed until the cargo's insurance company (Chinese) provided such security. The Chinese cargo owner's insurance company sued the ship owner in China for the purpose of seeking to recover the salvage expenses caused by its negligence. The defendant applied for a stay of the Chinese proceedings on the ground that there was an arbitration clause in B/L. The Chinese court dismissed the application and suggested that the salvage claim under LOF was not subject to that B/L arbitration clause. The defendant appealed to the higher court and was dismissed again for the same reason. In the meanwhile, the owner filed an arbitration against the cargo interest in London under the arbitration clause on B/L providing that all disputes arising out of the B/L shall be arbitrated at London. The arbitration tribunal awarded that the Chinese insurance company shall pay its contribution to the general average at the sum of $367,000 and the loss arising out of arrest at the sum of $28,500 and its interest. The Chinese insurance company challenged the arbitration proceedings in England and applied to the London High Court of Justice to have them stayed, but its request was dismissed.

4 Indussa Corp. v. S. S. Ranborg (1967) AMC 589.

actually undergone a fairly long process. Therefore, it cannot be definitely assured that the arbitration clauses under B/L will be acknowledged in China. In practice, some Chinese courts still reject the validity of such clause and insist on their own jurisdiction, and thus leading to the conflict between foreign arbitral or judicial jurisdiction and China's judicial jurisdiction.

There are two kinds of B/L. One is the Charterparty B/L, which is issued on the basis of the charter between parties, and the other is Liner B/L, which is made by and between the carrier and shipper. For the former, the validity of arbitration clause under the B/L depends on whether the clause incorporated in the B/L has enabled the arbitration clause to be incorporated in the charters. For the latter, as the B/L is issued by the carrier unilaterally, the jurisdiction over the B/L is often subject to the arbitration of the place where the carrier resides. This is obviously favorable to the carrier since they are more familiar with the local legal environment, and they could reduce legal costs in an effective way as well. Therefore, it is unfair to the cargo owners.

The validity of the arbitration clause under B/L differs in different countries. Some countries such as Australia and Italy clearly deny its validity; while some acknowledge its validity, regarding it as an agreed jurisdiction; some countries use the reciprocity principle to decide its validity; while more countries take no position on this issue, neither clearly affirm, nor completely deny its validity, but to a large extent leave it to the judge's discretion during the trial of a particular case (especially for China).

The mainstream view in continental European countries is basically to acknowledge the validity of the arbitration clause or the forum selection clause in the B/L. So far, in all cases involving COSCO adjudicated in the Netherlands, France, Germany and other continental European countries, no case has been found to deny the validity of arbitration clause.

Two issues are mainly involved in deciding the validity of the arbitration clause in the B/L: one is whether the B/L meets the written form requirement provided by law; the other is whether the parties not directly involved in a B/L are bound by such jurisdiction clause in the B/L.

Viewing from the judicial practices of many countries, the arbitration clause in the B/L has gained wide acknowledgement, which could be proved by the statistics of a questionnaire carried out by the China Maritime Law Association in 1993. The answer of the British Maritime Law Association was that the validity of arbitration clause in B/L would be confirmed by British law provided that this clause was

clear and complete. Reply from the Dutch Maritime Law Association was that the Dutch courts acknowledged the arbitration clause in B/L, but this clause should not refer to other documents that have not been negotiated by and between the B/L holder and carrier (such as the Charterparty which is not incorporated to the B/L). Canadian Maritime Law Association and Norwegian Maritime Law Association both held that their national courts would acknowledge the validity of the arbitration clause in B/L. American Maritime Law Association also stated that the arbitration clause in B/L was usually enforceable.

It should be noted that the acceptance of the validity of the arbitration clause in the U.S. has undergone a process. The U.S. court was inclined to protect the interest of cargo owners and used to hold the view that jurisdiction clause on B/L is invalid. Such attitude was further enhanced in the *Indussa Corporation v. the Ranborg* case.[5] However, after the case of *Sky Reefer*,[6] its validity has gained wide acceptance. Also, prior to the enactment of the U.S. Federal Arbitration Act 1925,[7] the admiralty courts refused to aid the enforcement of arbitration clause. But nowadays the U.S. Federal Arbitration Act enables arbitration agreements to be valid in every field of commercial jurisdiction subject to federal control, including federal maritime jurisdiction.[8]

III. Whether the B/L Meets the Written Form Requirement Provided by Law

Both Article 2(2) of the 1958 New York Convention and Article 7(2) of the 1985 UNCITRAL Model Law on International Commercial Arbitration provide that, an arbitration clause shall be contained in a contract or an arbitration

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5 377 F. 2d 200 (2d Cir. 1967). Indussa Corp. v. S. S. Ranborg (1967) AMC 589. Indussa Corporation v. The Ranborg, *Lloyd's Law Report*, Vol. 2, 1967, p. 101. The carrier in this case is Norway Shipping Corporation. The court of first instance refused to try this case. However, the 2nd circuit division of Federal Court of Appeals accepted the appeal and held that the jurisdiction clause on B/L is invalid. It is because that the clause on the transportation contract with a view to release or mitigate the responsibility and obligation is invalid in accordance with the Article 3(8) of the Carriage of Goods by Sea Act of America, 1936.

6 Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 29 F. 3d 727, 1994 U.S. App. LEX IS 16784, 1994 A.M.C. 2513 (1st Cir. Mass. 1994).

7 The United States Arbitration Act of February 12, 1925; 9 U.S.C. § §1-14 as amended on July 30, 1947.

8 H. R. Rep. 96, 68th Cong., 1st Sess., 1 (1924).

agreement signed by the parties or contained in an exchange of letters or telegrams. However, B/L, as an evidence of the contract of carriage of goods by sea, is often signed by the carrier in practice, without the signature of the other party (i. e. the shipper). Moreover, due to the negotiability (transferability) of B/L, the consignees have few chances to sign. Therefore, it seems that the arbitration clause on B/L does not conform to the formal requirement of a valid arbitration agreement under the New York Convention and the UNCITRAL Model Law.

The U.K. Arbitration Act 1996, the U.S. Federal Arbitration Act 1950, the new Arbitration Act 1998, and the Arbitration Law of P. R. China 1994 all require that the arbitration agreement should be made in writing. However, the interpretation of "written form" is not clear. For example, it's still in doubt whether the signatures and stamps of both parties are necessary. Since the liner B/L is usually signed by the carrier only, it apparently cannot meet such requirement.

The Arbitration Act 1996 of England has a liberal interpretation in this respect, which also recognizes oral agreements that could be proved by written documents.[9] The new Arbitration Act 1996 of England confirmed the requirement of written form, while giving it a flexible definition at the same time. Especially, it provides clearly that "written form" doesn't require the signatures of both parties.[10]

According to Dr. Ralf Richer, the arbitration clause in B/L may be signed only by the carrier and then acquiesced by the B/L bearer. This practice also constitutes a written form. In fact, there are at least three chances for the B/L bearer to decide whether to accept the B/L clauses or not. The first chance is when the shipper delivers his cargo to the carrier and receives a B/L, the second is when the ship arrives at the destination and the B/L bearer takes delivery of the cargo in accordance with his B/L, and the third is when the B/L bearer claims compensation from the carrier based on a clear B/L in case any damage of cargo is found. Such a position gives a liberal interpretation to the term "written form" without the signatures of both parties.

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9 Clare Ambrose and Karen Maxwell, *London Maritime Arbitration*, London: LLP, 1996, p. 22.

10 There is an agreement in writing–(a) if the agreement is made in writing (whether or not it is signed by the parties).

From the above discussion, it could be seen that, in many countries, the term "written form" has been opened for flexible interpretation in practice, and further appears a more liberal tendency. Therefore, the written form requirement shall not constitute an obstacle for acknowledging the validity of the arbitration clause in B/L. Basically speaking, the legislative purpose of requiring arbitration agreement to be made in writing is related to the development of international commercial arbitration. Since the function of "written form" to remind parties to consider prudently becomes weakened, invoking the rigid written form requirement to deny the validity of arbitration clause in B/L is obviously inconsistent with the current need and further development of international trade practice. Under such circumstance, it is necessary to follow the liberal tendency and to admit the arbitration agreements concluded by the parties through various means, including but not limited to electronic data, conventional customs and so on.

IV. Whether the Arbitration Clause or Forum Selection Clause Is Applicable to the B/L Holder That Is Not a Charterer?

It's not uncommon that the clauses in the Charterparty B/L are short and don't contain an arbitration clause or forum selection clause. For the currently widely used GENCON and CONGENBILL, the B/L contains only a few clauses such as Paramount clause. The arbitration or forum selection clause is normally invoked from the Charterparty in accordance with the incorporation clause on the B/L.[11] Therefore, the validity of these invoked clauses remains a question.

No answer could be found in the Arbitration Law of P. R. China. In contrast, the Arbitration Act 1996 of England clearly provides that disputes resulting from B/L could be subject to arbitration in accordance with the stipulation of the incorporation clause. Under the U.S. Federal Arbitration Act, the arbitration agreement must be made in writing,[12] but a person shall be bound by an arbitration agreement embodied in a Charterparty even though he has not signed the charter

11 The incorporation clause usually provides that all terms and conditions, liberties and exceptions of the charterparty, dated as overleaf, including the law and arbitration clause, are herewith incorporated.

12 9 U.S.C. §§ 2,3,4.

or been listed in it.[13] In the U.S. cases, it is also held that a simple and general incorporation clause may be an arbitral or forum selection clause incorporated into the B/L and be binding upon the B/L holder that is not a charterer. In the case of Alucentro Div Dell's Alusuiss Italia SPA abd others v. M/V "Hafnia" and others,[14] the court terminated the judicial litigation owing to the incorporation of the arbitration clause contained in the Charterparty to the B/L.

Although the arbitration clause is drafted and provided by the carrier unilaterally, all clauses on the B/L including the arbitration clause are open to the public. Further, since all clauses are printed on the back side of the B/L, B/L bearer has clearly known or should have clearly known the contents of all B/L clauses when he/she examines and acquires the B/L. Without agreements otherwise agreed between the carrier and the B/L bearer, B/L, as an evidence of the contract of transportation between the carrier and the shipper, should be applied to the B/L bearer.

In this regard, Chinese maritime courts hold that the incorporation clause should be clearly enough; otherwise, the arbitration clause invoked from the Charterparty would be null and void. That is to say, in this case, the arbitration clause should set forth some particular matters which are subject to arbitration. If the arbitration clause in the Charterparty simply provides that all disputes arising from this Charterparty should be subject to arbitration, it is not enough to bind the B/L holders, even though there is an incorporation clause in the B/L. The only exception to the above rule is the disputes arising from the Charterparty between the B/L holder and the shipowner. Such position was adopted by the Wuhan Maritime Court in the case of Shanghai Agricultural Industrial and Commercial Foreign Trade Company vs. Tianjin Ocean Shipping Company.[15] There are even more cases where Chinese maritime courts denied the validity of the jurisdiction

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13 E. A. S. T., Inc. v. M/V Alaia, 673 F. Supp. 796, 1988 AmC 1396 (E. D. La. 1987).

14 Alucentro Div Dell's Alusuiss Italia SPA abd others v. M/V "Hafnia" and others ,785 F. Supp. 155; 1991 U. S. Dist. LEXIS 20226; 1992 AMC 267.

15 Shanghai Agricultural Industrial and Commercial Foreign Trade Company vs. Tianjin Ocean Shipping Company, at http://www.ccmt.gov, 8 October 2007 (in Chinese). In this case, the court held that the arbitral matters covered not only disputes arising from the Charterparty but also damage compensation disputes arising from the contract of carriage of goods by sea; moreover, the arbitration clause in the Charterparty has no direct relation with the objects of the B/L so that it could not be incorporated into the B/L by a general incorporation clause. Therefore, the court rejected the defendant's submission to judicial jurisdiction. Another instance is that the Haikou Maritime Court also adopted the same view in a case in 1997 and hence rejected the submission to judicial jurisdiction.

selection clause because the arbitration and judicial jurisdiction clauses are contained in the B/L at the same time. For example, the B/L of COSCO provides that all disputes arising from or relating to this B/L should be subject to the judicial litigation or arbitration in the P. R. China in accordance with the law of P. R. China.

V. Doctrine of Tolerance of Arbitration Clause

There are a number of issues in the maritime area, especially for B/Ls, that do not conform to the traditional theories. Therefore, the issues such as the validity of the arbitration clause on a B/L for the transferee after the B/L is transferred, and the validity of the arbitration clause in a Charterparty for the transferee after the B/L, issued under the Charterparty is transferred, and the validity of the arbitration clause on B/L for the sub-transportation by train and trucks during door to door transportation, are still in question. It is the author's opinion that, in the modern legal society, the will of the parties should be fully respected and their preference for arbitration should prevail. In other words, when settling the conflict of jurisdictions, we should be tolerant to the arbitration clause on B/L and interpret it in an effective way.

The above mentioned cases show that, although the Chinese courts generally acknowledge the validity of arbitration clause on B/L, obstacles still exist in the implementation process and maritime arbitration practice. In particular, in case of conflict between Chinese judicial jurisdictions and foreign arbitral jurisdictions, such conservative position of Chinese courts actually goes against the Chinese parties. In some areas of China, local protectionism is still prevailing, which causes negative effect on foreign arbitration. In the western countries, as late as in 1938, the mainstream view was that if a clause included provisions concerning arbitration and litigation at the same time, a party to the agreement could successfully avoid such clause with the aid of the court.[16] Therefore, the conservative attitude of the Chinese courts should be changed economic globalization. The relative freedom of international trade needs to secure free trade to an even greater extent. The international litigation should be in conformity with the emergence of a truly global economy.

16 The Soloy, 98 F. 2d 711, 1938 AMC 1123 (2d Cir. 1938).

VI. To Accelerate the International Uniformity of Maritime Legislation

In the process of maritime dispute settlement, the popularity of forum shopping is partly due to the lack of uniform regulation around the world. From a plaintiff's or defendant's perspective, different provisions in procedural or substantive aspect under different jurisdictions will make some forums far more attractive than the others. Further, the relative lack of uniformity both in a State's internal laws and choice of law rules causes different results of similar cases, depending on the particular forum selected. Considering that a large part of maritime legislations involves techniques and professional knowledge, it is easier to unify the law in admiralty area than in any other areas. Even though international conventions have their limitations, they could still to some extent reduce conflict of jurisdictions. In admiralty area, the primary goal should be to promote the international legislations concerning arrest of ships, the uniformity of which may reduce the conflict of jurisdictions.

VII. Conclusion

The universally accepted and acknowledged arbitration clause in the Charterparty has encountered great challenge due to the unique nature of B/L. The maritime judges shall give adequate tolerance to the arbitration clause on or incorporated in the B/L. International legislation uniformity in maritime affairs seems to be an appropriate method to solve the jurisdictional conflicts, but considering the difficulty of coordination among countries, it is absolutely not the most effective way.

试析海事与刑事交叉案件的审理机制

韩　冰*

内容摘要: 刑事附带民事诉讼制度与海事案件专属管辖制度的并存，造成了我国司法审判实务中审理海事与刑事交叉案件的混乱。从海事案件的高度专业性和技术性出发，海事与刑事交叉案件的审理不应拘泥于现行立法关于刑事附带民事诉讼的规定，而应当由海事法院与地方法院对海事海商部分和刑事部分分别审理，在刑事案件尚未审结前，海事法院对法律事实基本清楚的民事案件应当及时作出裁判。

关键词: 海事与刑事交叉案件　刑事附带民事诉讼　先刑后民

一、引　言

所谓“民事与刑事交叉”，是指行为人的行为既构成犯罪，又致使被害人遭受经济等民事意义上的损失。我国现有法律对民事与刑事交叉案件的审理规定了刑事附带民事诉讼制度，《中华人民共和国刑事诉讼法》（以下简称“《刑事诉讼法》”）总则第七章、《中华人民共和国刑法》（以下简称“《刑法》”）第 36 条、第 37 条、第 64 条均对此作出了规定，最高人民法院也先后发布了《关于执行〈中华人民共和国刑事诉讼法〉若干问题的解释》、《关于刑事附带民事诉讼范围问题的规定》等一系列司法解释。其中，《刑事诉讼法》第 77 条规定，被害人由于被告人的犯罪行为而遭受物质损失的，在刑事诉讼过程中，有权提起附带民事诉讼。如果是国家财产、集体财产遭受损失的，人民检察院在提起公诉的时候，可以提起附带民事诉讼。《刑法》第 36 条第 1 款规定，由于犯罪行为而使被害人遭受经济损失的，对犯罪分子除依法给予刑事处罚外，并应根据情况判处赔偿经济损失。根据以上法律及司法解释的规定可以看出，我国的刑事附带民事诉讼，是指在刑事诉讼过程中，司法机关在解决被告人的刑事责任的同时，附带解决由遭受物质损失的人或人民检察院提起的，由于被告人的犯罪行为所引起的物质损害的赔偿而进行的诉讼活动。这些规范都充分肯定了刑事附带民事诉讼制度的意义，即在惩罚犯罪、

* 韩冰，法学硕士，武汉海事法院助理审判员。

保护国家和人民利益等诸多方面发挥了积极的作用，并建立了该制度的基本原则，比如“先刑后民”的原则。与此同时，我国在民事立法体系中设立了专属管辖制度。例如，《中华人民共和国海事诉讼特别程序法》（以下简称“《海事诉讼特别程序法》”）对专属海事法院管辖的案件范围作出了明确规定，其第 4 条规定，海事法院受理当事人因海事侵权纠纷、海商合同纠纷以及法律规定的其他海事纠纷提起的诉讼。

刑事附带民事诉讼制度与海事案件专属管辖制度的并存，在理论上形成一种困境。例如，对于海事类的民事案件，如果其同时也构成刑事案件，在民事部分由海事法院专属管辖的情况下，刑事部分由地方法院另案审理，这是否会构成对我国现有刑事附带民事诉讼制度的挑战？在这种情况下，是否应当继续贯彻“先刑后民”的原则，即海事部分的审理必须在刑事部分审理之后？对于以上问题，包括《海事诉讼特别程序法》在内的现有相关法律法规并未明确。在实践中，全国各海事法院的做法也不尽相同：有的是严格按照“先刑后民”的原则，在地方法院刑事审判作出后再审理海事案件；有的是各自审各自，对海事案件直接作出裁判，而不考虑地方法院是否对刑事案件作出审判。同时，随着社会的发展，也出现了质疑刑事附带民事诉讼的存在意义的呼声。本文希望通过分析审判实务中审理海事与刑事交叉案件的若干问题，为进一步完善相关法律提供建设性意见。

二、海事与刑事交叉案件分开审理的必要性和优势

如同法律没有明确对“民事与刑事交叉案件”的概念作出界定一样，“海事与刑事交叉案件”并没有明确的内涵和外延。在实践中，典型的海事与刑事交叉案件有 3 类：其一，船舶碰撞侵权与交通肇事罪；其二，海事侵权与海盗罪；[1] 其三，海事侵权与诈骗罪。[2] 以上 3 类海事与刑事交叉案件均为同一法律事实或相互牵连的不同法律事实分别侵犯了海事法律关系和刑事法律关系，其中，同一法律事实或相互牵连的不同法律事实构成海事与刑事交叉案件的交叉点。由此，不妨对“海事与刑事交叉案件”作出如下定义，即海事与刑事交叉案件是指同一法律事实或相互牵连的不同法律事实分别侵犯了海事法律关系和刑事法律关系的案件。

（一）海事与刑事交叉案件分开审理的必要性

1 海盗罪是一种国际犯罪，根据 1996 年国际商会国际海事局所采用的定义：海盗行为是指登上船舶，旨在行窃或从事其他犯罪行为，且有能力使用武力继续犯罪的任何行为。

2 这种情况多为国际犯罪，即国际海事诈骗，包括保险诈骗、预付货款诈骗、提单诈骗和集装箱诈骗等。

我国现有刑事附带民事诉讼制度对一般民事与刑事交叉案件由同一合议庭一并审理，主要理由有如下 4 个方面：首先，将民事诉讼附带于刑事案件一并审理，有利于提高诉讼效率，节约司法资源，符合诉讼经济原则；其次，刑事附带民事诉讼制度使公安司法机关在刑事诉讼中，积极查明被告人的犯罪行为所造成的物质损失情况，在刑事诉讼严格的证明标准的基础上，民事损害的事实认定和法律适用将更加准确，有利于查明事实，分清责任；再次，民事责任附带于刑事诉讼中进行追究，民事赔偿更容易得到兑现；最后，民事与刑事交叉案件一并审理可以维护司法判决的统一性和严肃性，避免裁判上的矛盾和冲突。

尽管有理由将上述交叉案件由同一合议庭一并审理，但笔者认为，不能将海事与刑事交叉案件简单地等同于一般民事案件而适用民刑事交叉案件合并审理的程序，海事与刑事交叉案件的特殊性决定了此类案件必须分别由海事法院和地方法院独立审理。海事与刑事交叉案件的特殊性主要体现在海事案件的专属管辖方面。《海事诉讼特别程序法》第 4 条规定，海事法院受理当事人因海事侵权纠纷、海商合同纠纷以及法律规定的其他海事纠纷提起的诉讼。同时，第六届全国人大常委会《关于在沿海港口城市设立海事法院的决定》中明确规定，海事海商案件实行由海事法院专属管辖的原则。最高人民法院《关于海事法院受理案件范围的若干规定》进一步明确了属于海事侵权纠纷、海商合同纠纷等 5 大类共 64 个小类的案件由海事法院专属管辖，其他法院无权管辖。[3] 以上法律及相关司法解释绝对排除了海事法院以外的其他法院（包括地方法院）对海事案件的管辖权。这也就意味着，对于海事与刑事交叉的案件，不能简单按照《刑事诉讼法》及其他法律对刑事附带民事制度的规定，由同一合议庭对刑事民事案件一并审理，而应该根据同一效力等级的法律，特殊法优先适用于普通法的法律适用原则，依照《海事诉讼特别程序法》对海事案件由海事法院专属管辖的规定，将海事与刑事交叉案件分开审理，即由海事法院审理海事部分，由地方法院审理刑事部分，这也与笔者所了解的全国部分地区的司法实践相一致。

此外，将海事和刑事交叉案件分开审理也是基于对海事海商纠纷高度的专业技术性和涉外性的充分考虑。海事诉讼在程序上有不同于《中华人民共和国民事诉讼法》（以下简称“《民事诉讼法》”）的特别规定，如果海事和刑事交叉案件由地方法院一并审理，可能造成执法尺度各异，不利于保护当事人的利益。

（二）海事与刑事交叉案件分开审理的优势

将海事与刑事交叉案件由海事法院和地方法院分开审理，其优势是显而易见

3 广东省高级人民法院《关于重申海事海商案件由海事法院专属管辖的通知》中也有具体体现。

的，主要体现在下述 4 点。

第一，分开审理充分重视了民事诉讼（具体到本文指海事诉讼）与刑事诉讼所追求目标的差异性。一方面，海事诉讼作为民事诉讼的一种，属于私权诉讼，可以依照个人意思进行处分，可以进行某些权利的放弃或妥协；而另一方面，刑事诉讼是一种公权诉讼，注重国家刑罚权的作用，而刑罚权源自不可放弃的国家公权，即在刑事诉讼中一般不存在放弃和妥协。因此，分开审理可以促使裁判者对自己在不同性质的诉讼活动中的作用有清楚的认识。

第二，海事诉讼作为民事诉讼的一种，实行“谁主张，谁举证”的举证责任分配原则；而刑事诉讼采取的则是严格证明的方法，证据的运用要达到排除合理怀疑的标准，并由国家公诉机关负责提供证据的来源和有效性，被告人不负任何举证义务。在证明标准上，民事诉讼只要求“全面地、客观地审查核实证据”，而刑事诉讼的证明标准是“证据确实、充分”。因此，海事诉讼与刑事诉讼的举证与证明标准不同，如果将海事与刑事交叉案件简单地交由同一合议庭一并审理，则很难要求同一合议庭同时依据不同规则来衡量相同证据，[4] 而分开审理则保证了法官能根据相应的规则衡量相同证据，有利于举证责任在诉讼双方之间的公平分配，从而有利于实现实体公正。

第三，现代各部门法律纷繁复杂，任何国家的法官都很难既是民事审判的专家，又是刑事审判的能手，更何况是对于专业性和技术性提出更高要求的海事审判。因此，将海事与刑事交叉案件分开审理，有利于培养高质量的专业法官队伍，符合法官专业化、专家化的现代法治的整体趋势。

第四，将海事与刑事交叉案件分开审理，可以避免由海事诉讼作为一种民事诉讼附带于刑事诉讼而在实践中造成“重刑轻民”的程序救济思路，同时避免造成对民事赔偿责任的轻视，使得受害人的个别救济问题淹没在国家追究、惩罚犯罪的过程中。因此，海事与刑事交叉案件分开审理更有利于对受害人民事权利的保护。

三、“先刑后民”原则与海事和刑事交叉案件的审理

（一）“先刑后民”原则

刑事附带民事诉讼制度所确立的“先刑后民”原则一直被司法机关作为审理一般民事与刑事交叉案件的“金科玉律”。“先刑后民”原则，是指人民法院在审

4 这种冲突的典型案例即著名的“辛普森案”。刑事诉讼基于排除合理怀疑的证明标准认定辛普森杀人罪不成立并宣告无罪；民事诉讼基于盖然性的证明标准认定辛普森应对被害人之死负责，判处被告承担赔偿责任。

理民事与刑事交叉案件时，必须先将刑事案件审理终结后，再对涉及的民事案件进行审理，或者在审理刑事案件的同时附带审理民事案件，在此之前，人民法院不能单独就其中的民事案件予以审理判决。[5] 该原则主要体现在以下法律中：《民事诉讼法》第 77 条规定，被害人由于被告人的犯罪行为而遭受物质损失的，在刑事诉讼过程中，有权提起附带民事诉讼。如果是国家财产、集体财产遭受损失的，人民检察院在提起公诉的时候，可以附带提起民事诉讼。其第 78 条规定，附带民事诉讼应当同刑事案件一并审判，只有为了防止刑事案件的过分迟延，才可以在刑事案件审判之后，由同一审判组织继续审理附带民事诉讼。最高人民法院《关于执行〈中华人民共和国刑事诉讼法〉若干问题的解释》第 89 条规定，附带民事诉讼应当在刑事案件立案以后第一审判决宣告以前提起。有权提起附带民事诉讼的人在第一审判决宣告以前没有提起的，不得再提起附带民事诉讼，但可以在刑事判决生效后另行提起民事诉讼。第 99 条规定，对于被害人遭受的物质损失或者被告人的赔偿能力一时难以确定，以及附带民事诉讼当事人因故不能到庭等案件，为了防止刑事案件的过分迟延，附带民事诉讼可以在刑事案件审判后，由同一审判组织继续审理。[6]

（二）海事与刑事交叉案件是否应当遵循“先刑后民”原则

实践中，一般民事与刑事交叉案件的形式多样，尽管有前述法律规定，但具体哪些交叉案件应当严格适用“先刑后民”原则，哪些交叉案件可以作出灵活变通，法律并不明确。在司法实践中，一般民事与刑事交叉案件在审理中，多数是严格遵照了“先刑后民”原则，也有少数是对此原则作出了变通。这就对海事与刑事交叉案件审理是否必须遵循“先刑后民”原则带来了更大的不确定性。具体到海商法领域而言，《海事诉讼特别程序法》也没有对海事与刑事交叉案件的审理作出具体规定。对全国各海事法院的实践而言，是否遵守“先刑后民”原则，即在审理海事海商纠纷过程中是否必须等待地方法院对刑事纠纷作出判决，各海事法院也莫衷一是。

笔者认为，如果海事法院对于海事与刑事交叉案件严格适用“先刑后民”原则，其弊端是显而易见的。一方面，不利于对被害人民事权利的保护，亦有碍实现司法公正。海事法院在审理案件时发现海事海商纠纷确有涉嫌犯罪的嫌疑，一般会向侦查机关移送涉嫌犯罪的材料，同时中止海事案件的审理。但据有关部门统计，

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5 陈江平：《刑民交叉案件“先刑后民”原则研究》，下载于 http://blog.chinacourt.org/wp-profilel.php?p=67460，2007 年 10 月 15 日。

6 “先刑后民”原则，在 1997 年 12 月 13 日施行的最高人民法院《关于审理存单纠纷案件的若干规定》和 1998 年 4 月 9 日施行的最高人民法院《关于在审理经济纠纷案件中涉及经济犯罪嫌疑若干问题》第 1 条、第 10 条、第 11 条、第 12 条的规定中也有体现。

我国每年的刑事破案率约为 60%，有相当部分刑事案件的犯罪嫌疑人长期未被抓获。[7] 按照“先刑后民”原则的规定，只要犯罪嫌疑人未被抓获，海事海商纠纷就可能被无限期拖延，使得海事诉讼长期受制于刑事案件，干扰了正常的海事诉讼，使公民、法人的权益不能得到及时有效的保护，极易导致矛盾恶化。应该说，民事案件与刑事案件各有不同的审限，对民事案件，尤其是对商事案件而言，审判活动所持续的时间和裁决的可执行能力至关重要。如果案件的完全审结需要等待刑事部分的结果，很可能无法满足其尽快实现经济利益的目的，这也是商事主体在涉案中对自己经济利益的考虑要超过对涉案嫌疑人刑事惩罚的考虑的原因。[8] 另一方面，需要重申的是，海事案件天然地具有高度的专业技术性。例如海事与刑事交叉案件中的船舶碰撞，如果由公安部门立案侦查并界定是否构成碰撞侵权，这在技术层面无疑是相当困难的;即便公安机关最终能够予以认定，其侦查、认定阶段所耗费的时间和成本也相对高昂。如果在此情形中严格适用“先刑后民”原则，就会使原本可以通过民事审判解决的纠纷受制于刑事审判。因此，在通常意义上，高度专业性的海事海商纠纷先由海事法官凭借专业知识和经验作出裁判，这样更有利于刑事案件的审理。

因此，笔者认为，海事与刑事交叉案件的审理不应当受“先刑后民”原则的制约。一方面，对于尚未立案、处于侦查阶段的海事与刑事交叉案件，海事法院应当对其海事海商纠纷部分立案，根据民事纠纷举证的证明标准来衡量证据;案件事实清楚，当事人权利义务明了的，应当及时依法裁判。另一方面，对于已经进入刑事审理阶段的交叉案件，海事法院除了在特定情形下必须等待地方法院对刑事部分作出判决而中止审理外，在通常情况下应当对海事海商部分及时依法裁判。

四、立法建议

由于海事案件的高度专业性和涉外性，涉及船舶碰撞、海盗以及海事欺诈等海事与刑事交叉案件，与一般民事与刑事交叉案件存在相当大的差别。因此，笔者认为不应该拘泥于现行立法关于刑事附带民事诉讼“先刑后民”的规定，而应当由海事法院与地方法院对海事海商部分和刑事部分分别审理，同时对于案件事实清楚，当事人权利义务明了的，应及时依法裁判。

要统一实践中的不同做法，提高审判效率，首先必须有法可依。我国现行法律仅有《刑事诉讼法》以及刑法的相关司法解释中涉及了民事与刑事交叉的问题。

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7 陈江平：《刑民交叉案件“先刑后民”原则研究》，下载于 http://blog.chinacourt.org/wp-profilel.php?p=67460，2007 年 10 月 15 日。

8 参见宋鱼水：《有关先刑后民思想的灵活适用及其意义》，下载于 http://politics.people.com.cn /GB/8198/42824/42830/3096960.html，2007 年 10 月 28 日。

《海事诉讼特别程序法》对海事法院专属管辖案件的范围作了规定，从而明确了海事与刑事交叉案件由海事法院和地方法院分开审理，但该法并没有对海事与刑事交叉案件的审理作出具体规定。例如，在刑事案件立案侦查阶段，海事法院是否应当受理海事海商案件？在刑事审理尚未结束的情况下，海事法院是否可以依法及时对海事海商部分作出裁判？这些问题均没有在上述法律规范中得以明确。因此，应当充分重视海事与刑事交叉案件的特殊性，在《海事诉讼特别程序法》中就上述问题作出规定。具体而言，笔者建议在《海事诉讼特别程序法》总则中对海事与刑事交叉案件作出规定，条文可以考虑设计为 2 条：其一，“同一法律事实或相互牵连的不同法律事实分别侵犯了海事法律关系和刑事法律关系的，构成海事与刑事交叉案件。案件当事人向海事法院起诉主张其民事权利的，海事法院应当受理。”其二，“对于海事与刑事交叉案件，在刑事案件尚未审结前，海事法院对法律事实基本清楚的民事案件应当及时作出裁判。”如无法在短时间内修改法律，则可以以最高人民法院司法解释的形式对此类交叉案件的审理作出规定。

由《海事诉讼特别程序法》对海事与刑事交叉案件的审理作出规定，可以充分考虑到此类案件的特殊性和专业性，使海事案件不会受制于现有法律就一般民事与刑事交叉案件所建立的刑事附带民事诉讼制度，同时也可避免现有刑事附带民事诉讼的弊端。此外，尽管现有的刑事附带民事诉讼制度设立已久，在维护国家和社会公共利益、提高司法效率、节约诉讼成本等方面发挥了重要作用，但随着现代司法理念的引入和国家法治进程的推进，刑事附带民事诉讼制度的弊端也在实践中逐渐暴露，多有论者主张对该制度进行完善或直接予以废除。在《海事诉讼特别程序法》中对海事与刑事交叉案件的审理作出规定，实际上是在海事与刑事交叉案件领域冻结了刑事附带民事诉讼制度，摈弃了“先刑后民”的原则。实际上，在《海事诉讼特别程序法》增加此项规定可以看作是对改善或废除刑事附带民事诉讼制度的初步尝试，从而为以后一般民事与刑事交叉案件审理机制的改革提供借鉴。

中国海事法院船舶及船载货物的拍卖：现行做法、存在问题与解决方法

徐曾沧 *

内容摘要：我国各海事法院目前关于船舶及船载货物拍卖的现行做法与相关法律规范不符，在拍卖过程中存在诸多问题。本文通过调查全国 10 家海事法院船舶及船载货物拍卖的具体做法，分析了这些存在的问题，并提出了解决这些问题的具体建议。

关键词：船舶及船载货物　拍卖　海事法院

我国海事法院在船舶及船载货物拍卖中，不同程度地存在着由船检机构出具《价格评估报告》、《价格评估报告》不送达当事人和其他利害关系人、起拍价不向竞买人公开、由审判委员会确定保留价和起拍价、保留价调整次数和调整幅度不确定、流拍后立即进行无保留价变卖、以物抵债实施条件不明确、《价格评估报告》等资料不随案卷归档等做法。这些做法是海事法院在拍卖立法不完善的历史条件下，长期以来探索形成的习惯性做法，曾经在一定程度上弥补了拍卖立法的缺位，发挥过积极的作用。但随着 2005 年 1 月 1 日起施行的最高人民法院《关于人民法院民事执行中拍卖、变卖财产的规定》（以下简称“《拍卖、变卖财产的规定》”）等拍卖规定的出台，[1] 拍卖立法日益完善，原来的这些做法逐渐暴露出诸多问题和不足。海事法院若固守这些做法，便会因与最高人民法院的司法解释不符而存在隐患。为规范船舶及船载货物拍卖行为，健全船舶及船载货物拍卖制度，维护当事人合法权益，笔者调查了解了我国各海事法院的现行做法，分析了其中存在的问题，提出了解决方法。

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* 徐曾沧，华东政法大学国际经济法博士研究生。

1 1994 年，最高人民法院颁布了《关于海事法院拍卖被扣押船舶清偿债务的规定》，对船舶扣押及船舶拍卖进行了一些规定。《中华人民共和国海事诉讼特别程序法》生效实施后，该司法解释并未明令废止，但其主要内容已被海诉法吸纳。值得说明的是，无论是该司法解释，还是现在的海诉法，对船舶及船载货物等财产拍卖的许多环节，如保留价的确定及调整等，都付之阙如，或不甚完善，这也是造成全国海事法院船舶及船载货物拍卖做法不一、欠缺规范的主要原因。

一、我国海事法院船舶及船载货物拍卖的现行做法

根据调查了解，笔者将目前各海事法院船舶及船载货物拍卖的现行做法整理如下：[2]

表 1　各海事法院船舶及船载货物拍卖做法比较表

	船舶拍卖是否适用《拍卖、变卖财产的规定》	船舶价格评估报告由谁出具	价格评估报告是否送达当事人及利害关系人	船舶起拍价、保留价由谁确定	起拍价是否公开	船舶保留价调整次数和幅度如何确定	船舶拍卖流拍后能否即变卖、变卖有最低保留价	船舶抵债应以何种物具备条件	船舶价格评估报告资料是否归档
广州	×	船检机构	×	审委会	×	不明确	√，无	不明确	×
大连	√	评估机构	√	审委会	×	不动产	×，≥ 50%	流拍，不依职权	√
天津	√	船检机构	√	合议庭或独任法官	√	不动产	×，不确定	非流拍，不依职权	√
青岛	×	评估机构	√	审委会	√	动产	√，≥ 60%	非流拍，不依职权	√
上海	√	评估机构	√	审委会	√	不明确	×，不确定	流拍，不依职权	√
宁波	√	船检机构	√	审委会	×	不动产	×，≥ 60%	非流拍，不依职权	√
厦门	√	评估机构	√	审委会	×	不动产	×，≥ 50%	非流拍，不依职权	√
北海	×	船检机构	√	拍卖委员会	√	动产	×，≥ 60%	非流拍，不依职权	√
海口	√	船检机构	√	审委会	×	动产	×，≥ 50%	非流拍，不依职权	√
武汉	√	评估机构	√	审委会	×	不动产	√，≥ 60%	流拍，不依职权	√

注：1. 本表中“√”表示肯定，“×”表示否定。
2. 武汉海事法院虽适用最高人民法院《拍卖、变卖财产的规定》，但有不同意见。
3. “变卖有无最低保留价要求”一栏所列百分比以评估价为基础。

结合上表，笔者对各海事法院船舶及船载货物拍卖的做法比较分析如下：

（一）最高人民法院《拍卖、变卖财产的规定》是否适用

2　数据采集时间截至 2006 年 12 月 31 日。

自 2005 年 1 月 1 日起施行的最高人民法院《拍卖、变卖财产的规定》对民事执行中的拍卖、变卖财产作了进一步规范，但该规定并未明确规定对海事法院拍卖、变卖船舶是否适用。从目前各海事法院拍卖船舶的司法实践来看，除广州海事法院、青岛海事法院不适用该规定外，其他海事法院均适用该规定。值得说明的是，武汉海事法院虽然适用该规定，但仍有不同意见。

（二）《价格评估报告》是否由具有评估资质的机构出具

《价格评估报告》是有资质的资产（价格）评估机构对拟拍卖船舶、船载货物市场价值的评估。大连、青岛、上海、厦门、武汉等 5 个海事法院，由具有评估资质的机构出具《价格评估报告》。上海海事法院的做法是，由资产评估机构、船舶检验机构联合完成船舶《价格评估报告》，船检机构出具《船舶状况勘验报告》作为《价格评估报告》的附件。大连海事法院采取了大致相同的做法。广州、天津、宁波、北海、海口等 5 个海事法院，则由仅具备船舶检验资质，不具备船舶评估资质的船检机构出具《价格评估报告》。

（三）《价格评估报告》是否送达当事人和其他利害关系人

目前我国的海事法院中，除广州海事法院外，其他 9 个海事法院都将《价格评估报告》送达当事人和其他利害关系人。广州海事法院的现行做法是：《价格评估报告》完成后提交给审判委员会（以下简称“审委会”），密封在信封内，内容保密。该《价格评估报告》不向当事人以及其他利害关系人送达，只用作审委会确定保留价的参考，审委会讨论保留价时方开启密封信封内的《价格评估报告》。

（四）船舶及船载货物起拍价是否向竞买者公开

起拍价是拍卖船舶及船载货物时竞买人开始竞价的价格，一般低于或等于保留价。广州海事法院和大连、宁波、厦门、海口、武汉等 6 个海事法院不向竞买者公开起拍价，而天津、青岛、上海、北海海事法院则向竞买者公开。根据广州海事法院的现行做法，一方面，由于拍卖船舶及船载货物公告在先，审委会确定起拍价时间在后，起拍价无法事先在拍卖公告中公开；另一方面，起拍价确定后，虽不保密，但直接交给拍卖委员会主任（一般为办案法官），竞买人也很难在拍卖日之前获悉起拍价。

（五）船舶及船载货物保留价、起拍价由谁确定

保留价也称底价，是为保护当事人合法权益而确定的拍卖可以成交的最低价格。在保留价、起拍价的确定主体方面，天津海事法院由合议庭或承办法官确定，

北海海事法院由船舶及船载货物拍卖委员会确定，广州海事法院与其他 7 家海事法院则由审委会确定。根据广州海事法院的现行做法，船舶及船载货物进入拍卖程序后，提请审委会确定保留价和起拍价，审委会则根据《价格评估报告》决定拍卖的保留价和起拍价。如果第一次流拍，须再次提请审委会调整保留价、起拍价，直至船舶及船载货物被最后处理。

（六）保留价调整次数和幅度如何确定

大连、天津、宁波、厦门、武汉等 5 个海事法院，第一次拍卖时，船舶保留价不低于评估价的 80％，如果第一次拍卖流拍，还可以对船舶保留价调整 2 次，即前后可以 3 次确定或调整保留价。而青岛、北海、海口海事法院，第一次拍卖时，船舶保留价不低于评估价的 80％，如果第一次拍卖流拍，只能对船舶保留价调整 1 次，即前后只能 2 次确定或调整保留价。广州海事法院的现行做法是，没有明确的保留价确定规则，第一次拍卖时，船舶保留价有时可低至评估价的 70％，如果第一次拍卖流拍，还可以调整船舶保留价，调整次数和调整幅度不确定。

（七）船舶流拍后可否立即进行变卖

广州海事法院和青岛、武汉海事法院在拍卖船舶流拍后可立即进行变卖，而其他 7 家海事法院不采用该种做法。在变卖是否设定最低保留价方面，广州海事法院和天津海事法院一般不设变卖的保留价，大连、厦门和海口海事法院设定最低变卖价不低于评估价的 50％，青岛、宁波和武汉 3 个海事法院设定最低变卖价不低于评估价的 60％。按照某些海事法院的现行做法，如因竞买价低于保留价导致流拍，须再次召开审委会调整保留价。为避免多次召开审委会调整保留价带来的不便，审委会作了一些变通，即在确定保留价的同时作出不设最低变卖价的变卖决定。例如，某海事法院在拍卖“粤湛江 03043 轮”的过程中，审委会在确定保留价的同时作出决定：若该轮竞买价低于保留价导致拍卖不成交，则采取变卖方式，价高者得。

（八）船舶以物抵债应具备何种条件

目前我国各海事法院中，除广州海事法院之外，其他 9 个海事法院都对法院依职权裁定以船舶抵债持否定态度。此外，大连、上海和武汉 3 个海事法院要求以物抵债以流拍为条件；天津、青岛、宁波、厦门、北海和海口 6 个海事法院则无此要求。按照广州海事法院的现行做法，审委会在讨论船舶保留价的过程中，对于流拍或难以拍卖的船舶，实施以物抵债的条件不明确。有观点认为，船舶抵债无须以流拍为前提，法院可依职权裁定以船舶抵债而不经当事人申请或同意。

（九）《价格评估报告》等资料是否随案卷归档

除广州海事法院不将船舶《价格评估报告》等资料随案卷归档外，其他 9 个海事法院均将这些资料随案卷归档。按照广州海事法院的现行做法，船舶《价格评估报告》、起拍价、保留价等资料均由审委会工作人员单独保管，不随案卷一并归档。

二、我国海事法院船舶及船载货物拍卖存在的问题

海事法院拍卖船舶及船载货物的上述做法，在司法实践中逐渐暴露出一些问题和不足，主要表现在以下方面：

（一）排除适用最高人民法院相关司法解释可能导致拍卖违法

最高人民法院《拍卖、变卖财产的规定》并没有规定其不适用于海事法院船舶和船载货物的拍卖，但如果海事法院在拍卖过程中并未遵守该规定，可能导致违法拍卖，甚至引发国家赔偿。《中华人民共和国国家赔偿法》第 31 条规定：“人民法院在民事诉讼、行政诉讼过程中，违法采取对妨害诉讼的强制措施、保全措施或者对判决、裁定及其他生效法律文书执行错误，造成损害的，赔偿请求人要求赔偿的程序，适用本法刑事赔偿程序的规定。”据此，海事法院依据生效的民事裁定对船舶进行拍卖，如未遵守最高人民法院《拍卖、变卖财产的规定》，可能导致违法拍卖，并引发国家赔偿问题。虽然目前还只是停留在反映问题的阶段，但并不排除将来有关方会请求确认船舶拍卖违法，并就因此而产生的损失请求国家赔偿的可能性。

（二）《价格评估报告》因评估机构没有资质而不具合法性

评估机构具有相应资质是《价格评估报告》合法和可采信的必要条件。船舶检验机构只具备船舶状况检验的资质，并无对船舶价值进行评估的资质，故由其作出《价格评估报告》是不合法的。大连海事法院就曾出现过当事人对船检机构出具《价格评估报告》的资质提出异议的情况。由船舶检验机构出具的《价格评估报告》，即使其实际评估结果是合理的，也是不具有合法性的。这正如一个案件诉诸法院寻求司法解决，该案件复杂到法官难以裁判的程度，而某法学专家尽管具备此方面的专业知识和处理技能，但绝不能代替法官裁决案件，因为他没有法官身份，不拥有司法裁判权。法官可听取法学专家的意见，但案件最后还得由法官裁决，因为法官才拥有裁判案件的资质。

（三）当事人对《价格评估报告》缺乏知情权和异议权

海事法院船舶及船载货物拍卖实践中，当事人意见最大、诟病最多的就是《价格评估报告》不送达的问题。由于《价格评估报告》不送达当事人，当事人便无法了解《价格评估报告》的内容，对被拍卖船舶及船载货物的评估价格和评估依据无法知晓，也难以对《价格评估报告》提出异议及申请重新评估。甚至在船舶已被拍卖的情形下，当事人仍不知船舶的评估价格，这对当事人来说是极不公平的。我国曾发生过当事人对此做法提出过异议的情况：某海事法院在拍卖船舶的过程中没有向船舶所有人送达《价格评估报告》，而船舶所有人认为其有权知道船舶的评估价格，对该院不送达《价格评估报告》的行为表示强烈不满。

（四）竞买人不能通过起拍价判断是否参与竞买

起拍价较保留价稍低或相等，竞买人本可以通过起拍价大致判断保留价、评估价，以决定是否参加竞买。但如果起拍价不公开，竞买人事先无法根据起拍价对保留价作出大致判断以决定是否参加竞买，只有在抵达拍卖现场后才能获知起拍价，由此产生了不必要的费用支出。

（五）审委会频繁讨论船价导致其职能失衡

审委会讨论船价并无不可，但经常性的拍卖使得审委会的主要工作集中在讨论拍卖价格上，弱化了审委会的其他职能和任务。以某海事法院 2006 年度召开的审委会会议为例，在召开的 15 次会议中，有 10 次是专门讨论船价，只有 5 次是专门或涉及讨论疑难案件和其他事项。审委会委员疲于应付讨论船舶或船载货物的保留价和起拍价，这使得审委会俨然成了“船舶定价委员会”。

（六）保留价弹性过大可能导致结果不公平

现代裁判理念要求裁判规则统一，对相同对象的处理应采用相同的方法，结果大致相同。海事法院缺乏明确统一的保留价确定规则，调整次数和调整幅度不统一，可能导致拍卖结果的横向和纵向不公平。就横向而言，同时拍卖同一类型的多条船舶，其保留价调整幅度和次数不同，结果自然各不相同。就纵向而言，先后拍卖同一类型的船舶，其保留价调整幅度和次数也不相同，结果也不相同。

（七）流拍后随即变卖不利于实现拍卖物价值的最大化

对扣押船舶进行变现，目的在于用所得价款清偿债务。船舶变现价款越高，越有利于实现债权，同时也越有利于保护债务人的合法权益。因此，选择何种方式对船舶变现至关重要。拍卖具有公开、公平竞争等特点，对扣押船舶以公平竞价的方式进行公开拍卖应为首选方式。这种方式有利于杜绝暗箱操作，实现价格

最大化。相对于拍卖而言，变卖是一种次优的选择。变卖缺乏公开性、透明度和竞争性，程序也较随意，在不设保留价的情形下，法院的执行权容易被滥用，船舶容易被“贱卖”，申请执行人、其他利害关系人以及被申请执行人的利益可能因此而受到损害。

（八）以物抵债规则不明确不利于债权保护

相对于拍卖、变卖而言，以物抵债因不能通过变现而清偿债务，故为各种处理方式中的最后选择。当存在多个债权人时，一条船舶难以清偿多个债务。即使强硬要求将船舶抵债给某个债权人，该债权人仍面临着变现困难或使用价值低等一系列问题。有鉴于此，将船舶以物抵债时，应充分尊重债权人意志，法院一般不应依职权裁定以物抵债。

（九）《价格评估报告》等资料不归档造成案卷不完整

《价格评估报告》等资料单独保管、不随案卷一起归档的做法将导致三方面的弊端：一是案卷资料不完整。案卷是案件处理过程的载体，记录办案的整个过程，涉及船舶拍卖的案卷理应记载拍卖船舶的全部过程，船舶《价格评估报告》等资料不归档会造成案卷资料的不完整。二是不利于当事人查阅案卷。对于船舶已被拍卖的案件，当事人出于了解案情、申请再审等需要，可以申请查阅案卷资料，但船舶《价格评估报告》等资料不归档，使得当事人无法查阅到相关资料。三是不利于法官了解情况。由于《价格评估报告》等资料不归档，办案法官也很难知道评估价格，给执行造成一定困难。例如，在“穗港浚 1 号轮”一案执行中，因 3 次流拍，执行人员拟进行变卖，变卖前需参考评估价确定保留价。但由于《价格评估报告》未归档，无法确定保留价，阻碍了变卖的及时进行，最后只得请求审委会工作人员提供《价格评估报告》。

三、我国海事法院船舶及船载货物拍卖问题的解决方法

针对前述存在的问题和不足，笔者认为，对海事法院拍卖船舶及船载货物的做法有必要作进一步的规范，具体意见和建议如下：

（一）补充适用最高人民法院《拍卖、变卖财产的规定》

按照诉讼的不同阶段，可将船舶及船载货物的拍卖分为 2 类：一类是海事请求保全阶段的拍卖，另一类是海事执行阶段的拍卖。笔者认为，海事执行阶段的拍卖，适用最高人民法院《拍卖、变卖财产的规定》应无任何疑义。这正如在海事执行阶

段要适用《中华人民共和国民事诉讼法》、《最高人民法院关于适用〈中华人民共和国民事诉讼法〉若干问题的意见》中有关执行的规定，以及最高人民法院颁布的其他民事执行司法解释一样，因为：

首先，最高人民法院《拍卖、变卖财产的规定》并没有排除适用于船舶及船载货物的拍卖。根据该规定序言“为了进一步规范民事执行中的拍卖、变卖措施，维护当事人的合法权益，根据《中华人民共和国民事诉讼法》等法律的规定，结合人民法院民事执行工作的实践经验，制定本规定”，以及第一条“在执行程序中，被执行人的财产被查封、扣押、冻结后，人民法院应当及时进行拍卖、变卖或者采取其他执行措施”的规定，船舶和船载货物拍卖并没有被排除在适用范围之外。

其次，最高人民法院其他关于执行工作的司法解释在海事执行中未被排除适用。海事执行过程中，最高人民法院其他关于执行工作方面的司法解释都予以适用，例如自1998年7月18日起施行的《关于人民法院执行工作若干问题的规定（试行）》、自2005年1月1日起施行的《关于人民法院民事执行中查封、扣押、冻结财产的规定》（法释[2004]15号）等，因此没有理由单独排除《拍卖、变卖财产的规定》的适用。

最后，拍卖机构接受法院委托拍卖仍应遵守最高人民法院《拍卖、变卖财产的规定》。拍卖机构接受法院委托拍卖船舶，性质上是民事代理，以法院名义进行，后果归于法院，乃是民事执行的一部分，当然要遵守最高人民法院《拍卖、变卖财产的规定》。我国虽然有专门的《拍卖法》，但该法主要适用于“商业拍卖”，调整公民、法人和其他组织自主委托拍卖机构所进行的拍卖活动。而法院在执行过程中委托拍卖机构所进行的拍卖属“司法拍卖”，有其特殊性，这种特殊性由最高人民法院《拍卖、变卖财产的规定》规制。

对于海事请求保全阶段的拍卖，是否适用《拍卖、变卖财产的规定》呢？有观点认为，海事请求保全阶段船舶及船载货物的拍卖不适用《拍卖、变卖财产的规定》，主要理由是：此类拍卖不属于民事执行；若适用该规定，则可能使竞买人待船舶降到最低保留价后再竞买；接受法院委托的拍卖机构在拍卖过程中应适用《拍卖法》而不适用《拍卖、变卖财产的规定》。

笔者认为，在海事请求保全阶段的船舶及船载货物拍卖的法律适用上，应首先适用《中华人民共和国海事诉讼特别程序法》（以下简称“《海诉法》”）及相关司法解释，对于《海诉法》及其司法解释没有明确规定的拍卖环节，应参考适用最高人民法院《拍卖、变卖财产的规定》，理由有三：

1. 船舶及船载货物在保全阶段拍卖与在执行阶段拍卖不应存在过大差异。从《海诉法》立法体例看，海事请求保全阶段的拍卖的确有别于执行阶段的拍卖。关于船舶及船载货物的拍卖，规定在《海诉法》第三章（海事请求保全）第二节（船舶的扣押与拍卖）、第三节（船载货物的扣押与拍卖）中。该法第42条规定：“除本节规定的以外，拍卖适用《中华人民共和国拍卖法》的有关规定。”第49条第2款规定：“拍卖船载货物，本节没有规定的，参照本章第二节拍卖船舶的有关规定。”第50条规定：“海事请求人对与海事请求有关的船用燃油、船用物料申请海事请

求保全，适用本节规定。”但如果以此为由，过分强调船舶及船载货物拍卖的特殊性，任意偏离《民事诉讼法》中关于执行的规定，会造成船舶及船载货物在不同阶段拍卖程序及结果的明显差异，有违公平。

2. 最高人民法院《拍卖、变卖财产的规定》填补了《海诉法》中有关船舶及船载货物拍卖的空白。《海诉法》虽然对拍卖船舶及船载货物作了一些规定，但关于价格评估、保留价的确定和调整等则没有作出规范。相反，最高人民法院《拍卖、变卖财产的规定》对这些拍卖环节作了详尽具体的规定，可有效弥补《海诉法》的空白，与其有而不用，不如借鉴适用。

3. 竞买人待价格降至最低保留价再竞买属于“串通竞买”之例外。作为法律规范的司法解释，本身具有指引和预测功能。竞买人根据最高人民法院《拍卖、变卖财产的规定》确定起拍价的规则，应能大致判断船舶保留价、评估价，作出有利于拍卖成交的报价。从这个意义上说，最高人民法院《拍卖、变卖财产的规定》有利于船舶拍卖。至于竞买人通过预判直至船舶降到最低保留价后再竞买，在所有竞买人共谋串买的情形下可能成立，但这是一种非正常的拍卖状态，应通过相应的防范和救济机制加以调整和解决，并非保留价规则本身存在问题。

（二）《价格评估报告》由具有评估资质的机构出具

根据最高人民法院《拍卖、变卖财产的规定》第 4 条，“对拟拍卖的财产，人民法院应当委托具有相应资质的评估机构进行价格评估。对于财产价值较低或者价格依照通常方法容易确定的，可以不进行评估”的规定，船舶及船载货物的拍卖应由具有评估资质的机构出具《价格评估报告》。我国其他海事法院可借鉴大连海事法院和上海海事法院的做法，由船舶检验机构与资产评估机构分工合作，船舶检验机构出具《船舶状况勘验报告》，资产评估机构在此基础上对船舶价值进行评估，出具《价格评估报告》。

（三）《价格评估报告》送达当事人及其他利害关系人

根据最高人民法院《拍卖、变卖财产的规定》第 6 条第 1 款“人民法院收到评估机构作出的价格评估报告后，应当在 5 日内将价格评估报告发送当事人及其他利害关系人。当事人或者其他利害关系人对价格评估报告有异议的，可以在收到价格评估报告后 10 日内以书面形式向人民法院提出”，以及第 2 款“当事人或者其他利害关系人有证据证明评估机构、评估人员不具备相应的评估资质或者评估程序严重违法而申请重新评估的，人民法院应当准许”的规定，《价格评估报告》应当送达当事人及其他利害关系人，并允许提出异议、申请重新评估。据此，今后海事法院应从 3 个方面规范《价格评估报告》的送达：一是完善《价格评估报告》的内容。在《价格评估报告》不送达的情形下，当事人和其他利害关系人看不到报告的内容，因此其内容过于简单、估价依据不明确等问题尚不突出。一旦《价格评

估报告》送达当事人以后，这些存在的问题就会凸现出来，这对《价格评估报告》提出了更高的要求，其依据应更明确，内容应更具体。二是明确送达范围。鉴于船舶公告期间有其他债权人登记债权，有可能参与船舶拍卖价款的分配，《价格评估报告》除应向当事人送达外，还要送达债权登记人。在当事人、利害关系人、债权登记人众多的情形下，还可考虑召开会议进行公开送达。三是严格重新评估的程序。允许当事人对《价格评估报告》提出异议不等于动辄启动重新评估程序。评估结果仅仅是确定拍卖保留价的一个参考因素，在评估阶段如果花费太多的时间、精力和费用，会增加当事人的负担，影响执行效率。因此，根据最高人民法院《拍卖、变卖财产的规定》第 6 条第 2 款，只有在有证据证明评估机构、评估人员不具备相关的评估资格或者评估程序严重违法的情况下，当事人或者其他利害关系人才可以申请重新评估。

（四）船舶起拍价以适当方式向竞买人公开

为了便于竞买人及时获知起拍价，通过起拍价初步判断保留价及评估价，节省不必要的差旅费用，应以适当方式向竞买人公开起拍价。由于拍卖船舶公告在先，船舶保留价及起拍价确定在后，起拍价难以在拍卖公告中公开，但可通过以下方式使竞买人尽早获知起拍价。一是在拍卖公告中提供查询线索。例如，在拍卖公告提供查询起拍价的信息和线索，包括联系人、联系方式、查询网址等。二是通过因特网及时公布起拍价。一旦起拍价确定，应通过中国扣押与拍卖船舶网（http://www.cnaas.com.cn）等网站予以公布，方便竞买人查询。除此以外，还可以选择其他适当的方式公布起拍价。

（五）依评估价金额确定制定保留价的主体

保留价是确认拍卖成交的最低价格。竞买人所出最高价低于保留价的，不能确认拍卖成交。保留价的确定设置了一种权利制衡机制，这一机制可以有效地避免利益的过分倾斜，防止因拍卖价格过低对被执行人的合法权益造成损害。根据最高人民法院《拍卖、变卖财产的规定》第 8 条，拍卖应当确定保留价，拍卖保留价由人民法院参照评估价确定。据此，拍卖船舶及船载货物应一律设定保留价，保留价由海事法院确定，但具体由海事法院哪一部门确定，规定并没有明确。一些海事法院的现行做法是统一由审委会确定。笔者认为，根据我国《民事诉讼法》和《人民法院组织法》的相关规定，合议庭或独任法官代表人民法院行使审判权，对具体案件进行审理并作出裁判，而审委会则主要负责总结审判工作经验，讨论决定重大疑难案件和研究其他审判工作问题。在有明确的保留价确定规则的前提下，无论由合议庭、独任法官，还是由审委会来确定保留价，均无不可。但如果所有船舶，无论价格和吨位大小，均由审委会确定保留价，受审委会议事规则影响（审委会会议的召开以及决议的形成，有法定人数和程序的要求），以及审委会职能和

任务的制约，会影响到拍卖效率以及审委会职能的平衡。而审委会又仍有必要确定影响重大的船舶的保留价。因此，需要在此间找到一个平衡点，既不能将所有船舶拍卖的保留价都交由审委会确定，又要将有重大影响的船舶拍卖的保留价决定权留给审委会。

关于在何种条件下应提交审委会决定保留价，可以有 2 种标准：一种是以船舶吨位为标准，即参照《中华人民共和国海商法》第 3 条第 1 款“本法所称船舶，是指海船和其他海上移动式装置，但是用于军事的、政府公务的船舶和 20 总吨以下的小型船艇除外”的规定，将超过 20 总吨的拟拍卖船舶提交审委会讨论保留价，而 20 总吨以下的拟拍卖船舶，则组成合议庭确定保留价即可。另一种是以船舶评估价为标准，规定评估价在一定金额以上的船舶由审委会确定保留价，低于该金额的船舶由组成的合议庭决定保留价。笔者认为，船舶吨位标准虽然客观，但吨位较大船舶受船龄、用途、结构等因素影响，价值可能并不大。相反，吨位较小的船舶受以上因素影响，价值也可能较大。船舶评估价格虽有主观性，但与当事人有重大利害关系，对债权债务的实现有重大影响。因此，将评估价格较大的船舶作为提交审委会决定保留价的标准更为合理。笔者建议，可以人民币 500 万元的船舶评估价格为分界点，评估价格在 500 万元以上（含 500 万元）的拟拍卖船舶，由审委会决定保留价和起拍价，评估价格在 500 万元以下的拟拍卖船舶，由合议庭决定保留价和起拍价。值得说明的是，有观点认为保留价可由拍卖船舶委员会决定。笔者认为，按照《海诉法》的规定，拍卖船舶委员会由海事法院指定的本院执行人员和聘请的拍卖师、验船师组成，对海事法院负责。因保留价由海事法院确定，拍卖师和验船师并无确定保留价的职权，故实际上只是法院执行人员可确定保留价，而且，法院执行人员代表的是法院而非拍卖船舶委员会。另外，拍卖船舶委员会对法院负责，并不意味能代表海事法院确定保留价。

（六）依评估价金额确定船舶保留价的调整规则

无论是合议庭还是审委会确定保留价，都应遵守一定的保留价确定原则。按照最高人民法院《拍卖、变卖财产的规定》，动产与不动产存在不同的保留价确定原则。该规定第 8 条第 3 款规定：“人民法院确定的保留价，第一次拍卖时，不得低于评估价或者市价的 80%；如果出现流拍，再行拍卖时，可以酌情降低保留价，但每次降低的数额不得超过前次保留价的 20%”，第 27 条规定：“对于第二次拍卖仍流拍的动产，人民法院可以依照本规定第 19 条的规定将其作价交申请执行人或者其他执行债权人抵债。申请执行人或者其他执行债权人拒绝接受或者依法不能交付其抵债的，人民法院应当解除查封、扣押，并将该动产退还被执行人”，第 28 条第 1 款规定：“对于第二次拍卖仍流拍的不动产或者其他财产权，人民法院可以依照本规定第 19 条的规定将其作价交申请执行人或者其他执行债权人抵债。申请执行人或者其他执行债权人拒绝接受或者依法不能交付其抵债的，应当在 60 日内进行第三次拍卖”，由此可见，动产可 2 次确定和调整保留价，第一

次保留价不低于评估价的 80%，第二次保留价（即最低保留价）不低于评估价的 64%（即 80％ ×80％）；而不动产可 3 次确定保留价，第一次保留价不低于评估价的 80％，第二次保留价不低于评估价的 64％（即 80％ ×80％），第三次拍卖确定的保留价（即最低保留价）不低于评估价的 51.2％（即 80％ ×80％ ×80％）。

船舶在本质上属动产，但带有某些不动产的特性，表现为权属登记制。《中华人民共和国物权法》第 24 条规定："船舶、航空器和机动车等物权的设立、变更、转让和消灭，未经登记，不得对抗善意第三人。"笔者认为，对于评估金额在 30 万元人民币以下的小型船舶，由于其流动性强，变现相对较容易，性质上更接近动产，可按动产规则确定和调整保留价，即可 2 次确定和调整保留价，保留价最低调整至评估价的 64％；对于评估金额在 30 万元人民币以上（含 30 万元）的船舶，变现相对困难，性质上更接近不动产，为促使其尽量、尽快变现，可按不动产规则确定保留价，即可 3 次确定和调整保留价，保留价最低调整至评估价的 51.2％。

（七）严格遵守船舶变卖条件

变卖有严格的限制条件。最高人民法院《拍卖、变卖财产的规定》规定了 3 种形式的变卖：一是不动产第三次流拍后的法定变卖。该规定第 28 条第 2 款规定："第三次拍卖流拍且申请执行人或者其他执行债权人拒绝接受或者依法不能接受该不动产或者其他财产权抵债的，人民法院应当于第三次拍卖终结之日起 7 日内发出变卖公告。自公告之日起 60 日内没有买受人愿意以第三次拍卖的保留价买受该财产，且申请执行人、其他执行债权人仍不表示接受该财产抵债的，应当解除查封、冻结，将该财产退还被执行人，但对该财产可以采取其他执行措施的除外。"二是当事人约定变卖。该规定第 34 条第 1 款规定："对查封、扣押、冻结的财产，当事人双方及有关权利人同意变卖的，可以变卖。"三是特殊物品的法定变卖。该规定第 34 条第 2 款规定："金银及其制品、当地市场有公开交易价格的动产、易腐烂变质的物品、季节性商品、保管困难或者保管费用过高的物品，人民法院可以决定变卖。"

因此，海事法院若对船舶等财产进行变卖，应注意 3 方面事项：第一，变卖方式需按前述 3 种形式，严格遵守变卖条件，不能在流拍后立即变卖。第二，评估金额在 30 万元人民币以下的小型船舶，因保管困难或保管费用过高的，可以按照第三种形式依职权决定变卖。第三，对于第一、三两种形式的变卖，根据最高人民法院《拍卖、变卖财产的规定》第 35 条第 2 款"按照评估价格变卖不成的，可以降低价格变卖，但最低的变卖价不得低于评估价的二分之一"的规定，应设定不低于评估价 1/2 的变卖保留价。

（八）严格遵守船舶以物抵债的条件

以物抵债有更为严格的条件限制。目前，我国法律允许 2 种形式的以物抵债：

一是申请执行人、其他债权人在流拍后申请或同意以物抵债。最高人民法院《关于适用〈民事诉讼法〉若干问题的意见》第 302 条规定："被执行人的财产无法拍卖或变卖的，经申请执行人同意，人民法院可以将该项财产作价后交付申请执行人抵偿债务，或者交付申请执行人管理；申请执行人拒绝接收或管理的，退回被执行人。"最高人民法院《拍卖、变卖财产的规定》第 19 条第 1 款规定："拍卖时无人竞买或者竞买人的最高应价低于保留价，到场的申请执行人或者其他执行债权人申请或者同意以该次拍卖所定的保留价接受拍卖财产的，应当将该财产交其抵债。"二是当事人协议以物抵债。最高人民法院《关于适用〈民事诉讼法〉若干问题的意见》第 301 条规定："经申请执行人和被执行人同意，可以不经拍卖、变卖，直接将被执行人的财产作价交申请执行人抵偿债务，对剩余债务，被执行人应当继续清偿。"因此，海事法院应严格遵循以上 2 种形式的船舶以物抵债的条件，不应在流拍或难以拍卖的情形下主动依职权裁定以物抵债。

（九）《价格评估报告》等资料随案卷归档

我国《民事诉讼法》第 61 条规定："代理诉讼的律师和其他诉讼代理人有权调查收集证据，可以查阅本案有关材料。查阅本案有关材料的范围和办法由最高人民法院规定。"自 2002 年 12 月 7 日起，最高人民法院制定的《关于诉讼代理人查阅民事案件材料的规定》开始施行，据此，人民法院民事审判案卷将向公众开放，律师和其他诉讼代理人可以持有效证件，在诉讼过程中到法院查阅所代理案件的有关材料。此外，当事人基于再审需要，也可以查阅已经审理终结的案件的有关材料。为落实当事人查阅拍卖船舶案件资料的权利，便于法官了解船舶情况，保证案卷资料的完整性，笔者建议，船舶《价格评估报告》、船舶保留价、起拍价等均应随案卷归入正卷；船舶保留价、起拍价的签发稿则随案卷归入副卷。

综上，笔者草拟了《海事法院规范船舶及船载货物等财产拍卖办法（示范稿）》。

第一条 目的和依据

为规范对船舶、船载货物（包括船用燃油、船用物料）拍卖、变卖、以物抵债的处理（以下简称"处理"），维护当事人及其他利害关系人的合法权益，依据现行法律法规，结合海事法院实际情况，制定本办法。

第二条 法律适用

船舶、船载货物（包括船用燃油、船用物料）在海事请求保全程序中的处理，适用《中华人民共和国海事诉讼特别程序法》（以下简称"《海诉法》"）；《海诉法》未作规定或者规定不明确的，参考适用最高人民法院《关于人民法院民事执行中拍卖、变卖财产的规定》（以下简称"《拍卖、变卖财产的规定》"）。

船舶、船载货物（包括船用燃油、船用物料）在执行程序中的处理，适用最高人民法院《拍卖、变卖财产的规定》，并参考适用《海诉法》。

其他财产的处理，适用《中华人民共和国民事诉讼法》，最高人民法院《拍卖、变卖财产的规定》等相关规定。

第三条 《船舶状况鉴定报告》的出具

根据《海诉法》规定，需要对船舶状况进行鉴定的，由具有船舶检验资质的机构和人员出具《船舶状况鉴定报告》。

《船舶状况鉴定报告》应包括如下内容：

（一）委托人姓名或者名称、委托鉴定的内容；

（二）委托鉴定的材料；

（三）鉴定的依据及所使用的科学技术手段；

（四）对鉴定过程的说明；

（五）明确的鉴定结论；

（六）对鉴定人员鉴定资格的说明；

（七）鉴定人员及鉴定机构的签章。

第四条 《价格评估报告》的出具

船舶、船载货物（包括船用燃油、船用物料）的《价格评估报告》，由具有资产（价格）评估资质的机构和人员出具。

资产（价格）评估机构评估船舶价格，应以船舶检验机构出具的《船舶状况鉴定报告》为基础。

《价格评估报告》应具备如下内容：

（一）评估对象；

（二）明确的评估依据；

（三）对评估方法的说明；

（四）对评估过程的说明；

（五）明确的评估结论；

（六）评估机构及评估人员的资质证明；

（七）评估机构及评估人员的签章；

（八）与价格评估有关的其他内容。

第五条 报告的送达

《船舶状况鉴定报告》、《价格评估报告》应当向当事人及其他利害关系人送达。

当事人及其他利害关系人在 10 人以上，不方便送达的，应当举行听证程序，通知当事人及其他利害关系人参加，就《船舶状况鉴定报告》和《价格评估报告》的内容进行听证。

第六条 确定保留价的主体

船舶、船载货物（包括船用燃油、船用物料）的拍卖、变卖须预设保留价。

船舶、船载货物（包括船用燃油、船用物料）的评估价格在 500 万元人民币以上（含 500 万元）的，由审判委员会确定和调整保留价；船舶、船载货物（包括船用燃油、船用物料）的评估价格在 500 万元人民币以下的，由合议庭初步确定和调整保留价后报主管副院长审批。但涉及重大、疑难、复杂、敏感案件，需报审判委员会的，由审判委员会确定和调整保留价。

保留价应当保密。

第七条 合议庭的组成

船舶、船载货物（包括船用燃油、船用物料）的拍卖须组成合议庭，合议庭由审判员或助理审判员组成。

合议庭履行以下职责：

（一）确定和调整船舶、船载货物（包括船用燃油、船用物料）的拍卖保留价及起拍价；

（二）决定船舶、船载货物（包括船用燃油、船用物料）的变卖及其保留价；

（三）决定船舶、船载货物（包括船用燃油、船用物料）的以物抵债；

（四）其他需要由合议庭决定的事项。

船舶、船载货物（包括船用燃油、船用物料）拍卖的具体事项，包括组织鉴定、评估、公告、拍卖、看管、交接财产等，由审判服务中心负责。

第八条 保留价确定和调整规则

船舶、船载货物（包括船用燃油、船用物料）的拍卖应预设保留价，保留价的确定和调整以评估价为基础。

动产可 2 次确定和调整保留价。第一次保留价不低于评估价的 80%；第二次保留价（即最低保留价）不低于评估价的 64%。

不动产可 3 次确定和调整保留价。第一次保留价不低于评估价的 80%；第二次保留价不低于评估价的 64%；第三次保留价（即最低保留价）不低于评估价的 51.2%。

第九条 船舶等财产保留价的确定

评估金额在 30 万元人民币以下的船舶，按动产确定和调整保留价。

评估金额在 30 万元人民币以上（含 30 万元）的船舶，按不动产确定和调整保留价。但因特殊情况需要尽快处理的，可以按照动产确定和调整保留价。

船舶以外的其他财产，按财产性质分别依照动产或不动产规则确定和调整保留价。

第十条 起拍价的公开

起拍价应及时向社会公开。

起拍价的公开可以通过以下方法：

（一）在拍卖公告中提供查询线索。包括查询时间、查询方式、查询联系人等；

（二）通过互联网公开。起拍价确定后，应当通过“中国扣押与拍卖船舶网”（http://www.cnaas.com.cn）等网站及时公开；

（三）以其他适当的方式公开。

第十一条 船舶、船载货物（包括船用燃油、船用物料）的变卖

船舶、船载货物（包括船用燃油、船用物料）在以下 3 种情形下方可进行变卖：

（一）协议变卖。根据最高人民法院《拍卖、变卖财产的规定》第 34 条第 1 款的规定，在当事人双方及有关权利人同意变卖的情形下进行变卖；

（二）特殊物品变卖。根据最高人民法院《拍卖、变卖财产的规定》第 34 条第 2 款的规定，对金银及其制品、当地市场有公开交易价格的动产、易腐烂变质的

物品、季节性商品、保管困难或者保管费用过高的物品，人民法院可以依职权决定变卖；

（三）船舶及其他不动产第三次流拍。根据最高人民法院《拍卖、变卖财产的规定》第 28 条第 2 款的规定，在第三次拍卖流拍且申请执行人或者其他执行债权人拒绝接受或者依法不能接受该不动产或者其他财产权抵债的情形下，人民法院可以组织变卖。

对于第（一）、（二）2 种情形的变卖，根据最高人民法院《拍卖、变卖财产的规定》第 35 条第 2 款的规定，应设定不低于评估价 50％的保留价。

评估金额在 30 万元人民币以下的船舶，因保管困难或保管费用过高的，人民法院可以按照第（二）种形式依职权决定变卖。

第十二条 船舶、船载货物（包括船用燃油、船用物料）的以物抵债

船舶、船载货物（包括船用燃油、船用物料）在以下 2 种情形下方可进行以物抵债：

（一）协议以物抵债。根据最高人民法院《关于适用〈中华人民共和国民事诉讼法〉若干问题的意见》第 301 条的规定，经申请执行人和被执行人同意，人民法院可以不经拍卖、变卖，直接将被执行人的财产作价交申请执行人抵偿债务；

（二）申请执行人、其他债权人在流拍后申请或同意以物抵债。根据最高人民法院《拍卖、变卖财产的规定》第 19 条第 1 款的规定，申请执行人或者其他执行债权人在流拍后申请或者同意以物抵债。

第十三条 资料归档

船舶、船载货物（包括船用燃油、船用物料）的《价格评估报告》、保留价、起拍价等资料应随案卷归入正卷；保留价、起拍价的签发稿应随案卷归入副卷。

第十四条 施行日期

本试行办法自通过之日起施行。

托运危险货物的义务与责任

杨 轶 *

内容摘要: 一旦危险货物在运输途中发生失火、爆炸等事故，对于载货船舶以及载货船舶上的船员都会造成难以估量的损害。因此，我们有必要探讨托运危险货物的义务与责任问题，尽可能地达到事前的预防而不是事后的弥补。

关键词: 危险货物 海上运输 《海牙—维斯比规则》 联合国《运输法草案》

一、问题的提出

韩进海运与阳明海运、川崎汽船、中国远洋运输集团及胜利航运联营远东及欧洲航线的船运公司，由德国投资公司彼得斯博士集团出资建造的 MV Hanjin Pennsylvania 轮于 2002 年 4 月交船，之后长期租给韩进海运，该轮于 11 月初由新加坡起航前往汉堡。驶往汉堡途中于斯里兰卡南部印度洋海域上（离科伦坡 88 海里）约上午 6 点时，第四舱甲板上左侧集装箱发生 2 起爆炸起火，2 名船员死亡，其他船员无法控制火势随后被他船救起。火势持续燃烧并夹杂小型爆炸声响，Smit 和 Wijsmuller 公司与韩进海运签订了救助合约但无法扑灭火势。为避免火势危及第一至第三舱甲板上装载的烟火类集装箱，救助人员必须用大量的海水喷浇于集装箱上，这会造成货舱内海水渗入，船只有沉没的可能。随着火势向后蔓延，第五舱及第六舱甲板上的集装箱开始燃烧，11 月 15 日第六舱内发生剧烈爆炸，波及驾驶台、住舱及机舱。该轮于 12 月 13 日拖抵新加坡，火势于 16 日完全扑灭。该轮保险金额为 6000 万美元，保险公司同意以推定全损结案，在卸载所有货物后，该轮以解体船价 230 万美元卖给佐迪艾克海运公司。2003 年 7 月 8 日该轮拖抵上海澄西船厂进行重建，2004 年 3 月 11 日出厂改名为 MV NORASIA BELLATRIX，估计重建成本约为 2000~3000 万美元。该轮失火原因至今仍未有定论，可能的原因有：（1）船上载有未申报或误申报的危险货物；（2）装载于甲板上的冷冻集装箱装有柴油机及其油料，航行于高温赤道海域，如果该冷冻集装箱未经完善的保养或维修致使油料外泄，加上甲板上线路及接头受损而导致线路走

* 杨轶，大连海事大学海商法专业硕士研究生。

火。[1]

本文暂且假定失火原因为第一种解释，即船上载有未申报或误申报的危险货物。可以看出，一旦危险货物在运输途中发生失火、爆炸等事故，其对于载货船舶以及载货船舶上的船员都会造成难以估量的损害。因此，我们有必要探讨托运危险货物的义务与责任问题。

二、危险货物的概念

（一）国际航运公约的规定

1.《海牙规则》的规定

《海牙规则》第 4 条第 6 款规定：承运人、船长或承运人的代理人对于事先不知性质而装载的具有易燃、爆炸或危险性的货物，可在卸货前的任何时候将其卸在任何地点，或将其销毁，或使之无害，而不予赔偿……。[2] 可见，《海牙规则》关于危险货物的规定是相当具有原则性的，即危险货物为“具有易燃、爆炸或危险性的货物”。我们不能苛求《海牙规则》的这种规定方式，毕竟在当时的条件下人们对于危险货物的认识大致集中在易燃或者爆炸的货物。然而，《海牙规则》通过规定“危险性的货物”也体现了一种开放式的规定方式，此时，普通法系所具有的灵活性的特点便完全显现出来了。针对日新月异的危险货物的具体情形，适用《海牙规则》的普通法系国家大多通过丰富的判例来补充和完善其对危险货物含义的理解，具有危险性的货物的范畴也因此越来越广泛。

Chandris v. Isbrandtsen-Moller Co. Inc. 一案[3] 涉及松脂运输，租船合同中规定禁止运输“酸性物质、易爆物质、武器、军火或其他危险货物”。托运人主张，“其他危险货物”应根据上下文作限制性解释。德夫林法官在判决中指出：“我不能发现其有应作限制性解释的暗示，我认为，船东之所以反对装运酸性物质、易爆物质、武器、军火的唯一原因就是因为它们是危险的，所以可以推测出船东对装运所有其他危险货物也同样是反对的。”

在 The “Giannis NK” 案[4] 中，第 4 号舱所装的花生粕染有虫斑皮蠹，致使第 2 号、第 3 号舱所装小麦（小麦未染上述虫害）在目的港被禁卸，最后所有货物

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1 MV Hanjin Pennsylvania: Explosions at Sea-Final Report, prepared by National Fireworks Association.

2 《海牙规则》第 4 条第 6 款英文原文为：Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation。

3 *Lloyd's Law Report*, Vol. 83, 1950, p. 385.

4 *Lloyd's Law Report*, No. 1, 1998, p. 337.

被迫卸入海中。一审朗莫尔法官判决，第 4 号舱所装花生粕是危险货物，因为是它致使装在同一船上的其他货物卸入海中造成损失。托运人不服一审判决提出上诉，上诉庭与上议院均支持此判决，上议院的劳埃德勋爵复述了德夫林法官在 Chandris v. Isbrandtsen-Moller Co. Inc. 一案中的观点，随后又指出："没有理由把货物有'危险'限定于只是对其他货物造成直接的物理损害。"的确，爆炸或者失火的货物一般情况下会对其附近的其他货物造成直接的物理损害。然而，我们却没有理由将"危险"一词解读为仅仅是"直接的危险"，理由是，《海牙规则》已经明确规定：该项货物的托运人，应对由于装载该项货物而直接或间接引起的一切损害或费用负责。朗莫尔法官在其极为清晰和简洁的判决[5]中指出，船舶所载运的花生粕是危险货物，因为是它致使装在同一船上的其他货物卸入海中造成损失。上诉庭的赫斯特法官[6]也支持上述判决："本人也完全同意他们的论证。因此，货物对船舶或其他货物没有造成任何物理意义上的危险，而根据某些当地法律法规其具有法律意义上的危险性，从而对船舶或其他货物造成迟延或损害，针对这种具有法律危险的货物是否属于危险货物已经没有必要再进行争辩了。"

《海牙—维斯比规则》并未修改《海牙规则》第 4 条第 6 款的规定。综上可以看出，海牙规则体系下对于危险货物的理解显然是开放式的，崭新的认定危险货物的判例不断丰富着危险货物的内涵与外延。然而，这种增加危险货物外延的方式却是一种事后的救济，并不能改变海难事故频繁发生的现状。各海运国家也逐渐认识到事前预防的重要性和必要性，不断通过制订国际公约以及国内立法来规范和完善海上危险货物运输。

2.《汉堡规则》的规定

《汉堡规则》中没有关于危险货物含义的规定。

3. 联合国《运输法草案》的规定

联合国《运输法草案》（WP. 56）文本第 33 条"关于危险货物的特别规则"第 1 款规定："危险货物"，系指因本身性质或特性而对人身或财产构成危险或对环境构成非法的或不能接受的危险或看似有合理理由可能构成此种危险的货物。[7]最新的（WP. 81）文本第 15 条"可能形成危险的货物"规定：……如果货物已经或者显现有可能在承运人责任期间内对人身、财产或环境形成实际危险……第 32 条"关于危险货物的特别规则"规定：当货物因其本身性质或特性而对人身或财产或环境有，或形成，或者适度显现有可能形成危险时……从中可以看出，联合国

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5 *Lloyd's Law Report*, No. 2, 1994, p. 171.

6 *Lloyd's Law Report*, No. 1, 1996, p. 577.

7 《运输法草案》（WP.56）第 33 条"关于危险货物的特别规则"第 1 款规定："Dangerous goods" means goods which by their nature or character are, or reasonably appear likely to become, a danger to persons or property or an illegal or unacceptable danger to the environment。

《运输法草案》对于危险货物的规定继承和发展了《海牙规则》第 4 条第 6 款的规定，一方面，《运输法草案》仍然是一种开放式的规定方式，只要该种物质因其本身性质或特性或者有其他证据可以证明其危险特性就可以将其认定为危险货物；另一方面，《运输法草案》将危险货物限定为对人身、财产或环境有，或形成，或者适度显现有可能形成危险的货物，并且此种危险是基于货物的本身性质或特性。

4. 小结

综上可以看出，不论是《海牙规则》还是最新的《运输法草案》，二者对于危险货物的规定都体现出一种开放式的方式，科学技术的发展不断丰富了危险货物的内涵和外延。然而，二者毕竟仅为国际航运公约，其目的是通过规定承运人与托运人的权利、义务以及责任来维护国际航运业的有序发展，不可能针对海上危险货物运输规定有更为详尽的内容，还需要通过制定国际危险货物运输公约以及国内立法来完善。然而，二者关于危险货物的开放式规定无疑为国际公约以及国内立法提供了方向：要尽可能地保护承运人的合法权益，维护航运业的健康有序发展。

（二）《国际海运危险货物规则》的规定

为了加强对海上危险货物运输进行国际管理，海上人命安全会议在 1948 年通过了危险货物的分类和有关船运危险货物的一般规定。1960 年又通过第 56 号建议案，由国际海事组织负责研究制定一个统一的《国际海运危险货物规则》（以下简称“《国际危规》”）。1965 年，该规则经海上安全委员会批准，由国际海事组织大会推荐给各国政府。《国际危规》问世之后，很多国家通过本国立法将该规则的要求付诸实施。目前世界上已有 50 多个国家在海上危险货物运输方面执行了《国际危规》，其船舶总吨位占世界商船总吨位的 84% 以上。在《国际危规》中，对于《国际海上人命安全公约》和《防止船舶污染国际公约》的相关部分有详细规定，从而使得该规则成为海上危险品运输和海洋污染物的法定规则。从海上运输角度看，危险品可分成包装危险品、固体散装危险品、液体散装危险品和散装液化气体危险品 4 个类别，最初分别由国际海事组织的《国际危规》、《固体散装货物安全操作规则》、《国际载运散装危险化学品船舶的建造和设备规则》和《国际载运散装液化气体船舶的建造和设备规则》调整。1994 年，国际海事组织将前 2 个规则合并，作为《国际危规》统一版（共 5 卷）公开发行。

统一版《国际危规》第 1.1.1 节“本规则的适用范围和实施”第 1.1.1.5 款规定：本规则中的规定适用于《经修正的 1974 年国际海上人命安全公约》所适用的和装运该公约第 VII 章 A 部分第 2 条下规定的危险货物的一切船舶。同时，在其第 1.1.2 节将《经修正的 1974 年国际海上人命安全公约》第 VII 章 A 部分“涉及包装或固体散装危险货物运输”原文复述。可见，《国际危规》与《经修正的 1974 年国际

海上人命安全公约》中危险货物的含义是一致的，后者第 VII 章 A 部分第 2 条“分类”[8] 可以被视为对危险货物含义的规定。该规定的定义方式比较特殊，既包括列举各种危险货物名称的封闭式规定方式，又包括一种开放式的规定方式，即规定了杂类危险物质，也就是“经验已经证明或可能证明其具有危险特性、应适用本章规定的任何其他物质”。也就是说，即使某种物质未列入第 1 类至第 8 类危险物质，只要有证据能够证明其具有危险特性，那么该种物质也被视为危险货物。上述规定方式无疑是合乎情理的，毕竟人们的认识能力有限，不可能穷尽地列举所有的危险货物，而且随着科学技术的进步，会不断有新的具有危险特性的物质出现，如果仅仅将《国际危规》所具体列明的危险品视为危险货物的话，势必会对承运人不公，不利于航运业的健康发展。正是基于此种考虑，《国际危规》在其第 9 类“杂类危险物质和物品”的规定中采用了开放式的规定方式，允许新的具有危险特性的物质被视为危险货物，并要求托运人履行托运危险货物的义务，以此给予从事高风险以及高投资的航运业承运人一定的保护，毕竟事前的预防较事后财产灭失或损坏的赔偿或者人命的补偿更为有效。

（三）国内法律法规的规定

我国《海商法》没有关于危险货物定义的规定，但是其第 68 条第 1 款规定：托运人托运危险货物，应当依照有关海上危险货物运输的规定，妥善包装，作出危险品标志和标签，并将其正式名称和性质以及应当采取的预防危害措施书面通知承运人；托运人未通知或者通知有误的，承运人可以在任何时间、任何地点根据情况需要将货物卸下、销毁或者使之不能为害，而不负赔偿责任。可见，理解危险货物含义的关键问题还在于对托运人所依照的有关海上危险货物运输规定的解读。因为只要明确了所依照的有关海上危险货物运输的规定，那么危险货物的含义也就找到答案了。显然，我国《海商法》第 68 条是关于托运人托运危险货物时的一般规定，在具体操作时要有更为明确细致的规定来配合一般规定的实施。

2004 年 1 月 1 日起，我国强制实施《国际危规》2002 年第 31 套修正案。与此同时，危险货物的所有包装、标签、堆装及其他事项应严格遵守进、出港国和《国际危规》的相关要求。也就是说，对于含有涉外因素的海上危险货物运输，《国际危规》的效力是高于国内法律法规的，即应当优先适用《国际危规》的相关规定。

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8 《经修正的 1974 年国际海上人命安全公约》第 VII 章 A 部分第 2 条“分类”规定：危险货物应被分为如下类别：1 类爆炸品；2 类加压后压缩、液化或溶解的气体；3 类易燃液体；4.1 类易燃固体；4.2 类易于自燃的物质；4.3 类遇水会散发易燃气体的物质；5.1 类氧化物；5.2 类有机过氧化物；6.1 类有毒的物质；6.2 类传染性的物质；7 类放射性的物质；8 类腐蚀性的物质；9 类杂类危险物质和物品，即经验已表明或可能表明，按其危险性质必须应用本部分规定的任何其他物质。

那么，上述关于危险货物含义的论述同样适用于我国。也就是说，在我国对于危险货物的认定不仅要看此种物质是否在《国际危规》的分类中具体列明，还要看此种物质能否被证明具有危险特性，只有综合上述两个方面进行分析才能够得出正确的结论。

除了上述优先适用的《国际危规》，我们国内相关行政法规的规定也应予以分析。我国交通部 2003 年第 10 号令颁布的《中华人民共和国船舶载运危险货物安全监督管理规定》第 23 条第 3 款规定：船舶载运尚未在《危险货物品名表》（国家标准 GB12268）或者国际海事组织制定的《国际海运危险货物规则》内列明，但具有危险物质性质的货物，应当按照载运危险货物的管理规定办理进、出港口申报。我国港务监督局 1993 年第 298 号令颁布的《船舶载运外贸危险货物申报规定》第 3 条规定：本规定中所述“危险货物”系指《1974 年国际海上人命安全公约》第 VII 章和《经 1978 年议定书修订的 1973 年国际防止船舶造成污染公约》附则 I、附则 II、附则 III，以及我国已加入的其他国际公约与规则中规定的危险有害物质与物品。其第 5 条规定：船舶载运下列危险货物进港或过境……（一）放射性物质；（二）感染性物质；（三）新的有机过氧化物；（四）《国际危规》中“未另列明”的物品；（五）散装液体化学品。可以看出，我国国内立法的规定与《国际危规》的立法精神是完全一致的。《危险货物品名表》（国家标准 GB12268）或者《国际危规》内列明的物质显然属于危险货物的范畴，然而，对于并未在《危险货物品名表》（国家标准 GB12268）或者《国际危规》内列明，但是有证据证明其具有危险物质性质的，也应将其视为危险货物。

对于不具有涉外因素的海上危险货物运输，《国际危规》将不能予以适用，而应当适用我国交通部 1996 年 12 月 1 日起实施的《水路危险货物运输规则》。该规则第 3 条第 1 款规定：凡具有爆炸、易燃、毒害、腐蚀、放射性等特性，在运输、装卸和储存过程中，容易造成人身伤亡和财产毁损而需要特别防护的货物，均属危险货物。可见，该定义的重点即在于货物自身的危险特性，对于那些在运输、装卸和储存过程中，容易造成人身伤亡和财产毁损而需要特别防护的货物，一律将其认定为危险货物。同时，该规则也根据中华人民共和国《危险货物分类和品名编号》（国家标准 GB6944）和中华人民共和国《危险货物品名表》（国家标准 GB12268）等有关国家标准，将危险货物划分为 9 类。该规则第 21 条规定：托运本规则未列明的危险货物，托运前托运人应向起运港港口管理机构和港务（航）监督机构提交经交通部认可的部门出具的“危险货物鉴定表”，由港口管理机构会同港务（航）监督机构确定装卸、运输条件，经交通部批准后，按本规则相应类别中“未另列名”项办理。上述规定也从另外一个角度说明，对于未在危险货物分类中列明的货物，只要其具有危险特性也应将其视为危险货物进行处理。

（四）小结

通过上文分析我们可以看出，不管是国际航运公约、《国际危规》，还是我国国内立法，对于危险货物含义的态度都是相同的，即都采纳一种开放式的规定方式。这是因为各国已经就给予运输危险货物的承运人更多、更全面的保护达成了共识，我国当然也不能例外。首先，我国《海商法》第 68 条的规定作为托运危险货物时托运人义务的一般规定统领全局。其次，作为海上危险品运输法定规则的《国际危规》更是详细列举了 9 大类 6000 多种危险货物，并且详尽规定了托运危险货物时所应履行的各项义务，该规则也是规范我国境内具有涉外因素的海上危险货物运输的具体规定。同时，交通部颁布的《中华人民共和国船舶载运危险货物安全监督管理规定》以及港务监督局颁布的《船舶载运外贸危险货物申报规定》也都为我国的海上危险货物运输管理提供了法律支持。最后，交通部于 1996 年 12 月 1 日起实施的《水路危险货物运输规则》适用于不具有涉外因素的海上危险货物运输。

三、托运危险货物的义务与责任

（一）国际航运公约的规定

1.《海牙规则》与《汉堡规则》

《汉堡规则》首次规定了托运危险货物的义务与责任，其在第 13 条“关于危险货物的特殊规则”中规定：（1）托运人必须以适当的方式在危险货物上加上危险的标志或标签。（2）当托运人将危险货物交给承运人或实际承运人时，托运人必须告知货物的危险性，必要时告知应采取的预防措施。如果托运人没有这样做，而且该承运人或实际承运人又未从其他方面得知货物的危险特性，则：（a）托运人对承运人和任何实际承运人因载运这种货物而造成的损失负赔偿责任。并且（b）根据情况需要，可以随时将货物卸下、销毁或使之无害，而不予赔偿。（3）任何人如在运输期间，明知货物的危险特性而加以接管，则不得援引本条第 2 款的规定。（4）如果本条第 2 款（b）项的规定不适用或不能援引，而危险货物对生命或财产造成实际危险时，可视情况需要，将货物卸下、销毁或使之无害，而不予赔偿……可见，在《汉堡规则》下，托运人应当履行 2 项义务：一是告知义务；二是注明义务。值得注意的是，第 3 款规定的任何人显然包括承运人，也就是说，一旦承运人明知货物的危险特性，即使托运人未告知或者误告知，其也无权援引该条第 2 款的规定要求赔偿因载运这种货物而造成的损失，但可根据情况需要，随时将货物卸下、销毁或使之无害，而不予赔偿。

《海牙规则》虽然没有明确规定托运人托运危险货物时的义务，但是却规定了托运人的赔偿责任，其第 4 条第 6 款规定：该项货物的托运人，应对由于装载该项货物而直接或间接引起的一切损害或费用负责。如果承运人知道该项货物的性

质，并已同意装载，则在该项货物对船舶或货载发生危险时，亦可同样将该项货物卸在任何地点，或将其销毁，或使之无害，而不负赔偿责任，但如发生共同海损则不在此限。

通过对比《海牙规则》与《汉堡规则》的规定，笔者认为以下2点内容值得注意：

一是承运人明知货物的危险特性的后果。在《海牙规则》和《汉堡规则》下，即使承运人明知货物的危险特性，其也可以将该项货物卸在任何地点，或将其销毁，或使之无害，而不负赔偿责任。

二是对于托运人赔偿责任的归责原则。在《海牙规则》下，对于托运人的赔偿责任实行的是严格原则。对此，我们可以在劳埃德勋爵在 The "Giannis NK" 一案的判决中找到答案。在该案中，托运人依据《海牙规则》第4条第3款的规定[9]主张，其对于货物染上害虫的事实并不知情因此不存在过错，所以不应承担赔偿责任。然而，上议院的劳埃德勋爵认为，"一方面，第 4 条第 3 款的规定并没有一个统领全局的效力，因为其并没有像第 6 条那样明确规定 '虽有前款各条规定'；更为重要的原因是，第 4 条第 6 款的前半部分赋予承运人对其不知性质的危险货物卸载以及销毁的权利。很明显，此项权利的享有并不依据托运人是否知道货物的危险特性。该条款未加停顿地继续写道：该项货物的托运人，应对由于装载该项货物而直接或间接引起的一切损害或费用负责，很自然地将该条款的两部分理解为一个硬币的正反两面。如果这样的话，托运人托运危险货物的责任并不取决于其是否知道货物的危险特性，他的赔偿责任也并非取决于其是否具有过错。"《汉堡规则》对于托运人的责任首先规定了一般规则，其第 12 条规定：托运人对承运人或实际承运人所遭受的损失或船舶所遭受的损坏不负赔偿责任，除非这种损失或损坏是由托运人、其受雇人或代理人的过失或疏忽所造成。托运人的任何受雇人或代理人对这种损失或损坏也不负责任，除非这种损失或损坏是由他自己的过失或疏忽所造成。可见，对于托运人的赔偿责任是过失责任原则。然而，该一般规则是不能统领第 13 条规定的特殊规则的，也就是说，对于托运人的赔偿责任实行的是严格责任原则。

2. 联合国《运输法草案》

最新的联合国《运输法草案》（WP. 81）第 32 条规定：当货物因本身性质或特性而对（或变得对）人身或财产或环境构成危险或看似有合理理由可能构成此种危险时：（a）托运人必须在发货人把货物交付承运人或履约方之前将货物的危险性质或特性及时通知承运人。托运人未这样做，而承运人或履约方又未从其他方面得知货物的危险性质或特性的，托运人为此种货运而直接或间接产生或导致的一切灭失、损坏、迟延交付和费用对承运人和任何履约方承担赔偿责任；（b）托运

9 《海牙规则》第 4 条第 3 款规定：对于任何非因托运人、托运人的代理人或其雇佣人员的行为、过失或疏忽所引起的使承运人或船舶遭受的灭失或损坏，托运人不负责任。

人必须依照预定的货物运输的任何阶段所适用的规则、条例或当局的其他要求，对危险货物加上标志或标签。托运人未这样做的，托运人应就因此而直接或间接产生或导致的一切灭失、损坏、迟延交付和费用向承运人和任何履约方承担赔偿责任。可见在《运输法草案》下，首先，托运人托运危险货物时的义务包括：一、告知义务；二、注明义务。其次，托运人承担赔偿责任的基础是严格责任，即“只要托运人未这样做”就应当承担赔偿责任。最后，托运人的赔偿范围包括“因此而直接或间接产生或导致的一切灭失、损坏、迟延交付和费用”。

（二）我国国内立法

我国《海商法》第 68 条规定：托运人托运危险货物，应当依照有关海上危险货物运输的规定，妥善包装，作出危险品标志和标签，并将其正式名称和性质以及应当采取的预防危害措施书面通知承运人；托运人未通知或者通知有误的，承运人可以在任何时间、任何地点根据情况需要将货物卸下、销毁或者使之不能为害，而不负赔偿责任。托运人对承运人因运输此类货物所受到的损害，应当负赔偿责任。承运人知道危险货物的性质并已同意装运的，仍然可以在该项货物对于船舶、人员或者其他货物构成实际危险时，将货物卸下、销毁或者使之不能为害，而不负赔偿责任。但是，本款规定不影响共同海损的分摊。其第 70 条规定：托运人对承运人、实际承运人所遭受的损失或者船舶所遭受的损坏，不负赔偿责任；但是，此种损失或者损坏是由于托运人或者托运人的受雇人、代理人的过失造成的除外。托运人的受雇人、代理人对承运人、实际承运人所遭受的损失或者船舶所遭受的损坏，不负赔偿责任；但是，这种损失或者损坏是由于托运人的受雇人、代理人的过失造成的除外。

可以看出，我国《海商法》的上述规定是借鉴《海牙规则》与《汉堡规则》合理规定的最终产物，一方面，我们依据《汉堡规则》规定了托运人托运危险货物时所应当履行的义务并有所发展。首先，托运人有向承运人如实提供危险货物资料的义务，即告知义务；其次，托运人有妥善包装危险货物的义务，即包装义务；最后，托运人有作出危险品标志和标签的义务，即注明义务。另一方面，我们又依据《海牙规则》规定了托运人托运危险货物时的赔偿责任以及归责原则。

就托运人应当履行的义务而言，具体分析如下：

1. 告知义务

该项义务的履行需要以各种文件为载体，通过托运人所提交的文件上记载的各项内容来达到告知承运人托运的货物所具有的危险特性的目的。

《国际危规》在其第 1.1.2 节将《经修正的 1974 年国际海上人命安全公约》第 VII 章 A 部分“涉及包装或固体散装危险货物运输”原文复述，该部分第 5 条第 1 款规定：在有关海运危险货物的所有文件中，货物的名称应使用正确技术名称

（不应单独使用商品名称），并按本部分第 2 条中所划分的类别加以正确的说明。我国交通部颁布的《中华人民共和国船舶载运危险货物安全监督管理规定》第 24 条规定：载运危险货物的船舶办理进、出港口申报手续，申报内容应至少包括：船名、预计进出港口的时间以及所载危险货物的正确名称、编号、类别、数量、特性、包装、装载位置等，并提供船舶持有安全适航、适装、适运、防污染证书或者文书的情况。……对于易燃、易爆、易腐蚀、剧毒、放射性、感染性、污染危害性等危险品，船舶应当在申报时附具相应的危险货物安全技术说明书、安全作业注意事项、人员防护、应急急救和泄漏处置措施等资料。港务监督局颁布的《船舶载运外贸危险货物申报规定》第 7 条规定：船舶装载出口危险货物应在开始装货前三天直接或通过代理人向港务监督填报《船舶载运危险货物申报单》报告预装危险货物的品名、联合国编号、类别或性质、数量、包装形式与规格或装运形式等，经港务监督批准后方可装船。其第 11 条第 1 款规定：填写危险货物有关单证应使用货物的正确技术名称。其第 12 条规定：托运人办理危险货物申报手续时，应在申报单证中写明应急措施和医疗急救方法或相应适用的应急措施和医疗急救指南表号，以及能随时取得联系的电话及其他通信方法。

综上可见，在我国法律体系下，针对具有涉外因素的危险货物运输，托运人应当重点向承运人告知如下内容：危险货物的正确技术名称（不应单独使用商品名称）、联合国编号、类别或性质、数量、包装形式与规格或装运形式、装载位置、安全技术说明书、安全作业注意事项、人员防护、应急急救和泄漏处置措施。上述内容构成一个有机的整体，无论托运人是未告知还是误告知，也不论其义务的违反是否源于过错，只要因上述内容的全部或部分造成承运人的损失，托运人都要对承运人负赔偿责任。下面 2 个案子体现了托运人的上述义务与责任：

案例一：青岛海事法院 2002 年审理的韩进海运有限公司诉连云港市化工医药保健品进出口公司等危险品货物运输损害赔偿及共同海损承担纠纷案。[10]

基本案情：2000 年 5 月，连云港市化工医药保健品进出口公司（以下简称“连云港医保”）就出口漂白粉事宜向福星船务公司连云港代表处出具了海运出口委托书，表明发货人为连云港医保，货物为 800 袋漂白粉，英文名称为 Lime chlorinated，1×20'，半危。随后，通过一系列的委托与转委托，由山东中粮国际仓储运输公司（以下简称“山东中粮”）向韩进海运有限公司（以下简称“韩进海运”）订舱，山东中粮告知韩进海运其是代理实际货主订舱的。韩进海运签发了 2000 年 5 月 10 日已装船提单，记明：货名漂白粉，箱号 HJCU8701653，托运人为亚洲货运，由托运人装箱计数，800 袋漂白粉装在 1×20' 集装箱内，装货港青岛，卸货港汉堡，交货地布达佩斯。运输途中，上述漂白粉发生自燃造成船舶以及其他货物的损失。

10　金正佳主编：《中国海事审判年刊》，北京：人民交通出版社 2003 年版，第 430 页。

韩进海运以托运人山东中粮、亚洲货运及实际托运人连云港医保在向原告托运货物时，未明确说明货物是危险品，也未提出严格运输要求；连云港医保作为实际托运人，明知货物为危险品，但未按《国际危规》及中国的相关法律的要求使用安全可靠的危险品包装，致使货物自燃起火，发生严重火灾事故，造成火灾和用水灭火引起的货损、雇佣拖轮、救助船、进避难港、聘请检验人、律师及共同海损理算产生的合理费用为由，于 2001 年 5 月 24 日向青岛海事法院提起诉讼，请求被告连带赔偿其损失。最终，法院认为，连云港医保是货物的实际托运人，应履行托运人的义务，其未向韩进海运申报危险品，也未对危险品作出标志，导致韩进海运对该货物未给予应有的注意，责任不在韩进海运而在货方。因此，依照《中华人民共和国海商法》的规定，连云港医保应对此承担一切责任。

案例二：广州海事法院 1999 年审理的“永安”号船海上危险货物运输合同纠纷案。[11]

基本案情：1998 年 7 月 2 日，韩国三星海运株式会社（以下简称“三星会社”）与被告中国有色金属进出口广东公司（以下简称“有色公司”）签订了一份航次租船合同。合同约定：三星会社为出租人，有色公司为承租人；运输货物为 4000~5000 公吨、最大含水率为 12％的散装硫铁矿，承运船舶为“永安”轮；装货港为中国黄埔港，卸货港为韩国蔚山港。同日，三星会社又与韩国新晟海运株式会社（以下简称“新晟会社”）签订了一份航次租船合同，约定由新晟会社所有的“永安”轮承运上述货物。7 月 11 日，“永安”轮装载 4498 公吨散装硫铁矿驶离黄埔港。12 日，该轮航行至汕头港外附近海域沉没。新晟会社于 1999 年 7 月 9 日向广州海事法院提起诉讼，请求判令被告有色公司赔偿其损失并承担本案诉讼费。

法院最终认为，中国政府已于 1982 年 10 月 2 日批准远洋运输货物正式执行《国际危规》，因此，本案应适用中国法律和《国际危规》来界定双方的责任。《国际危规》应包括其补充本《散货规则》。有色公司作为托运人，未能在货物装船前提供货物的流动水分点、积载因数、含水量、静止角、积水排放法等，并将有关测试证书在装货当时提交给船长，违反了《中华人民共和国海商法》第 67 条和《散货规则》的规定，应对由此产生的法律后果承担相应的责任。

通过上述 2 个案例我们可以看出，托运人违反告知义务的后果即向承运人承担损害赔偿责任。然而，针对集装箱货与散货的不同特点，托运人责任承担的比例又有所不同。案例一中托运的为集装箱货，提单上记载的货物名称为漂白粉，但承运人无从知晓集装箱内装载货物的实际情况，而且托运人未将并未列入《国际危规》的漂白粉所具有的危险特性如实地告知承运人，所以承运人对于危险货物根本不知情。因此，法院认定托运人承担全部责任。而案例二中托运的为散装货，

11 下载于 http://www. chinalawedu. com/news/2005％ 5C2％ 5Cli508835564132500216720. html，2006 年 5 月 24 日。

承运人可以知晓实际托运的为硫铁矿，因此其也就有可能预先做好载运危险货物的各项准备工作，以保障运输的安全进行。托运人未将货物的流动水分点、积载因数、含水量、静止角、积水排放法等如实告知承运人属于托运人告知义务的违反，同时，承运人对于其所知晓的危险货物没有要求托运人履行告知义务，并且没有妥善、谨慎地运输货物，也是具有不可推卸的责任的。因此，法院认定二者按比例承担责任。

可见，托运集装箱货的承运人风险较之托运散装危险货物更大，法律也应当对托运集装箱货的托运人施以更为严格的告知义务。《国际危规》第 1.1.2 节原文复述的《经修正的 1974 年国际海上人命安全公约》第 VII 章 A 部分“涉及包装或固体散装危险货物运输”第 5 条第 3 款规定：负责货物集装箱或道路车辆中危险货物包装的人员，应提供签署的集装箱装箱证书或车辆装车证明，其中写明：该单元中的货物已得到严格的包装和系固并符合所有适用的运输要求。我国交通部颁布的《中华人民共和国船舶载运危险货物安全监督管理规定》第 24 条第 2 款规定：对于装有危险货物的集装箱，船舶需提供集装箱装箱检查员签名确认的《集装箱装箱证明书》。港务监督局颁布的《船舶载运外贸危险货物申报规定》第 8 条第 3 款规定：使用集装箱装运危险货物的，应提交经港务监督考核的装箱检查人员现场检查后签发的《集装箱装箱证明书》。同时，港务监督局 1986 年颁布的《集装箱载运包装危险货物监督管理规定》第 4 条规定：危险货物装箱前，装箱单位应事先对集装箱和待运危险货物认真进行检查，使其符合国际海事组织《国际危规》第 12 节第 12.3.2 款和第 12.3.6 款的要求。第 7 条规定：装箱完毕经对装箱情况检查合格后，负责装箱的单位应签具符合《国际危规》第 12 节第 12.3.7 款要求的《集装箱装箱证明书》，现场装箱检查员应在证明书上签字。《集装箱装箱证明书》应呈交港务监督查验。港务监督认为必要时，将要求托运人呈验其他有关单证。

综合上述规定可以看出，针对装载于集装箱内的危险货物，一方面，装箱单位必须谨慎地、合理地履行其检查的义务；另一方面，海事局必须谨慎地、合理地检验托运人呈交的《集装箱装箱证明》，二者相辅相成、缺一不可。不过最关键还在于海事局的严格执法，海事局在某种意义上履行着保障安全运输的职责。一旦其就不符合要求的危险集装箱货物向托运人签发了《集装箱装箱证明》，那么对于承运人而言，其是难于知晓和防范危险货物的，因此而造成的损失也是难以估量的，所以装箱单位要把好第一道关卡，不让试图违规操作的托运人得逞，而海事局要把好第二道关卡，使得集装箱内货物与《集装箱装箱证明》达到内容与实质的统一。这一方面要依靠检查、检验人员自身素质的提高，另一方面要依靠法律对于其责任归属的完备规定。

针对不具有涉外因素的危险货物运输，托运人同样应当履行告知义务。我国交通部 1996 年实施的《水路危险货物运输规则》第 19 条规定：办理危险货物运输、装卸时，托运人、作业委托人应向承运人、港口经营人提交以下有关单证和资料：

（一）“危险货物运输声明”或“放射性物品运输声明”……（三）集装箱装运危险货物，应提交有效的“集装箱装箱证明书”……（五）除提交上述（一）至（四）款的有关单证外，对可能危及运输和装卸安全或需要特殊说明的货物还要提交有关资料。可见，该规则所体现的精神与具有涉外因素的危险货物托运是一致的。

2. 包装义务

《国际危规》第 1.1.2 节原文复述的《经修正的 1974 年国际海上人命安全公约》第 VII 章 A 部分“涉及包装或固体散装危险货物运输”第 3 条第 1 款规定：危险货物的包装应：（1）坚固并处于完好的状态；（2）具有这样的特性，即可能与所装物质相接触的内表不会受该物质的危险性影响；和（3）能经受装卸和海运的一般风险。该部分第 5 条第 2 款规定：由托运人准备的运输单证应包括或附有经签署的证书或申报书，以表明已按需要对所交运的货物严格地进行了包装、标记、附加标签或标牌，还应注明货物已处于合适的载运状态。其第 3 款规定：负责货物集装箱或道路车辆中危险货物包装的人员，应提供经签署的集装箱装箱证书或车辆装车声明，其中写明：该单元中的货物已得到严格的包装和系固并符合所有适用的运输要求。

下面的案例即体现了托运人的上述义务与责任：

2002 年上海海事法院审理的东方海外货柜航运公司（以下简称“东方公司”）诉中化山东烟台进出口公司（以下简称“中化公司”）和烟台土畜产进出口集团有限公司（以下简称“土畜产公司”）危险货物运输案。[12]

基本案情：东方公司接受土畜产公司的订舱，开具了一份已装船正本提单，该提单注明货物的品名为二氧化硫脲，船名“鳄鱼坚强”号，起运港青岛，卸货港洛杉矶，托运人为土畜产公司。1997 年 8 月 19 日晚，当“鳄鱼坚强”轮停泊在上海港时，发现二舱冒烟，经消防部门及港务公司共同检测，倒箱 166 个，将货物自燃冒烟的 OOLU3360121 集装箱卸下船，堆放在港区的危险品码头，同时卸下的还有编号为 OOLU3429526 的集装箱，因该箱散发浓烈的气味，开箱检查时，有 6 名工人发生轻微中毒。

货物到达目的港后，发生了多起收货人因货物受损引起的索赔，东方公司聘请美国的 FREEHILL HOGAN & MAHAR LLP 处理索赔事宜，发生了大量的费用。事故发生后，东方公司即委托了上海中衡咨询有限公司于 1997 年 8 月 26 日和 1998 年 8 月对出事的集装箱进行检验，后一次检验东方公司还委托了香港专家埃德蒙森、新加坡专家马伦一同参加，几份检验报告的一致意见是货物是由于装载不当引起自燃的。随后，东方公司诉至上海海事法院，请求中化公司和土畜产公司赔偿其各项损失。上海海事法院经审理认为，土畜产公司作为涉案海上货物运输合同的托运人，违反了《海商法》关于托运人应将货物妥善包装并装箱的规定，应对由于其过失而造成的承运人的损失负赔偿责任。

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12 下载于 http://www.ccrnt.org.cn/hs/news/show.php?c1d=5693，2006 年 5 月 24 日。

3. 注明义务

《国际危规》第1.1.2节原文复述的《经修正的1974年国际海上人命安全公约》第VII章A部分“涉及包装或固体散装危险货物运输”第4条规定：“对装有危险货物的包装件，应使用危险货物的正确技术名称作标记（不应单独使用危险货物的商业名称），并应配以醒目的标签或涂印式标签或标牌，以表明所装货物的危险性质……”我国港务监督局1986年颁布的《集装箱载运包装危险货物监督管理规定》第6条规定：装入箱内的危险货物及集装箱外表应按《国际危规》第7节和第8节的要求加以标记和张贴标志或标志牌。集装箱外表不得留有其他无关的危险货物标志。

对于不具有涉外因素的危险货物运输，我国交通部1996年实施的《水路危险货物运输规则》第13条规定：每一盛装危险货物的包装上均应标明所装货物的正确运输名称，名称的使用应符合附件一“各类危险货物引言和明细表”中的规定。包装明显处、集装箱四侧、可移动罐柜四周及顶部应粘贴或刷印符合附件二“危险货物标志”的规定。具有2种或2种以上危险性的货物，除按其主要危险性标贴主标志外，还应标贴本规则危险货物明细表中规定的副标志（副标志无类别号）。标志应粘贴、刷印牢固，在运输过程中清晰、不脱落。

就托运人托运危险货物时的赔偿责任以及归责原则而言，我国《海商法》第68条规定：托运人对承运人因运输此类货物所受到的损害，应当负赔偿责任……可见，托运危险货物的托运人承担的是严格责任，即不论其是否具有过错，只要承运人因运输此类货物受到损害，托运人就须承担赔偿责任。此条与《海牙规则》的立法精神是一致的，《海牙规则》第4条第3款的规定并没有一个统领全局的效力，我国《海商法》第70条的规定也是一样。后者并不能改变我国《海商法》第66条至第68条所规定的托运人的严格责任，该条规定的目的仅指在上述3个条款规定的义务之外，托运人承担的是过失责任，即如果托运人没有过错，无须承担赔偿责任。

四、结束语

从本文第一部分列举的海难事故可以看出，托运人违反托运危险货物时应当遵守的各项义务很可能造成难以估量的损失，我们要尽可能事前预防而不是事后弥补。首先，我国的国内立法体现了《海牙规则》以及《国际危规》关于危险货物的开放式规定，尽可能地将所有具有危险特性的货物列入危险货物的范畴，将具有危险特性的货物的申报纳入到托运人的视线中来；其次，明确规定托运人的告知义务、包装义务以及注明义务，从具体方面保障安全运输的实现；最后，借鉴《海牙规则》的规定对托运危险货物的托运人施以严格责任，使得其能够更加谨慎妥善地履行义务。立法是一个解决办法，但却不是最佳的解决之道，相关当事人安全意识的提高以及执法的坚决与彻底才是最终的解决之道。

尼加拉瓜和洪都拉斯在加勒比海的领土和海洋边界争端案

（尼加拉瓜诉洪都拉斯，1999—2007）

赵 伟 *

1999 年 12 月 8 日，尼加拉瓜共和国（以下简称“尼加拉瓜”）向国际法院提交诉状，就加勒比海分属两国的海洋区域划界争端对洪都拉斯共和国（以下简称“洪都拉斯”）提起诉讼。[1] 2007 年 10 月 8 日，国际法院对此案作出判决：加勒比海中的 4 个小岛的主权归洪都拉斯所有；同时确定了划分两国领海、大陆架和专属经济区的单一海洋边界。

一、案件的历史和地理背景

（一）历史背景

1821 年，尼加拉瓜和洪都拉斯两国分别脱离西班牙的殖民统治，成为独立国家。1823 年，两国加入中美联邦共和国（也称中美联合省）。1838 年，两国退出该联邦，并保持了加入以前各自的领土。1850 年和 1866 年，两国分别和西班牙女王签署条约，西班牙女王承认两国独立并取得各自对其陆地领土以及邻接其海岸的岛屿的主权，但是这 2 个条约中都没有明确属于两国的岛屿的名称。

1894 年，尼加拉瓜和洪都拉斯两国成功缔结了一个全面的边界条约并于

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* 赵伟，厦门大学法学院国际法专业 2006 级博士研究生，主要研究方向为海洋法。

1 Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras, 1997–2007). 本文根据国际法院 2007 年 10 月 8 日的判决整理和翻译而来，下载于 http://www.icj-cij.org/docket/files/120/14075.pdf?PHPSESSID=744e470fd41b57b37871957c7dbf17d3，2007 年 10 月 12 日。

1896 年生效。根据“保持占有”原则，[2] 该边界条约第 2 条规定，每个共和国分别拥有独立当时原尼加拉瓜和洪都拉斯殖民省所属领土的主权。该条约第 1 条还规定建立一个联合边界委员会以划定两国之间的边界。边界委员会确定了从太平洋的丰塞卡湾到波尔蒂洛的边界，大约占两国陆地边界的 1/3，但是没有能够确定两国之间从波尔蒂洛到大西洋海岸的边界。

根据该边界条约第 3 条的规定，尼加拉瓜和洪都拉斯随后将其关于边界剩余部分的争端提交给西班牙国王阿方索十三进行仲裁。阿方索十三于 1906 年作出的裁决划定了从位于格拉西亚斯—阿迪奥斯海角的可可河河口到波尔蒂洛的边界。后来，尼加拉瓜在外交照会中质疑该仲裁裁决的有效性和约束力，双方为解决此问题又进行了多次交涉，还于 1957 年发生了一系列的边界冲突。此后，经美洲国家组织会议建立的一个临时委员会的调解，尼加拉瓜和洪都拉斯同意将其关于仲裁裁决法律效力和约束力的争端提交国际法院解决。

1960 年 11 月 18 日，国际法院作出判决，认定国王阿方索十三 1906 年作出的仲裁裁决有效并具约束力，尼加拉瓜负有实施义务。[3]

由于两国在如何实施 1906 年仲裁裁决问题上不能达成一致，尼加拉瓜因此要求美洲国家间和平委员会介入。该组织建立的一个联合委员会于 1962 年划定了两国之间的边界并设置了界标，该联合委员会确定，两国陆地边界的起点在北纬 14°59.8' 和西经 83°08.9' 的可可河河口。

至此，两国的陆地边界问题得以彻底解决，但是两国之间尚未就其在加勒比海的海洋边界问题进行接触。

1977 年，尼加拉瓜通过外交照会的方式，要求和洪都拉斯谈判解决两国在加

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2 国际法上的这一原则，是指新独立国家应该保持其独立以前的边界，下载于 http://encarta.msn.com/encnet/refpages/search. aspx?q=uti+possidetis+juris，2007 年 10 月 12 日。该原则是非殖民化过程中解决领土和边界争端的重要原则，其目的在于国家边界必须保持独立时法律上的原状。其适用的前提是：相关的领土不是无主地，并且领土的边界在独立时已经确定。19 世纪美洲国家从西班牙统治下取得独立后，在它们之间的边界问题上普遍适用了这一原则。国际法院在处理非洲国家之间的领土和边界争端时，也确定了该原则的法律意义。国际法院在“比利时 / 荷兰边界主权案”和“布基纳法索 / 马里边界争端案”中都强调，该原则应该是指导全世界新独立国家处理边界问题的原则。也有人认为“柬埔寨 / 泰国隆端寺案”证明该原则的适用已经超出了非洲和美洲的范围（邵沙平主编：《国际法院新近案例研究（1990—2003）》，北京：商务印书馆 2006 年版，第 40~43 页）。对于该原则的翻译，有“保持占有”原则和“依法占有”原则等多种，本文认同“保持占有”原则。

3 Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, *I. C. J. Reports 1960*, pp. 215~217.

勒比海的海洋边界问题。但双方之间的谈判没有取得任何成果，且在此之后，双方在争议区域的争端更加突出。根据双方提交给国际法院的证据，双方因此而产生的争端表现在：

(1) 在争议海域相互抓捕获或者攻击对方国家渔船。在一系列的外交换文中都有在北纬 15 度线（1962 年联合划界委员会确定的北纬 14°59.8' 线，以下为行文的方便，所提及的北纬 15 度线均是指该条纬度线）附近发生此类事件的记载。1982 年，在双方的外交换文中，确认了两国之间的海洋边界并没有正式划定。但是，洪都拉斯认为北纬 15 度线构成了两国传统的海洋边界，而尼加拉瓜则认为两国之间并没有公认的海洋边界存在。

(2) 双方都进行了涉及争议地区的国内立法。尼加拉瓜于 1979 年制定的《大陆架和邻海法》第 2 条规定，尼加拉瓜的主权和管辖权延伸至距其海岸 200 海里的海域；1982 年洪都拉斯的新《宪法》规定，加勒比海内邻接其海岸的岛屿属其所有，并宣布了 200 海里的专属经济区。

(3) 在争议区域达成和第三国的划界安排。1986 年洪都拉斯和哥伦比亚之间签署海洋边界条约，规定两国在西经 82 度以东的海域，以北纬 15 度线为界，还明确表示要批准该条约。对于在争议区域作出的这种安排，尼加拉瓜坚决反对，并诉诸中美洲法院解决。

(4) 1990 年代，双方根据各自国内立法出版的官方地图，都将争议区域包括在内，双方为此还进行了一系列的外交换文，表达了反对立场。

（二）地理背景

尼加拉瓜和洪都拉斯两国相邻，沿加勒比海的海岸线向海突出，大致呈直角形状，海岸线的分界点是可可河河口所在的格拉西亚斯—阿迪奥斯海角的最东端。

两国的争议海域位于其海岸线以东的加勒比海，此处的大陆边一般被称为“尼加拉瓜海隆”，这是一个相对平坦的三角形高地，水深约 20 米。该海隆止于两国海岸和牙买加海岸的中线附近，从此水深急转直下至 1500 米左右。海隆之上存在一些超过 200 米深的海沟，将其分割成一些浅滩。在靠近尼加拉瓜和洪都拉斯大陆的浅海区域，存在很多暗礁，其中有一些高出海平面的礁石，大的礁石能够积聚足够的沉积物，并被植被覆盖和定着。在北纬 15 度线以北海域，距可可河河口 30~40 海里处，此类高出海平面的比较大的礁石包括伯贝礁岛、南礁岛、萨凡纳礁岛和皇家港礁岛。[4]

本案中，可可河河口是一个重要的地理特征，它不仅是两国之间陆地边界在

4 这些岛屿虽然名为礁石（cay），但是它们的特征完全符合《联合国海洋法公约》第 121 条对岛屿的定义。

加勒比海岸的分界，其带来的泥沙还在河口沉积形成三角洲和一些岛屿及沙洲。由于河口本身性质非常不稳定，位置经常发生改变，因此其附近的海岸线形态也比较容易变化，其沉积物在河口形成的三角洲、岛屿和沙洲也是不稳定的。

二、法院管辖权

在诉状中，尼加拉瓜认为国际法院对本案管辖权的依据在于：

第一，《美洲和平解决争端条约》（即《波哥大公约》）第 31 条。该条规定，承认国际法院对《国际法院规约》第 36 条第 2 款所规定的法律争端的强制管辖权（以缔约国接受法院强制管辖权的声明为前提）；缔约方间的争端不能通过调解解决或不能达成提交仲裁的合意时，任何一方都可以将争端提交国际法院；国际法院拒绝受理的情况下，可以提交强制仲裁程序。[5]

从 1950 年开始，尼加拉瓜和洪都拉斯两国均为该公约的缔约方，前者对公约第 31 条规定的有关争端解决的内容未作保留，后者对公约完全没有保留。

第二，双方作出的接受国际法院对《国际法院规约》第 36 条第 2 款规定的法律争端的强制管辖权的声明。[6]

尼加拉瓜于 1929 年 9 月 24 日作出接受常设国际法院管辖权的声明，而根据《国际法院规约》第 36 条第 5 款的规定，可以认为尼加拉瓜仍然接受国际法院的强制管辖权。[7]洪都拉斯则于 1986 年 6 月 6 日作出接受国际法院强制管辖权的声明。

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5 由于《波哥大公约》的作准文本为西班牙文，本文关于公约第 31 条的规定，参考了 1948 年 7 月《美国国际法杂志》关于该公约的一篇编辑评论，下载于《美国国际法杂志》的官方网站。Edgar Turlington, Editorial Comment: The Pact of Bogota, *American Journal of International Law*, Vol. 42, 1948, p. 608, at http://links.jstor.org/sici?sici=0002-9300%28194807%2942003A3%C608%3ATPOB%3E2.0.CO%3B2-K, 14 May 2007.

6 《国际法院规约》第 36 条第 2 款：本规约各当事国得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，不需另订特别协定：（子）条约之解释；（丑）国际法之任何问题；（寅）任何事实之存在，如经确定即属违反国际义务者；（卯）因违反国际义务而应予赔偿之性质及其范围。

7 《国际法院规约》第 36 条第 5 款：曾依常设国际法院规约第 36 条所为之声明而现仍有效者，就本规约当事国间而言，在该项声明期间尚未届满前并依其条款，应认为对国际法院强制管辖之接受。

三、双方的诉讼请求

双方在一系列的书面程序（诉状、辩诉状、答辩状）和口头程序中提出的诉讼请求包括：

（一）尼加拉瓜方面

(1) 从距可可河河口约 3 英里，位于北纬 15°02'00" 和西经 83°05'26" 的定点开始延伸的，代表两国海岸线最前沿的等分线[8] 构成两国争议海域的领海、专属经济区和大陆架之间的单一海洋边界；

(2) 单一海洋边界的起始点是 1906 年由西班牙国王的仲裁裁决确定的可可河主航道河口；

(3) 在不损害前述内容的情况下，请法院决定争议地区岛屿和礁石的主权问题。

应该注意的是，尼加拉瓜对争议海域内岛屿的主权主张是在 2001 年 3 月 21 日才提出的，在此之前，尼加拉瓜并没有主张对争议区域内岛屿的主权。

（二）洪都拉斯方面

(1) 北纬 15 度线以北尼加拉瓜称属其所有的伯贝礁岛、南礁岛、萨凡纳礁岛和皇家港礁岛等岛屿及所有其他岛屿、礁石、岩石、暗礁、浅滩的主权应归属洪都拉斯；

(2) 法院划定的海洋边界线起始点应位于北纬 14°59.8' 和西经 83°05.8'。在本案中，从 1962 年联合划界委员会确定的位于北纬 14°59.8' 和西经 83°08.9' 的定点到法院划定的海洋边界的起始点之间的界线，应由当事双方根据 1906 年西班牙国王仲裁裁决协商确定，并考虑到可可河河口地理特征的变化；

(3) 从北纬 14°59.8' 和西经 83°05.8' 开始，尼加拉瓜和洪都拉斯两国间领海、专属经济区和大陆架的单一海洋边界应以北纬 14°59.8' 线或者调整的等距离线，向东延伸至第三国的管辖范围。

双方争议的实质问题就是两国之间的单一海洋边界的起点和走向问题。尼加拉瓜一直认为双方之间的海洋边界从来没有划定，而洪都拉斯则认为北纬 15 度线构成了两国之间的传统海洋边界，这源于“保持占有”原则，并为两国之间的实践和第三国所确认。双方关于争议区域内岛屿的主权争端源于两国海洋边界的争端。

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8 此处的等分线是指按照两国海岸一般走向确定和计算的，两国海岸各自最前方各点的连线及其延长线形成的角度的等分线。下文对该等分线也有说明。

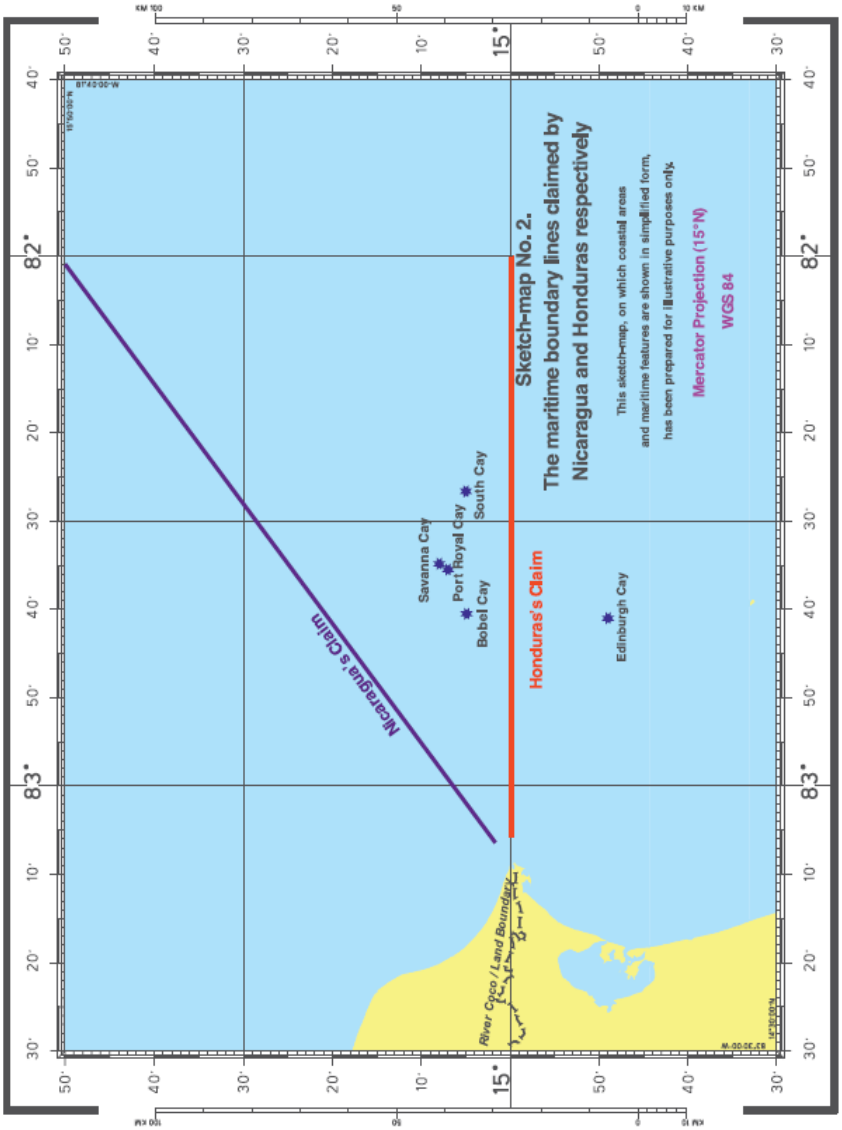

图 1　两国主张的海洋边界

（资料来源：《国际法院判决书》，第 25 页。）

四、双方在相关问题上的立场

（一）争议区域内岛屿的主权归属

尼加拉瓜主张对北纬 15 度以北的岛屿拥有主权，包括伯贝礁岛、南礁岛、萨凡纳礁岛和皇家港礁岛。洪都拉斯同样主张对这 4 个岛屿的主权，同时还主张对同一地区的其他较小的岛屿和礁石也拥有主权。

双方都同意，1821 年两国独立的时候，这些争议岛屿都不是无主地。但是，双方对此后的情形有不同意见。尼加拉瓜声称这些岛屿在 1821 年时并没有明确其主权归属，因此不可能根据“保持占有”原则确定，对这些岛屿的权属应该适用其他原则，且其根据邻接原则应当拥有对这些岛屿的原始权利。洪都拉斯则认为，基于“保持占有”原则，其拥有对这些争议岛屿的原始权利，并且这种权利为很多“有效统治”的证据所确认。

（二）领海以外的海洋边界

尼加拉瓜建议利用等分线方法进行划界，两国的海洋边界应该是建构在双方各自海岸最前方基础上的连线及其延长线形成的角度的等分线。这个等分线根据两国海岸的一般走向来计算和确定，由此形成的等分线以可可河河口作为一个定点，一直延伸至罗萨林德浅滩附近第三国的边界。

洪都拉斯则主张，应该根据“保持占有”原则，以北纬 15 度的传统边界作为两国在加勒比海的海洋边界，一直延伸至第三国管辖范围为止。如果法院不接受北纬 15 度线的主张，洪都拉斯请求法院划定一条调整的等距离线，直到第三国的管辖范围。

（三）海洋边界的起始点

双方都同意其陆地边界的终点已经由 1906 年仲裁裁决确定，位处于可可河主航道中心线的河口。1962 年的联合划界委员会确定的位于可可河河口的陆地边界的起点位置在北纬 14°59.8' 和西经 83°08.9'。双方还承认，由于泥沙沉积物的作用，1962 年以来河口的位置已经发生了变化。

尼加拉瓜建议海洋边界的起始点应该设定在一个“谨慎的距离”，也就是位处于等分线上距河口位置 3 海里的定点。洪都拉斯接受尼加拉瓜关于边界起始点应该位于距河口 3 海里处的主张，但是认为该起始点应该位于北纬 15 度线，而不是尼加拉瓜主张的等分线上。

（四）领海划界

尼加拉瓜认为，海岸相邻国家之间领海的划界应该根据 1982 年《联合国海洋法公约》第 15 条所确定的原则进行。[9] 该条确定了领海划界的“中间线＋特殊情况”原则。尼加拉瓜认为，在现有情势下，技术上不可能划定一条中间线，因为那需要完全建立在河口最外端两点的基础上，而河口的地理特征极不稳定，位置经常改变。因此，尼加拉瓜认为领海划界也应该适用等分线方法。

洪都拉斯同意根据《联合国海洋法公约》第 15 条的规定，在某些特殊情况下，需要采取其他的界线，而不是严格的中间线。但是洪都拉斯认为，海岸的形状可能是一种特殊情况，但是经由国家实践确立的以北纬 15 度线为传统海洋边界的事实应该有更重要意义，因此是一种更为重要的特殊情况，建议领海边界应该是沿北纬 15 度线向东延伸。

五、法院考察及认定的相关法律问题

根据双方的立场，法院在判决过程中考察和认定的程序和实体问题主要包括：

（一）可否受理对争端区域内岛屿主权提出的新主张

在尼加拉瓜的诉状中，并没有主张对争议区域内岛屿的主权，直到 2001 年 3 月 21 日，尼加拉瓜才向法院提出这个诉讼请求。关于诉讼过程中提出的新主张可否接受，法院考察了以前作出的相关判例。法院在“瑙鲁 / 澳大利亚某些富含磷酸盐的岛屿案”的判决中认为，如果一个形式上的新主张实质上可以包含在原有主张之内，则能够为法院接受。[10] 要证明新主张实质上已经包含在原有主张之内，仅证明两者在本质上相互联系并不充分，根据国际法院对“柬埔寨 / 泰国隆端寺案”和“联邦德国 / 冰岛渔业管辖权案”的判决，另外还要证明，一个新主张已

9 《联合国海洋法公约》第 15 条：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，均无权将其领海延伸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者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。

10 Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, *I. C. J. Reports 1992*, pp. 265~266.

经暗含在原有诉状中，[11] 或者直接源于诉状中的实质问题。[12]

考虑到法院在很多场合都曾强调过“陆地统治海洋”的原则，法院认为，为了在加勒比海争议区域划定一条单一海洋边界，就必须考虑海域内存在的海洋地物对海洋边界的走向可能产生的影响。为了确定该边界，无论是否有正式的主张存在，法院都必须首先确定哪个国家拥有争议区域内岛屿的主权。因此，和主权相关的新主张是暗含在并直接源于尼加拉瓜起诉书中的实质问题，也就是在争议海域划定领海、大陆架和专属经济区的界线问题。

法院因此判决，尼加拉瓜所提出的新主张可以接受。

（二）关键日期

法院认为，在和海洋划界及陆地主权相关的争端中，关键日期的重要意义在于，此日期前后的行为具有不同的法律意义。在关键日期之前实施的行为，能够有效地评估和确认有效统治的存在；而在此关键日期之后发生的行为，一般对确认有效统治的意义不大。因此，关键日期成为一个确认有效统治的分界线。

洪都拉斯认为，两国之间存在互相联系的 2 个争端：一个是两国是否有对岛屿的主权；另一个是双方现在是否以北纬 15 度线为边界。尼加拉瓜则认为这两者其实是一个争端。

洪都拉斯认为在争议区域内岛屿的主权问题上，可能有一个以上的关键日期。因此，在确定“占有”的问题上，关键日期是 1821 年——洪都拉斯和尼加拉瓜从西班牙获得独立的日期。为证明后殖民时代的有效统治，洪都拉斯认为关键日期不可能早于 2001 年 3 月 21 日，因为这是尼加拉瓜首次主张其对这些岛屿拥有主权的日期。关于海洋边界的争端，洪都拉斯认为桑迪内斯塔政府 1979 年开始执政的日期为关键日期，直到那时，尼加拉瓜仍没有对北纬 15 度以北岛屿的主权表现出兴趣。

尼加拉瓜则认为关键日期为 1977 年，当时双方在政府间的换文之后开始海洋划界的谈判。尼加拉瓜主张，海洋边界的争端暗含着相关区域内岛屿的主权争端，因此两者的关键日期是相同的。

对双方的主张进行考察后，法院认为，本案存在 2 个相互关联的争端，需要区分 2 个不同情况适用 2 个不同的关键日期。一个关键日期关系到岛屿主权归属，另一关键日期关系到海洋边界的划定。

关于岛屿的主权归属，法院认为 2001 年为关键日期，因为只有在 2001 年提

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11 Temple of Preah Vihear, Merits, Judgment, *I. C. J. Reports 1962*, p. 36.

12 Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, *I. C. J. Reports 1974*, p. 203; Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, *I. C. J. Reports 1992*, p. 266.

交的诉状中，尼加拉瓜才明确保留它在争议地区主张的所有岛屿和岩石的主权权利。关于海洋边界的争端，法院认为关键日期应为 1982 年，因为从那年 3 月发生 2 起逮捕对方渔船的事件，及其后双方之间的外交换文开始，才可以认为存在双方间关于海洋划界的争端。

（三）岛屿的主权归属

1. 争议区域内海洋地物的性质

在评价争议区域内海洋地物的法律性质时，法院指出，双方对伯贝礁岛、南礁岛、萨凡纳礁岛和皇家港礁岛在高潮时高于海平面这一事实没有争议。因此，按照两国均为缔约国的《联合国海洋法公约》第 121 条的规定，它们符合岛屿的定义和制度。[13]

除了这 4 个岛屿，争议区域内其他海洋地物的法律性质因为缺少足够的证据而难以认定。双方在书面和口头的程序中均要求法院对这些地物的主权作出判断，但是却没有提供足够的帮助以更为准确地定义它们的法律性质。

考虑到上述因素，法院认为适当的做法是仅仅对能够认定性质的 4 个岛屿的主权归属作出判断。

在口头程序中，双方还提出可可河河口岛屿的主权归属问题。河口不稳定的特性导致河口岛屿也处于不稳定的状态，因为这一地区不断变化的情况，法院也没有对河口岛屿的主权问题作出判断。

2. “保持占有”原则和争议岛屿的主权

法院注意到，洪都拉斯是以“保持占有”原则作为其对争议岛屿拥有主权的基础。尼加拉瓜对此提出反对，认为岛屿的主权归属并不能建立在这个原则之上。

在“布基纳法索 / 马里边界争端案”的判决中，法院已经承认了“‘保持占有’原则是非殖民化时期领土主权和边界划分问题上最重要的法律原则之一”。[14] 因此，法院认为，这项原则毫无疑问能够适用于尼加拉瓜和洪都拉斯间的划界问题，因为两者都曾经是西班牙的殖民省份。1894 年双方达成的边界条约第 2 条第 3 款确立该项原则为双方各自领土主权的基础，1906 年西班牙国王的仲裁裁决以此原则为基础确定了双方在 1894 年条约中未划定的边界，该仲裁裁决的有效性和约束力已经为国际法院 1960 年的判决所确认。

法院认为“保持占有”原则基本可以适用于海洋领土和海上空间，但是，仅仅援引该原则本身并不能为争议岛屿的主权提供一个明确的答案。如果这些岛屿不

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13 《联合国海洋法公约》第 121 条第 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。

14 Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, *I. C. J. Reports 1986*, p. 567.

是双方所称的公认的无主地，就必须假定它们曾在西班牙的统治之下。即使这个假定成立，也不必然证明洪都拉斯是这些岛屿唯一的继承者，是唯一正式有权主张这种法律地位的国家。法院认为，“保持占有”原则需要一个前提，那就是原来的殖民统治者已经在相关的殖民省份之间划定了其领土的边界。因此，要在争议岛屿的主权问题上适用该原则，必须证明西班牙国王已经将这些岛屿分配给各殖民省份。法院为此寻找了能够确定西班牙将这些岛屿分配给各殖民地的令人信服的证据。

双方都没有提供独立之前有关这些岛屿的文献记录或者其他证据。他们提供的西班牙殖民统治中美洲的信息并不能有效证明是否有 1 个实体，或者 2 个以上的附属实体在当时对尼加拉瓜和洪都拉斯的海上领土进行了管理。显然，各殖民地之间对于岛屿的划分并没有像它们之间的陆地边界那样明确。

尽管“保持占有”原则和拉丁美洲的非殖民化密切相关，具有历史和现实的重要性，但是本案中，并不能将该原则适用于那些离岸很远并且明显和两国海岸不邻接的岛屿，因此也不能据此确定这些岛屿的主权问题。

关于尼加拉瓜提出的邻接原则，法院认为，尼加拉瓜和洪都拉斯分别于 1850 年和 1866 年与西班牙缔结的独立条约只涉及它们海岸线之间的邻接，而没有涉及海上岛屿，尼加拉瓜关于这些争议岛屿邻接其爱丁堡礁岛的主张也因此不能接受。尽管法院没有依据邻接原则作出判决，但是法院注意到，在任何情况下，争议岛屿看起来实际更接近于洪都拉斯海岸。

在判定不能以上述基础解决争议岛屿的主权问题后，法院接着确定在殖民时代是否有相关的“有效统治”。在“布基纳法索 / 马里边界争端案”和“贝宁 / 尼日尔边界争端案”的判决中，法院已经定义了“有效殖民统治”的概念：能够证明殖民时期在一定区域有效实施了管辖权的殖民当局的行为。[15]

法院认为，本案中缺乏有关殖民当局此种行为的信息。由于这些岛屿的位置偏远，并且在当时缺乏特别的经济和战略意义，殖民当局没有对此进行“有效统治”，因此法院也不能以此为基础判定和确认争议岛屿的主权归属。

根据上述考虑，法院判定，“保持占有”原则不能提供充分的帮助以确定岛屿的主权归属，因为没有证据清楚地表明争议岛屿在独立前和独立当时是否已经归属于尼加拉瓜或洪都拉斯。1906 年西班牙国王的仲裁裁决也不能确定这种归属，因为它确定的是两国陆地边界。同样地，法院也没有得到殖民时代对这些岛屿“有效统治”的证据。

3. 后殖民时期的“有效统治”和争议岛屿的主权

根据国际法院和常设国际法院作出的判例，特别是“印度尼西亚 / 马来西亚

15 Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, *I. C. J. Reports 1986*, p. 586; Frontier Dispute (Benin/Niger), Judgment, *I. C. J. Reports 2005*, p. 120.

利吉丹岛和西巴丹岛主权归属案”的判决，小型海洋地物的主权，可以通过国家权力相对适度的展示的数量和质量来确定。法院考察了双方在这个方面的各种行为：

(1) 关于立法和行政控制。法院认为洪都拉斯的宪法、法律中并没有涉及争议岛屿的规定，而且也没有证据表明洪都拉斯以任何明确的方式将这些法律文件适用于这些岛屿。法院因此判定，洪都拉斯所主张的对这些岛屿的立法和行政控制是不能令人信服的。

(2) 关于刑事和民事法律的适用和执行。法院认为洪都拉斯提供的证据确实有重要的法律意义。1990 年代发生的很多刑事告诉行动（其中包括告诉在伯贝礁岛和萨凡纳礁岛上的偷盗和身体袭击罪行，以及 1993 年洪都拉斯和美国药品管理局的禁毒行动）都和“有效统治”相关，因为法院已经确定岛屿主权的关键日期为 2001 年。1993 年的禁毒行动，尽管不一定适用和执行洪都拉斯刑法，但是美国药品管理局飞越争议岛屿是经洪都拉斯政府授权的，授权文件中还明确提到 4 个岛屿的名称，可以理解为国家的主权行为，构成对该区域的“有效统治”。

(3) 关于移民管制。1999 年和 2000 年，洪都拉斯在这些岛屿上进行了很多关于移民和工作许可管理的活动。1999 年，洪都拉斯当局巡查了 4 个岛屿，并记录了生活在南礁岛、萨凡纳礁岛和皇家港礁岛上的外国人的详细情况。法院判定，尽管洪都拉斯关于移民管制的行动仅于 1990 年代后期开始，但这些证据对于证明“有效统治”仍具有法律意义。向牙买加人和尼加拉瓜国民签发工作许可和签证展示了洪都拉斯在这一方面的权力。洪都拉斯移民官员对这些岛屿的巡查承担起了对这些岛屿的管辖权，尽管其目的可能只是监督而非管理岛上移民。这些主权行为的时间跨度虽然很短，但是在争议区域，只有洪都拉斯采取和承担了能够被认为“有效统治”的措施。1990 年代前后，尼加拉瓜没有对洪都拉斯管理岛上移民的行为提出异议。

(4) 关于渔业活动的管理。洪都拉斯政府认为其对岛屿周围的海域有法律权利，并颁发捕鱼许可证。法院认为洪都拉斯管理渔船和岛上设施也是其行政和立法控制的证据。另外，洪都拉斯政府签发在萨凡纳礁岛上建设房屋以及储存捕鱼设备的许可证，也能够被视为管辖权的适度展示以及对争议岛屿“有效统治”的证据。尼加拉瓜认为，1950 年代其和英国关于在尼加拉瓜海岸之外重新确定捕捞海龟的权利也表明它对争议岛屿拥有主权，但法院对此不予认定。

(5) 关于海军巡防。双方所提供的海军巡防的证据很少，也和这些争议岛屿没有直接关系。因此法院判定，双方在这个方面提交的信息均不能构成“有效统治”的证据。

(6) 关于石油开采。法院判定，双方有关海上石油开发的证据和争议岛屿关系不大，因此将在公共工程方面集中谈到岛上和石油开采相关的活动。

(7) 关于公共工程。洪都拉斯认为，1975 年联合石油公司在伯贝礁岛上放置

的一个 10 米长的天线是洪都拉斯政府授权的石油开发活动不可缺少的一部分。石油公司定期向洪都拉斯政府提交有关这些活动的报告，其中包括相应的税额。尼加拉瓜认为，在伯贝礁岛上放置天线是私人行为，并无明确的政府授权。法院认为，天线的放置是为了进行经政府授权的石油开发活动，这些活动所缴纳的税款也能认定是政府授权的额外证据。法院因此判定，洪都拉斯所提到的公共工程构成“有效统治”的证据，能够支持洪都拉斯对这些岛屿的主权。

对双方提出的观点和证据进行考察后，法院判定，洪都拉斯所援引的后殖民时代的“有效统治”有“以行使主权的目的和意图行事”的证据，构成对这 4 个岛屿管理权的适度和真正的展示。尽管这 4 个岛屿的经济和战略重要性尚未确立，国家的主权行为也不是很多，但是洪都拉斯已经通过充分和全面的行为表明了其对这些岛屿行使主权管辖的意图。法院进一步说明，洪都拉斯这些活动能够构成“有效统治”还在于尼加拉瓜从来没有对其行为提出过抗议。至于尼加拉瓜，法院判定其既无作为主权者行动的意图和愿望，也无证据表明它实际对这些岛屿行使或展示了权力。

4. 地图对确认争议岛屿主权的证据价值

争端双方都提供了很多地图来支持各自的主张，但是包括这些争议岛屿的任何地图都没有清楚地说明哪个国家对这些岛屿行使了主权。另外，这些地图都不是有效的法律文件的一部分，或者更明确地构成尼加拉瓜和洪都拉斯缔结的边界条约的一部分。法院因此判定，双方提供的这些地图本身并不能成为它们对北纬 15 度线附近岛屿主权的证据。

5. 双边条约和多边条约是否构成第三国的承认

法院认为，没有证据能够支持双方所主张的对这些岛屿的主权已经得到第三国的承认。双方提供的某些证据只是一些不一贯和不连续的偶然事件，很明显，它们既没有明确承认争议岛屿的主权归属，也没有这种意图。

洪都拉斯援引哥伦比亚和洪都拉斯以及牙买加之间缔结的双边条约作为第三国承认对争议区域岛屿主权的证据。法院注意到，对这些条约涉及的争议区域的安排，尼加拉瓜一直持反对立场，从来没有理解为洪都拉斯对争议岛屿拥有主权。法院因此判定，这些双边条约并不能构成第三方对争议岛屿主权的承认。

双方还提出了一个多边自由贸易协定作为证据。该协定于 1998 年 4 月 16 日在圣多明戈签订，缔约方包括尼加拉瓜、洪都拉斯、哥斯达黎加、危地马拉、萨尔瓦多和多米尼加共和国。洪都拉斯指出，在协定的最初文本中包含了第 2 条第 1 款的一个附件，该附件定义了洪都拉斯的领土范围，其中包括保罗—得坎佩切和米地亚鲁那群（礁）岛。洪都拉斯声称，米地亚鲁那群（礁）岛一般是指争议地区的全部岛屿和礁石。尼加拉瓜指出，在批准条约的过程中，其议会批准的是修正的条约文本，并不包含上述第 2 条第 1 款的附件。考察了上述附件之后，法院认为其中并没有提到有争议的 4 个岛屿的名字。另外，法院还认为没有充分的证据

证明米地亚鲁那群（礁）岛这一用语含有洪都拉斯所主张的意义。根据这些情况，法院判定，没有必要进一步考察和该协定相关的主张及其在口头程序中的地位。

6. 对岛屿主权归属的判决

法院在考察了有关争议岛屿主权的所有证据和法律问题后，判定洪都拉斯根据后殖民时代的“有效统治”拥有对这些岛屿的主权。

（四）海洋划界

1. 洪都拉斯主张的传统海洋边界

洪都拉斯根据“保持占有”原则主张两国之间存在一个传统的海洋边界。法院认为，在某些情况下，该原则对海洋划界可能起作用，比如有关历史性海湾和领海的划界问题。但是，本案中洪都拉斯不能提出有效的证据说明自格拉西亚斯—阿迪奥斯海角起沿北纬 15 度线的延伸构成了两国之间海上管辖权的分界，它只断定西班牙国王总是利用经纬线来划分管辖范围，而没有提供证据表明殖民当局确实曾经以此纬线划定双方的管辖范围。

法院进一步认为，尼加拉瓜和洪都拉斯在独立当时，根据“保持占有”原则拥有原殖民省所拥有的陆地领土和领海的主权。法院还判定，根据“保持占有”原则不能确定争议岛屿的主权归属。西班牙国王并没有划定其原来的殖民省之间的海洋边界，甚至是领海的边界。尽管可以认为这些国家在独立当时已经拥有对领海的主权，但是这个法律事实本身并不能确定和邻国之间海洋边界的走向。在本案的情况下，不能够根据“保持占有”原则确定存在一条沿北纬 15 度线的传统海洋边界。

法院还注意到，以“保持占有”原则为基础的 1906 年仲裁裁决并没有处理两国之间的海洋边界问题，也没有确认沿北纬 15 度线的海洋边界。

法院因此判定，洪都拉斯根据“保持占有”原则所主张的沿北纬 15 度线的传统海洋边界不能成立。

既然没有根据“保持占有”原则确立的传统海洋边界，法院还必须确定在这个问题上是否存在洪都拉斯主张的默示协议。默示法律协议的存在必须有非常显著的证据支持，建立永久的海洋边界是一个非常重大的问题，不容易推测存在这样的默示协议。洪都拉斯提出了种种证据，包括海洋石油开采权、洪都拉斯和哥伦比亚之间的协议、渔业活动、两国间的外交换文等。法院认为这些证据要么受到尼加拉瓜的一贯反对，要么时间的跨度很短，具有偶然性，不足以默示形成两国之间的海洋边界。法院在对这些证据进行考察后判定，在 1982 年及以后的日期，不存在本质上能够确立有法律约束力的海洋边界的任何默示协议。

2. 海洋边界的划定

在判定不存在沿北纬 15 度线的传统海洋边界后，法院继续审查了两国之间的

划界问题：

(1) 准据法。双方都是 1982 年《联合国海洋法公约》的缔约国，[16] 因此都同意按照公约相关条款的规定来解决争端。

(2) 待划定的区域和方法。本案中的单一海洋边界将涉及不同的管辖海域，其范围从两国海岸至少延伸至西经 82 度经线，在那里可能涉及第三国的利益。根据《联合国海洋法公约》第 3 条，国家的领海宽度不能超过 12 海里。由于争议岛屿——包括已经判定归属洪都拉斯的 4 岛和归属尼加拉瓜的爱丁堡礁岛——和海岸的距离都超出 24 海里，因此都能产生自己的领海。而且这些岛屿相互间的距离都少于 24 海里，因此还会产生相互之间的重叠区域。要划定的单一海洋边界除了要区分两国的领海、大陆架和专属经济区外，还要划分这些岛屿相互之间的重叠区域。

《联合国海洋法公约》第 15 条规定了领海的划界方法和原则。关于如何实施这些规定，法院在“卡塔尔 / 巴林海洋划界和领土问题案”中认为，最合理并且应用最为广泛的方法就是首先划定一条等距离线，接着考虑是否要根据特殊情况对该等距离线作出调整。[17] 法院判例认为等距离线在划界实践中广泛应用的原因在于其科学特征和适用的简便性具有内在的价值，但是，等距离线并不优先于其他的划界方法，在特殊情况下，可能存在不适合运用等距离线的因素。争端双方也都没有提出根据等距离线来划定海洋边界。

关于界线基点的确认，法院考虑了两国海岸的地形，以及作为两国陆地边界终点的可可河河口的情况。由于可可河河口的不稳定性，任何在河口上选取的基点，并以此基点作为划界起点的情况，都会在将来造成不合理的结果。基于上述原因，法院认为存在《联合国海洋法公约》第 15 条所规定的特殊情况，因此不能适用等距离原则。

接着法院考虑了尼加拉瓜提出的等分线方法，认为在等距离线不可行的情况下，根据两国海岸的特殊情况，该方法是一种合适的替代方法，能够产生公平的结果。

(3) 岛屿周围的领海划界。根据《联合国海洋法公约》第 3 条的规定，[18] 北纬

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16 1993 年 10 月 5 日，洪都拉斯批准《联合国海洋法公约》，成为公约第 57 个缔约国。在提交诉状的当时，尼加拉瓜还不是《联合国海洋法公约》的缔约国，2000 年 5 月 3 日，尼加拉瓜批准公约，成为公约第 132 个缔约国。参见《联合国海洋法公约》及其执行协定缔约国批准年表，下载于 http://china-isa.jm.chineseembassy.org/chn/xwdt/P020070214235463597991.pdf，2007 年 5 月 14 日。

17 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, *I. C. J. Reports 2001*, p. 94.

18 《联合国海洋法公约》第 3 条：每一国家有权确定其领海的宽度，直至从按照本公约确定的基线量起不超过 12 海里的界限为止。第 121 条第 2 款：除第 3 款另有规定外，岛屿的领海、毗连区、专属经济区和大陆架应按照本公约适用于其他陆地领土的规定加以确定。

15 度线附近的岛屿应该有不超过 12 海里的领海。由于它们相互之间的距离小于 24 海里，就会产生领海相互重叠的问题，因此需要对岛屿周围的领海进行划界。在对这些岛屿的地理特征进行考察后，法院认为不存在不能适用等距离线的特殊情况，因此应该以等距离线来划定岛屿周围的领海边界。

(4) 海洋边界的起点和终点。考虑了双方的建议之后，法院认为海洋边界的起点应该位于 1962 年联合划界委员会确定的陆地边界界点沿等分线向海 3 英里处的定点。该海洋边界的起始点和 1906 年仲裁裁决所确定的陆地边界界点之间的界线，由双方再行协商决定。至于该边界的终点，法院并没有明确，只是说明应该至第三国管辖范围为止。

法院还考虑了第三国因双边条约而在该区域获得的利益，它们可能与尼加拉瓜和洪都拉斯之间划定的海洋边界相关。法院补充说明其已公正地考虑了任何第三国在该区域可能存在的任何合法利益。

因此，尽管法院没有明确边界的终点，但是可以相应的划定海洋边界，并说明在不影响第三国权利的情况下，可以超出西经 82 度经线，但是任何情况下都不能理解为边界超出从领海基线量起 200 海里范围。200 海里之外大陆架上的任何权利都必须符合《联合国海洋法公约》第 76 条关于大陆架定义的规定，并经大陆架委员会审查。

(5) 海洋边界的走向。在明确了海洋边界的起始点以及确定终点的原则后，法院判定了两国之间海洋边界的走向（详见判决）。

六、法院判决

基于以上原因，法院作出如下判决：

第一，一致判定：洪都拉斯拥有 4 个岛屿的主权。

第二，以 15 票赞成，2 票反对判定：两国单一海洋边界的起点位于北纬 15°00'52" 和西经 83°05'58" 处。法官帕拉—阿兰古伦和专案法官托雷斯•贝纳德斯提出反对意见。

第三，以 14 票赞成，3 票反对判定海洋边界的走向：从北纬 15°00'52" 和西经 83°05'58" 的起点开始，两国间的单一海洋边界沿 70°14'41.25" 的方位线（等分线）延伸至 A 点（地理坐标：北纬 15°05'25" 西经 82°52'54"），与伯贝礁岛 12 海里领海的外部界线相交。从 A 点开始，边界应沿伯贝礁岛领海外部界线向南延伸，至 B 点（地理坐标：北纬 14°57'13" 西经 82°50'03"），与爱丁堡礁岛的 12 海里领海的外部界线相交。从 B 点起，边界继续沿伯贝礁岛、皇家港礁岛、南礁岛（洪都拉斯）和爱丁堡礁岛（尼加拉瓜）领海的中间线，经过 C 点（地理坐标：北纬 14°56'45" 西经 82°33'56"）和 D 点（地理坐标：北纬 14°56'35" 西经 82°33'20"），直达 E 点（地

理坐标：北纬 14°53'15" 西经 82°29'24"），并在此和南礁岛和爱丁堡礁岛的 12 海里领海外部界线相交。从 E 点开始，边界沿南礁岛领海外部边缘的弧线向北，并在 F 点（地理坐标：北纬 15°16'08" 西经 82°21'56"）与 70°14'41.25" 的方位线相交，并从此点开始沿此方位向东，一直到达可能影响第三国权利的区域。法官兰杰瓦和帕拉—阿兰古伦以及专案法官托雷斯•贝纳德斯提出反对意见。

第四，以 16 票赞成，1 票反对判定：双方必须秉承善意协商解决 1906 年仲裁裁决所确定的陆地边界终点和本次划定的海洋边界的起点之间的海洋边界的走向。法官帕拉—阿兰古伦提出反对意见。

另外，法官兰杰瓦和科罗马在判决书上附加了独立意见；法官帕拉—阿兰古伦和专案法官加亚在判决书上附加了声明；专案法官托雷斯•贝纳德斯在判决书上附加了反对意见。

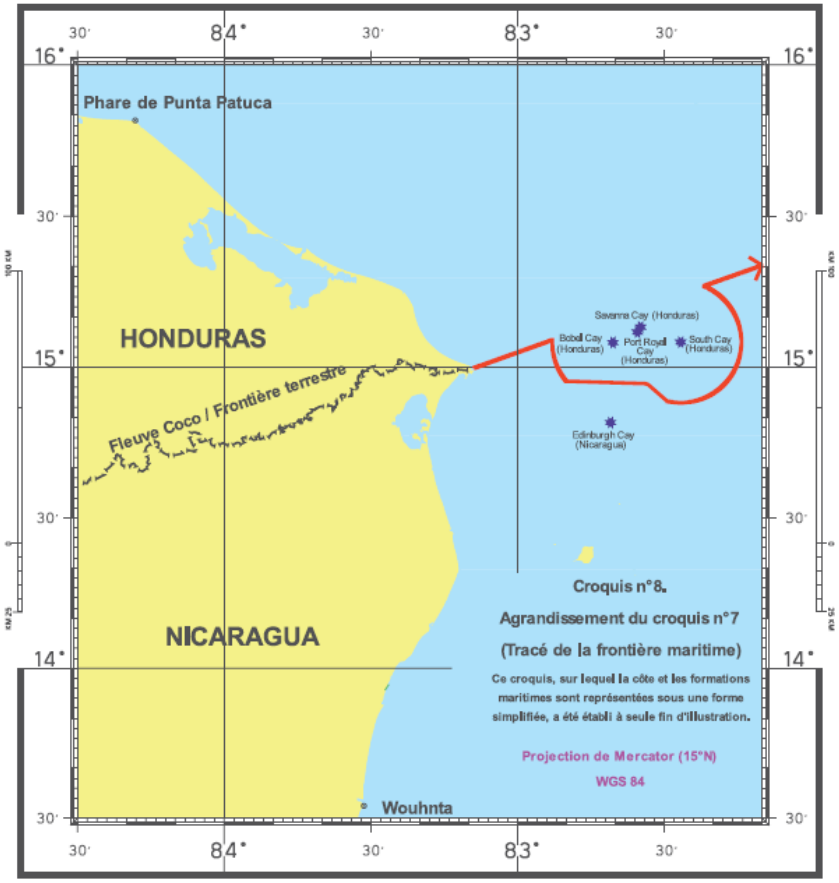

图 2 国际法院判定的两国海洋边界

（资料来源：《国际法院判决书》，第 92 页。）

2007 年中国海洋法学研究综述

本刊课题组 *

2007 年，我国海洋法学研究取得了一些新的突破和成绩，为了使相关研究人员能够更好地把握中国海洋法学的研究现状和动态，本刊现将 2007 年关于海洋法律和政策方面的著述分多个方面加以综述。

一、海洋主权纠纷与划界

2007 年，国内在有关海洋主权纠纷和划界问题上的研究进一步深入，对于很多新问题的研究更是值得关注。其中主要包括：国际法院有关海洋争端的案件、关于海洋划界的一般理论、中国在东海和南海与相关国家的争端问题。

（一）国际法院有关海洋争端的案件

2007 年 10 月 8 日，国际法院对“尼加拉瓜 / 洪都拉斯在加勒比海的领土和海洋边界争端案”作出判决。本案中，双方争议的实质问题是两国在加勒比海的领海、专属经济区和大陆架的单一海洋边界问题，以及源于该问题的相关岛屿的主权归属问题。

在争议岛屿主权归属问题上，尼加拉瓜根据邻接原则主张对这些岛屿的主权，而洪都拉斯则主张根据“保持占有”原则拥有这些岛屿的主权；在单一海洋边界问题上，尼加拉瓜认为两国之间从来没有正式划定海洋边界，请求国际法院根据“等分线”方法来划定该边界。洪都拉斯则请求法院确认北纬 15 度线构成两国之间的传统海洋边界，或者按照一条调整的等距离线来确定两国海洋边界。

法院在考察了双方提供的相关证据和有关法律问题后，作出了如下判决：关于争议岛屿的主权归属，法院认为双方对这些岛屿所主张的权利基础都不能成立。洪都拉斯在后殖民时期对这些岛屿进行了“有效统治”，从而应当拥有对这些岛屿的主权；关于单一海洋边界的起始点和走向，法院认为没有证据表明两国之间存在

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* 本课题组由厦门大学教授傅崐成指导，成员包括赵伟、王泽林、董琳、陆冰、高晓瑞、季烨、杨帆、吴春庆、朱艳、陈思思。

沿北纬 15 度线的传统海洋边界，而且两国之间存在《联合国海洋法公约》（简称为《海洋法公约》）海洋划界相关条款中规定的“特殊情况”，因此不能适用“等距离”原则。在这种情况下，法院判定尼加拉瓜所主张的“等分线”方法是一种合适的替代方法，因此基本按照该方法确定了海洋边界的一般走向。因为在相关岛屿附近不存在特殊情况，此处的海洋边界还是依照“等距离”原则来划定。法院还判定海洋边界的起始点位于等分线上距陆地边界终点 3 英里处，边界的终点至第三国管辖范围为止。

法院正在审理的另外一个有关海洋争端的案件是“罗马尼亚 / 乌克兰黑海划界争端案”。本案中罗马尼亚请求国际法院划定两国在黑海的大陆架和专属经济区之间的单一海洋边界。案件程序正在进行中，国际法院在 2007 年 6 月 28 日发布了一个命令，延长了双方提供答辩状的时间期限。

在本期杂志的相关文章中，赵伟博士生对这两个案件的判决和进展进行了介绍。[1]

（二）关于海洋划界的一般理论

本年度关于海洋划界一般理论的研究相当多，但是并没有出现新的观点。这个方面的文章，集中在对海洋划界中等距离原则的地位、特殊情况考量、成比例概念的适用、单一海洋边界的适用、公平原则等问题进行探讨。其中主要包括：赵凌老师认为，《海洋法公约》和国际实践中的“中间线＋特殊情况”规则和“公平原则”应该是大陆架划界的主要规则；曲波博士生通过对《海洋法公约》第 56 条第 3 款和第 83 条的考察，认为公平原则是大陆架划界的基本原则，其他的原则和方法只有在符合这一原则的基础上才能适用；任志强先生结合《海洋法公约》和相关的国际实践，考察了等距离原则在划界中的适用，得出的结论是，等距离原则不具有一般国际法或者习惯国际法的性质，其在划界中能否适用还要取决于具体的情况；李令华和谭树东两位研究员在其文章中提到了单一海洋边界和成比例概念在划界中的适用；李令华先生在另外一篇文章中还结合有关的国际判例对成比例概念在海洋划界中的适用进行了研究，并指出这个原则对于我国和邻国划定海洋边界的指导意义；黎兴亚先生通过考察《海洋法公约》相关规定和国际划界实践，认为协

1 赵伟：《国际法院解决海洋争端的最新发展》，载于《中国海洋法学评论》2006 年第 2 期；赵伟：《尼加拉瓜和洪都拉斯在加勒比海的领土和海洋边界争端案》，载于《中国海洋法学评论》2007 年第 2 期。

商和公平是划界的一般原则。[2]

（三）中国在东海和南海与相关国家的争端

傅崐成教授对中国周边大陆架的划界方法做了分别论述。他认为，对黄海大陆架，由于其上覆水体较浅，没有任何天然分界线，基本上可以运用一份衡平考量因素的清单，逐项按照科学证据加以考虑，最终完成衡平划界安排。对东中国海地区，冲绳海槽既深又长，并且还在不断扩张，已经将东海大陆架明确区分为两部分。要解决该地区的划界问题，必须首先解决钓鱼岛的主权归属和东海大陆架坡脚的位置问题。对于南中国海地区的大陆架划界，傅教授认为，南海小群岛并非一般海洋划界案件中的“小型物”，不可忽略不计，“不阻断原则”在该地区几乎不可能被完整适用，中国也从未意图在南海北部主张“历史性海湾”的法律地位，中国在 U 形线内的水域享有历史性权利，其他国家也有历史性水域。傅教授重申“南中国海三阶层”的概念，即整个半封闭的南中国海、南中国海水域内的历史性水域、南中国海的各个岛礁及其 12 海里领海，以此作为解决南海大陆架划界争端的基础。[3]

1. 中日东海划界问题

（1）相关的法理探讨

很多学者从国际法的角度探讨了中日之间的东海争端，相关文章主要还是集中在中日东海争端的由来、双方的立场、相关国际法和国际实践确立的划界原则、中日之间海洋划界的特殊情况考量等方面。[4]

高健军博士认为根据国际法和国际划界实践，中日之间的大陆架界线应该是一条位于冲绳海槽轴线和日本 200 海里界限之间的等距离线。而专属经济区界线则应当是一条经调整的海岸中间线，但有关基点必须由双方协商确定，同时做出有利于中国的调整以反映出两国海岸线长度间的重大差别；日本在东海单方面划定的中间线没有国际法根据；由于划界最终的结果可能产生两条不同的海床和上

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2 赵凌：《大陆架划界规则之比较》，载于《陕西行政学院学报》2007 年第 1 期；曲波：《对大陆架划界的几个问题的思考》，载于《当代法学》2006 年第 4 期；任志强：《论等距离在大陆架划界中的地位》，载于《海洋开发与管理》2007 年第 2 期；李令华、谭树东：《国际海洋边界划定理论和方法的新进展》，载于《海洋开发与管理》2006 年第 4 期；李令华：《海洋划界中的成比例概念及其有关案例》，载于《中国海洋大学学报（社科版）》2006 年第 2 期；黎兴亚：《协商与公平》，载于《海洋世界》2006 年第 5 期。

3 傅崐成：《中国周边大陆架的划界方法与问题》，载于傅崐成、水秉和编：《中国与南中国海问题》，台北：台湾问津堂 2007 年版，第 365~385 页。

4 这个方面的文章主要有：刘中民：《东海心结——中日东海争端的法理透视》，载于《海洋世界》2006 年第 5 期；高俊国、鞠光宇：《中日东海划界问题的国际法分析》，载于《海洋开发与管理》2006 年第 2 期；张万彬、张敏：《论东海大陆架划界原则》，载于《中国矿业大学学报（社科版）》2007 年第 2 期；石欣：《从国际法角度分析中日东海划界纠纷》，载于《海洋开发与管理》2006 年第 6 期。

覆水域界线，因此两国还需要就由此产生的重叠部分达成安排。[5]

卢修敏副教授认为，在东海争端中，钓鱼岛问题涉及领土主权争端，而东海大陆架、专属经济区则属于海洋管辖权这种不完全主权争端，两者权利属性不同，应予以区分处理。对于东海划界问题，中日双方都有国际法依据，日本主张按中间线划分并不违反国际惯例和公平原则。尽管《海洋法公约》并未考虑到海岸相邻或相向国家之间大陆架和专属经济区在适用时发生冲突的问题，但根据大陆架和专属经济区性质及《海洋法公约》的现有规定，大陆架制度具有优先适用的效力，其理由是：虽然大陆架和专属经济区在性质上同属于一定范围的海洋管辖权，即不完全主权，但基于领土主权优先于海洋管辖权的思想，大陆架是陆地领土的自然延伸，因而其地位应介于领土与专属经济区之间，这种结论还可从《海洋法公约》第 77 条的规定和国际法院的一系列判决中得到某种程度的承认或佐证。因此，中国完全可以据此提出自己的主张，维护我国合法权益，同时为发展和丰富国际海洋法作出自己的贡献。[6]

王德水等学者认为，在大陆架定义上，“自然延伸”是确定大陆架概念的基本原则，200 海里标准只有在符合“自然延伸”原则的基础上才起作用。“等距离原则”本身并非大陆架划界的一般国际法原则，而是从属于公平原则。因此，中日东海大陆架划界理应遵循公平原则和自然延伸原则，并考虑到有关一切情况，通过两国间的协议来划定。[7] 至于钓鱼岛对东海大陆架划界的影响，张万彬、张敏等认为，钓鱼岛等岛屿面积小，自然资源贫乏，假如不借助于外界资源根本不能维持人类居住或其本身的经济生活，按照《海洋法公约》第 121 条第 3 款不应拥有自己的大陆架；结合决定岛屿在划界效力方面的两方面因素，即岛屿对分界线走向的歪曲程度和岛屿的地位，钓鱼岛等岛屿在中日东海大陆架划界中不应具有划界效力。[8] 张天飞则通过研究国际法院的海洋法判例，归纳国际法院在审理海域争端案件中适用的一些理论要素，如公平原则、自然延伸、等距离、特殊情况、“一切有关的情况”、比例和邻 / 临近因素等，借此来评析争端各方主张的国际法效力。[9]

针对日方依据 1958 年《大陆架公约》并认为其为国际习惯法而加以适用的主

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5 高健军：《从国际法角度看中日东海划界争端——兼论日本主张的无理性》，载于《环球法律评论》2006 年第 6 期。

6 卢修敏：《中日东海争端之评析》，载于《广东广播电视大学学报》2007 年第 1 期。

7 王德水：《从国际法视角看中日钓鱼岛主权争端》，载于《海洋开发与管理》2007 年第 3 期；邢晓玲：《从国际法视角看中日东海大陆架划界争端》，载于《法制与社会》2007 年第 7 期；崔熙东：《中日两国钓鱼岛纷争的国际法分析》（硕士学位论文），大连：大连海事大学 2007 年版；张卫彬：《国际海洋划界公平原则研究》（硕士学位论文），合肥：安徽财经大学 2007 年版。

8 张万彬、张敏：《论东海大陆架划界原则》，载于《中国矿业大学学报（社会科学版）》2007 年第 2 期；张万彬、张敏：《钓鱼岛与中日东海大陆架划界》，载于《新西部》2007 年第 8 期。

9 张天飞：《国际法院的海域划界判例对中国与相邻和相向国家海洋划界的启示》（硕士学位论文），吉林：吉林大学 2007 年版。

张，陆伟、周德江认为，东海是有特殊情况存在的，不应适用等距离线（中间线）来确定界线，因为在海槽或海沟将两种不同的地质构造割裂开来的情况下，海槽或海沟作为有关的“特殊情况”，可被用来作为大陆架边界。且中日两国并不是《大陆架公约》的缔约国，该公约对中日并无法律约束力。此外，认定《大陆架公约》第 6 条为国际习惯法也是有问题的，等距离线在“法律确信”上存在异议，作为国际习惯法的主观要素并不具备。[10] 金永明认为，我国应继续坚持大陆架的基础——自然延伸的主张，采用大陆架与专属经济区分开划界的态度，并从地理地质结构等方面，论证和说明该海槽的成分和结构与附近的大陆架不同，中日在东海属非共大陆架，确立冲绳海槽在划界中的作用，以支撑我国的大陆架延伸至冲绳海槽的主张。[11]

（2）谈判协商是解决中日东海争端的唯一正确方法

国内学者从法律的角度认为这个争端可以通过法律方法解决的观点显然不是中国政府的实际选择。今年以来，中国政府通过谈判协商的政治方法来解决争端的立场更加明确。12 月 1 日，外交部部长杨洁篪表示：友好协商是解决东海问题的唯一正确方法；搁置争议、共同开发是解决东海问题的现实出路；相向而行是磋商取得进展的关键。[12]

2006 年 8 月 25 日，中国依据《海洋法公约》第 298 条规定，向联合国秘书长提交书面声明，对于《公约》第 298 条第 1 款（a）、（b）和（c）项所述的任何争端，即涉及海洋划界、领土争端和军事活动等争端，中国政府不接受公约第 15 部分第 2 节规定的任何国际司法或仲裁管辖。这个声明表明中国政府通过谈判协商的政治方法解决同周边国家海洋争端的基本立场，排除了在这些问题上接受国际司法或者仲裁管辖的可能性。本期将有古俊峰博士的论文对此问题加以专门介绍。

（3）共同开发是中日东海争端解决过程中的重要步骤

与上述问题相呼应，共同开发成为政府和学界普遍主张用来解决中日间东海划界矛盾的重要步骤。根据中国政府的立场，东海争端的最终解决依赖于两国的政治决断和外交技巧。由于东海的重要性，很显然这将是一个长期的过程。共同开发是这个过程之中的一个重要步骤，而且很有可能成为双方在这个问题上打破僵局的突破口。2007 年 4 月，温家宝总理访问日本时，和日本达成根据互惠原则共同开发东海的共识，主要内容包括：坚持使东海成为和平、合作、友好之海；作为最终划界前的临时性安排，在不损害双方关于海洋法诸问题立场的前提下，根据

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10 陆伟、周德江：《国际法视角下的中日东海争端》，载于《中国海洋大学学报（社会科学版）》2007 年第 5 期。

11 金永明：《日本在海洋问题上的动向及对我国的启示》，载于《中国海洋法学评论》2007 年第 1 期。

12 杨洁篪：《友好协商是解决东海问题的唯一正确办法》，下载于 http://news.xinhuanet.com/newscenter/2007-12/01/content-7179623.htm，2007 年 10 月 28 日。

互惠原则进行共同开发；根据需要举行更高级别的磋商；在双方都能接受的较大海域进行共同开发；加快磋商进程，争取在 2007 年秋天就共同开发具体方案向领导人报告。[13] 在共同开发的区域问题上，中国政府一直坚持的立场是，开发应该在双方争议海域进行。[14]

万霞、宋冬两位学者认为，共同开发是指两国或多国间的一项开发协定，其目的是对有争议区域的自然资源进行共同开发，并共同分摊成本，共同分享利益，具有协议性、现实性和临时性等特征。共同开发虽较多地使用于海域争议，但也可适用于国家陆地领土的争议。从法律角度看，共同开发制度是《海洋法公约》所倡议的临时安排之一，其实践效果也被许多国家的双边或多边协议的良好执行所证明，其成功运用的关键在于，在找准自己的国家利益和国家立场的同时，灵活务实，从国家间的共同利益和共同目标入手，争取主动。[15]

金永明研究员对共同开发的意义进行了比较详细的探讨，认为共同开发既能保持区域内的和平与稳定，双方又能通过合作开发获得实际的资源利益，并加强两国在各个领域的合作和交流。[16]

关于“共同开发”的法律特征，任怀峰认为，“共同开发”具有实际性、过渡性、鼓励性和禁止性的法律特征。[17] 何海榕则将其具体表述为：目标的共同性、实用性（功能性）、临时性和不妨碍性。[18]

关于中国提出的“共同开发”政策的法律性质，任怀峰认为，该主张契合《海洋法公约》的精神，是伴随着海洋法的发展而产生的，其背景是：国家海洋管辖权的扩张形成了海岸相邻或相向国家之间的海洋权益主张重叠的争议海域，有关国家本着求同存异的精神，在不损害各自主权和海洋管辖权的前提下，通过协商对争议海域的自然资源达到共同开发。[19] 何海榕认为，“共同开发”不是取得领土的方式，不构成主张主权的证据，不是以主权让渡为政治基础，只是适用于特殊海域的一种资源利用方式，属于国家之间的经济合作。“共同开发”符合《联合国宪章》、《维也纳条约法公约》等国际法律文件所确认和体现的合作、协调、睦邻友好等国际法原则，是以《海洋法公约》第 72 条和第 83 条为法律基础的一种“临时措施”。

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13 《中日就东海问题达成共识，将据互惠原则共同开发》，下载于 http://news.sina.com.cn/c/2007-04-11/211312754839.shtm1，2007 年 10 月 28 日。

14 《外交部：东海共同开发应在双方有争议海域进行》，下载于 http://news.sina.com.cn/c/2007-04-12/213911626885s.shtml，2007 年 10 月 28 日。

15 万霞、宋冬：《争议海域的共同开发制度——从邓小平和平解决国际争端的外交思想说开去》，载于《太平洋学报》2007 年第 6 期。

16 金永明：《论东海问题与共同开发》，载于《社会科学》2007 年第 6 期。

17 任怀峰：《南海共同开发研究》，载于傅崐成、水秉和编：《中国与南中国海问题》，台北：台湾问津堂 2007 年版，第 316~324 页。

18 何海榕：《对共同开发的法律解读》，载于傅崐成、水秉和编：《中国与南中国海问题》，台北：台湾问津堂 2007 年版，第 325~335 页。

19 任怀峰：《南海共同开发研究》，载于傅崐成、水秉和编：《中国与南中国海问题》，台北：台湾问津堂 2007 年版，第 316~324 页。

从经济角度、政治角度和解决问题的实效三个角度对共同开发和不作为做比较分析，可以发现共同开发是解决争议海域资源利用的较好方式，这也为国际实践所证明。[20]

（4）日本《海洋基本法》对东海争端的影响

2007 年 4 月 20 日，日本国会通过《海洋基本法》和《海洋构筑物安全水域设定法》，标志着日本从“岛国到海洋国家”的战略转变，确立了日本未来的海洋战略走向。前者主要内容包括推进海洋资源的开发和利用；推进开发专属经济区，防止外国侵犯专属经济区的行为。后者则以确保日本在专属经济区及大陆架内进行资源开发时的安全为目标，规定国土交通相有权在挖掘设施周围半径 500 米内设立安全水域，禁止船舶通行。

对此，周怡圃和李宜良两位研究员认为，日本《海洋基本法》所确立的一系列重要海洋制度折射了日本未来海洋战略走向；日本《海洋基本法》颁布实施后给日本海洋战略、政策带来的转变是革命性的，作为日本“海洋宪章”，日本《海洋基本法》为日本今后的海洋政策展开了一幅宏伟蓝图，而并非仅仅只是应对中国东海石油问题的应急之举。但是，日本通过这些法律，将其在东海大陆架和专属经济区的主张单方面合法（国内法）化，并且很多规定则直指东海油气资源开发。[21]

日本《海洋基本法》显示了日本在东海问题上的立场，增加了解决东海争端的难度，更加表明中日东海争端的解决不是短期之内能够完成的。

2. 南海争端

中国在南海问题上坚持的立场是，中国对西沙和南沙及其附近海域拥有主权。针对越南进行的一系列侵犯中国主权的行为，外交部都提出严正交涉，并重申这一立场。[22] 在此基础上，中国主张同南海周边国家“搁置争议、共同开发”，通过协商解决争端。

在相关理论研究上，汪翱探讨了《海洋法公约》和南海争端的解决；杨青认为，应该从国家整体利益和区域合作的大局出发，正确认识和处理南海争端。[23]

二、海洋污染与环境保护

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20 何海榕：《对共同开发的法律解读》，载于傅崐成、水秉和编：《中国与南中国海问题》，台北：台湾问津堂 2007 年版，第 325~335 页。

21 周怡圃、李宜良：《日本〈海洋基本法〉系列研究——法律内容分析》，载于《海洋开发与管理》2007 年第 4 期。

22 《中国重申西沙南沙群岛及附近海域主权》，下载于 http://news.sina.com.cn/c/2007-01-04/174811953759.shtml，2007 年 11 月 2 日；《中方对越南在南沙系列新行动提出严正交涉》，下载于 http://news.sina.com.cn/c/2007-04-10/174112744688.shtml，2007 年 11 月 2 日；《越南在南沙群岛举行所谓“国会选举”中国强烈抗议》，下载于 http://news.sohu.com/20070614/n250579278_1.shtml，2007 年 11 月 2 日。

23 汪翱：《〈联合国海洋法公约〉与南海争端的解决》，载于《黑龙江教育学院学报》2007 年第 6 期；杨青：《正确认识和处理南海争端》，载于《瞭望新闻周刊》2006 年 1 月 16 日。

在海洋环境保护领域，确定国家对防止海洋环境污染的管辖权以及国家对其造成的海洋污染所应承担的国家责任，对于保护海洋环境有着极其重要的意义。崔凤、徐伟力认为，随着人类逐渐认识到防止海洋环境污染的迫切性，在防止海洋环境污染的管辖权问题上，传统的船旗国单一管辖已发生变更，1982 年《海洋法公约》的签订，扩大了沿海国的管辖权，缩小了船旗国的管辖权，确立了沿海国、船旗国和港口国并行的综合管辖权制度。通过这种管辖权，所有国家在国际海事组织最高立法权下对处理海洋安全和防止污染问题都将发挥自己的角色。徐伟力还提出了完善我国现行防止船舶污染的法律、法规的建议，如与国际接轨，将国际公约具体化、国内化；完善我国内陆水域船舶污染防治法规和地方综合性法律法规；制定全面、多方位的船舶污染防治法规，并考虑加入相应的国际公约等，并提出了完善我国海洋执法管理体制的对策，如将海洋环境保护工作纳入海洋综合管理、加强防止船舶污染海洋环境的监督管理、加强港口环保等设施的建设、加强管理船舶污染的装备建设、加强地方管理部门的执法力度、加强与有关单位和国家的合作等。[24]

我国港口集装箱吞吐量已经连续 5 年居世界第一，[25] 如何控制船舶污染对于保护海洋环境和促进航运经济的健康发展有着极其重要的意义。危敬添通过对压载水管理计划和记录簿的具体分析，建议我国应加强对《2004 年国际船舶压载水和沉积物控制和管理公约》和《船舶压载水和沉积物控制和管理规则》的研究，以便海事主管机关和航运公司能更全面地了解压载水管理公约和规则，并采取相应行动减少和消除有害水生物和病原体对生态环境与人类健康造成的风险。[26] 由于我国目前还未制定相应的防治船舶污染海洋环境管理条例，刘功臣指出了我国现行防止船舶污染法规体系的不足，强调建立与完善该法规体系的必要性与紧迫性，并从层次、内容、方法、体制上提出了合理的建议。[27]

我国已成为第二大石油消费国，而船舶技术、船员素质、通信导航等能力还有待进一步发展。目前，海上大规模石油污染已处于高风险阶段。在油污损害民事责任方面，李金生和张云科通过分析《1992 年国际油污损害民事责任公约》的历史与内容，认为“谁漏油，谁负责”原则有效地解决了赔偿的及时性问题，但赔偿的充分性问题需要通过建立油污基金和强制保险制度来解决，因此，我国在相关

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24 崔凤、徐伟力：《试析〈联合国海洋法公约〉与船舶污染综合管辖权》，载于《中国海洋大学学报（社会科学版）》2007 年第 1 期；徐伟力：《试析沿海国防止船舶污染的管辖权》，载于《中国海洋法学评论》2007 年第 1 期；徐伟力：《沿海国防止船舶污染管辖权研究》（硕士学位论文），青岛：中国海洋大学 2007 年版。

25 中国交通资讯网：《我国港口集装箱吞吐量连续 5 年居世界第一》，下载于 http://news.c-cc.cn/news_detail.asp?Newsid=26220，2007 年 10 月 27 日。

26 危敬添：《关于船舶压载水和沉积物控制管理问题》，载于《中国远洋航务》2007 年第 6 期。

27 刘功臣：《建立完善中国舰船防污染法规体系》，载于《中国海事》2007 年第 6 期。

立法采用这一原则外，还应建立油污损害赔偿基金以保证赔偿的充分性，进而使受污染的海洋环境得到有效的治理。[28]

环境保护与经济发展是传统社会发展模式中的一对固有矛盾，如何解决这一冲突问题是学者们讨论的焦点。农作烈等以北部湾经济区为例，提出了开发与保护并重、海洋与陆地统筹的海洋环境保护原则，强调必须尽快制定海洋环境保护规划，并依据污染排放对不同海洋功能区的影响，制定合理的陆源污染控制目标，这样才能充分、合理、有效和可持续地利用海洋资源，发展海洋经济。[29] 强化环境管理是解决这一矛盾的重要手段，王琪、陈慧玲从我国海洋环境问题的现实出发，重点分析了海洋环境管理体制的供求现状和矛盾，提出我国在海洋环境管理方面应该转变观点、革新手段，以促进我国海洋环境与海洋经济的可持续发展。[30] 在我国海洋经济迅速发展的同时，各行业在海域利用方面都存在着激烈的矛盾和冲突。由于目前海洋产业布局实践还缺乏理论支撑，韩立民、都晓岩对海洋产业合理布局的现实需求进行了分析，并在此基础上研究了海洋产业布局的内涵、层次、实现方式等若干理论问题，最终提出了海洋产业合理布局的动力模型，以适应海洋经济可持续发展的迫切要求。[31]

于有龙、焦桂英剖析了当代海洋环境问题产生的根源，分析了海洋环境保护应遵循的原则，并提出了拟定海洋环境保护规划、加强和完善海洋公益服务工作、加强沿海和海洋保护区的建设和管理等建议以加强海洋环境保护和生态环境的修复。[32] 能否及时准确地获得海洋环境信息，对于政府部门、各个行业及其他相关者从事涉海活动有着极其重要的意义，但信息不对称问题在我国的海洋环境管理中十分突出。王琪、李杨认为这一问题主要归因于观念错位、利益驱动、体制不顺等因素，通过分析我国目前存在的信息不对称的四种表现形式，提出需要从转变观念、建立协调机制、实行“海陆一体化”的管理体制三个方面来解决这一问题。[33]

在整治渤海方面，王琪、高忠文分析了渤海环境综合整治行动中目前存在的诸多问题，比如传统指导思想的遗留痕迹、缺乏统一有效的领导机构、配套的政策法规缺失等，并提出了促进综合协调机制、公众参与等下一阶段需要重点解决的

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28 李金生、张云科：《评海上油污的“谁漏油，谁负责”原则》，载于《法学杂志》2007 年第 4 期。

29 农作烈等：《加强海洋环境保护和谐发展北部湾经济区》，载于《南方国土资源》2007 年第 9 期。

30 王琪、陈慧玲：《海洋环境管制的供需矛盾分析》，载于《生态经济》2007 年第 3 期。

31 韩立民、都晓岩：《海洋产业布局若干理论问题研究》，载于《中国海洋大学学报（社会科学版）》2007 年第 3 期。

32 于有龙、焦桂英：《关注海洋环境保护促进人海协调发展》，载于《海洋开发与管理》2007 年第 1 期。

33 王琪、李杨：《海洋环境管理中的信息不对称及应对措施》，载于《中国海洋大学学报（社会科学版）》2007 年第 5 期。

问题。[34] 孙书贤通过介绍渤海污染的基本现状和各种综合治理手段，指出目前渤海综合整治中存在的法规政策不完善、机制不健全等问题，建议制定一批有利于渤海环境保护的法规，实现依法治理渤海。[35]

在陆源污染方面，“陆源入海排污口超标排放现象有增无减，排污口邻近海域海水质量持续恶化”。[36] 为加强对海岸工程建设项目的管理，国务院于 2007 年 9 月 25 日公布了关于修改《中华人民共和国防治海岸工程建设项目污染损害海洋环境管理条例》的决定，并自 2008 年 1 月 1 日起施行。[37]

三、港口管理与船运

本年度，在港口管理方面，随着港口地位的日益提高，港口安全管理工作也得到了越来越广泛的重视，许多文章从不同角度对这一问题进行了探讨。[38] 而在港口建设管理方面，有学者从地方具体实际出发探讨了港口建设管理的新体制，提出应建立专业化的港口建设管理公司。[39] 有的则提出对于港口企业要使用绩效管理来避免资源浪费，提升港口企业的核心竞争力。[40] 有学者则根据目前港口建设发展状况及特点，阐述了港口建设可持续发展中构建持续发展的战略文化的重要性。[41] 而港口物流仍然是港口管理的一个重点，学者们对港口物流进行了多方面的探讨，有现状调查，也有对国外经验的借鉴，力图建立适合我国现状的现代港口物流模式。[42] 至 2007 年，我国港口货物和集装箱吞吐量将分别达到 64 亿吨和

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34 王琪、高忠文：《关于渤海环境综合整治行动的反思》，载于《海洋环境科学》2007 年第 3 期。

35 孙书贤：《用新技术新思路整治渤海》，载于《海洋开发与管理》2007 年第 1 期。

36 国家海洋局：《2007 年上半年中国海洋环境质量通报》，下载于 http://www.soa.gov.cn/news/200708/16241a.htm，2007 年 10 月 29 日。

37 下载于 http://www.gov.cn/zwgk/2007-09/30/content_765616.htm，2007 年 10 月 28 日。

38 于得齐：《港口企业内部安全管理探微》，载于《交通企业管理》2007 年第 1 期；王晨阳：《浅议港口企业安全生产管理》，载于《中国港口》2007 年第 2 期；曾仕娟：《港口安全监督管理探讨》，载于《中国港口》2007 年第 7 期；罗方进、安水源：《港口安全文化应用》，载于《中国水运》2007 年第 7 期；魏明：《我国港口设施保安在全面履约中向纵深发展》，载于《中国港口》2007 年第 8 期；沈跃、胡铁军：《港口应构建安全防护体系》，载于《中国港口》2007 年第 9 期。

39 邵作斌：《港口建设管理体制的新探索》，载于《水运工程》2007 年第 9 期。

40 周海云、安彤：《运用“全方位绩效看板”改进港口企业管理》，载于《交通企业管理》2007 年第 9 期。

41 张凤江：《试论港口建设可持续发展的战略文化》，载于《中国港湾建设》2007 年第 4 期。

42 李学工、任伟：《国外港口物流发展的趋势、特征及启示》，载于《港口科技》2007 年第 2 期；施丽容：《港口供应链的构建及其管理初探》，载于《物流科技》2007 年第 3 期；赵霞：《港口发展现代物流运作模式探讨》，载于《企业经济》2007 年第 7 期；顾亚竹：《可持续发展理念下港口物流园区战略定位探讨》，载于《商场现代化》2007 年 8 月；李向文：《我国港口物流信息化建设现状调查》，载于《中国物流与采购》2007 年第 16 期。

1.17 亿标准箱，集装箱吞吐量连续 5 年排名世界第一。[43] 针对这一形势，有学者专门研究了船舶大型化这一背景对班轮公司、航运贸易以及港口的影响，[44] 还有学者对集装箱船舶大型化进行了规模经济分析，并在此基础上提出了班轮公司的应对策略。[45] 在新法规方面，《港口建设管理规定》于 2007 年 1 月 25 日交通部第二次部务会议通过，自 2007 年 6 月 1 日起开始施行。《港口建设管理规定》的制定广泛地参考了《中华人民共和国港口法》、《建设工程质量管理条例》、《建设工程勘察设计管理条例》等法律法规，体现了“统一性”、“分级管理”和“公平竞争”的原则。《规定》还从港口建设项目管理方面，强调了包括初步设计审查制度、招投标备案管理制度、开工备案制度、竣工验收制度共四个环节的严格管理制度，其最大的特点是凸显了政府职能的转变，加强了行业的管理。[46] 在地方法规方面，浙江省于 2007 年 5 与 25 日通过了《浙江省港口管理条例》，于 2007 年 10 月 1 日开始实行。[47]

2007 年 10 月 29 日，“中国—东盟港口发展与合作论坛”在广西南宁落幕，中国与东盟十国的交通部长就未来港口发展与合作达成多项共识。近年来，随着中国—东盟自由贸易区的建立，中国与东盟进出口贸易迅速发展。据资料显示，中国与东盟国家的贸易中，有 80% 以上都是靠海运和港口建立关系。正基于此，“港口合作”成为博览会的主题，而首届“中国—东盟港口发展与合作论坛”也在南宁举行，来自中国与东盟 10 国的交通部官员、港航业著名企业家和专家学者约 450 人共商如何做好港口发展这篇大文章。中国和东盟各国交通部长共同发表了《中国—东盟港口发展与合作联合声明》（又称南宁共识），这标志着中国与东盟在港口领域的实质性合作全面启动，港口发展合作将绽开希望之花。《声明》明确了应尽快审议通过《中国—东盟交通合作战略规划》，并在第六次中国—东盟交通部长会议上签署《中国—东盟海运协定》，以便制定中国—东盟港口合作计划，明确重点和优先使用项目，并决定改善投资环境，制定相关便利政策，鼓励和支持各自企业根据本国的法律、规则和规章，积极参与对方港口基础设施建设。[48]

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43 《我国港口集装箱吞吐量将突破 1 亿》，下载于 http://www.zj.xinhuanet.com/newscenter/2007-10/21/content_11455458.htm，2007 年 10 月 24 日。

44 徐剑华、张锦：《船舶大型化对航运和港口的影响》，载于《中国航海》2007 年第 2 期。

45 徐敏杰：《集装箱船舶大型化的规模经济论证》，载于《集装箱化》2007 年第 5 期。

46 吕航：《强化管理：从项目到行业市场——〈港口建设管理规定〉解读》，载于《中国船检》2007 年第 6 期。

47 《浙江省港口管理条例》，载于《浙江人大（公报版）》2007 年第 4 期。

48 《中国—东盟港口发展与合作论坛绽开希望之花》，下载于 http://www.gx.xinhuanet.com/newscenter/2007-11/02/content11564954.htm，2007 年 11 月 2 日。

在船运方面，学者们主张通过借鉴国外先进经验，提升我国船运的竞争力。[49] 在具体制度上，有的学者围绕港口引航制度展开论证，[50] 有的涉及港口经营人的法律地位和责任，[51] 还有些学者针对承运人责任这一国际海上货物运输的核心制度，从不同的角度展开了研究。[52] 而在新法规方面，水运的高速发展，催生了《中华人民共和国船员条例》。2007 年 3 月 28 日，国务院第 172 次常务会议通过了《船员条例》，并于 2007 年 9 月 1 日起开始施行。该条例的施行，将有利于进一步加强船员管理，提高船员素质，维护船员的合法权益，从而最终达成保障水上交通安全的目的。

四、水下文化遗产国际保护

2001 年 11 月 2 日，联合国教科文组织在其第 31 届大会上正式通过《保护水下文化遗产公约》，该《公约》规定在收到批准、接受、核准或加入本公约的第 20 份文书 3 个月之后，《公约》生效。截至 2007 年 10 月 8 日，联合国教科文组织已经收到 16 个国家的上述文书，[53] 可以预计距离《公约》生效时间已经不远。

《公约》通过后，我国专家学者展开积极研究并取得一些成果。[54] 但与其他国际法领域比较而言，水下文化遗产国际保护的研究成果相对较少。通过中国国家图书馆的馆藏检索，目前只有两本专著：一是厦门大学法学院教授、博士生导师、厦门大学海洋政策与法律中心主任傅崐成与研究生宋玉祥所著的《水下文化遗产

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49 张晋元：《统筹管理的水上交通运输管理体制——美国港口与航运管理体制透视》，载于《中国港口》2007 年第 2 期；肖钟熙：《韩国海运政策调整的回顾》，载于《中国港口》2007 年第 2 期；葛春凤：《顺应世界海运业发展趋势提升我国海运国际竞争力》，载于《交通企业管理》2007 年第 8 期；井艳：《欧盟海运政策的发展和启示》，载于《中国港口》2007 年第 7 期。

50 王杰、于海：《中国港口引航组织机构模式的选择》，载于《大连海事大学学报（社会科学版）》2007 年第 3 期；沈忠平、黄岩：《关于加强引航管理和引航安全监管的几点认识》，载于《中国海事》2007 年第 7 期。

51 刘冰、耿新颖、刘强：《试析港口经营人在海上货物运输中的法律地位》，载于《中国水运》2007 年第 1 期；张建军：《港口经营人责任限制的合同策略》，载于《水运管理》2007 年第 3 期；丁兵：《论港口经营人的民事法律责任》，载于《珠江水运》2007 年第 5 期；王媛媛：《港口经营人海事赔偿责任限制主体》，载于《集装箱化》2007 年第 7 期。

52 张湘兰、张洁：《美国对受控承运人的运价限制及豁免》，载于《法学评论》2007 年第 2 期；傅廷中：《国际海运立法中分化与协调的百年变奏——以海上货物运输承运人责任制度为视角》，载于《法律科学》2007 年第 5 期；胡绪雨：《对目的理性支配下的承运人责任基础立法的批判》，载于《现代法学》2007 年第 5 期。

53 这 16 个国家分别是：保加利亚、克罗地亚、厄瓜多尔、黎巴嫩、利比亚、立陶宛、墨西哥、尼日利亚、巴拿马、巴拉圭、葡萄牙、罗马尼亚、圣卢西亚、西班牙、乌克兰、柬埔寨。

54 具体内容可参阅《水下文化遗产保护专家研讨会综述》，载于《中国海洋法学评论》2005 年第 1 期；《2006 年中国海洋法学研究综述——水下文化遗产保护》，载于《中国海洋法学评论》2006 年第 2 期。

的国际法保护——2001 年联合国教科文组织〈保护水下文化遗产公约〉解析》，[55] 该书对《公约》的制定背景、谈判过程予以介绍，对其内容进行详细的解析，对其中的一般原则与重要制度给予评析，并对中国与《公约》的关系以及是否加入《公约》进行考量，指出《公约》回避了水下文化遗产的所有权问题，为以后的国际争端留下隐患，因此作者提出了对《公约》修订的实体性与程序性建议。二是华南理工大学法学院教师、厦门大学法学博士赵亚娟所著的《联合国教科文组织〈保护水下文化遗产公约〉研究》，[56] 该书对有关水下文化遗产保护的国际法律、《公约》的出台背景及内容进行较详细的介绍与分析，并列专章对我国有关水下文化遗产保护的实践和现行立法进行反思和提出建议。

世界各地的水下文化遗产正面临着各种各样的威胁，张一鸿在其文章中给予简述。[57] 王君玲在《水下文化遗产的管辖权和所有权》一文中，通过国际公约与实践，对不同海域的水下文化遗产的管辖权和所有权进行分析，认为沿海国管辖权权能应自领海起递减，水下文化遗产中的国家船舶和其他公共财产所有权明显，主张各国在保护水下文化遗产的同时，维护国家主权，坚持管辖权和所有权。[58]

赵亚娟博士结合我国立法对“南海一号”事件进行分析，认为此事件暴露出我国有关水下文化遗产的报告发现和相关奖惩制度存在缺陷，认为就地保护方式有其自身的合理性、科学性，值得我国文化遗产保护立法借鉴，应允许私人在一定条件下介入水下文化遗产的发掘，以便集中力量保护那些最重要的遗址。[59] 通过对有关水下文化遗产保护的国际法新发展分析，提出完善我国相关立法的若干建议。[60] 水下文化遗产是否适用海难救助制度，学者之间存在巨大的争议，主要焦点在海难救助是否会影响水下文化遗产的保护，《公约》规定原则上不能适用，但符合 3 个条件则可以适用救助法和发现物法。赵亚娟认为解决水下文化遗产的考古价值和经济价值之间冲突的关键是寻找一个平衡点，《公约》的规定也正是寻找平衡的体现。[61] 关于 1982 年《海洋法公约》、1989 年《国际救助公约》和 2001 年《保护水下文化遗产公约》三者之间的关系，作者通过详细的比较分析之后，认为通过

55 傅崐成、宋玉祥著：《水下文化遗产的国际法保护——2001 年联合国教科文组织〈保护水下文化遗产公约〉解析》，北京：法律出版社 2006 年版。

56 赵亚娟著：《联合国教科文组织〈保护水下文化遗产公约〉研究》，厦门：厦门大学出版社 2007 年版。

57 张一鸿：《水下文化遗产面临的威胁与保护》，载于《世界文化》2007 年第 7 期。

58 王君玲：《水下文化遗产的管辖权和所有权》，载于《海洋开发与管理》2007 年第 1 期。

59 赵亚娟、张亮：《从“南海一号”事件看我国水下文化遗产保护制度的完善》，载于《法学》2007 年第 1 期。

60 赵亚娟：《我国有关水下文化遗产保护的立法完善》，载于《华南师范大学学报（社会科学版）》2007 年第 2 期。

61 赵亚娟：《论海难救助制度与水下文化遗产的保护——兼评公约的相关规定》，载于《中国海洋法学评论》2007 年第 1 期。

这三个公约，国际社会终于完成水下文化遗产保护的三部曲。[62]

五、海洋能源

海洋是一个巨大的能源宝库，不仅蕴涵石油、天然气等传统的不可再生能源，还蕴涵丰富的潮汐与潮流能、海洋生物能和海洋地热能等取之不尽、用之不竭的新兴可再生能源。随着科技的不断发展，各国逐渐重视海洋能源的合理开发和保护。

傅崐成教授认为，要缓解当前中国所面临的能源紧缺的压力，开发海洋油气资源是一个理想的选择。中国在海洋石油开采方面的成功与 1982 年颁布的《中华人民共和国对外开采海洋石油资源条例》的作用密切相关。除了依靠自身的力量加强海洋油气资源的开采，该条例还允许外国公司以一定的方式参与进来，从而实现了对外合作与自营相结合的“两条腿走路”。但傅崐成教授同时认为，中国在海洋石油开采方面的前景并不十分乐观，许多问题都涉及如何基于国际海洋法来衡平解决资源背后的政治、法律争议，其中最紧要的莫过于海洋划界和共同开发的难题。尽管基于和平发展战略及其他因素的综合考量，中国政府尚未向联合国大陆架界限委员会提交其外部大陆架界限，但其“搁置争议、共同开发”的政策在实践中并不十分理想，许多周边国家对资源开采行动的兴趣，远比对划界谈判和共同开发的兴趣大得多。中国是否会依据《海洋法公约》所提供的程序来解决此类争端，态势尚不明朗。但无论如何，中国必须做好准备，为其权利主张提供充分的依据，不仅仅是地理和地质学方面，还需要包括关于既得权和历史性权利方面的法律依据。[63]

在海洋能源的开发方面，本年度各界关注的重点在于不可再生能源的开发。随着全球温室效应的日益加剧，《京都议定书》所规定的国家在境外实现部分减排承诺的一种履约机制，即清洁发展机制成为人们关注的焦点，其目的在于减少全球温室气体的排放，减缓温室效应，将发展中国家实现的温室气体减排额度卖给发达国家。孙丽英在清洁发展机制下探讨了我国能源、化工、林业和再造林及农业等领域的新能源的开发潜力，指出清洁发展机制是我国引进发达国家资金和技术的契机，有关政府部门、企业和研究咨询机构应利用好这个机会，使之最大限度地服务于我国经济、社会和环境的协调和可持续发展，提出合理利用潮汐能、波浪能、温差能等新能源和可再生能源。[64] 2007 年 6 月国务院通过的《可再生能源中

62 赵亚娟：《水下文化遗产保护的国际法制——论有关水下文化遗产保护的三项多边条约的关系》，载于《武大国际法评论》2007 年第 6 卷。

63 傅崐成：《中国的能源政策与海洋法》，载于傅崐成、水秉和编：《中国与南中国海问题》，台北：台湾问津堂 2007 年版，第 77~107 页。

64 孙丽英：《CDM 背景下的新能源开发》，载于《新能源产业专辑》2007 年第 3 期。

长期发展规划》亦指出，开发利用包括海洋能在内的可再生能源，对于保障能源安全、保护生态环境、实现可持续发展具有重要意义。但据专家介绍，我国目前利用海洋能的技术尚不成熟，还有若干技术瓶颈有待突破。此外，在传统不可再生能源的开发利用方面，国家海洋局发布的报告显示，2007 年上半年，我国加强海洋油气勘探技术的自主创新研究，在冀东南堡发现地质储量达 10 亿吨的整装浅海油田。同时，积极开展对外海洋油气合作，加快海底天然气水合物的开发利用，增强海洋油气开发潜力。2007 上半年，海洋油气业保持高速增长，实现增加值 573.61 亿元，比上年同期增长 33.2%。[65]

“9•11”事件以后，海上通道日益成为恐怖活动的目标，并对我国的能源运输安全带来隐患。杨泽伟认为，就打击恐怖主义活动而言，当前与海上能源通道有关的国际法律制度仍然存在不少缺陷：没有专门针对海上能源通道安全的公约，规范具有任意性，缺乏实施监督机制，容易产生领海管辖权的冲突。因此，他建议制定统一的反对恐怖主义的国际公约，建立公约的实施监督机制，发挥联合国机构等国际组织的作用，健全国际海事合作机制。中国也必须深化与东盟国家的合作，特别是加强与马六甲海峡沿岸国家的合作，加强与有关的国际组织和相关国家在海上反恐情报交流、反恐线索调查、犯罪嫌疑人的追捕、劫持船舶的追缴、罪犯引渡等方面的执法合作，推动中日韩“东北亚能源共同体”的建立，共同维护海上能源通道安全。[66] 张桂红指出，在能源安全问题的处理上，中国面临双重压力：一是因南海主权争议引发的南海油气能源的开发问题，二是马六甲海峡的特殊性和复杂性影响了中国海上能源通道安全。有鉴于此，中国有必要加强海洋能源安全方面的国际合作，以《海洋法公约》为基础，采取共同体与条约并驾齐驱、国内立法与国际法并重、长期供应合同和特许协议互补、海域与地区合作先行的合作模式，保障能源的开发供应。

六、海洋渔业

渔业补贴方面。为了维护渔民利益，国家从 2006 年开始发放渔用燃油补贴。陈梦、汪泉两位学者结合国际渔业补贴纪律改革研究以及其他地区的经验教训，对渔用燃油补贴政策实施过程中的一些问题进行探讨，并建议及早完善相关管理配套措施，认为此项补贴对于渔业的可持续发展而言只是一项短期政策，是出于解一时之急的过渡性政策。在国际渔业补贴不断得到规范的情况下，此项补贴到底能走多远不得不令人担忧。因此，作为 WTO 成员国，我国也应在此补贴的实

65 国家海洋局：《海洋局发布 2007 年上半年中国海洋经济运行情况报告》，下载于 http://www.china5e.com/news/newpower/200709/200709140252.html，2007 年 12 月 5 日。

66 杨泽伟：《反恐与海上能源通道安全的维护》，载于《华东政法学院学报》2007 年第 1 期。

施方法上未雨绸缪。[67] 陈静娜、慕永通、殷文伟认为，自 WTO《多哈部长宣言》将渔业补贴列为谈判议题以来，尽管各方分别在提案中提出“不作为法”、“信号灯法”或“特殊和差别待遇法”等，迄今仍未达成共识，但谈判前景逐渐明朗。对此，他们提出了一些相应的政策建议，认为我国应组成跨学科的专家团队对渔业各项议题的决策方向做细致周密的分析，积极参加国际渔业补贴相关问题的研讨会，对渔业补贴诸议题进行规范研究和实证分析、理论预期与案例分析，给我国谈判代表详尽的参考信息，避免信息不对称造成的遗憾。[68] 此外，尹金辉从目前 WTO 对于渔业补贴问题的规定入手，阐明现存制度的不足，说明制定新的渔业补贴制度的必要性，为我国参与新一轮的国际渔业补贴规则谈判提供理论参考。他认为，WTO 反补贴协定的初衷是为了规范贸易中的补贴行为，但没有考虑环境对贸易的影响，本身并不具有环境目的。而渔业补贴却是一个环境与贸易联系尤为紧密的问题。另外，反补贴协定往往针对的是出口补贴问题，而渔业补贴中有很大一部分与出口贸易没有直接关系。因此，反补贴协定已无法适应渔业补贴问题的需要，应当制定一套更加严格、专门针对渔业补贴的纪律和制度。[69]

中国海洋渔业法律体系方面。欧盟的渔业法和共同渔业政策对我国建立完善的渔业法律体系具有很大的借鉴意义。刘新山、于洋两位学者综述了欧盟渔业和渔业资源的现状、欧盟渔业法和共同渔业政策的演变和基本内容，指出欧盟渔业法包括基本法、次级法和判例法。次级法又分为条例、决定和指令。欧盟共同渔业政策是涵盖资源利用与养护、结构政策与渔船管理、水产品共同市场、与第三国的渔业关系、渔业执法以及水产养殖等方面的所有规则和机制。虽然共同渔业政策在建设更紧密的欧洲、发展渔区经济、改善渔区人民的生活水平、促进水产品贸易标准化、保护消费者健康和环境、增强渔业的竞争力等方面发挥了积极的作用，但是在保护渔业资源方面却不是很成功。原因在于保护渔业资源不是仅通过渔业管理就能实现的，共同渔业政策的设计者与决策者也要关注渔业的经济效益、水产品供给、就业和国家关系等问题。[70] 王建廷、窦黑铁两位学者考察了《渔业法》颁布实施 20 年来，我国海洋和渔业法治建设已取得的成就，也指出了这一法规体系尚存在多方面问题。文章从海洋环境保护和渔业资源养护立法、海洋与渔业自然保护区立法、渔业保险立法、渔船管理立法、《防治海洋工程建设项目污染损害海洋环境管理条例》配套法规等五个方面，提出了进一步完善我国海洋和渔业法

67 陈梦、汪泉：《渔用燃油补贴政策小议》，载于《渔业经济研究》2007 年第 4 期。
68 陈静娜、慕永通、殷文伟：《WTO 渔业补贴谈判探析》，载于《浙江海洋学院学报（人文科学版）》2007 年第 2 期。
69 尹金辉：《渔业补贴和 WTO 规则》，载于《中国渔业经济》2007 年第 1 期。
70 刘新山、于洋：《欧盟渔业法和共同渔业政策综述》，载于《上海水产大学学报》2007 年第 5 期。

规的建议。[71] 安全管理由近代的事故管理，发展到现代的隐患管理。刘增桢、谢庆键特别专题性研究了福建渔业船舶安全管理状况和安全管理相关法律、法规的规定，分析渔业船舶安全管理工作中存在的问题和原因，提出在市场经济条件下应构建渔业安全生产体制，促进渔业生产的发展；加强对港、船、人的管理，建立健全渔业船舶安全管理体系；规范渔业船舶安全管理的实体与组织，控制隐患，消除危险，夯实安全生产基础。[72]

海洋渔业是生态环境的一个重要组成部分。陶燕丽通过问卷调查等方式从消费观、价值观等角度分析了人文因素与渔业资源衰竭的关系，分析了社会机制问题与渔业资源衰竭的关系。她指出，渔业资源环境的消耗与我国人口、经济、社会机制等问题有着直接的相关性，应该从渔业资源修复的社会机制、增强人们保护资源的意识、提倡节约等方面加以完善和提高。[73] 另外，关于远洋渔业，吕祥等学者指出，我国远洋渔业自新中国成立后有了长足的发展，但是仍然面临着严重的问题，尤其是《海洋法公约》生效后，我国远洋渔业的发展环境更加恶劣。因此，政府应该通过加大投资力度、开展渔业外交、寻找新的合作伙伴等措施来积极推动远洋渔业的发展。[74] 在中北太平洋公海渔业资源的开发利用方面，孙明指出，1994 年《海洋法公约》生效后，新的国际海洋法制度逐步确立，沿海国 200 海里专属经济区管理体制日趋完善，这使远洋渔业外部环境发生了重大变化，海洋资源的开发竞争越来越激烈，作业空间越来越狭窄。发展远洋渔业特别是受限制较少的公海大洋性渔业是我国调整海洋渔业产业结构的重要举措，它的发展对于带动加工、贸易、运输、渔需物资等相关产业的发展有着重要而积极的意义。孙明还就中北太平洋海山渔场的开发利用情况作了述评，对我国开发利用中北太平洋公海渔业资源的可行性进行了初步探讨。[75]

休闲渔业已成为现代渔业的重要组成，对其法律问题的研究也已经成为近年来的热门课题。对于休闲渔业模式的研究，学者杨子江基于体验经济的视角提出了理解休闲渔业的新思路：以水产品、水生生物和渔业工艺为道具，以渔业服务和渔（鱼）文化为舞台，以提供“三渔”体验作为主要经济提供品的渔业经济门类或形态。在探讨我国休闲渔业发展的现状与问题的基础上，他指出了进一步推动我国休闲渔业发展的建议：要落实科学发展观进行整体形象定位和合理规划，要以渔文化整合休闲渔业资源，要与渔业结构调整相结合，要针对不同休闲渔业经营方

71 王建廷、窦黑铁：《进一步完善我国的海洋和渔业法规》，载于《海洋开发与管理》2007 年第 5 期。
72 刘增桢、谢庆键：《福建省渔业船舶安全管理体系建设初探》，载于《福建水产》2007 年第 1 期。
73 陶燕丽：《海洋渔业资源衰退的人文因素分析》，载于《渔业经济研究》2007 年第 4 期。
74 吕祥、李璐、骆乐：《我国远洋渔业的发展浅析》，载于《渔业经济研究》2007 年第 3 期。
75 孙明：《浅析中北太平洋公海渔业资源的开发利用》，载于《齐鲁渔业》2007 年第 1 期。

式进行体验化设计，要按照体验经济的要求选择营销推广策略。[76] 对于我国休闲渔业的发展现状与对策问题，王琳和韩增林两位学者通过对我国休闲渔业发展现状的分析，说明了发展休闲渔业的必要性、优势条件及其意义，也指出了面临的困境，探讨了发展休闲渔业的对策和建议。他们认为，我国的休闲渔业发展符合社会及经济的发展要求，虽然其属于新兴产业，有很多问题仍需要探索，但是由于目前的发展速度，加上政策的推动，我国的休闲渔业市场将更加细分，休闲项目也将更加多种多样，以满足不同消费人群的需要，法制更加健全，投资更加多元化、合理化。经过 5~10 年的发展，休闲渔业一定能够在渔业经济中占据重要的位置。[77] 他山之石，可以攻玉。柴寿升、张佳佳两位学者对美日休闲渔业的发展模式作了介绍并指出了其对我国的启示。他们认为，休闲渔业发展对于渔业产业结构的调整和可持续发展具有重要意义。美国和日本休闲渔业发展较早，在管理体制、管理手段、法制体系、组织建设、科研与资源保护等方面有很多成功经验。我国在休闲渔业开发中普遍存在缺乏规划、竞争无序、资源退化、资金短缺、管理混乱、法制建设滞后等突出问题，借鉴美、日经验，迫切需要做好规划，建立科学的管理体制，健全法规体系，广辟融资渠道，加强科学研究，强化信息系统管理。[78]

《物权法》颁布以来，我国海洋渔业权的研究掀起了一个热潮。孙宪忠教授指出，刚刚通过的《物权法》在用益物权一编规定了渔业权，这是《物权法》关注民生、维护民权的具体体现，既是我国政治法律和社会文明进步的结果，也是构建社会主义和谐社会的有力保障。他通过回顾我国研究渔业权制度的背景，畅谈了渔业权制度建设的意义及其内涵。他认为应从以下几个方面认识《物权法》中渔业制度的内涵：首先，渔业权是兼备用益物权和特许物权特点的一种物权。其次，渔业权是与现有渔业管理制度相衔接的。再次，在渔业权与海域使用权的关系上，渔业权是渔民的基本生存权，是第一位阶的权利，如果海域使用权损害了渔业权时，应该给予渔业权人合法的赔偿。最后，应广泛宣传《物权法》，让渔民了解《物权法》，增强自我保护意识，维护自己权益。[79] 全国人大农委、农业部联合召开贯彻实施《物权法》暨渔业政策座谈会，呼吁赋予渔民长期而有保障的水域、滩涂使用权，稳定渔业基本经营制度，切实维护渔民合法权益，推进渔业权制度建设，促进渔业持续健康发展。[80] 全永波特别关注了“失海”渔民这一新的弱势群体。他

76 杨子江：《基于体验经济视角的休闲渔业及其发展模式探讨》，载于《上海水产大学学报》2007 年第 5 期。

77 王琳、韩增林：《我国休闲渔业发展现状分析与对策探究》，载于《海洋开发与管理》2007 年第 1 期。

78 柴寿升、张佳佳：《美、日休闲渔业的发展模式对我国休闲渔业发展的启示》，载于《中国海洋大学学报（社会科学版）》2007 年第 1 期。

79 孙宪忠：《〈物权法〉：渔业权保护的新起点——谈渔业权制度建设的意义及其内涵》，载于《中国水产》2007 年第 5 期。

80 张嘉秋：《全国人大农委和农业部联合召开贯彻实施〈物权法〉暨渔业政策座谈会》，载于《中国水产》2007 年第 7 期。

认为其基本权利渔业权存在制度上的缺失，并与海域使用权在权利设置上存在冲突，进而造成了救济的困难，因此从立法上国家应完善渔业权制度，制定渔民特别权益保护法，从程序上加强“失海”渔民权益的法律救济。他通过对“失海”渔民渔业权缺失的现状、原因和法理解读，评析了现有的救济方法，认为问题的关键是渔业权的确认和保障，并可通过完善的法律程序进行救济。[81] 关于渔业权的保障问题，申天恩认为:渔业权是客观存在的，渔业权的属性应该界定为用益物权。对于渔业权的保障应该明晰渔业权的定位，廓清渔业权的权属，并从公权力与私权利两方面健全渔业法的保护路径。[82] 还有多位学者对海域使用权和渔业权的法律冲突问题进行了研究。金可可认为，《物权法》中规定了渔业权的相关内容，但不尽详细。按照水域所有权之不同，我国存在两种渔业权，两者在物权法体系中具有不同的性质与定位。物权法所规定的渔业权制度与《宪法》、《民法通则》、《土地管理法》、《农业法》、《渔业法》、《海域使用法》、《水法》等法律是可以协调的。[83] 万雅琴提出，海域使用权与渔业权之间存在结构性的冲突，难以协调。传统渔业权中包含养殖权和捕捞权两种性质截然不同的权利。如果将渔业权中的养殖权从渔业权中剥离，纳入海域使用权之中，问题便可迎刃而解。[84]

海洋渔业执法方面。在法律体系不健全、执法力度不足、渔业违法违规现象日益严重的情况下，海洋渔业执法部门的工作难以得到全面有效的实施。林旗善对其产生的根源进行深入分析，并提出加快海洋渔业立法步伐、理顺渔业管理体制、拓宽执法监督渠道的对策。[85] 杨波专门就海上渔事纠纷引发的治安案件的预防与控制问题进行了研究，他指出，渔事纠纷引发的治安案件主要有违法行为手段恶劣，后果严重;违法主体群体化;案发具有季节性和区域性等特点。针对当前严峻的海上治安形势，公安边防部门应完善海上治安管理体制、强化群防群治、加大执法力度、建立跨区域治安协作机制、构建协调机制等措施，有效地预防和控制渔事纠纷引发的治安案件。[86] 施通池对渔业行政处罚中“责令检讨”的合法性进行了质疑，他认为，行政机关在依法履行职责中，对当事人的抗拒执法等不协助行为另外课予“责令检讨”的做法，从行政法学的原理上属于法理分类的申诫罚，其适用应符合《行政处罚法》的规定和要求。而法律并未规定渔业行政主体能采取“责令检讨”的处罚行为，因此对管理相对人作出“责令检讨”的行政行为是不合法的。[87]

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81 全永波:《“失海”渔民的权益缺失与法律救济》，载于《海洋开发与管理》2007 年第 5 期。
82 申天恩:《论渔业权之保障》，载于《经济与社会发展》2007 年第 9 期。
83 金可可:《物权法视野中的渔业权制度——以渔民权益保护为基点》，载于《中国市场》2007 年第 31 期。
84 万雅琴:《海域使用权与渔业权的冲突及协调》，载于《郧阳师范高等专科学校学报》2007 年第 4 期。
85 林旗善:《浅析海洋渔业执法存在问题及对策》，载于《福建水产》2007 年第 3 期。
86 杨波:《海上渔事纠纷引发的治安案件的预防与控制》，载于《海洋开发与管理》2007 年第 2 期。
87 施通池:《渔业行政处罚中“责令检讨”的合法性研究》，载于《河北渔业》2007 年第 3 期。

张金荣对完善我国的渔业行政执法进行了思考，他提出的主要措施和途径有：理顺渔业行政执法体制，建立科学的渔业综合执法体制；规范渔业行政执法行为；重视国际公约的履行工作；依法开展渔业行政复议工作；积极应对渔业行政诉讼案件；加强渔业行政执法监督。[88]

七、南北极问题

本年度对于两极地区的研究主要围绕国际极地年所确定的相关主题展开。国际极地年是全球科学家共同策划、联合开展的大规模极地科学考察活动。2007—2008 年第四次国际极地年由国际科学理事会和世界气象组织联合发起，并得到了各国政府、科学组织和科学家的积极响应。2007 年 3 月 1 日，国际极地年中国行动计划在北京正式启动。中国行动计划，包括南极普里兹湾—埃默里冰架—冰穹 A 断面综合考察（PANDA）、北冰洋科学考察、国际合作、信息与数据共享、科普与宣传 5 个计划组成。在 2007—2010 年，我国将在执行南、北极科学考察年度任务的基础上，执行国际极地年中国行动计划，在东南极 PANDA 断面以及北冰洋关键区域开展冰川、大气、海洋、地球物理、地质、测绘、天文等领域综合科学考察；与 10 多个国家开展极地科学考察与后勤保障合作；积极开展国际极地年数据共享和极地科普宣传。在上述 5 个计划中，PANDA 计划已列入国际极地年核心科学计划，美、英、法、德、澳等国的科学家积极响应，纷纷向中国提出合作申请。这一计划的实施，不仅将开拓我国南极研究的新领域，形成我国在南极研究的优势区域，还将大大增强我国极地考察与研究的国际竞争力和影响力。[89]

在南极研究方面，南极内陆站建设、冰穹 A 深冰芯研究及天文观测等问题成为热点。2007 年 11 月 12 日，我国南极考察队乘坐改造升级后的“雪龙”号极地破冰船开始第 24 次南极科考，此次南极考察活动就将围绕长城站、中山站两站改造，实施国际极地年中国行动计划和确保内陆站建设选址这三大任务一一展开。科考队将第二次登顶冰穹 A 开展冰川、天文、地质、大气和空间物理学考察，并为我国南极内陆科学考察站建设进行选址与环境评估工作。科考队会在冰穹 A 区域绘制高精度三维冰下地形图，为确定内陆科考站站址提供最翔实的探测数据；同时，也可明确冰穹 A 是否存在超过 150 万年的古老冰体，并寻找最佳的深冰芯钻探位置。另外，根据冰穹 A 的特殊地理位置，还将建立一个天然地震观测系统，利用天然地震观测数据，获得站点及其周围地区地球深部结构信息。[90] 如果能够

88 张金荣：《关于完善渔业行政执法的思考》，载于《大连干部学刊》2007 年第 5 期。
89 苏涛：《科学发展，引领未来——中国极地研究中心二次创业再铸辉煌》，载于《中国海洋报》2007 年 8 月 3 日。
90 余建斌：《雪龙号启程再访南极，拟在南极内陆建新考察站》，载于《人民日报（海外版）》2007 年 11 月 12 日。

在冰穹 A 获得约 3200 米深度的冰盖完整冰芯，就能够重建地球 120~150 万年来高分辨率气候变化记录，揭示地球气候变化规律以及地球气候变化对生物演化和生物界的影响。为保证冰穹 A 深冰芯研究取得国际影响的成果，冰穹 A 考察将开展广泛而深入的国际合作。南极内陆已被国际天文界公认为地球上最好的天文台址，而冰穹 A 地区又可能是南极内陆最佳观测点，中国天文学家将充分利用冰穹 A 地区极佳的天文观测条件，开展天文选址和试观测，推动建造一系列天文望远镜，努力提升我国天文观测能力，积极寻求解决现代天文学中地球、恒星系统和宇宙的起源、早期宇宙和宇宙中暗能量的本质研究以及类地行星的起源等关系到生命起源等最重要的问题。[91]

最近一段时间，南极的主权争议再次升温，10 月 16 日，英国宣布准备向联合国提交对南极部分海床拥有主权的动议，这可能会使英国拥有南极南大洋沿岸 350 英里（约 560 千米）海域内的海床所有权，并享有在这一区域开采石油、天然气等自然资源的权利。由于《南极条约》体系建立了比较完善的南极法制，冻结了对南极领土和主权的要求，因此英国实际是在主张条约到期以后的权利。国际社会对此反应强烈，但目前看来还不至于形成新一轮的南极“圈地运动”。

在北极研究方面，俄罗斯深海“插旗”事件最为引人注目。而美国、加拿大、丹麦和挪威等国也纷纷采取行动，希望在北极争夺中抢占先机。[92] 国内也对这一问题进行了广泛的讨论。其中值得关注的是中国社会科学院刘楠来教授和中国人民大学余民才教授对此问题的看法。刘楠来教授认为，北极相关海域都有以《海洋法公约》为代表的国际法规则调整；俄罗斯的这一举动并不具有宣示主权的作用，而是为其外大陆架主张寻找科学证据；由于北冰洋沿岸各国对北冰洋大陆架的主张存在重叠，可能因此而产生争端；在北冰洋沿岸国家能够确定的外大陆架界限以外的北冰洋海底是国际海底区域，中国有相应的利益。余民才教授认为，俄罗斯的举动使一个法律问题复杂化了，因为这就潜藏着“北极属于北冰洋沿岸国家所有”的观念，而这是不符合国际法的，也是对其他国家海洋利益的侵犯。他们还认为应该建立更完善的北极法制。[93]

就这个问题，我国科学家认为，北极点在地球上只有一个，它应是全人类共同的财富。中国应提高北极科学考察保障能力，定期组织北极科学考察，深入开展北极气候与环境变化及其对我国气候与国民经济影响的研究，为有效维护我国的北极权益作出贡献。[94] 2007 年度中国北极科考已经启动，2007 年 6 月 9 日至 2008 年 5 月 30 日，黄河站科学考察项目将主要围绕斯瓦尔巴地区现代冰川与气

91 曾红辉：《2007 极地年年会热点聚焦》，载于《中国海洋报》2007 年 9 月 4 日。
92 万言：《北极预言之忧》，载于《中国海洋报》2007 年 9 月 25 日。
93 《北极争端本是法律问题，海洋权益中国有份》，下载于 http://www.jcrb.com/200708/ca628594.htm, 2007 年 10 月 19 日。
94 曾红辉：《2007 极地年年会热点聚焦》，载于《中国海洋报》2007 年 9 月 4 日。

候环境变化监测研究、北极 GPS 跟踪站维护和站区数字全景建设、北极斯瓦尔巴地区持久性有机污染物的水平及变化趋势、黄河站周边环境样品采集与放线菌的初步分离、北极黄河站生态环境监测与研究、黄河站地区生物多样性研究、极区高空大气物理观测、北极黄河站周边海岸带冰水沉积与气候记录等 12 个项目开展科学考察。[95]

与此同时，中国极地科考辅助设备的研制工作也有了新的进展。由我国极地科学家秦为稼主持的国家“863”计划课题“极地科学考察的冰雪面移动和低空飞行机器人关键技术与系统研究”和孙波主持的“863”计划项目“基于电磁感应的海冰厚度监测关键技术与系统研究”于日前双双通过科技部评审，批准立项。项目完成后将为我国极地科考提供可适应极地恶劣环境、具有一定自主能力和多种观测能力的冰雪面移动机器人和低空飞行机器人。样机将参加我国 2008—2009 年度极地考察，以现场试验验证极地科考机器人的功能。[96]

此外，2007 年度“中国极地科学战略研究基金”项目申报评审工作已经完成。将有《我国极地考察 21 世纪前半叶战略与政策研究》、《国际有关南北极法律法规对我国开展极地考察与权益的影响分析与对策研究》等 36 个项目获得该基金总共 198 万元的资金支持，其中大多为青年科技工作者项目。[97]

八、海洋科研

2007 年，有关海洋科研法律与政策方面的焦点主要集中于海洋遗传资源的有关问题。从国内看，主要的文献是江家栋的硕士论文《国际海底区域遗传资源管理法律问题研究》；[98] 从国际上看，2007 年 3 月 12 日，联合国秘书长潘基文向联合国大会第 62 届会议提出题为“海洋和海洋法”的年度综合报告（A/62/66）。该报告有专门一章，较为详细地介绍了海洋遗传资源的相关问题。2007 年 6 月 25 日至 29 日，联合国海洋和海洋法问题不限成员名额非正式协商进程（下称协商进程）第八次会议在纽约联合国总部举行。按照联合国大会第 61/222 号决议的有关要求，会议重点讨论了海洋遗传资源问题。本节将在联合国秘书长报告和协商进程第八次会议工作报告以及《国际海底区域遗传资源管理法律问题研究》一文的基础上，对海洋遗传资源涉及的海洋法方面的问题进行综述。

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95 张一玲：《我国 2007 年度北极科考启动》，载于《中国海洋报》2007 年 6 月 12 日。
96 刘科峰：《中国极地研究中心两项“863”课题获批》，载于《中国海洋报》2007 年 2 月 16 日。
97 张一玲：《2007 年极地战略研究基金项目揭晓》，载于《中国海洋报》2007 年 7 月 3 日。
98 江家栋：《国际海底区域遗传资源管理法律问题研究》（硕士学位论文），厦门：厦门大学 2007 年版。

（一）概述

《生物多样性公约》将遗传资源定义为“具有实际或潜在价值的遗传材料”，将遗传材料定义为“来自植物、动物、微生物或其他来源的任何含有遗传功能单位的材料”（第 2 条）。海洋当中存在着大量的未被发觉的遗传资源，它们在支撑和调节环境与气候、卫生保健、营养等方面有巨大的价值。现在人类有关海洋遗传资源的活动似乎有三种类型：对海洋及其生物学过程的科学调查、研发或“生物勘探”，以及资源开发利用。所谓的“生物勘探”是指有关海洋遗传资源的研究与开发，研究人员对这个词的通常理解是，寻找对于各种应用特别是商业应用具有实际或潜在价值的生物化合物。[99] 但是海洋科学调查与海洋研发之间的界线越来越不清晰，因为在公共研究机构和生物技术公司的伙伴关系范围内，通常作为科研计划的一部分进行遗传资源的收集和分析。往往只是在后期阶段，来自这种资源的知识、信息和可用材料才进入商业阶段。

（二）海洋遗传资源研究和开发所涉及的法律问题

1. 定义

《海洋法公约》中未使用“海洋遗传资源”这个术语，但该公约的一般原则却适用于此类资源。有些国家认为，考虑到惠益分享安排，海洋遗传资源的定义已变得越来越重要。[100] “生物勘探”这个概念也没有得到澄清。若干国家认为“生物勘探”应当归于科学研究的范畴，纯粹的海洋科研和应用海洋科研在方法上没有本质的区别。因此，“生物勘探”应当适用《海洋法公约》关于海洋科学研究的相关规定，不应给予特别的监管。[101]

2. 国家管辖范围以内区域的海洋遗传资源的法律制度

根据《海洋法公约》，沿海国对内水、领海、专属经济区和大陆架上的自然资源的勘探、开发、养护和管理拥有主权或主权权力。这些权力也应当及于国家管辖范围以内区域中的遗传资源。[102]

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99 联合国秘书长向联合国大会第 62 届会议提出的“海洋和海洋法”报告，第 150 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368556.htm，2007 年 10 月 29 日。

100 联合国海洋和海洋法问题不限成员名额非正式协商进程第 8 次会议的工作报告，第 53 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm，2007 年 10 月 29 日。

101 联合国海洋和海洋法问题不限成员名额非正式协商进程第 8 次会议的工作报告，第 54~55 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm，2007 年 10 月 29 日。

102 联合国秘书长向联合国大会第 62 届会议提出的“海洋和海洋法”报告，第 191~195 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368556.htm，2007 年 10 月 29 日。

若干国家强调必须在国家一级设立切合实际的法律和监管框架。[103] 考虑到下游商业风险，采集过程中法律确定性非常重要，特别是有关所有权、投资保护和明确界定的惠益分享安排问题。同时需要对外国行为者收集样本行为制定明确的国家条例。此类条例应就许可证的颁布作出规定。[104]

一些国家对“生物盗窃”表示关切，它们认为，生物盗窃包括从国家管辖范围以内区域乃至国家管辖范围以外区域的非法采集海洋遗传资源和相关传统知识的活动。“生物盗窃”对发展中国家尤其是个问题，原因包括发展中国家缺乏关于海洋遗传资源的知识，关于“生物勘探”的国家和国际法律规定不明了，在执行现行法律和条例方面存在困难。后者尤其影响到小岛屿发展中国家，因为它们在监测专属经济区方面存在困难。其他国家则指出，对“生物盗窃”没有公认的定义。它们主张，在国家管辖范围以外区域不存在“生物盗窃”。还有一些国家指出，“生物盗窃”也可以通过制定清晰的法律和监管框架加以解决，这些框架应虑及所有利益攸关方的利益。[105]

3. 国家管辖范围以外的海洋遗传资源的法律制度

国家管辖范围以外的地区包括：公海和国际海底区域（“区域”）。根据《海洋法公约》，公海对所有国家开放，但是公海自由必须在该公约和其他国际法规则所规定的条件下行使。“区域”及其资源 [为第十一部分的目的界定为“‘区域’内在海床及其下原来位置的一切固体、液体或气体矿物资源，其中包括多金属结核”（《海洋法公约》第 133 条）] 是人类的共同继承财产（《海洋法公约》第 136 条）。

在联合国大会的工作中，各国就“区域”内发现的遗传资源的法律地位发表了不同意见。[106]

若干国家重申，它们认为“区域”内的所有资源，包括海洋遗传资源，均是人类的共同继承财产。在国家管辖范围以外区域的深海海底所进行的与生物资源相关的所有活动，包括与海洋遗传资源相关的活动，应为了整个人类的共同利益而开展。适用于海洋遗传资源的制度不应等同于公海海洋生物资源的管理制度。获取和惠益分享不应依据与国家管辖范围以外区域有关的契约，而要依据“人类的共同继承财产”原则。应按照《海洋法公约》序言第 4 段公正、有效地使用海洋遗

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103 联合国海洋和海洋法问题不限成员名额非正式协商进程第 8 次会议的工作报告，第 58 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm，2007 年 10 月 29 日。

104 联合国海洋和海洋法问题不限成员名额非正式协商进程第 8 次会议的工作报告，第 58~60 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm，2007 年 10 月 29 日。

105 联合国海洋和海洋法问题不限成员名额非正式协商进程第 8 次会议的工作报告，第 63~65 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm，2007 年 10 月 29 日。

106 联合国秘书长向联合国大会第 62 届会议提出的“海洋和海洋法”报告，第 200 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368556.htm，2007 年 10 月 30 日。

传资源。还有代表团表示，人类的共同继承财产原则早于《海洋法公约》，将其编纂入《海洋法公约》并不削弱其重要性和影响力。因此，《海洋法公约》第 133 条不应被理解为将国家管辖范围以外区域的深海海底的海洋遗传资源排除在人类的共同继承遗产之外。根据《海洋法公约》条款，海洋遗传资源是人类共同继承财产的一部分，未来任何执行《海洋法公约》的协定均须澄清这点。[107]

其他国家表达了不同的意见，它们表示，海洋遗传资源既不在《海洋法公约》与“区域”相关的第十一部分条款范围内，也不在国际海底管理局的任务范围内。对这些国家来说，适用于海洋遗传资源的相关条款载于关于公海的第七部分，特别是关于公海海洋生物资源的第 2 节第 117 条和第 118 条，以及第十二、第十三和第十四部分。若干国家表示，虽然也认为国家管辖范围以外区域的海洋遗传资源不在“区域”资源的定义范围内，但《海洋法公约》并未对国家管辖范围以外区域的海洋遗传资源的管理提供一个明确的综合框架。国际社会应在《海洋法公约》框架内拟定一个切合实际的综合框架，用于处理探测和开采国家管辖范围以外区域的所有海洋遗传资源的问题，以保护和保留这些资源，并有利于获取和惠益分享。[108]

（三）结语

综合联合国的两份报告，海洋遗传资源涉及的法律和政策方面的问题越来越多地受到各国的关注。各国就这一问题进行了有益的探讨与合作，但是在一些关键问题，特别是国家管辖范围以外的海洋遗传资源法律地位和法律制度问题上，各国还存在很大的分歧，还需要在以后的讨论中进一步协商和探讨。对于今后的发展，江家栋提出了若干建议：制定一部可用于确定和保护国家管辖范围以外地区的所有脆弱生态系统的国际条约，其中包括“区域”；考虑有关协调机制和现有条约及其他有关国际文书的可适用性，协调有关国际组织和开展研究的相关国家采取行动；鼓励国际科学界制定行为守则，规范具备活动能力的机构和个人在“区域”的活动。就我国而言，其认为应当采取深海海床矿物资源与生物资源并重的方针，加快进入深海热液喷口区开展研究工作的能力建设，加强我国深海资源开发产业化模式经营。

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107 联合国海洋和海洋法问题不限成员名额非正式协商进程第 8 次会议的工作报告，第 71~72 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm，2007 年 10 月 30 日。

108 联合国海洋和海洋法问题不限成员名额非正式协商进程第 8 次会议的工作报告，第 73~81 段，下载于 http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm，2007 年 10 月 30 日。

九、海上执法和海洋军事利用

2007 年，关于海上执法、海洋军事利用方面的成果相对比较丰富，讨论的内容主要包括海上自卫权、紧追权、对外国军用船舶的管理、海上安全等多个方面。

（一）紧追权

关于紧追权，龚迎春认为，沿海国在专属经济区、大陆架及公海等海域行使紧追权时，可能会和相关国家的管辖权或其他权利的行使发生冲突。而导致海上执法领域沿海国和他国之间的管辖权发生冲突的原因复杂多样，其中包括《海洋法公约》本身存在的不确定性和制度空白，使得缔约国在解释和适用《公约》时产生争端；以及有些国家在解释和适用《公约》时，有意识地对《公约》中的一些条款进行扩大解释，目的在于扩大本国的管辖范围和空间。特别是日本在构建东亚地区海上安全合作机制的过程中，对紧追的违法要件和主体进行扩大解释，对现行国际法规则提出了挑战。[109] 上述因素和行为加剧了国际海洋法领域的“国际法不成体系”，导致周边国家间的关系对立，影响地区安全，削弱国际海洋法律秩序的统一性和权威性。因此，构建东亚地区海上安全合作机制应在各国普遍接受的国际法框架内进行，相关国家应摒弃一味追求本国利益而对国际公约做任意扩大解释的做法，以避免加剧国际法的分裂。[110]

郭红岩比较了我国现行立法与《海洋法公约》相关规定的异同，认为我国应完善中国关于内水和领海方面的法律规章，应充分利用《海洋法公约》关于自内水或领海开始的紧追权的授权，应根据不同海域的不同法律地位，对《专属经济区和大陆架法》中有关紧追权的内容条款进行具体补充，明确飞机可以单独实施紧追权，建立一支以单一机构为主、其他相关部门为辅的海上执法体系，制定约束紧追权行使的条件，将武力作为紧追时可采取的最后措施且禁止滥用，增加紧追权行使不当而向受损实体进行赔偿的责任条款等，以此保护我国的海洋权益。[111]

（二）海上自卫权

关于海上自卫权，邢广梅博士认为行使这项权力必须符合《联合国宪章》第 51 条以及其他国际司法判例、联合国决议中所设定的条件。包括：海上自卫权的

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109 龚迎春：《东亚海上安全合作中的国际法问题——兼论国家实践中紧追要件的变化》，载于《外交评论》2007 年第 5 期。

110 龚迎春：《东亚海上安全合作中的国际法问题——兼论国家实践中紧追要件的变化》，载于《外交评论》2007 年第 5 期。

111 郭红岩：《中国海上紧追权立法浅议》，载于《国际关系学院学报》2007 年第 2 期。

实施主体是以海军为主体的武装部队，只能针对武力攻击国管辖下的特定目标，行使海上自卫权的前提是受到针对或来自海上的武力攻击，实施时间必须是在安理会采取必要措施之前，行为限度上必须遵循必要性和相称性两项基本习惯国际法规则。

对于外国军舰无害通过领海是否可能触发海上自卫权的问题，邢广梅博士认为由于军舰是否享有领海无害通过权，世界上存在着二元的立法和实践，我国海军应当采取慎重的态度。而对于海上自卫权和辅助海上执法权的区分，其认为两者有明显的界分，但是也有相互转化的可能，特别是在外国军舰非法进入我国领海而且拒不离开的情况下。

最后，邢广梅博士认为我国在海上自卫权、外国军舰进入领海等问题上法律规定过于笼统和抽象，应当加以细化。[112]

（三）海盗罪

钱飞着重分析了《海洋法公约》中关于海盗罪的相关规定的不足，认为其中“私人目的”和“在公海上”两个条件将各种恐怖行为（如含有政治动机或国家支持的海盗行为）及在一国领海内发生的抢劫和掠夺等暴力行为排除在国际法意义上的海盗罪的范围之外，主张采纳 1996 年国际海事局对海盗行为的定义，即海盗行为是指“一种强行登临或企图强行登临任何船只的行为，目的是盗窃或进行其他犯罪，并打算或能够使用武力完成这一行为”，以加强对海盗这一国际罪行的打击。[113]

孙晓晶认为在国际公约的指引下，我国的国内立法应当加强对海盗及海上恐怖主义问题的解决力度。中国需要有一部专门与系统的海上反恐法，规范海上反恐行动，调动各方力量，明确海上反恐职责等内容，以有力地打击海盗及海上恐怖主义犯罪。我国是联合国、国际海事组织等国际组织的成员国，同时也是有关国际公约的缔约国，因此在制定我国海上反恐法的时候，应当遵循有关的国际公约和决议的要求，履行相应的反恐义务和承诺，保持我国反海盗和反海上恐怖主义立法与国际标准的统一。[114]

（四）对领海内外国军用船舶的管理

2007 年 3 月，伊朗在伊拉克和伊朗交界水域扣押了 15 名英国海军士兵。就

112 邢广梅：《海上自卫权及相关法律问题初探》，载于《中国海洋法学评论》2006 年第 2 期。

113 钱飞：《〈联合国海洋法公约〉之海盗罪评述》，载于《现代商业》2007 年第 17 期。

114 孙晓晶：《海盗及海上恐怖主义的法律问题研究》（硕士学位论文），大连：大连海事大学 2007 年版。

这一事件，田士臣先生认为其涉及管辖权、军舰的无害通过权、国家豁免权、一国对于联合国决议所承担的义务、间谍罪、对领事官员的通知义务、外交保护权和争端解决程序等诸多法律问题，需要逐一分析。而自《海洋法公约》通过以来的各国立法和实践表明，沿海国可以允许外国军舰无害通过其领海而不加特别限制，也可以规定此种通过须经事先通知或许可或履行其他义务，而意欲进行这种通过的外国军舰，有义务遵守沿海国关于外国军舰通过其领海的法律和规章。通过这一事件反观我国对领海内外国船舶的管理制度，我国在立法和执法层面都有很大的漏洞，必须加以改进，当务之急一是要完善立法，制定实施细则，二就是要统一执法力量。[115]

（五）军事测量

过去三四年间，美国的军用测量船多次进入中国和印度的专属经济海域进行所谓的“军事测量”，美方认为“军事测量”并非《海洋法公约》中所规范的“海洋科学研究”，沿海国无权反对。

傅崐成教授则认为《海洋法公约》明确要求在专属经济区行使航行自由和飞越自由时，必须仅限于和平目的。而且该《公约》也规定任何专属经济区内的科学测量活动，无论是民事的还是军事的都必须经过沿海国同意，且限于和平目的。任何所谓的和平目的的军事测量都必须经由沿海国同意，对于测量活动是否为了“和平目的”，判断权是属于沿海国的。因此，美国无权在未经沿海国同意的情况下进入其专属经济区进行军事测量。[116]

就这个问题，张海文研究员认为，随着科学技术的发展，已经很难严格区分纯海洋科学研究和应用海洋科学研究，或海洋科学研究与海道测量（军事测量）活动之间的区别了，这些活动的成果都可以运用到科学研究、经济、军事等多方面。《海洋法公约》关于海洋科学研究的法律制度已经相当明确，在专属经济区从事海洋科学研究必须事先得到沿海国的同意。但是在定义方面存在一些缺憾。各国应加强沟通，就科学研究和军事测量等问题和分歧达成共识和谅解。[117]

万彬华则认为，专属经济区军事测量属于《海洋法公约》规定的海洋科学研究范畴，同时也是军事活动。因此，非沿海国在沿海国专属经济区内进行的任何形式的海洋科学研究以及军事测量活动，都必须得到沿海国的同意并接受管辖，出

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115 田士臣：《从伊朗扣押英国水兵事件看中国对其领海内的外国军用船舶的管理》，载于《中国海洋法学评论》2007 年第 1 期。

116 傅崐成：《Military Survey and Liquid Cargo Transfer in the EEZ: Some Undefined Rights of the Coastal State》，载于《中国海洋法学评论》2006 年第 2 期。

117 张海文：《沿海国海洋科学研究管辖权与军事测量的冲突问题》，载于《中国海洋法学评论》2006 年第 2 期。

于和平目的，应适当顾及沿海国的合法权益，所得信息和情报应与沿海国共享，禁止一切非法活动。[118]

（六）海上执法力量和武装力量建设

中国海上执法力量条块分割，缺乏统一性，造成了实践中的许多问题与困难，而建立统一指挥领导的海岸警卫队能够解决这方面的难题，同时它也可以成为一支强大的海上武装后备力量。《中国海岸警卫队组建的可行性分析》一文认为中国已经具备了建立海岸警卫队的物质基础、执法环境、海洋法制环境和社会环境，当然也存在一些制约因素，如涉及部门较多，改革难度大；海岸警卫队的归属部门难以确定；执法有效性上存在疑虑等，但是这些因素多是主观因素，只要国家能够下定决心，建立海岸警卫队的决策是可行的。[119]

万月月通过比较中国与世界各主要大国的海洋行政执法体制，认为我国的海上行政执法管理体制高度分散。由于体制的根源问题没有解决，职能和权力配置缺乏科学性，执法手段也相应落后。因此，我国的行政执法队伍应当加以统一。从统一的必要性看，其具有坚实的行政法学基础，是维护我国海洋权益，保障我国海洋资源开发利用和国民经济可持续发展，提高执法效率和树立执法权威的需要。从统一的可行性上看，已经具备了良好的物质基础、社会条件、法制环境和外部动力。在此基础上，万月月提出了我国海洋行政执法体制改革的构想。首先是“两条主线”，将行政管理权与行政执法权分离，以国家海洋局为基础，建设综合性的国家海洋政策管理机构，同时以中国海事局为基础建立中国的海岸警卫队，统一海上执法力量。其次，改革应当分两步走，先立法，颁布机构组织法和海岸警备队法，然后组建机构。[120]

（七）海洋权益的维护

2007 年，有多篇论文聚焦于中国海洋权益的保护。对于什么是海洋权益，学者们普遍认为海洋权益是海洋权利与海洋利益的总称。国家海洋权利是从法律角度界定国家应当享有的各种权利，其中包括沿海国依法在管辖海域（领海及毗连区、专属经济区和大陆架）内，维护国家和领土完整的权利，包括对所属岛屿行使

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118 万彬华：《论专属经济区“海洋科学研究”和“军事测量”的法律问题》，载于《西安政治学院学报》2007 年第 5 期。

119 何忠龙、任兴平、罗宪芬、冯永利：《中国海岸警卫队组建的可行性分析》，载于《海洋开发与管理》2007 年第 3 期。

120 万月月：《中国海洋行政执法主体研究》（硕士学位论文），大连：大连海事大学 2007 年版。

主权、管辖权和管制权；开发和利用海洋生物资源和非生物资源的权利；在国家管辖区域外（公海、国际海底区域）的各项自由和权利等。《海洋法公约》所建立的海洋法制度对国家海洋权利进行了系统、全面和明确的规定，为沿海国开发利用海洋、有效管理海洋提供了法理依据。[121] 国家海洋利益是国家在开发利用海洋方面实际享有的便利和收益，是国家海洋权利的具体体现和实际享有状态。[122] 国家海洋利益是国家利益的重要组成部分，而海洋利益中最重要的是政治利益、经济利益和安全利益。[123]

对于中国海洋权益维护的制约因素，张瑞、张林认为主要是海洋维权法规还不完善。缺乏战略性立法思想和专门的立法监督协调机构；对以《海洋法公约》为核心的国际海洋法理解不够，法律的制定缺乏前瞻性；各单行法规相对独立，内部发展不平衡，对整体海洋权益的维护缺乏系统性、协调性和针对性；海洋维权行政管理体制存在交叉和空白，缺乏有效统一的协调权力分配与执法管理的法规。[124]

对于如何维护中国海洋权益，学者普遍认为，首先是要完善法律法规和管理体制，如建立专门的海洋立法监督协调机构，建立统一的海洋管理领导机构，对特定海域进行专门立法，[125] 制定和实施领海法和专属经济区大陆架法实施细则。[126] 其次，要建设一支强大的人民海军，以武装力量作为维护海洋权益的有力后盾。[127]

（八）“防扩散安全倡议”

“9•11”事件以后，美国提出了“防扩散安全倡议”以满足其反恐的现实需要，甚至服务于其谋求全球霸权的总体战略框架。李小军认为，“防扩散安全倡议”旨在对怀疑运输大规模杀伤性武器（WMD）及其部件的货船进行海上拦截，其海上武力拦截对扩散者形成强大的威慑效应，直接增强了防扩散机制的“牙齿”功能，克服了“导弹及其技术控制制度”的非强制性弱点，其控制功效和迅速发展势头表明其存在具有一定的合法性基础。但根据《海洋法公约》的规定，如果一国船只运输的是 WMD 及其弹道导弹运载工具，只要不从事损害沿海国和平、良好秩序或安全的 12 项非法活动，同样享有在领海的无害通过权，如果把 WMD 及其弹道

121 张瑞、张林：《健全海洋维权的法规体系》，载于《海洋开发与管理》2007 年第 5 期。
122 丁丽柏：《论海洋权益的军事保护》，载于《求索》2006 年第 11 期。
123 朱坚真、张庆霖、乔俊果、师银燕：《南海权益保护与海洋竞争力培植》，载于《经济研究参考》2007 年第 46 期。
124 张瑞、张林：《健全海洋维权的法规体系》，载于《海洋开发与管理》2007 年第 5 期。
125 张瑞、张林：《健全海洋维权的法规体系》，载于《海洋开发与管理》2007 年第 5 期。
126 朱坚真、张庆霖、乔俊果、师银燕：《南海权益保护与海洋竞争力培植》，载于《经济研究参考》2007 年第 46 期。
127 丁丽柏：《论海洋权益的军事保护》，载于《求索》2006 年第 11 期；朱坚真、张庆霖、乔俊果、师银燕：《南海权益保护与海洋竞争力培植》，载于《经济研究参考》2007 年第 46 期。

导弹的运输也列入 12 种被禁止的活动，则显得牵强和困难。因此，作为美国主导的一种非条约机制，“防扩散安全倡议”得到的国际支持有限，其相关规定与国际法的激烈冲突使其陷入了合法性危机。[128] 刘焱进一步认为，“防扩散安全倡议”具体实施措施的进攻性、强制性和单边性特征，尤其会对现行国际海洋法规则产生巨大冲击。其中关于美国及其盟国的海军在公海上拦截有向所谓“无赖国家”运送大规模杀伤性武器及其材料嫌疑的所有船舶的权利的规定，将使得公海航行自由原则形同虚设，违背了公海船旗国专属管辖的规定，构成对军舰或专用于政府非商业性服务的船舶在公海上享有的完全豁免权的严重侵犯。其主张的登临权由安全部队船舶在“国际水域”对用于商业或私人目的、被合理怀疑从事大规模杀伤性武器海上扩散活动的船舶进行登临检查，这一规定有悖于现行国际海洋法的规定。“防扩散安全倡议”将紧追权作为其海上拦截行动的国际法依据，缺乏准确性。此外，“防扩散安全倡议”要求所有参加国动用国内措施在其领海采取拦截行动，如果有关国家在美国的压力下采取了此种措施，将直接损害本国承担的相关国际海洋法义务（如沿海国的领海制度、港口和领空制度等应无歧视地适用于所有国家的义务），由此将直接导致现行领海制度的混乱，并对中国国内立法和海空执法方面带来影响。[129]

（九）海上安全

在新一轮以海洋为主体的国际活动中，有关“海上安全”的研究与实践占据着重要的地位。陈海波认为，在现阶段，南中国海海上安全问题主要体现于海上非传统安全（包括海盗及对船武装抢劫行为、海上恐怖主义）、海上航行与交通安全、海洋环境保护 3 个方面。尽管联合国、国际海事组织等国际组织分别或共同制定了《海洋法公约》、《1974 年国际海上人命公约》等，但由于这些法律文件对“海盗行为”、“恐怖主义行为”等界定并不明确，一些国际海事组织海上安全条约甚至尚未生效，已生效的条约并未囊括所有国家，而基于海洋的特性、海上安全问题的复杂性，上述三个方面的问题需要相关各国通过区域合作来共同解决，具体可以通过以下途径展开：（1）参加与执行有关的国际条约；（2）设施建设、人员培训与技术援助；（3）执法人员的培训交流与合作；（4）资讯资料的交流；（5）海洋科学研究；（6）建立高效的海难及突发事件报告、搜救、反应、调查合作机制；（7）加强港口国控制与避难港建设。[130]

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128 李小军：《美国“防扩散安全倡议”的合法性及其危机》，载于《学术探索》2007 年第 1 期。
129 刘焱：《“反扩散安全倡议”的国际法分析》（硕士学位论文），兰州：兰州大学 2007 年版。
130 陈海波：《中国海的海上安全与中国——东盟区域合作》，载于傅崐成、水秉和编：《中国与南中国海问题》，台北：台湾问津堂 2007 年版，第 108~202 页。

十、海域使用权

（一）《海域使用管理法》实践中遇到的问题

中国海监台州支队的杜华忠对《中华人民共和国海域使用管理法》实施 5 年来，各级海监机构在查处非法占用海域（含非法占用海域进行围填海）的案件中所显露出的该法对非法占用海域法律责任设置的不足进行了关注和搜集，并通过对这类问题进行必要的分析，提出了解决的方案。具体包括："持续使用特定海域 3 个月以上"问题；罚款以"应缴纳的海域使用金"为基数计算所产生的问题；没收违法所得无法科处问题；退还非法占用的海域，恢复海域原状问题；赔偿损失法律责任的缺失问题。[131]

（二）海域使用权与其他权利的冲突、协调

全永波认为"失海"渔民作为新弱势群体，其基本权利渔业权存在制度上的缺失，并与海域使用权在权利设置上存在冲突，进而造成了救济的困难，因此从立法上国家应完善渔业权制度，制定渔民特别权益保护法，从程序上加强"失海"渔民权益的法律救济。[132] 另外，他认为海域使用权和渔业权的平衡需要用利益衡量的法学方法，通过权利价值的衡量，使与两种权利有关的个体利益、社会利益和制度利益达到平衡：（1）从社会基本价值观角度进行协调：法律的一般观念是保护弱势群体，而相应的海域使用权经营者大多具备一定的经营实力，因此在权利配置时对相对弱者（即渔业生产者）的优先配置也符合社会基本价值观；（2）考虑既定法律秩序：渔业获得物对于社会来讲也是人民的必要生活资料，乃人类第一需要之物品，间接讲渔业权是为人类的生存而存在，该权利当属于第一位阶权利，高于一般的海域使用权的行使范畴；（3）公共政策：这对于国家主权和未来发展都具有战略意义，其社会利益十分重大，比较而言，公共政策显然高于渔民群体利益的价值追求，因而在制度重构时须全面考量。他还认为：海域使用权和渔业权都属于国家和社会所不可缺少的权利，少数学者通过承认海域使用权否定渔业权的存在是不可取的，用这种方法来避免两者的权利冲突只会损害渔业权的权利主体的利益，进而否定社会的基本价值理念，与制度价值背离。海域使用权在涉及国家海洋权利时主要体现为国家主权利益，其权利利益是最高的，任何其他权利都应予服从；但当海域使用权在涉及个体利益和部分群体利益之经济权利时，如与渔业权冲突

131 杜华忠：《非法占用海域法律责任的不足及完善》，载于《海洋开发与管理》2007 年第 5 期。

132 全永波：《"失海"渔民的权利缺失与法律救济》，载于《海洋开发与管理》2007 年第 5 期。

时，应服从于渔业权的需要。立法设计理应对以上观点重新审视，法官也可以用利益衡量方法在司法判决中加以实践。[133]

万雅琴认为：海域使用权与渔业权之间存在的冲突为结构性的，难以协调。传统渔业权中包含养殖权和捕捞权两种性质截然不同的权利。如果将渔业权中的养殖权从渔业权中剥离，纳入海域使用权之中，问题便可迎刃而解。她认为，经过剥离后只剩下捕捞权的渔业权与海域使用权还是会发生效力上的冲突，但是，这种冲突与传统渔业权同海域使用权之间的冲突是根本不同的。未经改造的传统渔业权同海域使用权之间的冲突是结构性的冲突，根源在于权利体系的不合理不协调，是一种立法的纰漏，这种冲突在原有权利体系或制度框架内是无法调和的。如欲加以协调必须突破原有权利体系和制度框架。而经过改造后的渔业权同海域使用权之间的冲突则完全不同，它不是立法的纰漏，而是权利之间正常的、不可避免的效力冲突，或者说是权利行使的冲突，是能够而且容易协调的。协调这种冲突的途径在于明确规定渔业权与海域使用权效力的优先顺序。具体来说，应当根据“渔业权优先”和“成立在先的权利优先于成立在后的权利”原则来确定。[134]

刘舜斌认为，对于海域权属与渔业权或渔民权益的关系可以得出三点结论：渔业权不是产生于海域国家所有权，渔业权优先于海域使用权，渔业权更不能被海域使用权所吸收或成为海域使用权的一种。另外，对于如何建立渔民权益的维护机制，刘舜斌认为，应从两方面进行考虑：一是完善滩涂、海域使用权出让的程序；二是建立对渔民权益的补偿制度。[135]

王淼教授认为海洋矿业权人在进行探矿和采矿过程中必然要排他性地占有一定海域，如建造钻井平台或建立勘探作业区等，必然会与该海域其他使用者产生矛盾，其中与渔业权的矛盾尤为突出，目前尚无理想的解决方案，直接影响矿业权市场的交易量和交易效果，有效投资减少，因此她认为应积极协调海洋矿业权与海域使用权的关系。由于海域使用的多功能性，需开发海洋矿产资源的海域可能出现两种情况：该海域已授权其他用途或尚未进行转让，因此应分情况探讨：（1）海域已授权其他用途，应视重要程度收回或共同使用。一是重要的海洋矿产资源如石油、天然气，国家应收回原海域使用权并补偿原有使用者损失。根据《海域使用管理法》规定，国家拥有赎回权。油气资源影响国家的安全，具有重要的战略意义，国家可依法收回原海域使用权转让给海洋矿业权者。但对于如何补偿原海域使用权者，保障其合法权益，国家并未明确规定。国家可采取资金补偿或考虑其再次申请其他海域时赋予优先权。二是非战略性海洋矿产资源，国家可协调申请者与原海域使用者，在可允许的范围内共同使用海域。海洋矿产资源的开采一方

133 全永波：《海域使用权与渔业权冲突中的利益衡量》，载于《探索与争鸣》2007 年第 5 期。
134 万雅琴：《海域使用权与渔业权的冲突及协调》，载于《郧阳师范高等专科学校学报》2007 年第 4 期。
135 刘舜斌：《试论海域权属与渔民的权益》，载于《中国水产》2007 年第 10 期。

面会污染环境，影响诸如养殖、捕捞等权益，另一方面也可以与其他资源利用产生互动，如以油气开发平台为依托，可以发展捕捞、养殖事业，海底油气开发的各种建设也为我国海洋旅游事业准备了必要的条件，因此共同使用海域极具可行性。当然，若海矿使用者在使用过程中产生污染，影响其他海域使用者的正常活动，前者应对后者进行赔偿。（2）海域尚未转让，应由海洋局与矿产局共同管理。一些学者如鹿守本、栾维新等认为在矿产开发可行性论证和颁发许可证阶段，由海洋管理部门进行审议是必要的，并且在矿产开发实施阶段，海洋管理部门也有监督之责。王淼教授同意上述观点，然而海矿申请者从经过海域论证可行，到海洋管理部门申请海域使用权，获得海域使用权证，再申请获得矿业权，过程较复杂，海洋局可否在批准其矿产开采请求后，直接将“两证”（探矿权或采矿权许可证与海域使用权证）合一，统一发给申请者，实现海洋局与矿产局的共同管理模式。该模式包括从申请、转让、利益分配到监督全过程的协调管理。首先，在申请批准阶段，探矿权中包含的优先采矿权也可应用于海域使用权，即探矿权人进行采矿时也可优先获得海域使用权；其次，在采取招、拍、挂等方式转让使用权时，获得收益，尤其是溢价转让时，两局共分利益；再次，在监督已转让资源时，建议赋予海洋局一定的处罚权，除对污染海域的主体进行处罚外，还应确立对违规船只的依法处罚权，形成与矿产局共同监督的机制。[136]

中国人民大学法学院的杨立新教授认为民法应当建立一个大一统的地上权概念，同时他也对海域使用权的性质进行了剖析：在海域上建造建筑物的权利，属于海域地上权；在海域上晒盐、采矿，属于采矿权等特许物权或者准物权；不在海域建造建筑物，而仅仅是一般的使用海域的，如养殖、旅游、娱乐等对海面和海水的使用，则是一般的用益权。杨立新教授指出：海域使用权并不是一个单一的、单纯的用益物权，而是聚合不同种类的海域使用的一个集合式的用益物权体系，其中有一部分属于海域地上权，即在海域建造建筑物的这一海域使用权，应当纳入大一统的地上权体系，按照地上权的概念进行解释、理解和适用。[137]

（三）关于海域使用权收回的问题

吴继陆、张志华明确提出：海域使用权收回的实质是海域使用权的征收而非征用，并认为海域使用权征收与土地征收一样，需要解决以下几个核心问题——公共利益的界定、补偿的标准和收回（征收）的程序。他们分别对三个核心问题进行了较为详细的阐述，认为：免缴海域使用金的用海项目基本都符合“公共利益”，

136 王淼、袁栋：《海洋矿产资源产权市场问题原因与对策》，载于《中国国土资源经济》2007 年第 8 期。

137 杨立新：《关于建立大一统的地上权概念和体系的设想》，载于《河南省政法管理干部学院学报》2007 年第 1 期。

部分减交海域使用金的用海项目具有“公共利益”的性质；在确定海域使用权收回的补偿标准和额度时应当以市场价值为基础确定补偿额度，达到“公平补偿”，同时可以与海域调整相结合，给予原海域使用权人实物赔偿，分配面积相当或略大的海域以弥补原海域使用权人的损失；海域使用权收回的程序应包括“公共利益”的认定程序、公告通知程序、海域使用权人参与程序、争议解决程序。他们认为通过立法很难给“公共利益”下一个恰当的定义，并详细规定其范围，但权力机关（我国的各级人大）可以通过个案监督的形式认定“公共利益”，防止征收权的滥用。同时，司法机关在受理和审判补偿案件时，可以通过司法解释弥补法律空白，对公共利益的认定是否合理、补偿额是否合理、是否有程序性违法等方面内容作出判断。从这个角度来说，在国家出台有关规定前，海域使用权收回工作不能因为“无法可依”而举步不前。相反，我们应当努力做好海域征收工作，避免土地征收中出现的诸多问题，不断积累经验，促进海域使用权收回制度的建立。[138]

吴卓在对海域使用权及因公益提前收回海域使用权分析的基础上，对因公益提前收回海域使用权的性质展开探讨，批驳了将因公益提前收回海域使用权定性为行政许可撤回行为的观点，在对国内外征收征用制度研究的基础上，将因公益提前收回海域使用权定性为是一种公益征收，从而为海域使用权提前收回及补偿机制的研究提供理论支持。接着又对因公益提前收回海域使用权的限制和补偿问题展开了论述，通过对渔民失海后生产生活状况的再现，指出了我国现有征海补偿机制的不健全，并尝试着建立一个以支付补偿金为主要方式，以异地搬迁、社会保障安置、其他政策性安置为补充的多层次多渠道的征海补偿机制。[139]

（四）海域使用权市场化问题

张惠铃、张文强以福建省宁德市的实践为例，剖析了当前开展海域使用抵押贷款工作中存在的问题，并提出今后扩大办理此项业务的对策和建议。开办海域使用权抵押贷款存在的问题主要有：海域使用权归属不清，可供抵押的海域使用权证少；海域使用权抵押贷款法律障碍难跨越，评估、抵押到位难；市场流通体系尚未建立，抵押资产变现难；海域使用权抵押贷款风险大，风险防范难。扩大海域使用权抵押贷款业务的对策和建议主要有：设立有资质的专业评估机构，制定明确的评估标准；培育发达的二级交易市场，构建贷款业务平台；简化办证手续，降低收费标准和贷款利率；规范操作流程，防范信贷风险。[140]

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138 吴继陆、张志华：《海域使用权收回的几个法律问题》，载于《海洋开发与管理》2007 年第 1 期。

139 吴卓：《因公益提前收回海域使用权及补偿研究》（硕士学位论文），大连：大连海事大学 2007 年版。

140 张惠铃、张文强：《海域使用权抵押贷款问题探讨》，载于《福建金融》2007 年第 5 期。

姚菊芬认为海域使用权市场化经营的法律障碍主要有：（1）海域使用权市场化经营的民事法律欠缺；（2）现有海域使用管理的法律之间冲突严重；（3）海域所有权与公共管理权主体不分，海域使用权一级市场经营主体资格不适；（4）一级市场中海域使用权 3 种取得方式规定目的性不明确、不科学；（5）海域使用权出资、转让、继承、抵押、出租等缺少具体规定；（6）现有海域使用权法律责任规定操作困难。相应的，她又提出了海域使用权市场化经营的法律对策：（1）建立健全海域使用权市场化经营的民事法律；（2）理顺各法律之间的关系，明确各自调整的范围；（3）建立具有独立法律主体地位的海域资产管理机构，保证一级市场经营主体的适格性；（4）明确一级市场海域使用权的出让方式与行政审批之间的关系；（5）理顺二级市场流通渠道，建立健全海域使用权出资、转让、继承、抵押、出租法律制度；（6）逐步建立和完善海域使用权法律责任制度，为海域使用权市场化经营保驾护航。[141]

兰岚等在现行国家海域使用权抵押权的立法尚属空白的情况下，结合《担保法》，参照土地使用权抵押的有关规定，详细地研究分析了海域使用权抵押的成立和实现。[142]

（五）海域使用权与《物权法》

国家海洋局张宏声副局长指出，《物权法》在用益物权一编专门规定海域使用权，明确了海域使用权的法律地位和性质。在法律性质上，海域使用权与土地使用权一样，都是基本的用益物权。海域使用权作为用益物权，就要适用《物权法》的原则和规定。《物权法》的基本原则之一是对各类主体的物权实行平等保护。因此，《物权法》对海域使用权的专门规定为维护用海者的合法权益提供了基本法律依据，有利于从根本上理顺用海者之间的权利义务关系，增强包括渔民在内的各类用海者的投资信心，发展壮大海洋经济。[143]

中国人民大学法学院院长王利明认为，海域使用权是重要的用益物权，应当在《物权法》中专章规定，并且《物权法》出台后应及时修改《海域使用管理法》：应该增加海域使用权出让合同方面的内容；应具体规定海域使用权转让、抵押问题；应进一步完善海域使用权登记制度。[144]

华北科技学院的李遐桢认为，从整部《物权法（草案）》确立的用益物权体系

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141 姚菊芬：《海域使用权市场化经营的法律问题探讨》，载于《特区经济》2007 年第 6 期。

142 兰岚、朱楠、张华明、袁丁：《论海域使用权抵押的成立和实现》，载于《海洋开发与管理》2007 年第 1 期。

143 张宏声：《海洋法制建设又一个里程碑——贯彻实施〈中华人民共和国物权法〉》，载于《海洋开发与管理》2007 年第 2 期。

144 王利明：《以〈物权法〉立法为契机进一步完善海域物权制度》，载于《海洋开发与管理》2007 年第 1 期。

来看，明显没有考虑海域，因此，海域役权被排斥于地役权之外，我国的《物权法（草案）》对地役权之“地”的这种修正并不彻底，仍然与其他国家一样存在缺陷，即缺乏对海域役权制度的规范。并且，他认为我国物权法应建立不动产役权制度，使其涵盖海域役权，克服地役权制度的不足，并创设新型的不动产役权。[145]

十一、其他问题

（一）岛屿制度

《海洋法公约》中的岛屿制度也成为今年学界讨论的热点。刘新华认为，国家海权就是国家的系统的海洋能力，即利用海洋汲取财富的能力、控制海洋的能力和由海向陆的能力。国家发展、获得和维持海权需要一系列战略资源的有效结合。由于国际海洋战略环境的变迁以及海岛国际法律地位的演进，海岛在国家发展海权的战略中起着其他战略资源无法替代的战略作用。[146] 王艺认为，《海洋法公约》并未明确岛屿是指哪一种高潮时露出水面的陆地区域，地理含义不明确；“不能维持人类居住或其本身的经济生活”这一条款的规定给各国留下广泛的解释余地；岛屿是自然形成还是人工建造在实践中很难区分；岛屿与其他陆地区域的界限不清。因此，王艺建议国家加强对争议岛屿的实际控制，进行海洋意识教育，加强海上防务力量。[147]

在涉及岛屿的海洋划界方面，马超主张应借助一些岛屿，主要是那些远离大陆超过 24 海里的离岸岛屿、中区岛屿和远洋岛屿来主张管辖海域宽度，同时发挥位于不同情形下岛屿对划界的作用。对位于我国海岸附近的岛屿可以作为确定领海基线的基点；位于我国领海海域以外但未超出两国海域中间线的岛屿，可以主张完全效力，即自身的领海、毗连区等等；位于两国海域中间线上的岛屿可以主张半效力，借以换取对方给予相同或相类似的让步；位于邻近他方海域一边的岛屿可给予零效力，但可以主张一定宽度的安全区；此外，对关于岛屿已存在的历史性权利可以继续主张，或基于互惠原则对双方的主张要么都予以承认，要么都予以限制。[148]

目前，我国海域内的海洋划界工作正在进行，正确测定领海基点和基线的位置至关重要。李令华指出，基线类型确定不取决于政府的意愿，而应当取决于海

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145 李遐桢：《关于我国地役权制度的几点思考》，载于《黑龙江省政法管理干部学院学报》2007 年第 1 期。

146 刘新华：《论海岛对国家发展海权的战略意义》，载于《中国海洋大学学报（社会科学版）》2007 年第 4 期。

147 王艺：《对海洋法公约中岛屿制度的几点看法》，载于《科教文汇》2007 年第 5 期。

148 马超：《论岛屿制度与国际海洋划界》（硕士学位论文），贵州：贵州大学 2007 年版。

岸自然地理状况。领海基线标准全球必须统一，直线基线的最大长度必须得到严格的限制，任何国家都不能自行其是。领海基线确定原则和技术标准各国需要统一；大洋小岛在整个海洋划界中的效力在降低，大洋中孤立的小岛更难以享有拥有较大的海洋区域的资格；整个国际上领海基点和基线的确定标准正在朝向统一标准的方向发展。[149]

（二）国际海洋法法庭和其他国际机构

国际海洋法法庭是依据《海洋法公约》设立的常设性国际司法机构。自 1996 年成立至今，已经处理了不少国际海洋争端。徐曾沧、卢建祥二位通过对国际海洋法法庭与常设国际仲裁法庭、国际法院 10 年来处理海洋争端情况的比较实证分析，认为国际海洋法法庭对“临时措施”、“船只和船员的迅速释放”两类程序性争端具有强制管辖权，其对此两类案件的处理成就斐然；《海洋法公约》附件七规定的仲裁，具有“剩余备用”性质，已成为联系《海洋法公约》和常设国际仲裁法庭的桥梁；国际海洋法法庭对海洋争端的强制性管辖存在法定和约定的例外，对争端实体问题的处理已成为其最为薄弱的环节；由于“区域”海底资源开发仍处在勘探阶段，海底争端分庭未受理过任何案件，但海底争端分庭在处理海底争端方面具有“强制管辖权”、“当事方”、“可适用的法律”三方面优势，随着“区域”海底资源开发大规模、大批量地进行，海底争端分庭处理海底争端的潜力巨大。[150] 关晶则重点分析了国际海洋法法庭独特的剩余强制管辖权，主张尽管《海洋法公约》中有关法庭临时措施管辖权的规定具有一定的模糊性，但法庭在实践中却逐步对临时措施的约束力、目的、简易程序等问题予以完善，并呼吁我国在适宜时诉诸法庭以解决我国与周边国家的海洋法争端。[151]

大陆架界限委员会是依据《海洋法公约》第 76 条和附件二的规定而设立的机构，专门负责外大陆架方面的工作。范云鹏总结了大陆架委员会成立以来的基本工作，认为委员会是一个监督《公约》执行的专家机构，委员会的建议不应对当事国产生法律拘束力，但就《公约》文本和实践来看这种约束力是实际存在的。委员会的工作事关国际社会、沿海提案国和利害关系国等各方利益的平衡，因此应尽

149 李令华：《关于领海基点和基线的确定问题》，载于《中国海洋大学学报（社会科学版）》2007 年第 3 期。

150 徐曾沧、卢建祥：《〈联合国海洋法公约〉争端解决机制十年：成就、不足与发展——以常设国际仲裁法庭、国际法院的比较实证分析为视角》，载于《中国海洋法学评论》2007 年第 1 期。

151 关晶：《论国际海洋法法庭的临时措施管辖权》，载于《中国海洋法学评论》2007 年第 1 期。

快改善其工作方式，增强透明度和可参与性。[152]

（三）从国际关系角度看待国际海洋法

将国际关系理论引入国际法逐渐成为中国国际法学研究的一条新路径。黎兴亚从国际关系的角度，以“杜鲁门公告”、“帕多提案”等关键历史事件为穿插点，具体分析了围绕专属经济区制度的争议与妥协均衡的历史过程，探究各个国家集团、政治联盟的态度变化及其对专属经济区制度的形成所起的作用，阐释在国际关系的变化发展中这一新的海洋法律制度建立的政治进程，以及该制度生效之后对国际关系的影响，以探讨其对中国的启示。[153] 与此论点形成巧合的是，美国政府开始重新考虑加入《海洋法公约》。尽管《海洋法公约》自 1982 年起就已经开始生效，但美国在过去长达 25 年的时间里并不急于加入。但 2007 年夏天，在俄罗斯科考队员首次下潜到北极点处北冰洋洋底插上俄罗斯国旗后，美国各界的态度发生了巨大转折。2007 年 10 月 31 日，美国参议院外交关系委员会以 17 票赞成 4 票反对的表决结果，同意美国政府批准《海洋法公约》，相应法案随后提交参议院准备进行最后总结性投票。这是该委员会第二次投票赞成批准这一公约。2004 年，该委员会首次投票赞成批准公约，但未能提交全院表决。如果本次美国参议院通过了《海洋法公约》，美国将在北极大陆架领土和资源的争夺大战中获得新的法律权利，特别是拥有要求阿拉斯加沿岸到北极点附近地区的主权权利。布什政府也一再敦促参议院批准公约，称这将明确美国海军的行动权限，使美国海军在“重建国际海上秩序”时有据可循。

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

153 黎兴亚：《〈联合国海洋法公约〉与当代国际关系的互动关系研究——以专属经济区制度为例》（硕士学位论文），青岛：中国海洋大学 2007 年版。

美国参议院外交关系委员会赞成美国加入联合国海洋法公约

2007 年 10 月 31 日，美国参议院外交关系委员会举行会议，以 17 票赞成、4 票反对的表决结果通过一项议案，建议参议院同意美国加入 1982 年 12 月 10 日《联合国海洋法公约》（以下简称《公约》）并批准 1994 年《关于执行 1982 年 12 月 10 日〈联合国海洋法公约〉第十一部分的协定》（以下简称《执行协定》）。

1982 年，时任美国总统里根曾以“该公约关于深海底矿藏开采部分不符合美国的目标”为由拒绝签署《公约》。1994 年，由于《执行协定》的出台满足了美国关于国际海底区域制度的关切，克林顿政府签署了该协定，并于当年将加入《公约》和批准《执行协定》的事项提请参议院审议。

2004 年 2 月 25 日，美国参议院外交关系委员会以全票赞成的表决结果通过议案，建议参议院同意美国加入《公约》并批准《执行协定》。由于受到部分共和党议员的阻挠，在当年国会会期结束前，该议案未能提交参议院进行表决，从而成为废案。

2007 年，美国参议院外交关系委员会再次启动有关《公约》和《执行协定》的审议工作。9 月 27 日和 10 月 4 日，委员会就美国是否应加入《公约》和批准《执行协定》的问题举行两次听证会，包括国务院副国务卿内格罗蓬特、国防部副部长英格兰和美国航运协会主席考克斯等在内的美国政界、军界和企业界代表作了证词。大多数证词支持美国加入《公约》和批准《执行协定》，这为委员会于 10 月 31 日高票通过有关议案奠定了基础。

委员会在 2007 年 10 月 31 日所通过的议案与其在 2004 年 2 月 25 日所通过的议案内容完全相同。

10 月 31 日的议案通过后，外交关系委员会首席共和党议员卢格随即敦促美国参议院多数党领袖雷德，尽快安排参议院全体会议对该议案进行审议。雷德希望参议院能够在 2007 年底之前对有关《公约》加入和《执行协定》批准的议案进行表决。根据有关规定，上述议案须经出席的参议员中三分之二多数赞成方能通过。

Text of the Convention concerning Work in the Fishing Sector

(International Labour Conference, Geneva, 2007)

The General Conference of the International Labour Organization, having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its ninety-sixth session on 30 May 2007, and Recognizing that globalization has a profound impact on the fishing sector, and no-ting the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and taking into consideration the fundamental rights to be found in the following International Labour Conventions: the Forced Labour Convention, 1930 (No. 29), the Freedom of Association and Protection of the Right to organise Convention, 1948 (No. 87), the Right to organise and Collective Bar-gaining Convention, 1949 (No. 98), the Equal Remuneration Convention, 1951 (No. 100), the Abolition of Forced Labour Convention, 1957 (No. 105), the Discrimination(Employment and Occupation) Convention, 1958 (No. 111), the Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182), and noting the relevant instruments of the International Labour Organization, in particular the Occupational Safety and Health Convention (No. 155) and Recommendation (No. 164), 1981, and the Occupational Health Services Convention (No. 161) and Recommendation (No. 171), 1985, and noting, in addition, the Social Security (Minimum Standards) Convention, 1952 (No. 102), and considering that the provisions of Article 77 of that Convention should not be an obstacle to protection extended by Members to fishers under social security schemes, and recognizing that the International Labour Organization considers fishing as a hazardous occupation when compared to other occupations, and Noting also Article 1, paragraph 3, of the Seafarers' Identity Documents Convention (Revised), 2003（No. 185), and mindful of the core mandate of the organization, which is to promote decent conditions of work, and mindful of the need to protect and promote the rights of fishers in this regard, and recalling the United Nations Convention on the Law of the Sea, 1982, and taking into account the need to revise the following international Conventions adopted by the International Labour Conference specifically concerning the fishing

sector, namely the Minimum Age (Fishermen)Convention, 1959 (No. 112), the Medical Examination (Fishermen) Convention, 1959 (No. 113), the Fishermen's Articles of Agreement Convention, 1959 (No. 114), and the Accommodation of Crews (Fishermen) Convention, 1966(No. 126), to bring them up to date and to reach a greater number of the world's fishers, particularly those working on board smaller vessels, and no-ting that the objective of this Convention is to ensure that fishers have decent conditions of work on board fishing vessels with regard to minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security, and having decided upon the adoption of certain proposals with regard to work in the fishing sector, which is the fourth item on the agenda of the session, and having determined that these proposals shall take the form of an international Convention; adopts this day of June of the year two thousand and seven the following Convention, which may be cited as the Work in Fishing Convention, 2007.

PART I DEFINITIONS AND SCOPE

DEFINITIONS

Article 1

For the purposes of the Convention:

(a) "commercial fishing" means all fishing operations, including fishing operations on rivers, lakes or canals, with the exception of subsistence fishing and recreational fishing;

(b)"competent authority" means the minister, government department or other authority having power to issue and enforce regulations, orders or other instructions having the force of law in respect of the subject matter of the provision concerned;

(c) "consultation" means consultation by the competent authority with the representative organizations of employers and workers concerned, and in particular the representative organizations of fishing vessel owners and fishers, where they exist;

(d) "fishing vessel owner" means the owner of the fishing vessel or any other organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the vessel from the owner and who, on assuming such responsibility, has agreed to take over the duties

and responsibilities imposed on fishing vessel owners in accordance with the Convention, regardless of whether any other organization or person fulfils certain of the duties or responsibilities on behalf of the fishing vessel owner;

(e) "fisher" means every person employed or engaged in any capacity or carrying out an occupation on board any fishing vessel, including persons working on board who are paid on the basis of a share of the catch but excluding pilots, naval personnel, other persons in the permanent service of a government, shore-based persons carrying outwork aboard a fishing vessel and fisheries observers;

(f) "fisher's work agreement" means a contract of employment, articles of agreement or other similar arrangements, or any other contract governing a fisher's living and working conditions on board a vessel;

(g) "fishing vessel" or "vessel" means any ship or boat, of any nature whatsoever, irrespective of the form of ownership, used or intended to be used for the purpose of commercial fishing;

(h) "gross tonnage" means the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I to the International Convention on Tonnage Measurement of Ships, 1969, or any instrument amending or replacing it;

(i) "length" (L) shall be taken as 96 per cent of the total length on a water-line at 85 per cent of the least moulded depth measured from the keel line, or as the length from the foreside of the stem to the axis of the rudder stock on that waterline，if that be greater. In vessels designed with rake of keel, the waterline on which this length is measured shall be parallel to the designed waterline;

(j) "length overall" (LOA) shall be taken as the distance in a straight line parallel to the designed waterline between the foremost point of the bow and the aftermost point of the stern;

(k) "recruitment and placement service" means any person, company, institution, agency or other organization, in the public or the private sector, which is engaged in recruiting fishers on behalf of, or placing fishers with, fishing vessel owners;

(l) "skipper" means the fisher having command of a fishing vessel.

SCOPE

Article 2

1. Except as otherwise provided herein, this Convention applies to all fishers and all fishing vessels engaged in commercial fishing operations.

2. In the event of doubt as to whether a vessel is engaged in commercial fishing, the question shall be determined by the competent authority after consultation.

3. Any Member, after consultation, may extend, in whole or in part, to fishers working on smaller vessels the protection provided in this Convention for fishers working on vessels of 24 metres in length and over.

Article 3

1. Where the application of the Convention raises special problems of asubstantial nature in the light of the particular conditions of service of the fishers or of the fishing vessels' operations concerned, a Member may, after consultation, exclude from the requirements of this Convention, or from certain of its provisions:

(a) fishing vessels engaged in fishing operations in rivers, lakes or canals;

(b) limited categories of fishers or fishing vessels.

2. In case of exclusions under the preceding paragraph, and where practicable, the competent authority shall take measures, as appropriate, to extend progressively the requirements under this Convention to the categories of fishers and fishing vessels concerned.

3. Each Member which ratifies this Convention shall:

(a) in its first report on the application of this Convention submitted under article 22 of the Constitution of the International Labour Organisation:

(i) list any categories of fishers or fishing vessels excluded under paragraph 1;

(ii) give the reasons for any such exclusions, stating the respective positions of the representative organizations of employers and workers concerned, in particular the representative organizations of fishing vessel owners and fishers, where they exist; and

(iii) describe any measures taken to provide equivalent protection to the excluded categories; and

(b) in subsequent reports on the application of the Convention, describe any measures taken in accordance with paragraph 2.

Article 4

1. Where it is not immediately possible for a Member to implement all of the measures provided for in this Convention owing to special problems of asubstantial nature in the light of insufficiently developed infrastructure or institutions, the Member may, in accordance with a plan drawn up in consultation, progressively implement all or some of the following provisions:

(a) Article 10, paragraph 1;

(b) Article 10, paragraph 3, in so far as it applies to vessels remaining at sea for more than three days;

(c) Article 15;

(d) Article 20;

(e) Article 33; and

(f) Article 38.

2. Paragraph 1 does not apply to fishing vessels which:

(a) are 24 metres in length and over; or

(b) remain at sea for more than seven days; or

(c) normally navigate at a distance exceeding 200 nautical miles from the coastline of the flag state or navigate beyond the outer edge of its continental shelf, whichever distance from the coastline is greater; or

(d)are subject to port state control as provided for in Article 43 of this Convention, except where port state control arises through a situation of for cemajeure, nor to fishers working on such vessels.

3. Each Member which avails itself of the possibility afforded in paragraph1 shall:

(a) in its first report on the application of this Convention submitted under article 22 of the Constitution of the International Labour Organisation:

(i) indicate the provisions of the Convention to be progressively implemented;

(ii) explain the reasons and state the respective positions of representative organizations of employers and workers concerned, and in particular the representative organizations of fishing vessel owners and fishers, where they exist; and

(iii) describe the plan for progressive implementation; and

(b) in subsequent reports on the application of this Convention, describe measures taken with a view to giving effect to all of the provisions of the Convention.

Article 5

1. For the purpose of this Convention, the competent authority, after consultation, may decide to use length overall (LOA) in place of length (L) as the basis for measurement, in accordance with the equivalence set out in Annex I. In addition, for the purpose of the paragraphs specified in Annex III of this Convention, the competent authority, after consultation, may decide to use gross tonnage in place of length (L) or length overall (LOA) as the basis for measurement in accordance with the equivalence setout in Annex III.

2. In the reports submitted under Article 22 of the Constitution, the Memher shall communicate the reasons for the decision taken under this Article and any comments arising from the consultation.

PART II GENERAL PRINCIPLES IMPLEMENTATION

Article 6

1. Each Member shall implement and enforce laws, regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to fishers and fishing vessels under its jurisdiction. Other measures may include collective agreements, court decisions, arbitration awards, or other means consistent with national law and practice.

2. Nothing in this Convention shall affect any law, award or custom, or any agreement between fishing vessel owners and fishers，which ensures more favourable conditions than those provided for in this Convention.

COMPETENT AUTHORITYAND COORDINATION

Article 7

Each Member shall:

(a) designate the competent authority or authorities; and

(b) establish mechanisms for coordination among relevant authorities for the fishing sector at the national and local levels, as appropriate, and define their

functions and responsibilities, taking into account their complementarities and national conditions and practice.

RESPONSIBILITIES OF FISHING VESSEL OWNERS, SKIPPERS AND FISHERS

Article 8

1. The fishing vessel owner has the overall responsibility to ensure that the skipper is provided with the necessary resources and facilities to comply with the obligations of this Convention.

2. The skipper has the responsibility for the safety of the fishers on boardand the safe operation of the vessel，including but not limited to the following areas:

(a) providing such supervision as will ensure that, as far as possible, fishers perform their work in the best conditions of safety and health;

(b) managing the fishers in a manner which respects safety and health, including prevention of fatigue；

(c) facilitating on-board occupational safety and health awareness training; and

(d) ensuring compliance with safety of navigation, watch keeping and associated good seamanship standards.

3. The skipper shall not be constrained by the fishing vessel owner from taking any decision which, in the professional judgment of the skipper, is necessary for the safety of the vessel and its safe navigation and safe operation, or the safety of the fishers on board.

4. Fishers shall comply with the lawful orders of the skipper and applicable safety and health measures.

PART III MINIMUM REQUIREMENTS FOR WORK ON BOARD FISHING VESSELS MINIMUM AGE

Article 9

1. The minimum age for work on board a fishing vessel shall be 16 years. However, the competent authority may authorize a minimum age of 15 for persons who are no longer subject to compulsory schooling as provided by national legislation, and who are engaged in vocational training in fishing.

2. The competent authority, in accordance with national laws and practice, may authorize persons of the age of 15 to perform light work during school holidays. In such cases, it shall determine, after consultation, the kinds of work permitted and shall prescribe the conditions in which such work shall be undertaken and the periods of rest required.

3. The minimum age for assignment to activities on board fishing vessels, which by their nature or the circumstances in which they are carried out are likely to jeopardize the health, safety or morals of young persons, shall not be less than 18 years.

4. The types of activities to which paragraph 3 of this Article applies shall be determined by national laws or regulations, or by the competent authority, after consultation, taking into account the risks concerned and the applicable international standards.

5. The performance of the activities referred to in paragraph 3 of this Article as from the age of 16 may be authorized by national laws or regulations, or by decision of the competent authority, after consultation, on condition that the health, safety and morals of the young persons concerned are fully protec-ed and that the young persons concerned have received adequate specific instruction or vocational training and have completed basic presea safety training.

6. The engagement of fishers under the age of 18 for work at night shall be prohibited. For the purpose of this Article, “night” shall be defined in accordance with national law and practice. It shall cover a period of at least nine hours starting no later than midnight and ending no earlier than 5 a. in. An exception to strict compliance with the night work restriction may be made by the competent authority when:

(a) the effective training of the fishers concerned, in accordance with established programmers and schedules, would be impaired; or

(b) the specific nature of the duty or a recognized training programme requires that fishers covered by the exception perform duties at night and the authority determines, after consultation, that the work will not have a detrimental impact on their health or well-being.

7. Nothing in this Article shall affect any obligations assumed by the Member arising from the ratification of any other international labour Convention.

MEDICAL EXAMINATION

Article 10

1. No fishers shall work on board a fishing vessel without a valid medical certificate attesting to fitness to perform their duties.

2. The competent authority, after consultation, may grant exemptions from the application of paragraph 1 of this Article, taking into account the safety and health of fishers, size of the vessel, availability of medical assistance and evacuation, duration of the voyage，area of operation, and type of fishing operation.

3. The exemptions in paragraph 2 of this Article shall not apply to a fisher working on a fishing vessel of 24 metres in length and over or which normally remains at sea for more than three days. In urgent cases，the competent authority may permit a fisher to work on such a vessel for a period of a limited and specified duration until a medical certificate can be obtained，provided that the fisher is in possession of an expired medical certificate of a recent date.

Article 11

Each Member shall adopt laws, regulations or other measures providing for:

(a)the nature of medical examinations;

(b)the form and content of medical certificates;

(c)the issue of a medical certificate by a duly qualified medical practitioner or, in the case of a certificate solely concerning eyesight, by a person recognized by the competent authority as qualified to issue such a certificate; these persons shall enjoy full independence in exercising their professional judgment;

(d) the frequency of medical examinations and the period of validity of medical certificates;

(e) the right to a further examination by a second independent medical practitioner in the event that a person has been refused a certificate or has had limitations imposed on the work he or she may perform; and

(f) other relevant requirements.

Article 12

In addition to the requirements set out in Article 10 and Article 11, on a fishing vessel of 24 metres in length and over, or on a vessel which normally remains at sea for more than three days:

1. The medical certificate of a fisher shall state, at a minimum, that:

(a) the hearing and sight of the fisher concerned are satisfactory for the fisher's duties on the vessel; and

(b)the fisher is not suffering from any medical condition likely to be aggravated by service at sea or to render the fisher unfit for such service or to endanger the safety or health of other persons on board.

2. The medical certificate shall be valid for a maximum period of two year sunless the fisher is under the age of 18, in which case the maximum period of validity shall be one year.

3. If the period of validity of a certificate expires in the course of a voyage, the certificate shall remain in force until the end of that voyage.

PART IV CONDITIONS OF SERVICEMANNING AND HOURS OF REST

Article 13

Each Member shall adopt laws，regulations or other measures requiring that owners of fishing vessels flying its flag ensure that:

(a) their vessels are sufficiently and safely manned for the safe navigation and operation of the vessel and under the control of a competent skipper; and

(b) fishers are given regular periods of rest of sufficient length to ensure safety and health.

Article 14

1. In addition to the requirements set out in Article 13，the competent authority shall:

(a) for vessels of 24 metres in length and over, establish a minimum level of manning for the safe navigation of the vessel, specifying the number and the qualifications of the fishers required;

(b) for fishing vessels regardless of size remaining at sea for more than three days, after consultation and for the purpose of limiting fatigue, establish the minimum hours of rest to be provided to fishers. Minimum hours of rest shall not be less than:

(i) ten hours in any 24-hour period; and

(ii) 77 hours in any seven-day period.

2. The competent authority may permit, for limited and specified reasons, temporary exceptions to the limits established in paragraph 1(b) of this Article. However, in such circumstances, it shall require that fishers shall receive compensatory periods of rest as soon as practicable.

3. The competent authority, after consultation, may establish alternative requirements to those in paragraphs 1 and 2 of this article. However, such alternative requirements shall be substantially equivalent and shall not jeopardize the safety and health of the fishers.

4. Nothing in this article shall be deemed to impair the right of the skipper of a vessel to require a fisher to perform any hours of work necessary for the immediate safety of the vessel, the persons on board or the catch, or for the purpose of giving assistance to other boats or ships or persons in distress at sea. Accordingly, the skipper may suspend the schedule of hours of rest and require a fisher to perform any hours of work necessary until the normal situation has been restored. As soon as practicable after the normal situation has been restored, the skipper shall ensure that any fishers who have performed work in a scheduled rest period are provided with an adequate period of rest.

CREW LIST

Article 15

Every fishing vessel shall carry a crew list, a copy of which shall be pro-vided to authorized persons ashore prior to departure of the vessel, or communicated ashore immediately after departure of the vessel. The competent authority shall determine to whom and when such information shall be provided and for what purpose or purposes.

FISHER'S WORK AGREEMENT

Article 16

Each Member shall adopt laws, regulations or other measures:

(a) requiring that fishers working on vessels flying its flag have the protection of a fisher's work agreement that is comprehensible to them and is consistent with the provisions of this Convention; and

(b) specifying the minimum particulars to be included in fishers' work agreements in accordance with the provisions contained in Annex II.

Article 17

Each Member shall adopt laws, regulations or other measures regarding:

(a)procedures for ensuring that a fisher has an opportunity to review and seek advice on the terms of the fisher's work agreement before it is concluded;

(b) where applicable, the maintenance of records concerning the fisher' s work under such an agreement; and

(c) the means of settling disputes in connection with a fisher's work agreement

Article 18

The fisher's work agreement, a copy of which shall be provided to thefisher, shall be carried on board and be available to the fisher and, in accordance with national law and practice, to other concerned parties on request.

Article 19

Articles 16 to 18 and Annex Ⅱ do not apply to a fishing vessel owner whois also single-handedly operating the vessel.

Article 20

It shall be the responsibility of the fishing vessel owner to ensure that eachfisher has a written fisher's work agreement signed by both the fisher and thefishing vessel owner or by an authorized representative of the fishing vessel owner (or, where fishers are not employed or engaged by the fishing vessel owner, the fishing vessel owner shall have evidence of contractual or similar arrangements) providing decent work and living conditions on board the vessel as required by this

Convention.

REPATRIATION

Article 21

1. Members shall ensure that fishers on a fishing vessel that flies their flagand that enters a foreign port are entitled to repatriation in the event that thefisher's work agreement has expired or has been terminated for justified reasons by the fisher or by the fishing vessel owner, or the fisher is no longer ableto carry out the duties required under the work agreement or cannot be expected to carry them out in the specific circumstances. This also applies to fishers from that vessel who are transferred for the same reasons from the vessel to the foreign port.

2. The cost of the repatriation referred to in paragraph 1 of this Article shall be borne by the fishing vessel owner, except where the fisher has been found, in accordance with national laws, regulations or other measures, to be in serious default of his or her work agreement obligations.

3. Members shall prescribe, by means of laws, regulations or other measures，the precise circumstances entitling a fisher covered by paragraph 1 of this Article to repatriation, the maximum duration of service periods onboard following which a fisher is entitled to repatriation, and the destinations to which fishers may be repatriated.

4. If a fishing vessel owner fails to provide for the repatriation referred to in this Article，the Member whose flag the vessel flies shall arrange for the repatriation of the fisher concerned and shall be entitled to recover the cost from the fishing vessel owner.

5. National laws and regulations shall not prejudice any right of the fishing vessel owner to recover the cost of repatriation under third party contractual agreements.

RECRUITMENT AND PLACEMENT

Article 22

Recruitment and placement of fishers

1. Each Member that operates a public service providing recruitment and placement for fishers shall ensure that the service forms part of, or is coordinated with, a public employment service for all workers and employers.

2. Any private service providing recruitment and placement for fishers which operates in the territory of a Member shall do so in conformity with a standardized system of licensing or certification or other form of regulation, which shall be established, maintained or modified only after consultation.

3. Each Member shall, by means of laws, regulations or other measures:

(a) prohibit recruitment and placement services from using means, mechanisms or lists intended to prevent or deter fishers from engaging for work;

(b) require that no fees or other charges for recruitment or placement of fishers be borne directly or indirectly, in whole or in part, by the fisher; and

(c) determine the conditions under which any licence, certificate or similar authorization of a private recruitment or placement service may be suspended orwithdrawn in case of violation of relevant laws or regulations; and specify the conditions under which private recruitment and placement services can operate.

Private employment agencies

4. A Member which has ratified the Private Employment Agencies Convention, 1997 (No. 181), may allocate certain responsibilities under this Convention to private employment agencies that provide the services referred to in paragraph 1(b) of Article 1 of that Convention. The respective responsibilities of any such private employment agencies and of the fishing vessel owners, who shall be the "user enterprise" for the purpose of that Convention, shall be determined and allocated, as provided for in Article 12 of that Convention. Such a Member shall adopt laws，regulations or other measures to ensure that no allocation of the respective responsibilities or obligations to the private employ-ment agencies providing the service and to the "user enterprise" pursuant to this Convention shall preclude the fisher from asserting a right to a lien arising against the fishing vessel.

5. Notwithstanding the provisions of paragraph 4, the fishing vessel owner shall be liable in the event that the private employment agency defaults on its obligations to a fisher for whom, in the context of the Private Employment

Agencies Convention, 1997 (No. 181), the fishing vessel owner is the "user enterprise".

6. Nothing in this Convention shall be deemed to impose on a Member the obligation to allow the operation in its fishing sector of private employment agencies as referred to in paragraph 4 of this article.

PAYMENT OF FISHERS

Article 23

Each Member, after consultation, shall adopt laws, regulations or other measures providing that fishers who are paid a wage are ensured a monthly o rother regular payment.

Article 24

Each Member shall require that all fishers working on board fishing vessels shall be given a means to transmit all or part of their payments received, including advances, to their families at no cost.

PART V ACCOMMODATION AND FOOD

Article 25

Each Member shall adopt laws，regulations or other measures for fishing vessels that fly its flag with respect to accommodation, food and potable water on board.

Article 26

Each Member shall adopt laws, regulations or other measures requiring that accommodation on board fishing vessels that fly its flag shall be of sufficient size and quality and appropriately equipped for the service of the vessel and the length of time fishers live on board. In particular，such measures shall address，as appropriate, the following issues:

(a) approval of plans for the construction or modification of fishing vessels in respect of accommodation;

(b) maintenance of accommodation and galley spaces with due regard to hygiene and overall safe, healthy and comfortable conditions;

(c) ventilation, heating, cooling and lighting;

(d) mitigation of excessive noise and vibration;

(e) location, size, construction materials, furnishing and equipping of sleeping rooms, mess rooms and other accommodation spaces;

(f) sanitary facilities, including toilets and washing facilities, and supply of sufficient hot and cold water; and

(g) procedures for responding to complaints concerning accommodation that does not meet the requirements of this Convention.

Article 27

Each Member shall adopt laws, regulations or other measures requiring that:

(a) the food carried and served on board be of a sufficient nutritional value, quality and quantity;

(b) potable water be of sufficient quality and quantity; and

(c) the food and water shall be provided by the fishing vessel owner at no cost to the fisher. However, in accordance with national laws and regulations，the cost can be recovered as an operational cost if the collective agreement governing a share system or a fisher's work agreement so provides.

Article 28

1. The laws, regulations or other measures to be adopted by the Member in accordance with Articles 25 to 27 shall give full effect to Annex 111 concerning fishing vessel accommodation. Annex Ⅲ may be amended in the manner provided for in Article 45.

2. A Member which is not in a position to implement the provisions of Annex Ⅲ may, after consultation, adopt provisions in its laws and regulations or other measures which are substantially equivalent to the provisions set out in Annex III, with the exception of provisions related to Article 27.

PART VI MEDICAL CARE, HEALTH PROTECTION AND SOCIAL SECURITY MEDICAL CARE

Article 29

Each Member shall adopt laws, regulations or other measures requiring that:

(a) fishing vessels carry appropriate medical equipment and medical sup-plies for the service of the vessel，taking into account the number of fishers onboard, the area of operation and the length of the voyage;

(b) fishing vessels have at least one fisher on board who is qualified or trained in first aid and other forms of medical care and who has the necessary knowledge to use the medical equipment and supplies for the vessel concerned, taking into account the number of fishers on board, the area of operation and the length of the voyage;

(c) medical equipment and supplies carried on board be accompanied by instructions or other information in a language and format understood by the fisher or fishers referred to in subparagraph (b);

(d) fishing vessels be equipped for radio or satellite communication with persons or services ashore that can provide medical advice, taking into account tthe area of operation and the length of the voyage; and

(e) fishers have the right to medical treatment ashore and the right to be-taken ashore in a timely manner for treatment in the event of serious injury or illness.

Article 30

For fishing vessels of 24 metres in length and over, taking into account the number of fishers on board, the area of operation and the duration of the voyage, each Member shall adopt laws，regulations or other measures requiring that:

(a) the competent authority prescribe the medical equipment and medical supplies to be carried on board;

(b) the medical equipment and medical supplies carried on board be proper-ly maintained and inspected at regular intervals established by the competent authority by responsible persons designated or approved by the competent authority;

(c) the vessels carry a medical guide adopted or approved by the competent authority, or the latest edition of the International Medical Guide for Ships;

(d) the vessels have access to a prearranged system of medical advice to vessels at sea by radio or satellite communication, including specialist advice, which shall be available at all times;

(e) the vessels carry on board a list of radio or satellite stations through which medical advice can be obtained; and

(f) to the extent consistent with the Member's national law and practice, medical care while the fisher is on board or landed in a foreign port be provided free of charge to the fisher.

OCCUPATIONAL SAFETY AND HEALTHAND ACCIDENT PREVENTION

Article 31

Each Member shall adopt laws, regulations or other measures concerning:

(a) the prevention of occupational accidents，occupational diseases and work-related risks on board fishing vessels，including risk evaluation and management, training and on-board instruction of fishers;

(b) training for fishers in the handling of types of fishing gear they will use and in the knowledge of the fishing operations in which they will be engaged;

(c) the obligations of fishing vessel owners, fishers and others concerned, due account being taken of the safety and health of fishers under the age of 18;

(d) the reporting and investigation of accidents on board fishing vessels flying its flag; and

(e) the setting up of joint committees on occupational safety and health or, after consultation, of other appropriate bodies.

Article 32

1. The requirements of this Article shall apply to fishing vessels of 24 metres in length and over normally remaining at sea for more than three days and, after consultation, to other vessels, taking into account the number of fishers on board, the area of operation, and the duration of the voyage.

2. The competent authority shall:

(a) after consultation, require that the fishing vessel owner, in accordance with national laws, regulations, collective bargaining agreements and practice, establish on-board procedures for the prevention of occupational accidents, injuries and

diseases, taking into account the specific hazards and risks on the fishing vessel concerned; and

(b) require that fishing vessel owners, skippers, fishers and other relevant persons be provided with sufficient and suitable guidance, training material, or other appropriate information on how to evaluate and manage risks to safety and health on board fishing vessels.

3. Fishing vessel owners shall:

(a) ensure that every fisher on board is provided with appropriate personal protective clothing and equipment;

(b) ensure that every fisher on board has received basic safety training approved by the competent authority; the competent authority may grant written exemptions from this requirement for fishers who have demonstrated equivalent knowledge and experience; and

(c) ensure that fishers are sufficiently and reasonably familiarized with equipment and its methods of operation, including relevant safety measures，prior to using the equipment or participating in the operations concerned.

Article 33

Risk evaluation in relation to fishing shall be conducted, as appropriate, with the participation of fishers or their representatives.

SOCIAL SECURITY

Article 34

Each Member shall ensure that fishers ordinarily resident in its territory, and their dependants to the extent provided in national law, are entitled to benefit from social security protection under conditions no less favourable than those applicable to other workers, including employed and self-employed per-sons, ordinarily resident in its territory.

Article 35

Each Member shall undertake to take steps, according to national circumstances, to achieve progressively comprehensive social security protection for all fishers who are ordinarily resident in its territory.

Article 36

Members shall cooperate through bilateral or multilateral agreements or other arrangements, in accordance with national laws, regulations or practice:

(a) to achieve progressively comprehensive social security protection for fishers, taking into account the principle of equality of treatment irrespective of nationality; and

(b) to ensure the maintenance of social security rights which have been acquired or are in the course of acquisition by all fishers regardless of residence.

Article 37

Notwithstanding the attribution of responsibilities in Articles 34, 35 and 36, Members may determine, through bilateral and multilateral agreements and through provisions adopted in the framework of regional economic integration organizations, other rules concerning the social security legislation to which fishers are subject.

PROTECTION IN THE CASE OF WORK-RELATED SICKNESS, INJURY OR DEATH

Article 38

1. Each Member shall take measures to provide fishers with protection, in accordance with national laws，regulations or practice, for work-related sickness, injury or death.

2. In the event of injury due to occupational accident or disease, the fisher shall have access to:

(a)appropriate medical care; and

(b) the corresponding compensation in accordance with national laws and regulations.

3. Taking into account the characteristics within the fishing sector, the protection referred to in paragraph 1 of this Article may be ensured through:

(a) a system for fishing vessel owners' liability; or

(b) compulsory insurance, workers' compensation or other schemes.

Article 39

1. In the absence of national provisions for fishers, each Member shall

adopt laws, regulations or other measures to ensure that fishing vessel ownersare responsible for the provision to fishers on vessels flying its flag, of health protection and medical care while employed or engaged or working on a vessel at sea or in a foreign port. Such laws, regulations or other measures shall en-sure that fishing vessel owners are responsible for defraying the expenses of medical care, including related material assistance and support, during medical treatment in a foreign country, until the fisher has been repatriated.

2. National laws or regulations may permit the exclusion of the liability of the fishing vessel owner if the injury occurred otherwise than in the service of the vessel or the sickness or infirmity was concealed during engagement, or the injury or sickness was due to wilful misconduct of the fisher.

PART VII COMPLIANCE AND ENFORCEMENT

Article 40

Each Member shall effectively exercise its jurisdiction and control over vessels that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention including, as appropriate, inspections, reporting, monitoring, complaint procedures, appropriate penalties and corrective measures, in accordance with national laws or regulations.

Article 41

1. Members shall require that fishing vessels remaining at sea for more than three days, which:

(a) are 24 metres in length and over; or

(b) normally navigate at a distance exceeding 200 nautical miles from the coastline of the flag state or navigate beyond the outer edge of its continental shelf, whichever distance from the coastline is greater, carry a valid document issued by the competent authority stating that the vessel has been inspected by the competent authority or on its behalf, for compliance with the provisions of this Convention concerning living and working conditions.

2. The period of validity of such document may coincide with the period of validity of a national or an international fishing vessel safety certificate, but inno case shall such period of validity exceed five years.

Article 42

1. The competent authority shall appoint a sufficient number of qualified inspectors to fulfil its responsibilities under Article 41.

2. In establishing an effective system for the inspection of living and working conditions on board fishing vessels, a Member, where appropriate, may authorize public institutions or other organizations that it recognizes as competent and independent to carry out inspections and issue documents. In all cases, the Member shall remain fully responsible for the inspection and issuance of the related documents concerning the living and working conditions of the fishers on fishing vessels that fly its flag.

Article 43

1. A Member which receives a complaint or obtains evidence that a fishing vessel that flies its flag does not conform to the requirements of this Convention shall take the steps necessary to investigate the matter and ensure that action is taken to remedy any deficiencies found.

2. If a Member, in whose port a fishing vessel calls in the normal course of its business or for operational reasons, receives a complaint or obtains evidence that such vessel does not conform to the requirements of this Convention, it may prepare a report addressed to the government of the flag state of the vessel, with a copy to the Director-General of the International Labour Office, and may take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health.

3. In taking the measures referred to in paragraph 2 of this Article，the Member shall notify forthwith the nearest representative of the flag state and, if possible, shall have such representative present. The Member shall not unreasonably detain or delay the vessel.

4. For the purpose of this Article, the complaint may be submitted by a fisher, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the vessel，including an interest in safety or health hazards to the fishers on board.

5. This Article does not apply to complaints which a Member considers to be manifestly unfounded.

Article 44

Each Member shall apply this Convention in such a way as to ensure that the fishing vessels flying the flag of any state that has not ratified this Convention do not receive more favourable treatment than fishing vessels that fly the flag of any Member that has ratified it.

PART VIII AMENDMENT OF ANNEXES I, II AND III

Article 45

1. Subject to the relevant provisions of this Convention, the International Labour Conference may amend Annexes I, II and III. The Governing Body of the International Labour Office may place an item on the agenda of the Conference regarding proposals for such amendments established by a tripartite meeting of experts. The decision to adopt the proposals shall require a majority of two-thirds of the votes cast by the delegates present at the Conference, including at least half the Members that have ratified this Convention.

2. Any amendment adopted in accordance with paragraph 1 of this Article shall enter into force six months after the date of its adoption for any Member that has ratified this Convention, unless such Member has given written notice to the Director-General of the International Labour Office that it shall not enter into force for that Member, or shall only enter into force at a later date upon subsequent written notification.

PART IX FINAL PROVISIONS

Article 46

This Convention revises the Minimum Age (Fishermen) Convention, 1959 (No. 112), the Medical Examination (Fishermen) Convention, 1959 (No. 113), the Fishermen's Articles of Agreement Convention, 1959 (No. 114), and the Accommodation of Crews (Fishermen)Convention, 1966 (No. 126).

Article 47

The formal ratifications of this Convention shall be communicated to the

Director-General of the International Labour Office for registration.

Article 48

1. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General of the International Labour Office.

2. It shall come into force 12 months after the date on which the ratifications of ten Members, eight of which are coastal States，have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member 12months after the date on which its ratification is registered.

Article 49

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Lahour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article，will be bound for another period of ten years and, thereafter, may denounce this Convention within the first year of each new period of ten years under the terms provided for in this Article.

Article 50

1. The Director-General of the International Labour Office shall notify all Members of the International Labour organization of the registration of all ratifications, declarations and denunciations that have been communicated by the Members of the organization.

2. When notifying the Members of the organization of the registration of the last of the ratifications required to bring the Convention into force, the Director-General shall draw the attention of the Members of the organization to the date upon which the Convention will come into force.

Article 51

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and denunciations registered by the Director-General.

Article 52

At such times as it may consider necessary, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part, taking into account also the provisions of Article 45.

Article 53

1. Should the Conference adopt a new Convention revising this Convention, then, unless the new Convention otherwise provides:

(a) the ratification by a Member of the new revising Convention shall ipsojure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 49 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 54

The English and French versions of the text of this Convention are equally authoritative.

ANNEX I EQUIVALENCE IN MEASUREMENT

For the purpose of this Convention, where the competent authority, after consultation, decides to use length overall (LOA) rather than length Was the basis of measurement:

(a) a length overall (LOA) of 16.5 metres shall be considered equivalent to a length(L)of 15 metres;

(b) a length overall (LOA) of 26.5 metres shall be considered equivalent toa length (L) of 24 metres;

(c) a length overall(LOA)of 50 metres shall be considered equivalent to a length (L) of 45 metres.

ANNEX II FISHER'S WORK AGREEMENT

The fisher's work agreement shall contain the following particulars, except in so far as the inclusion of one or more of them is rendered unnecessary by the fact that the matter is regulated in another manner by national laws or regulations, or a collective bargaining agreement where applicable:

(a) the fisher's family name and other names，date of birth or age, and birthplace;

(b) the place at which and date on which the agreement was concluded;

(c) the name of the fishing vessel or vessels and the registration number of the vessel or vessels on board which the fisher undertakes to work;

(d) the name of the employer, or fishing vessel owner, or other party to the agreement with the fisher;

(e) the voyage or voyages to be undertaken, if this can be determined at the time of making the agreement；

(f) the capacity in which the fisher is to be employed or engaged;

(g) if possible, the place at which and date on which the fisher is required to report on board for service;

(h) the provisions to be supplied to the fisher，unless some alternative sys-tem is provided for by national law or regulation;

(i) the amount of wages, or the amount of the share and the method of calculating such share if remuneration is to be on a share basis, or the amount of the wage and share and the method of calculating the latter if remuneration is to be on a combined basis，and any agreed minimum wage;

(j) the termination of the agreement and the conditions thereof, namely:

(i) if the agreement has been made for a definite period, the date fixed for its expiry;

(ii) if the agreement has been made for a voyage, the port of destination and

the time which has to expire after arrival before the fisher shall be discharged;

(iii) if the agreement has been made for an indefinite period, the conditions which shall entitle either party to rescind it, as well as the required period of notice for rescission, provided that such period shall not be less for the employer，or fishing vessel owner or other party to the agreement with the fisher;

(k) the protection that will cover the fisher in the event of sickness, injury or death in connection with service;

(1) the amount of paid annual leave or the formula used for calculating leave, where applicable;

(m) the health and social security coverage and benefits to be provided to the fisher by the employer, fishing vessel owner, or other party or parties to the fisher's work agreement, as applicable;

(n) the fisher's entitlement to repatriation;

(o) a reference to the collective bargaining agreement, where applicable;

(p) the minimum periods of rest, in accordance with national laws，regulations or other measures; and

(q) any other particulars which national law or regulation may require.

ANNEX III FISHING VESSEL ACCOMMODATION

General provisions

1. For the purposes of this Annex:

(a) "new fishing vessel" means a vessel for which:

(i) the building or major conversion contract has been placed on or after the date of the entry into force of the Convention for the Member concerned；or

(ii)the building or major conversion contract has been placed before the date of the entry into force of the Convention for the Member concerned, and which is delivered three years or more after that date; or

(iii) in the absence of a building contract, on or after the date of the entry into force of the Convention for the Member concerned:

—the keel is laid, or

—construction identifiable with a specific vessel begins, or

—assembly has commenced comprising at least 50 tonnes or 1 percent of the estimated mass of all structural material，whichever is less;

(b) “existing vessel” means a vessel that is not a new fishing vessel.

2. The following shall apply to all new, decked fishing vessels, subject to any exclusions provided for in accordance with Article 3 of the Convention. The competent authority may, after consultation, also apply the requirements of this Annex to existing vessels，when and in so far as it determines that this is reasonable and practicable.

3. The competent authority, after consultation, may permit variations to the provisions of this Annex for fishing vessels normally remaining at sea for less than 24 hours where the fishers do not live on board the vessel in port. In the case of such vessels，the competent authority shall ensure that the fishers concerned have adequate facilities for resting, eating and sanitation purposes.

4. Any variations made by a Member under paragraph 3 of this Annex shall be reported to the International Labour Office under Article 22 of the Constitution of the International Labour Organisation.

5. The requirements for vessels of 24 metres in length and over may be applied to vessels between 15 and 24 metres in length where the competent authority determines, after consultation, that this is reasonable and practicable.

6. Fishers working on board feeder vessels which do not have appropriate accommodation and sanitary facilities shall be provided with such accommodation and facilities on board the mother vessel.

7. Members may extend the requirements of this Annex regarding noise and vibration, ventilation, heating and air conditioning, and lighting to enclosed working spaces and spaces used for storage if, after consultation, such application is considered appropriate and will not have a negative influence on the function of the process or working conditions or the quality of the catches.

8. The use of gross tonnage as referred to in Article 5 of the Convention is limited to the following specified paragraphs of this Annex: 14, 37, 38, 41, 43, 46, 49, 53, 55, 61, 64, 65 and 67. For these purposes, where the compe-ent authority, after consultation, decides to use gross tonnage (gt) as the basis of measurement:

(a) a gross tonnage of 75 gt shall be considered equivalent to a length (L) of 15 metres or a length overall (LOA) of 16.5 metres;

(b) a gross tonnage of 300 gt shall be considered equivalent to a length (L) of 24 metres or a length overall (LOA) of 26.5 metres;

(c) a gross tonnage of 950 gt shall be considered equivalent to a length (L) of 45 metres or a length overall(LOA)of 50 metres.

Planning and control

9. The competent authority shall satisfy itself that, on every occasion when a vessel is newly constructed or the crew accommodation of a vessel has been reconstructed, such vessel complies with the requirements of this Annex. The competent authority shall, to the extent practicable, require compliance with this Annex when the crew accommodation of a vessel is substantially altered and, for a vessel that changes the flag it flies to the flag of the Member, require compliance with those requirements of this Annex that are applicable in accordance with paragraph 2 of this Annex.

10. For the occasions noted in paragraph 9 of this Annex, for vessels of 24metres in length and over, detailed plans and information concerning accommodation shall be required to be submitted for approval to the competent authority, or an entity authorized by it.

11. For vessels of 24 metres in length and over, on every occasion when the crew accommodation of the fishing vessel has been reconstructed or substantially altered, the competent authority shall inspect the accommodation for compliance with the requirements of the Convention, and when the vessel changes the flag it flies to the flag of the Member, for compliance with those requirements of this Annex that are applicable in accordance with paragraph 2of this Annex. The competent authority may carry out additional inspections ofcrew accommodation at its discretion.

12. When a vessel changes flag, any alternative requirements which the competent authority of the Member whose flag the ship was formerly flying may have adopted in accordance with paragraphs 15，39，47 or 62 of this Annex cease to apply to the vessel.

Design and construction Headroom

13. There shall be adequate headroom in all accommodation spaces. For spaces where fishers are expected to stand for prolonged periods, the minimum headroom shall be prescribed by the competent authority.

14. For vessels of 24 metres in length and over, the minimum permitted headroom in all accommodation where full and free movement is necessary shall not be less than 200 centimeters.

15. Notwithstanding the provisions of paragraph 14，the competent authority may, after consultation, decide that the minimum permitted headroom shall not be less than 190 centimeters in any space—or part of any space—in such

accommodation, where it is satisfied that this is reasonable and will not result in discomfort to the fishers.

Openings into and between accommodation spaces

16. There shall be no direct openings into sleeping rooms from fish rooms and machinery spaces, except for the purpose of emergency escape. Where reasonable and practicable, direct openings from galleys，storerooms, drying rooms or communal sanitary areas shall be avoided unless expressly provided otherwise.

17. For vessels of 24 metres in length and over, there shall be no direct openings, except for the purpose of emergency escape, into sleeping rooms from fish rooms and machinery spaces or from galleys, storerooms, drying rooms or communal sanitary areas；that part of the bulkhead separating such places from sleeping rooms and external bulkheads shall be efficiently constructed of steel or another approved material and shall be watertight and gas-tight. This provision does not exclude the possibility of sanitary areas being shared between two cabins.

Insulation

18. Accommodation spaces shall be adequately insulated；the materials used to construct internal bulkheads, panelling and sheeting, and floors and joinings shall be suitable for the purpose and shall be conducive to ensuring a healthy environment. Sufficient drainage shall be provided in all accommodation spaces.

Other

19. All practicable measures shall be taken to protect fishing vessels' crew accommodation against flies and other insects，particularly when vessels are operating in mosquito-infested areas.

20. Emergency escapes from all crew accommodation spaces shall be provided as necessary.

Noise and vibration

21. The competent authority shall take measures to limit excessive noise and vibration in accommodation spaces and, as far as practicable, in accordance with relevant international standards.

22. For vessels of 24 metres in length and over, the competent authority shall adopt standards for noise and vibration in accommodation spaces which shall ensure adequate protection to fishers from the effects of such noise and vibration, including the effects of noise—and vibration-induced fatigue.

Ventilation

23. Accommodation spaces shall be ventilated，taking into account climatic conditions. The system of ventilation shall supply air in a satisfactory condition whenever fishers are on board.

24. Ventilation arrangements or other measures shall be such as to protect non-smokers from tobacco smoke.

25. Vessels of 24 metres in length and over shall be equipped with a sys-tem of ventilation for accommodation, which shall be controlled so as to maintain the air in a satisfactory condition and to ensure sufficiency of air movement in all weather conditions and climates. Ventilation systems shall be in operation at all times when fishers are on board.

Heating and air conditioning

26. Accommodation spaces shall be adequately heated, taking into account climatic conditions.

27. For vessels of 24 metres in length and over，adequate heat shall be provided，through an appropriate heating system，except in fishing vessels operating exclusively in tropical climates. The system of heating shall provide heat in all conditions, as necessary, and shall be in operation when fishers ar eliving or working on board, and when conditions so require.

28. For vessels of 24 metres in length and over, with the exception of those regularly engaged in areas where temperate climatic conditions do not re-quire it，air conditioning shall be provided in accommodation spaces，the bridge, the radio room and any centralized machinery control room.

Lighting

29. All accommodation spaces shall be provided with adequate light.

30. Wherever practicable, accommodation spaces shall be lit with natural light in addition to artificial light. Where sleeping spaces have natural light, a means of blocking the light shall be provided.

31. Adequate reading light shall be provided for every berth in addition to the normal lighting of the sleeping room.

32. Emergency lighting shall be provided in sleeping rooms.

33. Where a vessel is not fitted with emergency lighting in mess rooms, passageways, and any other spaces that are or may be used for emergency escape, permanent night lighting shall be provided in such spaces.

34. For vessels of 24 metres in length and over, lighting in accommodation spaces shall meet a standard established by the competent authority. In any part of the accommodation space available for free movement, the minimum standard for such lighting shall be such as to permit a person with normal vision to read an ordinary printed newspaper on a clear day.

Sleeping rooms

General

35. Where the design, dimensions or purpose of the vessel allow, the sleeping accommodation shall be located so as to minimize the effects of motion and acceleration but shall in no case be located forward of the collision bulk-head.

Floor area

36. The number of persons per sleeping room and the floor area per person, excluding space occupied by berths and lockers, shall be such as to pro-vide adequate space and comfort for the fishers on board, taking into account the service of the vessel.

37. For vessels of 24 metres in length and over but which are less than 45metres in length，the floor area per person of sleeping rooms, excluding space occupied by berths and lockers, shall not be less than 1.5 square metres.

38. For vessels of 45 metres in length and over, the floor area per person of sleeping rooms，excluding space occupied by berths and lockers, shall not be less than 2 square metres.

39. Notwithstanding the provisions of paragraphs 37 and 38, the competent authority may, after consultation, decide that the minimum permitted floor area per person of sleeping rooms, excluding space occupied by berths and lockers, shall not be less than 1.0 and 1.5 square metres respectively, where the competent authority is satisfied that this is reasonable and will not result in discomfort to the fishers.

Persons per sleeping room

40. To the extent not expressly provided otherwise, the number of persons allowed to occupy each sleeping room shall not be more than six.

41. For vessels of 24 metres in length and over, the number of persons allowed to occupy each sleeping room shall not be more than four. The competent authority may permit exceptions to this requirement in particular cases if the size, type or intended service of the vessel makes the requirement unreasonable or impracticable.

42. To the extent not expressly provided otherwise, a separate sleeping room

or sleeping rooms shall be provided for officers, wherever practicable.

43. For vessels of 24 metres in length and over, sleeping rooms for officers shall be for one person wherever possible and in no case shall the sleeping room contain more than two berths. The competent authority may permit exceptions to the requirements of this paragraph in particular cases if the size, type or intended service of the vessel makes the requirements unreasonable or impracticable.

Other

44. The maximum number of persons to be accommodated in any sleeping room shall be legibly and indelibly marked in a place in the room where it can be conveniently seen.

45. Individual berths of appropriate dimensions shall be provided. Mattresses shall be of a suitable material.

46. For vessels of 24 metres in length and over, the minimum inside dimensions of the berths shall not be less than 198 by 80 centimetres.

47. Notwithstanding the provisions of paragraph 46，the competent authority may, after consultation, decide that the minimum inside dimensions of the berths shall not be less than 190 by 70 centimetres，where it is satisfied that this is reasonable and will not result in discomfort to the fishers.

48. Sleeping rooms shall be so planned and equipped as to ensure reasonable comfort for the occupants and to facilitate tidiness. Equipment provided shall include berths, individual lockers sufficient for clothing and other personal effects，and a suitable writing surface.

49. For vessels of 24 metres in length and over, a desk suitable for writing, with a chair, shall be provided.

50. Sleeping accommodation shall be situated or equipped, as practicable, so as to provide appropriate levels of privacy for men and for women.

Mess rooms

51. Mess rooms shall be as close as possible to the galley, but in no case shall be located forward of the collision bulkhead.

52. Vessels shall be provided with mess-room accommodation suitable fo rtheir service. To the extent not expressly provided otherwise, mess room accommodation shall be separate from sleeping quarters, where practicable.

53. For vessels of 24 metres in length and over, mess room accommodation shall be separate from sleeping quarters.

54. The dimensions and equipment of each mess room shall be sufficient for

the number of persons likely to use it at any one time.

55. For vessels of 24 metres in length and over, a refrigerator of sufficient capacity and facilities for making hot and cold drinks shall be available and accessible to fishers at all times.

Tubs or showers, toilets and washbasins

56. Sanitary facilities, which include toilets, washbasins, and tubs or showers, shall be provided for all persons on board, as appropriate for the service of the vessel. These facilities shall meet at least minimum standards of health and hygiene and reasonable standards of quality.

57. The sanitary accommodation shall be such as to eliminate contamintion of other spaces as far as practicable. The sanitary facilities shall allow for reasonable privacy.

58. Cold fresh water and hot fresh water shall be available to all fishers and other persons on board, in sufficient quantities to allow for proper hygiene. The competent authority may establish, after consultation, the minimum amount of water to be provided.

59. Where sanitary facilities are provided, they shall be fitted with ventilation to the open air, independent of any other part of the accommodation.

60. All surfaces in sanitary accommodation shall be such as to facilitate easy and effective cleaning. Floors shall have a non-slip deck covering.

61. On vessels of 24 metres in length and over, for all fishers who do not occupy rooms to which sanitary facilities are attached, there shall be provided at least one tub or shower or both, one toilet，and one washbasin for every four persons or fewer.

62. Notwithstanding the provisions of paragraph 61, the competent authority may, after consultation, decide that there shall be provided at least one tub or shower or both and one washbasin for every six persons or fewer, and at least one toilet for every eight persons or fewer, where the competent authority is satisfied that this is reasonable and will not result in discomfort to the fishers.

Laundry facilities

63. Amenities for washing and drying clothes shall be provided as necessary, taking into account the service of the vessel, to the extent not expressly provided otherwise.

64. For vessels of 24 metres in length and over, adequate facilities for

washing，drying and ironing clothes shall be provided.

65. For vessels of 45 metres in length and over, adequate facilities for washing, drying and ironing clothes shall be provided in a compartment separate from sleeping rooms，mess rooms and toilets, and shall be adequately ventilated，heated and equipped with lines or other means for drying clothes.

Facilities for sick and injured fishers

66. Whenever necessary, a cabin shall be made available for a fisher who suffers illness or injury.

67. For vessels of 45 metres in length and over, there shall be a separate sick bay. The space shall be properly equipped and shall be maintained in a hygienic state.

Other facilities

68. A place for hanging foul-weather gear and other personal protective equipment shall be provided outside of, but convenient to, sleeping rooms.

Bedding, mess utensils and miscellaneous provisions

69. Appropriate eating utensils，and bedding and other linen shall be provided to all fishers on board. However, the cost of the linen can be recovered as an operational cost if the collective agreement or the fisher's work agreement so provides.

Recreational facilities

70. For vessels of 24 metres in length and over, appropriate recreational facilities，amenities and services shall be provided for all fishers on board. Where appropriate，mess rooms may be used for recreational activities.

Communication facilities

71. All fishers on board shall be given reasonable access to communication facilities，to the extent practicable，at a reasonable cost and not exceeding the full cost to the fishing vessel owner.

Galley and food storage facilities

72. Cooking equipment shall be provided on board. To the extent not expressly provided otherwise, this equipment shall be fitted, where practicable，in a separate

galley.

73. The galley, or cooking area where a separate galley is not provided, shall be of adequate size for the purpose, well lit and ventilated, and properly equipped and maintained.

74. For vessels of 24 metres in length and over, there shall be a separate galley.

75. The containers of butane or propane gas used for cooking purposes in agalley shall be kept on the open deck and in a shelter which is designed to protect them from external heat sources and external impact.

76. A suitable place for provisions of adequate capacity shall be provided which can be kept dry, cool and well ventilated in order to avoid deterioration of the stores and, to the extent not expressly provided otherwise, refrigerators or other low-temperature storage shall be used, where possible.

77. For vessels of 24 metres in length and over, a provisions storeroom and refrigerator and other low-temperature storage shall be used.

Food and potable water

78. Food and potable water shall be sufficient, having regard to the number of fishers, and the duration and nature of the voyage. In addition, they shall be suitable in respect of nutritional value, quality, quantity and variety, having regard as well to the fishers' religious requirements and cultural practices in relation to food.

79. The competent authority may establish requirements for the minimum standards and quantity of food and water to be carried on board.

Clean and habitable conditions

80. Accommodation shall be maintained in a clean and habitable condition and shall be kept free of goods and stores which are not the personal property of the occupants or for their safety or rescue.

81. Galley and food storage facilities shall be maintained in a hygienic condition.

82. Waste shall be kept in closed, well-sealed containers and removed fromfood-handling areas whenever necessary.

Inspections by the skipper or under the authority of the skipper

83. For vessels of 24 metres in length and over, the competent authority shall require frequent inspections to be carried out, by or under the authority of the skipper, to ensure that:

(a) accommodation is clean, decently habitable and safe, and is maintained in a good state of repair;

(b)food and water supplies are sufficient; and

(c) galley and food storage spaces and equipment are hygienic and in a proper state of repair. The results of such inspections，and the actions taken to address any deficiencies found, shall be recorded and available for review.

Variations

84. The competent authority, after consultation, may permit derogations from the provisions in this Annex to take into account，without discrimination, the interests of fishers having differing and distinctive religious and social practices，on condition that such derogations do not result in overall conditions less favourable than those which would result from the application of this Annex.

中华人民共和国防治海岸工程建设项目污染损害海洋环境管理条例

（根据中华人民共和国国务院第 507 号令修改，自 2008 年 1 月 1 日起施行）

第一条 为加强海岸工程建设项目的环境保护管理，严格控制新的污染，保护和改善海洋环境，根据《中华人民共和国海洋环境保护法》，制定本条例。

第二条 本条例所称海岸工程建设项目，是指位于海岸或者与海岸连接，工程主体位于海岸线向陆一侧，对海洋环境产生影响的新建、改建、扩建工程项目。具体包括：

（一）港口、码头、航道、滨海机场工程项目；

（二）造船厂、修船厂；

（三）滨海火电站、核电站、风电站；

（四）滨海物资存储设施工程项目；

（五）滨海矿山、化工、轻工、冶金等工业工程项目；

（六）固体废弃物、污水等污染物处理处置排海工程项目；

（七）滨海大型养殖场；

（八）海岸防护工程、砂石场和入海河口处的水利设施；

（九）滨海石油勘探开发工程项目；

（十）国务院环境保护主管部门会同国家海洋主管部门规定的其他海岸工程项目。

第三条 本条例适用于在中华人民共和国境内兴建海岸工程建设项目的一切单位和个人。

拆船厂建设项目的环境保护管理，依照《防止拆船污染环境管理条例》执行。

第四条 建设海岸工程建设项目，应当符合所在经济区的区域环境保护规划的要求。

第五条 国务院环境保护主管部门，主管全国海岸工程建设项目的环境保护工作。

沿海县级以上地方人民政府环境保护主管部门，主管本行政区域内的海岸工程建设项目的环境保护工作。

第六条 新建、改建、扩建海岸工程建设项目，应当遵守国家有关建设项目环境保护管理的规定。

第七条 海岸工程建设项目的建设单位，应当在可行性研究阶段，编制环境影响报告书（表），按照环境保护法律法规的规定，经有关部门预审后，报环境保护主管部门审批。

环境保护主管部门在批准海岸工程建设项目的环境影响报告书之前，应当征求海事、渔业主管部门和军队环境保护部门的意见。

禁止在天然港湾有航运价值的区域、重要苗种基地和养殖场所及水面、滩涂中的鱼、虾、蟹、贝、藻类的自然产卵场、繁殖场、索饵场及重要的洄游通道围海造地。

第八条 海岸工程建设项目环境影响报告书的内容，除按有关规定编制外，还应当包括：

（一）所在地及其附近海域的环境状况；

（二）建设过程中和建成后可能对海洋环境造成的影响；

（三）海洋环境保护措施及其技术、经济可行性论证结论；

（四）建设项目海洋环境影响评价结论。

海岸工程建设项目环境影响报告表，应当参照前款规定填报。

第九条 禁止兴建向中华人民共和国海域及海岸转嫁污染的中外合资经营企业、中外合作经营企业和外资企业；海岸工程建设项目引进技术和设备，应当有相应的防治污染措施，防止转嫁污染。

第十条 在海洋特别保护区、海上自然保护区、海滨风景游览区、盐场保护区、海水浴场、重要渔业水域和其他需要特殊保护的区域内不得建设污染环境、破坏景观的海岸工程建设项目；在其区域外建设海岸工程建设项目的，不得损害上述区域的环境质量。法律法规另有规定的除外。

第十一条 承担海岸工程建设项目环境影响评价的单位，应当依法取得《建设项目环境影响评价资质证书》，按照证书中规定的范围承担评价任务。

第十二条 海岸工程建设项目竣工验收时，建设项目的环境保护设施，应当经环境保护主管部门验收合格后，该建设项目方可正式投入生产或者使用。

第十三条 县级以上人民政府环境保护主管部门，按照项目管理权限，可以会同有关部门对海岸工程建设项目进行现场检查，被检查者应当如实反映情况、提供资料。检查者有责任为被检查者保守技术秘密和业务秘密。法律法规另有规定的除外。

第十四条 设置向海域排放废水设施的，应当合理利用海水自净能力，选择好排污口的位置。采用暗沟或者管道方式排放的，出水管口位置应当在低潮线以下。

第十五条 建设港口、码头，应当设置与其吞吐能力和货物种类相适应的防污设施。

港口、油码头、化学危险品码头，应当配备海上重大污染损害事故应急设备

和器材。

现有港口、码头未达到前两款规定要求的，由环境保护主管部门会同港口、码头主管部门责令其限期设置或者配备。

第十六条 建设岸边造船厂、修船厂，应当设置与其性质、规模相适应的残油、废油接收处理设施，含油废水接收处理设施，拦油、收油、消油设施，工业废水接收处理设施，工业和船舶垃圾接收处理设施等。

第十七条 建设滨海核电站和其他核设施，应当严格遵守国家有关核环境保护和放射防护的规定及标准。

第十八条 建设岸边油库，应当设置含油废水接收处理设施，库场地面冲刷废水的集接、处理设施和事故应急设施;输油管线和储油设施应当符合国家关于防渗漏、防腐蚀的规定。

第十九条 建设滨海矿山，在开采、选矿、运输、贮存、冶炼和尾矿处理等过程中，应当按照有关规定采取防止污染损害海洋环境的措施。

第二十条 建设滨海垃圾场或者工业废渣填埋场，应当建造防护堤坝和场底封闭层，设置渗液收集、导出、处理系统和可燃性气体防爆装置。

第二十一条 修筑海岸防护工程，在入海河口处兴建水利设施、航道或者综合整治工程，应当采取措施，不得损害生态环境及水产资源。

第二十二条 兴建海岸工程建设项目，不得改变、破坏国家和地方重点保护的野生动植物的生存环境。不得兴建可能导致重点保护的野生动植物生存环境污染和破坏的海岸工程建设项目;确需兴建的，应当征得野生动植物行政主管部门同意，并由建设单位负责组织采取易地繁育等措施，保证物种延续。

在鱼、虾、蟹、贝类的洄游通道建闸、筑坝，对渔业资源有严重影响的，建设单位应当建造过鱼设施或者采取其他补救措施。

第二十三条 集体所有制单位或者个人在全民所有的水域、海涂，建设构不成基本建设项目的养殖工程的，应当在县级以上地方人民政府规划的区域内进行。

集体所有制单位或者个人零星经营性采挖砂石，应当在县级以上地方人民政府指定的区域内采挖。

第二十四条 禁止在红树林和珊瑚礁生长的地区，建设毁坏红树林和珊瑚礁生态系统的海岸工程建设项目。

第二十五条 兴建海岸工程建设项目，应当防止导致海岸非正常侵蚀。

禁止在海岸保护设施管理部门规定的海岸保护设施的保护范围内从事爆破、采挖砂石、取土等危害海岸保护设施安全的活动。非经国务院授权的有关主管部门批准，不得占用或者拆除海岸保护设施。

第二十六条 未持有经审核和批准的环境影响报告书(表)，兴建海岸工程建设项目的，依照《中华人民共和国海洋环境保护法》第八十条的规定予以处罚。

第二十七条 拒绝、阻挠环境保护主管部门进行现场检查，或者在被检查时

弄虚作假的，由县级以上人民政府环境保护主管部门依照《中华人民共和国海洋环境保护法》第七十五条的规定予以处罚。

第二十八条 海岸工程建设项目的环境保护设施未建成或者未达到规定要求，该项目即投入生产、使用的，依照《中华人民共和国海洋环境保护法》第八十一条的规定予以处罚。

第二十九条 环境保护主管部门工作人员滥用职权、玩忽职守、徇私舞弊的，由其所在单位或者上级主管机关给予行政处分；构成犯罪的，依法追究刑事责任。

第三十条 本条例自 1990 年 8 月 1 日起施行。

公安机关海上执法工作规定

（2007 年 5 月 30 日公安部部长办公会议通过，自 2007 年 12 月 1 日起施行）

第一章 总则

第一条 为加强和规范公安机关海上执法工作，维护国家安全和海域治安秩序，保护公共财产和公民人身财产安全，根据《中华人民共和国人民警察法》《中华人民共和国治安管理处罚法》《中华人民共和国刑事诉讼法》《中华人民共和国领海及毗连区法》和《中华人民共和国专属经济区和大陆架法》等有关法律，制定本规定。

第二条 公安机关海上执法任务，由公安边防海警承担，公安机关其他部门配合，但法律、法规另有规定的除外。

第三条 本规定所称公安边防海警，是指沿海公安边防总队及其所属的海警支队、海警大队。

沿海公安边防总队、海警支队和海警大队办理海上治安案件和刑事案件，分别行使地（市）级人民政府公安机关、县级人民政府公安机关和公安派出所相应的职权。

第四条 对发生在我国内水、领海、毗连区、专属经济区和大陆架违反公安行政管理法律、法规、规章的违法行为或者涉嫌犯罪的行为，由公安边防海警根据我国相关法律、法规、规章，行使管辖权。

第五条 公安边防海警在开展海上执法工作中，应当加强与外交、海军、海关、渔政、海事、海监等相关部门的协作和配合。

第二章 职责权限

第六条 公安边防海警依法履行下列职责：

（一）预防、制止、侦查海上违法犯罪活动，维护国家安全和海域治安秩序；

（二）负责海上重要目标的安全警卫；

（三）参与海上抢险救难，保护公共财产和公民人身财产安全；

（四）依照规定开展海上执法合作；

（五）法律、行政法规及公安部依法赋予的其他职责。

第七条 公安边防海警履行前条规定的职责时，可以依法行使下列职权：

（一）对海上发生的违反公安行政管理法律、法规、规章的治安案件进行调查处理；

（二）对海上发生且属于公安机关管辖的刑事案件进行侦查；

（三）对违反公安行政管理法律、法规或者涉嫌犯罪的人员，以及与违法犯罪行为有关的工具或者物品，采取登临、检查、执行逮捕、扣留等措施；

（四）为防止和惩处在我国陆地领土、内水、领海内从事危害安全、走私、偷越国（边）境等违法犯罪行为，在毗连区内实施管制；

（五）对违反公安行政管理法律、法规或者涉嫌犯罪的外国船舶实施紧追；

（六）法律、法规规定由公安机关行使的其他职权。

第八条 对有违法犯罪嫌疑的人员，公安边防海警可以依照《中华人民共和国人民警察法》和《公安机关适用继续盘问规定》，行使当场盘问、检查权和继续盘问权。

海警支队经报请公安边防总队批准，可以在符合条件的海警大队设置候问室。

第九条 为及时有效地制止违法犯罪行为，公安边防海警可以依照《中华人民共和国人民警察使用警械和武器条例》的规定，使用警械和武器。

第三章 管辖分工

第十条 沿海公安边防总队的管辖海域由公安部边防管理局划定。海警支队的管辖海域由公安边防总队划定，报公安部边防管理局和所在地省、自治区、直辖市公安厅、局备案，并通报海军、海关、渔政、海事、海监等相关部门。

沿海地区水上公安机关、港航公安机关管辖区域不变。

第十一条 在划定管辖海域时，应当充分考虑执法办案工作的需要，可以不受行政区划海域划分的限制。

第十二条 海上发生的一般治安案件，由违法行为发生海域海警大队管辖；重大、复杂、涉外的治安案件，由违法行为发生海域海警支队管辖；海上发生的刑事案件，由犯罪行为发生海域海警支队管辖。

同一省、自治区、直辖市内跨海警支队管辖海域的治安案件和刑事案件，由违法犯罪行为发生海域海警支队协商确定管辖；协商不一致的，由公安边防总队指定管辖。

跨省、自治区、直辖市管辖海域的治安案件和刑事案件，由违法犯罪行为发生海域公安边防总队协商确定管辖；协商不一致的，由公安部边防管理局指定管辖。

如果由违法犯罪嫌疑人居住地或者主要违法犯罪行为发生地公安机关管辖

更为适宜的，可以由违法犯罪嫌疑人居住地或者主要违法犯罪行为发生地的公安机关管辖；对管辖有争议或者情况特殊的治安案件和刑事案件，由地（市）级、省级公安机关或者公安部指定管辖。

对需要移交违法犯罪嫌疑人居住地或者主要违法犯罪行为发生地公安机关管辖的案件，公安边防海警应当将违法犯罪嫌疑人，连同查获的涉案货物、物品、运输工具以及案件卷宗一并移交。

第四章　案件办理

第十三条　公安边防海警执法办案，应当以自己的名义作出决定和制作法律文书，所需法律文书由公安边防总队按照公安部规定的格式统一印制。

第十四条　公安边防海警执法办案，应当在所在地省、自治区、直辖市公安厅、局的领导下进行，接受所在地人民政府公安机关的统一协调，并与所在地人民政府公安机关及其业务部门互相配合、加强协作。

地方人民政府公安机关及其业务部门应当积极配合公安边防海警执法办案，并对其在执法办案中的援助请求予以支持。

公安边防海警与地方人民政府公安机关及其业务部门在案件管辖、办案协作中出现分歧时，由地（市）级、省级公安机关或者公安部协调解决。

第十五条　公安边防海警办理治安案件或者刑事案件，对依法决定行政拘留的违法行为人或者决定刑事拘留、批准逮捕的犯罪嫌疑人，分别送所在地县、市、区拘留所或者看守所执行。

公安边防海警依法决定取保候审、监视居住的，由犯罪嫌疑人居住地或者指定居所地公安派出所执行。

第十六条　公安边防海警在办理刑事案件中，需要提请批准逮捕或者移送审查起诉的，应当向所在地人民检察院提请或者移送。

第十七条　公安边防海警查获涉嫌涉税走私违法犯罪案件的，应当将涉案违法犯罪嫌疑人，连同查获的走私货物、物品和走私运输工具，一并移送所在地海关缉私部门依法处理。

第十八条　公民、法人或者其他组织对海警大队作出的具体行政行为不服依法申请行政复议的，由该海警大队隶属的海警支队依法办理。

公民、法人或者其他组织对海警支队作出的具体行政行为不服依法申请行政复议的，由该海警支队隶属的公安边防总队依法办理。

公民、法人或者其他组织对公安边防总队作出的具体行政行为不服依法申请行政复议的，由公安部边防管理局依法办理。

第十九条　公民、法人或者其他组织认为公安边防海警作出的具体行政行为

侵犯其合法权益提起行政诉讼的，由作出决定的公安边防海警依法出庭应诉。

第二十条 公民、法人或者其他组织认为公安边防海警违法行使职权侵犯其合法权益造成损害申请国家赔偿的，由作出决定的公安边防海警依法办理。

第二十一条 公安边防海警管辖的案件应当由具有执法资格的警官承担，士兵可以协助执行任务，但不得从事讯问、询问、调查等执法办案活动。

第二十二条 公安边防海警应当建立健全内部执法监督、执法质量考核评议和执法过错责任追究等制度，并接受警务督察部门的现场督察和检察机关的法律监督。

公安边防海警及其工作人员违反法律、法规、规章和本规定执法办案的，应当依法追究直接责任人员的执法过错责任；构成犯罪的，应当依法追究刑事责任。

第五章 附则

第二十三条 本规定未明确事项，分别依据《公安机关办理行政案件程序规定》《公安机关办理刑事案件程序规定》《公安机关办理行政复议案件程序规定》等规定执行。

第二十四条 本规定自 2007 年 12 月 1 日起施行。本规定发布前公安部制定的有关规定与本规定不一致的，以本规定为准。

中华人民共和国港口设施保安规则

（2007 年 11 月 30 日经第 12 次交通部部务会议通过，自 2008 年 3 月 1 日起施行）

第一章 总则

第一条 为加强港口设施保安工作，根据经修订的《1974 年国际海上人命安全公约》（以下简称 SOLAS 公约）、《国际船舶和港口设施保安规则》（以下简称 ISPS 规则）和《国际海运危险品规则》，制定本规则。

第二条 为航行国际航线的客船、500 总吨及以上的货船、500 总吨及以上的特种用途船和移动式海上钻井平台服务的港口设施保安工作，适用本规则。

第三条 本规则下列用语的含义是：

（一）船港界面活动，是指船舶与港口之间人员往来、货物装卸或者接受其他港口服务时发生的交互活动；

（二）港口设施，是指在港口发生船港界面活动的场所，包括码头及其相应设施和航道、锚地等港口公用基础设施；

（三）船到船活动，是指从一船向另一船转移物品或者人员的行为；

（四）保安事件，是指威胁船舶、港口设施、船港界面活动和船到船活动安全的任何可疑行为或者情况；

（五）保安等级，是指可能发生保安事件的风险级别划分；

（六）港口设施保安评估，是指港口所在地港口行政管理部门通过对港口设施保安状况进行分析并提出相关保安措施建议的活动；

（七）港口设施保安计划，是指港口设施经营人或者管理人根据保安评估报告为确保采取旨在保护港口设施和港口设施内的船舶、人员、货物、货物运输单元和船上物料免受保安事件威胁的措施而制订的计划；

（八）港口设施保安主管，又称港口设施保安员，是指被港口设施经营人或者管理人指定负责制定、实施、调整《港口设施保安计划》，并与船舶保安员和船公司保安员进行保安联络的人员；

（九）保安声明，是指发生船港界面活动时，港口设施与船舶为协调各自采取的保安措施签署的书面协议（式样见附件 1）；

（十）经指定的保安组织，是指具备相关能力，经交通部指定可以受委托从事港口设施保安评估、编写《港口设施保安评估报告》、制订《港口设施保安计划》、

提供港口设施保安咨询服务的组织；

（十一）替代保安协议，是指我国政府与其他 SOLAS 公约缔约国政府就相互间固定短程航线上的港口设施签署的双边或者多边保安协议；

（十二）港口设施保安训练，是指对经批准的《港口设施保安计划》规定内容的部分或者全部保安措施和应急反应程序进行的练习；

（十三）港口设施保安演习，是指为了验证、评价和提高各级保安组织、相关部门、港口设施及人员的综合反应和协调配合能力，通过模拟保安事件，根据经批准的《港口设施保安计划》进行的多单位参与、协同进行的练习；

（十四）港口设施管理人，是指航道、锚地等港口公用基础设施的管理主体。

第四条 交通部主管全国港口设施保安工作，履行下列职责：

（一）制定并发布全国港口设施保安工作制度和技术标准；

（二）确定并发布港口设施保安等级和各保安等级的基本保安措施（内容见附件 2）及 3 级保安状态下的保安指令；

（三）审查《港口设施保安评估报告》，提出修改意见和建议；

（四）批准《港口设施保安计划》；

（五）建立全国港口设施保安管理信息系统，收集、整理、分析港口设施保安信息并按规定向相关单位提供，视情向国际海事组织、相关缔约国政府以及国内其他相关部门通报；

（六）颁发《港口设施保安符合证书》（式样见附件 3），监督和检查《港口设施保安符合证书》年度核验工作；

（七）签署替代保安协议；

（八）指定可以受委托从事港口设施保安评估、编写《港口设施保安评估报告》、制订《港口设施保安计划》、提供港口设施保安咨询服务的组织；

（九）组织全国性的港口设施保安演习。

第五条 省级交通（港口）管理部门负责本行政区域内的港口设施保安工作，具体履行下列职责：

（一）负责“港口设施保安符合证书”年度核验工作；

（二）收集、整理、分析并向相关单位提供港口设施保安信息；

（三）组织区域性港口设施保安演习。

第六条 港口所在地港口行政管理部门履行下列职责：

（一）负责组织港口设施保安评估和评估报告的后续修订；

（二）监督检查《港口设施保安计划》的实施；

（三）收集、整理、分析并向有关单位提供港口设施保安信息；

（四）组织本港港口设施保安演习；

（五）对其管理的港口公用基础设施进行保安评估，编写《港口设施保安评估报告》；

（六）受交通部委托，对申请“港口设施保安符合证书”的港口设施实施经批准的《港口设施保安计划》情况进行检查并提交检查报告；

（七）受省级交通（港口）管理部门委托，对申请“港口设施保安符合证书”年度核验的港口设施上一年度的保安工作进行核查并提交核查报告；

（八）监督检查港口设施保安费的征收和使用。

第七条 港口设施经营人或者管理人履行下列职责：

（一）负责制订《港口设施保安计划》和已批准计划的后续修订；

（二）实施经批准的《港口设施保安计划》；

（三）为港口设施保安主管履行职责提供必要的条件；

（四）在 3 级保安状态下，实施交通部发出的保安指令；

（五）收集、整理、分析并向有关部门提供港口设施保安信息；

（六）进行港口设施保安训练，参加港口设施保安演习。

港口设施经营人按照规定收取港口设施保安费。

第八条 港口设施保安是港口安全管理的重要内容，应当与港口生产经营统筹考虑，遵循节约、环保、资源共享的原则。

第九条 港口设施的保安评估和保安计划的制订及实施的有关费用由港口设施保安费支出。

第二章 保安等级

第十条 交通部应当根据相关情报信息，国内外形势以及影响社会政治稳定的因素，威胁信息的可信程度、威胁信息得到印证的程度、威胁信息的具体或者紧迫程度和保安事件的潜在后果，确定港口设施的保安等级。

地方各级交通（港口）管理部门可以向交通部提出变更港口设施保安等级的建议。

第十一条 港口设施的保安等级从低到高分为三级，分别是保安等级 1、保安等级 2 和保安等级 3。

保安等级 1 是指应当始终保持的最低防范性保安措施的等级。

保安等级 2 是指由于保安事件危险性升高而应在一段时间内保持适当的附加保护性保安措施的等级。

保安等级 3 是指当保安事件可能或者即将发生（尽管可能尚无法确定具体目标）时应当在一段有限时间内保持进一步的特殊保护性保安措施的等级。

第十二条 交通部确定港口设施保安等级为 2 级或者 3 级的依据消失时，应当及时调整港口设施的保安等级。

交通部确定实施 3 级保安时，在必要的情况下应当发出适当的保安指令，并

向可能受到影响的港口设施提供与保安有关的信息。

第十三条 港口设施经营人或者管理人应当根据保安等级的变化，按照经批准的《港口设施保安计划》及时调整保安措施。

在3级保安状态下，港口设施的经营人或者管理人应当执行交通部发出的保安指令，省、自治区交通（港口）管理部门和港口所在地港口行政管理部门应当监督保安指令的执行。

第十四条 交通部变更港口设施保安等级，应当根据具体情况及时以适当的方式通知有关的交通（港口）管理部门、海事管理机构、港口设施经营人或者管理人。

第十五条 各级交通（港口）管理部门、海事管理机构、港口设施经营人或者管理人收到港口设施保安等级变更的决定后，应当予以确认，并报告所采取的相应措施。

第十六条 计划入港或者在港的船舶保安等级高于港口设施的保安等级时，港口设施保安主管应当与船舶保安员或者船公司保安员协商，对有关情况作出评估，确定适当的保安措施，签署《保安声明》；计划入港或者在港的船舶保安等级不得低于该港口设施保安等级。

第十七条 港口设施经营人或者管理人应当将港口设施保安等级变更过程中的有关情况予以记录，作为进行港口设施保安评估、编写《港口设施保安评估报告》、制（修）订《港口设施保安计划》、实施经批准的《港口设施保安计划》的参考依据。

第三章 保安评估

第十八条 港口所在地港口行政管理部门负责港口设施保安评估，也可以委托经指定的保安组织进行保安评估。

第十九条 港口设施保安评估应当符合交通部制定的港口设施保安评估规范。

港口设施保安评估应当进行现场保安检验。现场保安检验包括检查和评估港口的现有保安措施、程序和操作。

第二十条 对港口设施进行保安评估应当评估下列事项：

（一）设施的保安状况；

（二）设施的结构、布局情况；

（三）对人员进行保护的安全体系；

（四）保安工作程序；

（五）无线电和电信系统，包括计算机系统和网络；

（六）如被损害或者被用于非法窥测，会对人员、财产或者港口作业构成危险的其他区域。

第二十一条 港口设施保安评估应当进行以下工作：

（一）确定和评估重点保护的财产和基础设施；

（二）对可能威胁财产和基础设施的因素及其发生的可能性进行识别，并确定相应的保安要求；

（三）根据可能威胁财产和基础设施的因素及其发生可能性的识别结果，以及相应的保安要求，对采取的保安措施进行鉴别、选择和优化；

（四）分析港口设施和人员的安全保护体系、运营流程等，确定其中可能导致保安事件的薄弱环节，提出消除薄弱环节或者降低薄弱环节影响的措施。

第二十二条 港口设施保安评估完成后应当编写评估报告。

《港口设施保安评估报告》应当结合港口设施实际情况，全面反映评估的开展情况，内容主要包括：

（一）港口设施的基本情况，包括设施种类、位置、经营人、所有人等情况；

（二）港口设施的保安现状调查及分析；

（三）保安事件预测及风险控制评估；

（四）风险评估方法及应用；

（五）可能导致保安事件的薄弱环节及说明；

（六）消除薄弱环节或者降低薄弱环节影响的措施建议；

（七）评估结论。

第二十三条 《港口设施保安评估报告》完成后应当送交通部征求意见。

第二十四条 交通部应当在收到材料后二十个工作日内对《港口设施保安评估报告》提出修改意见和建议。

交通部可以根据需要，建立全国港口设施保安专家库，组织专家开展本条第一款规定的工作。

参加上述工作的人员应当由保安、风险分析、港口行政管理、港口经营、港口设计与工程、船舶经营与管理和海事方面的专家组成。

第二十五条 港口设施的保安评估每五年进行一次。

港口设施发生重大变化时，应当重新进行保安评估。重新进行保安评估及相关程序按照本章规定办理。

前款所称重大变化包括港口主要设施或者其功能发生重大变化，港口设施保安组织、通信系统、保安工作的协调与配合程序发生重大改变，港口设施发生了重大保安事件等。

第二十六条 如果同一经营人所经营的多个港口设施位置、运营方式、设备和设计相类似，可以共同评估并制作一份《港口设施保安评估报告》。

第二十七条 《港口设施保安评估报告》应当保密，港口设施和承担港口设施

保安评估的机构应当制定并落实防止擅自接触、泄露的措施。

第四章　保安计划

第二十八条　港口设施经营人或者管理人负责制订《港口设施保安计划》，也可以委托经指定的保安组织制订。

制订《港口设施保安计划》应当根据《港口设施保安评估报告》、交通部提出的修改意见和建议进行。

第二十九条　《港口设施保安计划》应当包含下列内容：

（一）港口设施经营人或者管理人所确定的负责实施《港口设施保安计划》的机构或者部门；

（二）负责实施《港口设施保安计划》的组织与其他有关单位的联系和必要的通信系统；

（三）港口设施保安主管及二十四小时联系方式；

（四）1 级保安状态下的保安措施和保安等级提高时的全部附加措施和特殊的保安措施；

（五）根据经验和实际情况对《港口设施保安计划》进行经常性评价，并不断完善的安排；

（六）《港口设施保安计划》保密措施；

（七）向交通（港口）管理部门报告的程序；

（八）港口设施内部报告保安事件的程序；

（九）便利船上人员登岸或者人员变动以及来访者上船的程序和措施；十）对保安状况受到的威胁或者破坏作出反应的程序，包括维护港口设施或者船港界面的关键操作的规定；

（十一）对交通部在 3 级保安状态下发出的保安指令的反应程序；

（十二）在保安状况受到威胁或者破坏的情况下撤离人员的程序；

（十三）负有保安责任的港口设施人员和设施内参与保安事务的其他人员的职责；

（十四）与船舶保安活动进行配合的程序，特别是港口设施的保安等级低于船舶的保安等级时港口设施应当采取的程序和保安措施；

（十五）港口设施内船舶的保安报警系统被启动后作出反应的程序；

（十六）针对与曾靠泊过非缔约国港口的船舶、不适用 ISPS 规则的船舶以及固定（浮动）平台或者移动式海上钻井平台进行船港界面活动的程序和保安措施。

第三十条　对港口设施重新进行保安评估时，港口设施经营人或者管理人应当按照本规则规定重新制订《港口设施保安计划》。

当港口设施发生本规则第二十五条以外的情况变化时，港口设施经营人或者管理人可以对《港口设施保安计划》进行必要的调整，但交通部声明未经其同意不得改变的内容除外。

第三十一条 《港口设施保安计划》完成后应当报交通部审查批准。

第三十二条 交通部应当在受理后二十个工作日内对《港口设施保安计划》审查完毕，必要时可以组织对港口设施的现场检查。

第三十三条 《港口设施保安计划》应当保密。港口设施经营人或者管理人、审查批准计划的机构应当制定并落实防止擅自接触、泄露的措施。未经交通部同意，任何人不得泄露其内容。

在下列条件下，执法人员可以查看《港口设施保安计划》：

（一）各级港口行政管理部门进行港口设施保安现场检查时；

（二）“港口设施保安符合证书”年度核验过程中需要对《港口设施保安计划》内容实施情况进行核实时。

第三十四条 港口设施经营人或者管理人应当全面落实批准后的《港口设施保安计划》，包括配备必要的保安人员，安装使用保安设备设施，制定并执行各项保安制度、措施和程序。

第三十五条 港口设施经营人或者管理人应当按照交通部规定的保安标准配备保安、交通、通信装备，按照规定设置港口设施内的标志。

第三十六条 新建或者改扩建的港口设施的保安设备设施应当与港口设施主体工程同时设计、同时建设、同时验收、同时投入使用。

第三十七条 港口设施经营人或者管理人在执行保安措施时，应当最大限度地减少对乘客、船舶、船上人员和来访者、货物以及相关服务的干扰或者延误。

第三十八条 各级交通（港口）管理部门应当对港口设施经营人或者管理人在执行《港口设施保安计划》过程中涉及海事、海关、公安（边防）、检验检疫等部门的相关事宜给予必要的协调。

第三十九条 非经常性地为国际航行船舶提供服务的港口设施和处于试生产阶段的港口设施，经港口所在地港口行政管理部门同意，可以不制订《港口设施保安计划》，但应当采取适当的保安措施来达到保安要求。

港口所在地港口行政管理部门应当对港口设施采取的保安措施是否适当进行现场监管。

第五章 港口设施保安符合证书

第四十条 《港口设施保安计划》实施后，港口设施经营人或者管理人应当向交通部申请《港口设施保安符合证书》，并将申请书抄送港口所在地交通（港口）

管理部门。

第四十一条 交通部受理申请后应当委托港口所在地港口行政管理部门对《港口设施保安计划》落实情况进行检查并提出检查意见，必要时也可以组织直接检查。对检查合格的，交通部颁发“港口设施保安符合证书”。对检查不合格的，不予颁发证书，并说明理由。

“港口设施保安符合证书”应当自受理之日起二十个工作日内完成颁发工作。二十个工作日内不能作出决定的，经本机关负责人批准，可以延长十个工作日，并应将延长期限的理由告知申请人。

“港口设施保安符合证书”由交通部指定的负责人签发，并在签发后通知相关交通（港口）管理部门。

第四十二条 “港口设施保安符合证书”的有效期为五年。在有效期内每年由省级交通（港口）管理部门核验一次。

“港口设施保安符合证书”年度核验期限为签发之日起每周年的前三个月和后三个月。

第四十三条 港口设施经营人或者管理人应当于“港口设施保安符合证书”签发之日起每周年的前三个月内，向省级交通（港口）管理部门提出年度核验申请，并提交如下材料：

（一）“港口设施保安符合证书”年度核验申请表；

（二）“港口设施保安符合证书”正、副本；

（三）港口设施保安年度工作报告；

（四）港口设施保安主管及相关人员具备履行其职责的知识和能力的证明；

（五）港口设施保安自评表；

（六）其他需要提交的文件。

前款所称港口设施保安年度工作报告由港口设施保安主管负责编写，港口设施经营人或者管理人应当盖章确认。港口设施保安年度工作报告应当全面反映《港口设施保安计划》的落实情况、接受相关培训情况、保安训练、演习情况及记录、保安事件发生的情况及记录、《港口设施保安计划》修改记录等内容。

第四十四条 省级交通（港口）管理部门应当自受理之日起二十个工作日内完成“港口设施保安符合证书”年度核验。二十个工作日内不能完成的，经本机关负责人批准，可以延长十个工作日，并应将延长期限的理由告知申请人。年度核验内容包括：

（一）港口设施保安组织结构；

（二）港口设施保安主管及相关人员是否具备履行其职责的知识和能力；

（三）港口设施保安设备状况及运行情况；

（四）港口设施保安通信状况；

（五）港口设施保安规章制度及实施情况；

（六）港口设施保安训练、演习情况；

（七）《港口设施保安计划》所确定保安措施及程序的落实情况；

（八）港口设施保安事件发生及应对情况；

（九）《港口设施保安计划》的年度调整情况；

（十）其他与港口设施保安工作有关的事项。

除前款规定外，港口设施于上一次核验后发生过本规则第二十五条第三款规定的重大变化的，年度核验主管部门应当审查港口设施是否已重新进行保安评估并重新制订《港口设施保安计划》。

年度核验时，省级交通（港口）管理部门可以对港口设施上一年度的保安工作进行核查，也可以委托港口所在地港口行政管理部门核查并接受其提交的核查报告。

第四十五条 下列情况年度核验不得通过：

（一）保安设备设施状况不符合《港口设施保安计划》规定；

（二）港口设施保安主管、港口设施其他保安人员不具备履行其职责的知识和能力；

（三）未按照规定进行或者参加保安训练、演习；

（四）未按照规定收取和使用港口设施保安费。

第四十六条 通过年度核验的港口设施，由省级交通（港口）管理部门主管领导或者其授权的人员（仅限授权 1 名）在“港口设施保安符合证书”正、副本上签字并加盖专用章。

前款所指的主管领导或者其授权的人员应当向交通部备案。

第四十七条 未通过年度核验的港口设施，由省级交通（港口）管理部门主管领导或者其授权的人员在年度核验申请书上签署意见并退还申请人，责令其限期改正。港口设施经营人或者管理人在期限内改正完毕，可以重新申请“港口设施保安符合证书”年度核验。

第四十八条 省级交通（港口）管理部门应及时将下列情况报交通部备案：

（一）通过年度核验的港口设施；

（二）未通过年度核验的港口设施；

（三）未按本规则第四十二条规定时间申请年度核验的港口设施；

（四）在年度核验过程中隐瞒有关情况或者提供虚假材料的港口设施；

（五）连续两个年度未申请年度核验的港口设施；

（六）发生过本规则第二十五条第三款规定的重大变化但未重新进行保安评估并重新制订《港口设施保安计划》的港口设施。

第四十九条 交通部应当将全国“港口设施保安符合证书”年度核验情况予以公布。

第五十条 “港口设施保安符合证书”记载的内容发生变化或者证书丢失、毁

损时，应当向交通部书面申请换发或者补办，并附相关证明材料。

交通部核发新证书时，应当公告原证书作废。

第六章　港口设施保安主管

第五十一条　港口设施经营人或者管理人应当指定具备履行其职责的知识和能力的人员担任港口设施保安主管。

第五十二条　港口设施保安主管应当由专人担任。

一人只能担任一个港口设施的港口设施保安主管。

第五十三条　港口设施保安主管履行下列职责：

（一）配合港口设施保安评估对港口设施进行初次全面保安检查；

（二）确保港口设施按本规则的规定制订《港口设施保安计划》；

（三）对港口设施进行定期保安检查，保证《港口设施保安计划》有效实施；

（四）对《港口设施保安计划》所载内容进行经常性评价和必要的调整；

（五）进行港口设施相关人员保安意识和警惕性的教育；

（六）确保港口设施保安工作人员获得充分的培训；

（七）与相关机构和人员保持信息沟通，向有关部门报告危及港口设施保安的事件并保存事件记录；

（八）与船公司和船舶保安员协调实施《港口设施保安计划》；

（九）签署《保安声明》；

（十）与提供保安服务的机构协调保安工作；

（十一）确保港口设施保安人员符合相关要求；

（十二）确保正确操作、测试、校准和保养保安设施设备；

（十三）在接到船舶保安员请求时，协助其确认登船人员的身份。

第五十四条　当港口设施保安主管被告知船舶在履行 SOLAS 公约第Ⅺ-2 章和 ISPS 规则的要求或者在实施《船舶保安计划》所列的措施和程序遇到困难时，以及在港口设施处于 3 级保安的情况下，港口设施的经营人或者管理人执行交通部发出的保安指令遇到困难时，港口设施保安主管和船舶保安员应进行联络并协调适当的行动。

第五十五条　港口设施保安主管在船舶入港之前和船舶在港口期间，应当履行下列义务：

（一）了解船舶履行 SOLAS 公约和 ISPS 规则的情况；

（二）与船舶保安员或者船公司保安员联系，了解该船舶的保安等级，并掌握有关船舶保安等级的任何变化；

（三）在与船舶建立联系后，港口设施保安主管应当将港口设施保安等级及

其任何后续变化通知港内靠泊船舶和将要靠泊的船舶，并向船舶提供必要的保安信息。

第五十六条 当港口设施的保安等级确定为 2 级或者 3 级后，港口设施保安主管应及时确认《港口设施保安计划》所列的对应保安措施和程序得到执行，并应当立即与相关船公司和船舶保安员取得联系并协调适当的行动。

第五十七条 当港口设施保安主管得知船舶所处的保安等级高于港口设施的保安等级时，应当及时报告港口所在地港口行政管理部门，并与船舶保安员取得联系并协调适当的行动，包括按照各自的《保安计划》操作，并可视情填写或者签署《保安声明》。

第七章 保安声明

第五十八条 在下列情况下，应船舶的要求，港口设施经营人或者管理人应当与船舶签署《保安声明》：

（一）该船所处的保安等级高于与之发生界面活动的港口设施的保安等级；

（二）中国政府与其他缔约国政府之间有涉及某些国际航线或者这些航线上的特定船舶关于《保安声明》的协议；

（三）曾经有过涉及该船或者涉及该港口设施的保安威胁或者保安事件。

第五十九条 在港口设施保安评估所确定的需要引起特别注意的船港界面活动开始前，应港口设施经营人或者管理人的要求，船舶应当与港口设施经营人或者管理人签署《保安声明》。

前款所称需要引起特别注意的船港界面活动，包括在人口密集或者经济上重要的作业场所或者在其附近的设施进行的作业，以及旅客上下船舶、危险货物或者有害物质的过驳或者装卸作业、船舶曾经靠泊过本规则第二条规定以外的港口设施等。

第六十条 港口设施所在地港口行政管理部门可以根据船港界面活动对人员、财产、环境可能造成危险程度的判断，要求船、港双方签署《保安声明》。

第六十一条 《保安声明》由港口设施保安主管与船长或者船舶保安员签署。

第六十二条 《保安声明》应当根据保安等级变化做相应的改变或者重新签署。

第六十三条 《保安声明》应当由港口设施保安主管保存三年。

第八章 港口设施保安培训、训练和演习

第六十四条 港口设施保安主管及下列从事港口设施保安工作的人员，应当按照 ISPS 规则的有关要求，完成交通部规定的港口设施保安培训，具备履行其职

责的知识和能力：

（一）从事港口设施保安行政管理工作的人员；

（二）从事港口设施保安评估的人员；

（三）制订《港口设施保安计划》的人员；

（四）参加《港口设施保安评估报告》、《港口设施保安计划》审查批准和预审工作的人员；

（五）港口设施经营人中主管安全、生产的副总经理。

其他从事与港口设施保安有关工作的人员，应当按照 ISPS 规则的有关要求，经过相应的培训，具备履行其担任职责方面的知识和能力。

第六十五条 万吨级以上的港口设施应有六人以上具备履行保安职责方面的知识和能力，万吨级以下的港口设施应有三人以上具备履行保安职责方面的知识和能力。

第六十六条 港口设施经营人或者管理人应当对其员工进行相关保安基础知识和岗位保安要求的教育或者培训，使其有针对性地了解并掌握《港口设施保安计划》中与其职责相关的内容，并保证其具备如下知识：

（一）各保安等级的含义和本岗位保安要求；

（二）辨认和探察武器、危险物质和装置；

（三）辨认可能威胁保安者的特点和行为模式；

（四）紧急撤离、简单救护等自我保护技术。

第六十七条 港口设施应当进行保安训练和演习，确保港口设施人员熟练履行其在各保安等级所承担的保安职责，发现并及时改进任何保安缺陷。

第六十八条 港口设施的经营人或者管理人应当保证至少每三个月进行一次港口设施保安训练。

训练应当根据《港口设施保安计划》进行，目的是对经批准的《港口设施保安计划》全部或部分内容进行测试。

第六十九条 各级交通（港口）管理部门应当组织保安演习。保安演习至少每年进行一次，两次演习间隔不得超过十八个月。

演习应当结合经批准的《港口设施保安计划》，通过模拟一定保安事件情景，根据船港界面活动所涉及的各项保安要求，由多单位参与、协同进行，验证、评价和提高港口设施保安人员的综合反应能力，加强各级保安组织、各相关部门的整体反应和协调配合能力。

演习应当编制演习方案，并报送上级交通（港口）管理部门备案。

第七十条 港口设施的经营人或者管理人应当参加包括有关部门、船舶保安员共同进行的保安演习。

第七十一条 港口设施保安训练、演习可以采用实地或者模拟的形式，也可以与相关训练、演习结合进行。

第七十二条 训练、演习完成后，应当进行评估并记录存档。

第九章 保安信息与联络

第七十三条 中国海上搜救中心总值班室是全国港口设施保安总联络点，负责全国港口设施的保安报警接收和保安信息联络工作。

各地方港口行政管理部门值班室是所在地港口设施保安联络点，负责下列事项的全天候联系工作：

（一）接收港口设施保安信息，向相关海事管理机构了解船舶保安信息，针对接收到的保安报警及时按照应急反应程序采取保安行动，并视情通报有关部门；

（二）将港口设施保安信息及时通报海事管理机构，并为相关船舶提供保安建议或者援助；

（三）向中国海上搜救中心总值班室报告保安信息。

第七十四条 港口设施保安主管收到保安报警后，应立即与港口所在地港口行政管理部门联系，报告港口设施名称、位置，经营人或者管理人名称，设施内相关船舶、人员和货物，受到的保安威胁等情况。

港口设施保安主管应当随时保持通信联络畅通。

第七十五条 港口所在地港口行政管理部门收到相关船舶保安事件和其他船舶保安信息，应当按照应急反应程序，通知相关的港口设施，协调港口设施和船舶的保安行动。

第七十六条 交通部根据国际公约规定和工作需要，向国际海事组织报送港口设施保安信息，并负责接收和向国内相关部门、机构传送相关信息。

第七十七条 港口设施保安相关信息发生变化后港口设施经营人或者管理人应当向原报送单位及时发出更正信息。

第七十八条 各级交通（港口）管理部门应当建立信息系统，保证港口设施保安信息的及时报送、接收、分析和转发。

第十章 监督检查与法律责任

第七十九条 各级交通（港口）管理部门依法对港口设施保安活动实施的监督检查，任何单位或者个人不得拒绝、妨碍或者阻挠。

有关单位或者个人应当接受港口行政管理部门依法实施的监督检查，并为其提供必要的方便。

港口行政管理部门的工作人员实施监督检查时，应当出示执法证件，表明身份。

第八十条 港口所在地港口行政管理部门应当对港口设施的下列保安事项进行监督检查：

（一）“港口设施保安符合证书”的有效性；

（二）《港口设施保安计划》的实施效果，包括保安措施实施过程中的协调性；

（三）港口设施保安主管和相关人员对保安知识的掌握情况。

第八十一条 交通部应当对“港口设施保安符合证书”年度核验工作进行监督检查，发现不符合规定的，应当要求省级交通（港口）管理部门予以纠正。

第八十二条 未按规定取得有效“港口设施保安符合证书”且不符合本规则第三十九条规定的港口设施，不得为航行国际航线船舶提供服务。

对于违反前款规定，擅自为航行国际航线船舶提供服务的港口设施，由港口所在地港口行政管理部门予以警告并责令停止违法行为，并可处以 3 万元以下罚款。

第八十三条 对于违反本规则规定，港口设施保安主管和相关人员未经必要的培训，港口行政管理部门可以责令更换；港口设施保安主管和相关人员未能履行本规则规定的职责，港口行政管理部门可以责令其参加保安培训，情节严重的，可以责令暂停或者撤销其港口设施保安主管资格。

第十一章 附则

第八十四条 交通部通过“中国港口设施保安网”公布与港口设施保安相关的公开信息。

第八十五条 本规则自 2008 年 3 月 1 日起施行。但为 500 总吨及以上特种用途船服务的港口设施自 2008 年 7 月 1 日起适用本规则。交通部于 2003 年 11 月 14 日发布的《港口设施保安规则》（交水发 [2003]500 号）同时废止。

中华人民共和国航运公司安全与防污染管理规定

（2007 年 5 月 9 日交通部第 6 次部务会议通过，自 2008 年 1 月 1 日起施行）

第一章 总则

第一条 为提高航运公司安全与防污染管理水平，保障水上交通安全，防止船舶污染水域环境，根据《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》、《国务院对确需保留的行政审批项目设定行政许可的决定》等法律、行政法规以及我国缔结或者加入的相关国际公约，制定本规定。

第二条 本规定适用于航运公司安全与防污染管理体系（以下简称安全管理体系）的建立、实施、保持及其相关活动的监督管理。

第三条 交通部主管全国航运公司安全与防污染工作。

中华人民共和国海事局依照本规定对航运公司安全与防污染活动实施监督管理。

有关海事管理机构依照中华人民共和国海事局确定的职责权限，具体负责本辖区航运公司安全与防污染活动的监督管理。

第二章 航运公司安全与防污染责任

第四条 航运公司应当建立、健全安全与防污染管理制度，完善安全与防污染条件，保障船舶安全，防止船舶污染水域环境。

第五条 航运公司应当确保向船舶提供足够的资源和岸基支持，并对安全与防污染工作进行监控，保持船岸之间的有效联系。

第六条 航运公司应当确定安全与防污染管理的方针和目标，并指定本公司主要负责人为安全与防污染工作的第一责任人。

第七条 航运公司应当具有适任的安全与防污染管理人员，并明确其岗位职责。

航运公司的主要安全与防污染管理人员不得在船上兼职或者跨航运公司兼职。

第八条 航运公司应当为船舶配备满足最低安全配员要求的适任船员。

第九条 航运公司应当确定船长在船舶安全与防污染管理方面的最终决定权。

第十条 航运公司应当建立教育培训制度，加强和规范安全与防污染知识的教育和培训，确保相关人员熟悉安全与防污染的有关规定和操作规程，掌握相应的操作技能，并提高对船舶安全与防污染的应急反应能力。

第十一条 航运公司应当建立船舶安全与防污染监督检查制度，确保对船舶及其设备进行有效的维护和保养。

第十二条 航运公司应当根据船舶的种类、航区等因素制定相应的岸基、船岸和船舶应急预案，并定期组织训练演习。

第十三条 中国籍船舶发生事故、重大险情或者被滞留时，航运公司应当尽快向船籍港所在地的交通部直属海事管理机构或者省级交通主管部门所属的海事管理机构报告。

第十四条 船舶所有人、经营人、光船承租人可以将其所属船舶的安全与防污染管理委托其他航运公司。

航运公司在接受安全与防污染管理委托时，应当与委托方签订安全与防污染管理协议，协议内容应当包括：

（一）当安全与防污染同生产、经营、效益发生矛盾时，应当坚持安全第一和保护环境优先的原则；

（二）本规定所有有关安全与防污染的责任和义务由受托方独立承担；

（三）在不妨碍船长履行其职责并独立行使其权力的前提下，受托方对处理涉及安全与防污染的事务具有最终决定权；

（四）委托方应当向受托方提供足够的资源，确保受托方有效开展船舶安全与防污染管理工作；

（五）委托方船舶的船员配备和调动、船舶及设备维护、应急反应等方面应当服从受托方的指令。

委托方、受托方应当将双方及其船舶的详细情况及船舶管理协议报受托方所在地和船籍港所在地的交通部直属海事管理机构或者省级交通主管部门所属的海事管理机构备案。

第十五条 需要建立安全管理体系的航运公司，应当建立安全管理体系并保持体系的有效性。

需要建立安全管理体系的航运公司的范围，由交通部公布。

第十六条 需要建立安全管理体系的航运公司，除应当符合本章第四条至第十四条规定外，还应当满足以下要求：

（一）制定安全与防污染操作规程；

（二）确保当发生事故、险情和不符合规定情况时得到报告、调查、分析和纠

正；

（三）有效控制与安全管理体系有关的所有文件和资料；

（四）对安全管理体系进行内部审核、有效性评价和管理复查。

第十七条 建立安全管理体系的航运公司，应当及时向公司所在地的交通部直属海事管理机构或者省级交通主管部门所属的海事管理机构报告安全管理体系运行过程中发生的重大事项。

第十八条 鼓励第十五条规定范围外的航运公司按照相关要求，建立、实施并保持安全管理体系。

第三章 航运公司安全与防污染管理体系的审核、发证

第十九条 安全管理体系经过审核，由中华人民共和国海事局及其指定的海事管理机构对符合条件的航运公司签发相应的安全与防污染能力符合证明（以下简称符合证明）或者临时符合证明，对符合条件的船舶签发相应的安全管理证书或者临时安全管理证书。

审核、发证应当符合《中华人民共和国海事行政许可条件规定》规定的条件，并按照《交通行政许可实施程序规定》及中华人民共和国海事局制定的审核发证规则和审核发证程序执行。

第二十条 经过初次审核，对符合安全管理体系要求的航运公司，海事管理机构应当签发有效期为 5 年的符合证明。

第二十一条 船舶应当保存一份符合证明的副本，船舶所持符合证明副本中载明的船舶种类应当覆盖该船舶。

第二十二条 经过初次审核，船上的管理及操作符合安全管理体系要求的，海事管理机构应当向船舶签发有效期为 5 年的安全管理证书。

第二十三条 航运公司应当在符合证明的周年日前 3 个月内申请年度审核，船舶应当在安全管理证书第二和第三个周年日期内申请中间审核。海事管理机构根据年度审核、中间审核的结论决定符合证明、安全管理证书是否继续有效。

第二十四条 新成立的航运公司或者对原符合证明增加船种的航运公司应当申请临时审核。经过海事管理机构审核合格的，发给有效期为 12 个月的临时符合证明。

新建造船舶投入营运前或者航运公司新承担对某一船舶的安全与防污染管理责任或者船舶更换国籍的，航运公司应当为船舶申请临时审核，经过海事管理机构审核合格的，发给有效期为 6 个月的临时安全管理证书。

特殊情况下，海事管理机构可以对临时安全管理证书的有效期展期 6 个月。

航运公司应当在临时符合证明、临时安全管理证书有效期届满前 2 个月申请初次审核。

第二十五条 航运公司应当在符合证明、安全管理证书有效期届满前 3 个月申请换证审核;通过审核的，签发新的符合证明、安全管理证书。新签发的符合证明或者安全管理证书自原证书的届满之日起算，有效期为 5 年。

第二十六条 在年度审核或者换证审核中，发现安全管理体系运行存在严重不符合规定的情况，或者有大量不符合规定的情况并且已经严重影响到安全管理体系运行的有效性时，海事管理机构应当对其在相应审核的 6 个月后实施跟踪审核。

航运公司所管理的船舶出现发生重大事故、连续发生事故、多次被滞留等情况时，海事管理机构应当对其实施附加审核。

第二十七条 海事管理机构在安全管理体系审核中发现不符合规定情况的，应当要求航运公司限期改正，并按时指派审核人员验证航运公司在规定期限内所采取的纠正措施。

第二十八条 符合证明、临时符合证明、安全管理证书和临时安全管理证书，由中华人民共和国海事局确定格式并统一制作。

第四章 监督检查

第二十九条 海事管理机构应当建立、健全航运公司安全与防污染的监督检查制度，对航运公司的安全与防污染管理活动实施监督检查。监督检查的情况和处理结果应当记录，由监督检查人员签字后归档。

海事管理机构实施监督检查时，有关单位和个人应当予以协助和配合，不得拒绝、妨碍或者阻挠。

第三十条 航运公司所在地海事管理机构发现航运公司在安全与防污染管理方面存在安全隐患时，应当责令其立即消除或者限期消除。

第三十一条 航运公司所在地海事管理机构发现航运公司应当办理符合证明而未办理的，或者航运公司、船舶不再符合签发符合证明、安全管理证书条件的，应当责令航运公司、船舶立即改正。船舶不按照要求改正的，对船舶可以采取责令停航、改航、停止作业、禁止进出港口等行政强制措施。

第三十二条 作出许可决定的海事管理机构发现航运公司未按照第二十三条、第二十四条、第二十五条的要求申请审核，或者审核发现有重大不符合规定情况的，应当注销符合证明、临时符合证明、安全管理证书或者临时安全管理证书;如果注销符合证明或者临时符合证明，所有相关安全管理证书或者临时安全管理证书也应当注销。

第三十三条 作出许可决定的海事管理机构发现航运公司未按照第二十七条的要求对安全管理体系审核中出现的不符合规定情况采取纠正措施的，应当注销符合证明或者安全管理证书。

第三十四条 有关海事管理机构应当建立、健全监督检查制度，对审核、发证及相关活动实施监督。

第五章 法律责任

第三十五条 违反本规定第七条、第九条、第十五条、第十七条规定，由海事管理机构责令改正，并可以对航运公司处以 5000 元以上 3 万元以下罚款。

第三十六条 违反本规定第十四条规定，受托航运公司未履行安全与防污染管理责任的，由海事管理机构责令改正，并可以对受托航运公司处以 5000 元以上 3 万元以下罚款。

第三十七条 有关审核人员违反本规定以及相应的审核发证规则和程序的，由有关海事管理机构责令改正；情节严重的，追究有关审核人员的行政责任。

第三十八条 违反本规定的其他规定应当进行处罚的，按照《海上海事行政处罚规定》和《内河海事行政处罚规定》执行。

第六章 附则

第三十九条 本规定下列用语的定义：

（一）航运公司：是指承担安全与防污染管理责任和义务的航运企业，包括船舶所有人、经营人、管理人和光船承租人。

（二）安全管理体系：是指能使航运公司人员有效执行航运公司安全和防污染方针的结构化和文件化的体系。

（三）符合证明：是指签发给航运公司，表明该航运公司安全管理体系符合要求的证明文件。

（四）安全管理证书：是指签发给船舶，表明其航运公司和船上管理已经按照安全管理体系运作的证明文件。

（五）安全管理体系运行的重大事项：是指建立安全管理体系的航运公司发生体系文件改版，体系内重大人事及机构变动，体系内船舶数量和种类变动，航运公司内部审核、有效性评价和管理复查发现体系运行出现重大问题等情况。

（六）不符合规定的情况：是指客观证据表明不满足某一具体规定要求的情况。

（七）重大不符合规定的情况：是指对人员或者船舶安全构成严重威胁或者

对环境构成严重危险，并需要立即采取纠正措施的事项或者情况，包括未能有效和系统地实施本规则的有关要求。

（八）周年日：是指符合证明和安全管理证书有效截止日期的每年的该月该日。

第四十条 本规定自 2008 年 1 月 1 日起施行。

海洋功能区划管理规定

第一章 总则

第一条 为了规范海洋功能区划编制、审批、修改和实施工作，提高海洋功能区划的科学性，根据《中华人民共和国海域使用管理法》、《中华人民共和国海洋环境保护法》等有关法律法规，制定本规定

第二条 海洋功能区划按照行政区划分为国家、省、市、县四级。

第三条 国家海洋局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，编制地方海洋功能区划。

第四条 全国和沿海省级海洋功能区划，报国务院批准。沿海市、县级海洋功能区划，报所在地的省级人民政府批准，并报国家海洋局备案。

第五条 海洋功能区划的修改，由原编制机关会同同级有关部门提出修改方案，报原批准机关批准；未经批准，不得改变海洋功能区划确定的海域功能。

第六条 编制和修改海洋功能区划应当建立公众参与、科学决策的机制。

第七条 国家海洋局负责指导、协调和监督省级海洋功能区划的实施。省级海洋行政主管部门负责指导、协调和监督市、县级海洋功能区划的实施。

第二章 海洋功能区划的编制

第八条 海洋功能区划编制的原则：

（一）按照海域的区位、自然资源和自然环境等自然属性，科学确定海域功能；

（二）根据经济和社会发展的需要，统筹安排各有关行业用海；

（三）保护和改善生态环境，保障海域可持续利用，促进海洋经济的发展；

（四）保障海上交通安全；

（五）保障国防安全，保证军事用海需要。

第九条 编制海洋功能区划，应当依据上一级海洋功能区划，遵守《海洋功能区划技术导则》等国家有关标准和技术规范，采用符合国家有关规定的基础资料。

第十条 全国海洋功能区划的主要任务是：科学划定一级类海洋功能区和重点的二级类海洋功能区，明确海洋功能区的开发保护重点和管理要求，合理确定

全国重点海域及主要功能，制定实施海洋功能区划的主要措施。

省级海洋功能区划的主要任务是：根据全国海洋功能区划的要求，科学划定本地区一级类和二级类海洋功能区，明确海洋功能区的空间布局、开发保护重点和管理措施，对毗邻海域进行分区并确定其主要功能，根据本省特点制定实施区划的具体措施。

市、县级海洋功能区划的主要任务是：根据省级海洋功能区划，科学划定本地区一级类、二级类海洋功能区，并可根据社会经济发展的实际情况划分更详细类别海洋功能区。市、县级海洋功能区划应当明确近期内各功能区开发保护的重点和发展时序，明确各海洋功能区的环境保护要求和措施，提出区划的实施步骤、措施和政策建议。设区市海洋功能区划的重点是市辖区毗邻海域和县（市、区）海域分界线附近的海域，县级海洋功能区划的重点是毗邻海域。

第十一条 海洋功能区划期限应当与国民经济和社会发展规划相适应，不应少于五年。

第十二条 国家海洋局负责组建国家海洋功能区划专家委员会，省级海洋行政主管部门负责组建省级海洋功能区划专家委员会。

国家海洋功能区划专家委员会负责发布海洋功能区划编制技术单位推荐名录。承担海洋功能区划编制任务的技术单位应当从海洋功能区划编制技术单位推荐名录中选择。

第十三条 各级海洋行政主管部门提出编制海洋功能区划前，应当对现行海洋功能区划以及各涉海规划的实施效果进行总结和评价，认真分析存在的问题和出现的新情况，从沿海地区经济社会发展、海洋产业发展和规划、海洋资源供给能力、海域使用状况、海洋环境保护状况等方面进行前瞻性研究，作为海洋功能区划编制的工作基础。

第十四条 海洋功能区划应当按照以下程序组织编制：

（一）海洋行政主管部门选择技术单位，组织前期研究，并提出进行编制工作的申请，经同意后方可组织编制。其中，组织编制省级海洋功能区划的，省级海洋行政主管部门应当向国家海洋局提出申请；组织编制市、县级海洋功能区划的，市、县级海洋行政主管部门应当向省级海洋行政主管部门提出申请。

（二）县级以上地方各级人民政府要组织成立政府领导牵头、各部门领导参加的编制工作领导小组，具体办事机构设在海洋行政主管部门，负责海洋功能区划编制工作的组织协调；海洋行政主管部门要组织成立行业专家参加的技术指导组，指导技术单位编制工作方案、技术方案和功能区划各项成果。

（三）工作方案、技术方案经技术指导组、领导小组审定后，报同级政府批准实施。编制技术单位按照《海洋功能区划技术导则》等有关国家标准、规范和工作方案、技术方案的要求，编制海洋功能区划成果征求意见稿。在海洋功能区划编制过程中，对于涉及港口航运、渔业资源利用、矿产资源开发、滨海旅游开发、海

水资源利用、围填海建设、海洋污染控制、海洋生态环境保护、海洋灾害防治等重大专题，应当在海洋功能区划编制工作领导小组的组织下，由相关领域的专家进行研究。

（四）海洋功能区划文本、登记表、图件应当征求政府有关部门、上一级海洋行政主管部门、下一级地方政府、军事机关等单位的意见。要采取公示、征询等方式，充分听取用海单位和社会公众的意见，对有关意见采纳结果应当公布。在充分吸取有关意见后，形成海洋功能区划成果评审稿。

（五）海洋功能区划评审工作由负责编制区划的海洋行政主管部门主持。国家和省级海洋功能区划评审专家应从国家海洋功能区划专家委员会委员中选择；市、县级海洋功能区划评审专家应从省级海洋功能区划专家委员会委员中选择。根据评审意见修改完善后，形成海洋功能区划成果送审稿。海洋功能区划成果文件应当以纸质和电子文件两种介质形式提交。

第十五条 海洋功能区划成果包括：文本、登记表、图件、编制说明、区划报告、研究材料、信息系统等。

第三章 海洋功能区划的审批和备案

第十六条 海洋功能区划上报审批前，应经同级人民政府审核同意。审核的内容包括：

（一）开发利用与保护状况分析是否从当地实际出发，实事求是；

（二）目标的确定是否与本地区国民经济和社会发展规划相协调，是否有利于促进当地经济的发展和生态环境的保护；

（三）海洋功能区划是否做到统筹兼顾、综合部署，是否与有关区划、规划相协调；

（四）海洋功能区的划分是否经过充分论证；

（五）是否有保证区划实施的政策措施，措施是否可行；

（六）与政府各部门及下一级政府的协调情况，主要问题是否协商解决。

第十七条 海洋功能区划上报后，由具有审批权的人民政府海洋行政主管部门负责审查工作。审查的主要依据是：

（一）国家的有关海洋开发利用与保护的方针政策；

（二）国家有关法律、法规及海洋功能区划管理的规章制度；

（三）国家有关部门发布的海洋功能区划技术标准和规范；

（四）国民经济和社会发展规划及其他经批准的区划、规划；

（五）上一级海洋功能区划及相邻地区的海洋功能区划；

第十八条 省级海洋功能区划按如下程序审批：

（一）省级海洋功能区划经省级人民政府审核同意后，由省（自治区、直辖市）人民政府上报国务院，同时抄送国家海洋局（抄送时附区划文本、登记表、图件、编制说明、区划报告、专家评审意见，一式 20 份）。

（二）国务院将省级人民政府报来的请示转请国家海洋局组织审查；国家海洋局接国务院交办文件后，即将报批的海洋功能区划连同有关附件分送国务院有关部门及相邻省、自治区、直辖市人民政府征求意见；有关部门和单位应在收到征求意见文件之日起 30 日内，将书面意见反馈国家海洋局，逾期按无意见处理。

（三）国家海洋局综合协调各方面意见后，在 15 日内提出审查意见。审查认为不予批准的或有关部门提出重大意见而又有必要对区划进行重新修改的，国家海洋局可将该区划退回报文的省级人民政府，请其修改完善后重新报国务院。

（四）省级海洋功能区划经审查同意后，由国家海洋局起草审查意见和批复代拟稿，按程序报国务院审批。

第十九条 市、县级海洋功能区划审批程序由省级海洋行政主管部门制定，报省、自治区、直辖市人民政府批准。

第二十条 经批准的省级海洋功能区划应报国家海洋行政主管部门备案，经批准的市、县级海洋功能区划应报国家和省级海洋行政主管部门备案。备案内容应包括文本、登记表、图件、编制说明、区划报告及信息系统。

第二十一条 海洋功能区划经批准后，本级人民政府应在批准之日起 30 个工作日内向社会公布文本。但是，涉及国家秘密的部分除外。第四章 海洋功能区划的评估和修改

第二十二条 海洋功能区划批准实施两年后，县级以上海洋行政主管部门对本级海洋功能区划可以开展一次区划实施情况评估，对海洋功能区划提出一般修改或重大修改的建议。评估工作可以由海洋行政主管部门自行承担，也可以委托技术单位承担。

第二十三条 一般修改是指在局部海域不涉及一级类、只涉及二级类海洋功能区的调整。重大修改是指在局部海域涉及一级类海洋功能区的调整，或者不改变海域自然属性的功能区、围海性质的功能区调整为填海性质的功能区。

经国务院批准，因公共利益、国防安全或者大型能源、交通等基础设施建设，需要改变海洋功能区划的，根据国务院的批准文件修改海洋功能区划。

第二十四条 海洋功能区划按照以下程序修改：

（一）通过评估工作，在局部海域确有必要修改海洋功能区划的，由海洋行政主管部门会同同级有关部门提出修改方案。属于重大修改的，应当向社会公示，广泛征求意见。

（二）修改方案经同级人民政府审核同意后，报有批准权的人民政府批准。属于重大修改的，有批准权人民政府海洋行政主管部门应当对修改方案进行论证和评审，作为批准修改方案的重要依据。

（三）修改方案经批准后，本级人民政府应将修改的条文内容向社会公布。涉及下一级海洋功能区划修改的，根据批准文件修改下一级海洋功能区划，并报省级海洋行政主管部门备案。

第二十五条 下列情形，应当按照海洋功能区划编制程序重新修编，不得采取修改程序调整海洋功能区。

（一）国家或沿海省、自治区、直辖市统一组织开展海洋功能区划修编工作的；

（二）根据经济社会发展需求，需要在多个海域涉及多个海洋功能区调整的；

（三）国务院或省、自治区、直辖市人民政府规定的其他情形。

第五章 海洋功能区划的实施

第二十六条 海洋功能区划一经批准，必须严格执行。在海洋功能区划文本、登记表和图件中，所有一级类和二级类海洋功能区及其环境保护要求应当确定为严格执行的强制性内容。

第二十七条 海洋功能区划是编制涉海规划的依据。海洋环境保护规划应当依据海洋功能区划编制。养殖、盐业、交通、旅游等行业规划涉及海域使用的，应当符合海洋功能区划。土地利用规划、城市规划、港口规划应当与海洋功能区划相衔接。

第二十八条 海域使用项目应当符合海洋功能区划。海域使用论证报告书应当明确项目选址是否符合海洋功能区划。

对于不符合海洋功能区划的用海项目的申请不予受理，受理机关依法告知申请人。对于经国家和省级人民政府批准立项的海域使用项目，与海洋功能区划不符合的，海洋行政主管部门可以提出重新选址的意见。

对于符合海洋功能区划的填海项目，要根据国家有关标准严格限制填海规模，集约用海。

第二十九条 编制海洋环境保护规划和重点海域区域性海洋环境保护规划的，海洋环境保护和管理的目标、标准和主要措施应当依据各类海洋功能区的环境保护要求确定。各类海洋保护区的选划建设应当符合海洋功能区划。

选择入海排污口位置，设置陆源污染物深海离岸排放排污口，审核、核准海洋（海岸）工程建设项目，选划海洋倾倒区等应当依据海洋功能区划。对于不符合海洋功能区划的海洋（海岸）工程建设项目，海洋行政主管部门不予审核或核准环境影响报告书。海洋环境监测评价和监督管理工作应当按照各类海洋功能区的环境保护要求执行。

第三十条 各级海洋行政主管部门应加强海洋功能区的监视监测，防止擅自改变海域用途。对于擅自改变海域用途的，按照《海域使用管理法》第四十六条的

规定处罚。对于不按海洋功能区划批准使用海域的，按照《海域使用管理法》第四十三条的规定处罚。

第六章　附则

第三十一条　各级海洋行政主管部门以及区划任务承担单位应加强区划档案的管理，建立档案的立卷、归档、保管和查阅等管理制度。归档材料包括海洋功能区划成果和区划管理材料。区划管理材料指与海洋功能区划编制、审批、评估和修改等相关的文件资料。

第三十二条　各级海洋行政主管部门依据查询申请给予海域使用申请人、利益相关人查询经批准的海洋功能区划。查询内容包括海洋功能区划文本、登记表和图件。不能当场查询的，应在 5 日内提供查询。

第三十三条　本规定自 2007 年 8 月 1 日起施行。

中国正式成为南极海洋生物资源养护委员会成员

自 2007 年 10 月 2 日起，中国成为南极海洋生物资源养护委员会的正式成员。该委员会是《南极条约》框架下管理海洋生物资源的唯一多边机构。

南极海域海洋生物资源丰富，渔业资源包括蕴藏量丰富的磷虾以及市场价值较高的南极犬牙鱼、南极冰鱼等。为保护与合理利用南极海洋生物资源，澳大利亚、新西兰、美国等国于 1980 年 5 月 20 日签署了《南极海洋生物资源养护公约》。公约于 1982 年 4 月 7 日生效，现有 34 个缔约国。委员会秘书处设在澳大利亚塔斯马尼亚州首府霍巴特。经国务院批准，中国于 2006 年 10 月加入《南极海洋生物资源养护公约》，并于 2007 年 8 月 2 日申请成为委员会成员。

《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。

五、来稿文责自负，除非作者特别声明，《评论》编辑部保留对来稿进行技术性加工处理的权利。

六、为适应我国信息化建设，扩大《评论》及作者知识信息交流渠道，本书被CNKI《中国优秀法律学术论文集全文数据库》收录，其作者著作权使用费与本书稿酬一次性给付，并免费提供作者文章引用统计分析资料。除非作者特别声明，所有来稿均视为同意被同步编入该数据库。

七、《评论》实行双向匿名审稿制度。来稿一经刊用，即付稿酬，并提供样书两册，无需版面费。

八、凡向《评论》编辑部投稿，即视为接受本稿约。投稿时务请附电子稿（以软盘或 E-mail 传送）。

地址: 中国福建厦门大学法学院
厦门大学海洋政策与法律研究中心《中国海洋法学评论》编辑部
邮编: 361005
电话:（86-592）-2187383；（86-592）-2187781
传真:（86-592）-2187781
E-mail: colr@xmu.edu.cn; copl@xmu.edu.cn

《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。

3. 引用中文译著的注解格式为：

（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

“共同开发”：南海争端的临时对策

吴士存 *

内容摘要：南海争端的新发展是目前全球范围内涉及诸多国家和地区的最为复杂的海洋争端。相关国家对资源的争夺使得这一局势更加严峻。他们罔顾其他国家的反对，开发南海资源，特别是石油和天然气的开采，而这也增加了南海争端的复杂性和严峻性。为了和平、双赢地解决南海争端，中国政府早在上世纪 90 年代就提出“搁置争议，共同开发”。2005 年 3 月于马尼拉签署的共同勘探南海争端海域石油和天然气资源的三方协议方使这一提议初见成效。即便如此，在推进和实现“共同开发”的道路上依然面临着种种阻碍。故而，为和平解决南海争端，还应在其他方面做出努力，包括在渔业开发和保护、海洋研究以及航运等领域加强合作。

关键字：共同开发　南海　争端解决

一、南海争端海域的现状

南海争端的新发展是目前全球范围内最为复杂的海洋争端，涉及的国家和地区包括有：中国大陆、越南、菲律宾、马来西亚、印度尼西亚、文莱以及中国台湾。事实上，南海争端的核心在于南沙群岛，其原因可总结如下：首先，作为从太平洋到印度洋的中转站，南沙群岛被多国围绕，占据具有战略意义的地缘位置。此外，美国、日本以及印度等南海域外海洋大国在这一区域也具有军事利益和经济利益。其次，随着南沙群岛周边地区人口的增加以及这些发展中国家的经济发展，各国对资源的需求也在激增。因此，南沙群岛的丰富资源便成为周边诸国竞相争夺的对象。第三，历史上的殖民入侵也造成了一些重大问题。此外，国际霸权的斗争，尤其是冷战格局的发展，使得南沙群岛争端异常复杂，而不仅仅是主权和管辖权的争端。南沙争端已经成为影响区域稳定、甚至国际政治局势的一个关键因素。第四，试图利用当今国际法对主权的定义来评判中国的传统管辖行为，这并不合理，而且会减损这些管辖行为的法律意义。由于《联合国海洋法公约》对“历史性权利”的

* 吴世存博士，教授，南海研究院（海口）院长。

模糊界定，其事实上加剧了国际社会对岛屿的争夺。《联合国海洋法公约》缺乏解决海岸相邻或相向国家间海洋争端的明确、有效的条款，这些模糊的规定使得各种相冲突的主张可以共存。

在上述造成南海争端的因素中，笔者认为导致南海潜在冲突的关键因素在于该区域内众所期待的油气资源。随着中国各邻国和地区经济的发展，他们对南海区域的油气需求也在激增。一些国家已经罔顾相关国家的反对，开始在争议区域开采油气。还有一些国家甚至开始同外国公司进行联合开发，以使区域争端国际化。

二、南海争端区域的资源开发

根据数十年的地质勘查发现，（南海）有 13 个总面积为 61.95 万平方千米的大中型沉积盆地，其中 41.7 万平方千米的区域位于中国的“U形线”内。据估计，这些区域蕴藏着 235 亿吨石油和 10 万亿立方米天然气。此外，南海区域还蕴藏大量的天然气水合物，俗称可燃冰。由于其浓度高、分布广泛、储存规模大，天然气水合物被视为 21 世纪极具商业前景的战略资源。专家认为，天然气水合物会在未来 15 至 20 年内被大规模地开发利用。我国国家自然科学基金委员会在上世纪 90 年代就已确认了一些天然气水合物的科研项目。1996 年，科研项目“西太平洋天然气水合物开采前景和方法研究”实施；1998 年，“中国海域天然气水合物调查研究”项目结束。1999 年，广州海洋地质调查局在南海西沙群岛发现天然气水合物，并于 2000 年在同一海域开展了地震调查。初步的调查显示，其中 8000 平方千米的海域可能含有天然气水合物，相当于 800 亿吨的石油，即我国石油总储量的一半。然而，我国还处于研究与调查的阶段，并未进行钻探、开采以及开发。

早在上世纪 80 年代，我国就已经开始了南沙群岛的石油调查，尽管只是实地地质勘察。1992 年，中国远洋石油公司就万安滩的油气联合开发与美国克雷斯顿能源公司签订合同。然而由于越南的抵制，该合同并未得到执行。截至目前，中国在南沙群岛尚未进行石油开采。

自上世纪 70 年代起，包括越南、菲律宾、马来西亚、印度尼西亚以及文莱在内的一些东盟国家就凭借其地理优势，通过吸引外国（尤其是西方国家）石油公司来加速其在南海的油气开采，其中一部分开采地区位于我国 U 形线内。1947 年，中国政府公布了一份标明南海四群岛（南沙群岛、西沙群岛、东沙群岛、中沙群岛）以及这些岛屿外围的“十一断线”地理位置的地图。从那时起，该断续线就被称为中国“U形线”。中国在“U形线”内享有包括渔业开发在内的历史性权利和对资源开发的管辖权。

越南曾是东南亚最贫困的国家之一，正是石油开发使其得以脱贫。在结束了30 年的内战、失去了前苏联石油援助的情形下，为了重塑经济，越南着力开发陆上和海洋石油。在开放其石油开采市场后，越南先后与 50 多个外国石油公司签订了 33 份合同。数据显示，南海大陆架每年的石油开采量可达 1100 万吨，而越南也在逐步增大石油和天然气出口。1998 年越南出口石油 1210 万吨，1999 年增加至 1450 万吨，收益达 20 亿美元。根据美国能源信息署 2002 年 5 月公布的最新数据显示，越南在南海地区的石油日产量可达 35.6 万桶，而天然气的年产量可达 190 亿立方英尺。2000 年，越南石油日出口达 13.3 万桶，绝大部分采自南海。石油出口因此成为越南外汇的主要来源之一。

南海的石油开采也使得菲律宾（该国 95% 的石油依赖于进口）有望将其石油进口比例从 95% 降至 85%。菲律宾于 1976 年开始同外国石油公司在礼乐滩联合开采石油。目前，菲律宾正试图同壳牌公司联合开发位于巴拉望岛西北方的天然气田。据预计，该气田可在未来 20 年开采出 1.2 亿桶石油。根据美国能源信息署 2002 年 5 月公布的数据显示，菲律宾在南海地区每日开采 9460 桶石油和 10 亿立方英尺天然气。菲律宾媒体也报道称，菲计划将其大陆架从 200 海里延伸至 350 海里，从而使其能够在南海区域开采更多的油气。菲律宾国立大学国际法研究中心已经向参议院请求资助，以便收集相关资料的数据。

不同于越南和菲律宾，马来西亚拒绝南海域外国家参与南海争端，并反对将南海争端国际化。但是，马来西亚也同样在南海地区开采石油，并从中获益。近几年，马来西亚以建立设施用于科学研究为借口，在其占据的岛礁上建筑人工设施。此外，马来西亚还加快了在南海的石油开采。截至目前，马来西亚已经在中国“U 形线”内开发了 18 个油田和 40 个天然气田。2000 年，马来西亚石油日产量虽然只有 69 万桶，但仅在南海地区开采的石油就达到 66.8 万桶，占总量的 89.07%。根据美国能源信息署 2002 年 5 月的报告显示，马来西亚在南海的石油日产量达到 7.5 亿桶，天然气日产量达 1.437 万亿立方英尺。

印度尼西亚是石油输出国组织成员之一，是石油生产和出口的主要国家之一。能源产业也一直是印度尼西亚的龙头产业，受到中央政府和地方政府的极大重视。全国税收总收入的 25%~30% 来自能源业和矿产资源业。印度尼西亚的液化天然气优势明显，占据了在亚太地区液化天然气市场的三分之一。由印度尼西亚国家石油公司和美国艾克森石油公司联合开发的纳土纳气田储量达 1.6 万亿立方米，印度尼西亚在该气田开发中收益颇丰。这一耗资 400 亿美元的开发项目的目标是建成后每年产出 600 万吨的液化天然气。2001 年，印度尼西亚每天可以生产 122 万桶石油，其中 20% 的石油采自南海地区。目前，印度尼西亚在南海每天开采 21.5 万桶石油，每年产天然气 120 亿立方英尺。

文莱是亚太地区主要的石油生产国，同时也是全球最大的石油出口国之一。其石油开采地点主要位于沙巴盆地。油气开采是文莱国民的主要经济来源。然而，

现有的油气田只能继续开采 25 年。因此，文莱政府急需开发新的海上油田以维持文莱国内现有的繁荣。位于中国“U形线”内的弹丸礁，一旦被文莱占领，其就有权开发此区域大陆架所蕴藏的石油资源。目前，文莱在南海地区石油日产量达 19.5 万桶，天然气年产量达 3340 亿立方英尺。

一直以来，石油都被称为工业血液，其与一国经济发展、政局稳定以及国家安全都有直接联系。全球的能源专家都认为，“21 世纪所有可用能源中，石油依然占据核心地位”。在其他替代能源出现之前，绝大多数国家不得不面对一系列紧迫的问题，如:为确保国家经济和社会的持续发展，如何增加石油供应并确保石油进口安全。21 世纪，国际社会对石油的竞争已越演越烈，这可能诱发政治冲突和武装冲突，在南海地区更是如此。

三、中国提议“共同开发”

诚如上文所述，南海地区蕴藏有大量油气资源，这对该区域内的国家和地区而言意义重大。然而，由于南海争端海域的复杂局势，油气开发将毫无疑问地成为敏感问题，不仅会导致冲突，还会引起有关投资和合作的问题，诸如潜在风险和高成本。

争端区域的特点可能导致油气开采过程中不可避免地发生冲突。因此，各争议主体可采取如下措施：

1. 单边行动，也就是说争议一方不顾其他有关各方的反对，单独采取行动；

2. 双边合作，是指双方在双边争议区域注重加强合作，以避免冲突；

3. 多边合作，通常发生在多边争议区域；

4. 冻结争端，是指搁置争议并且停止在争议区域的开发活动。

以下是一些在争议区域进行共同开发的成功案例：

（1）突尼斯—利比亚大陆架案。突尼斯和利比亚两国的大陆架争端起于 1982 年，原因在于加贝斯湾的石油开发。之后，该争端被提交到国际法院。国际法院的法官建议两国进行共同开发，最终两国签署了加贝斯湾的共同开发协定，从而解决了此争端。[1]

（2）冰岛－挪威共同开发协议。冰岛与挪威于 1981 年 10 月就冰岛与扬马延岛间的大陆架签订协议，以解决两国对该海域渔业资源的主权权利主张的争端。经双边谈判，两国最终签署了共同开发协定。[2]

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1 大阿拉伯利比亚人民社会主义民众国与突尼斯共和国就实施国际法院对突尼斯—利比亚大陆架案（1988 年 8 月 8 日）判决的协议。

2 冰岛—挪威关于扬马延岛的协议（1981 年）。

（3）泰国－马来西亚共同开发案。[3]泰马协议设立了一个强大的联合机构，承担两国在合作所列区域内的权利和责任。该机构为具有法人资格的国际组织，负责管理包括合同条款在内的该区域的所有开发活动。

争议区域的开发无论采取何种模式都应视为基于当前争端与冲突而做出的临时利益安排。合作协议是基于政治实体之间的的妥协，这些政治实体已承认争端的存在，并通过政治协商就利益分享达成一致意见。但是，这些临时安排很容易受各种因素的影响。如，澳大利亚与印度尼西亚签署的东帝汶协议就因为东帝汶的独立而终止。在以国家利益为重心的地缘政治和经济安全框架内，临时利益安排可起到安全阀的作用，但也可能导致冲突的产生。此外，由于利益分配和政治妥协的复杂情况，多边开发相比于双边开发更难实现。因此，合作模式只能在有关各方通过必要的政治保证和经济支持就合作和冲突管理机制达成一致意见后才能建立。

在经过长期的谈判和纷争后，已故中国领导人邓小平在这个问题上提出了著名的建议，即在南海“搁置争议，共同开发”。该提议与上文分析的合作模式有着共同特征。“搁置争议，共同开发”考虑到了有关各方的实际利益，有助于南海争端的最终解决。此提议表明了中国在南海问题上的友好和诚意。

近些年，中国政府做出了很多努力以践行邓小平的提议，并且就海洋环境保护、海洋科学研究、渔业和其他特定问题频繁地与东盟国家开展讨论。

2002 年 11 月，中国和东盟十国通过了《南海各方行为宣言》，这为中国与东盟国家之间未来可能的商业合作以及区域内的长期和平稳定奠定了政治基础。

2005 年 3 月 14 日，菲律宾、中国以及越南三国的石油公司在马尼拉签署了具有里程碑意义的三方协议，以对南海争议区域的石油资源状况进行联合地震调查。预计该调查会在今年台风季来临前启动，调查覆盖的总面积约为 14.3 万平方公里。在一份联合申明中，协议三方确认，协议的签署与各国政府的基本立场一致，亦即在《联合国海洋法公约》和《南海各方行为宣言》指导下，将南海变为和平、稳定、合作和开发之海。

这份协议的签署普遍被认为是对中方邓小平提议的初步实践。其也表明了三国正在采取积极措施以履行中国同东盟签署的《南海各方行为宣言》。

国内专家认为，中、越、菲三国秉持互利、灵活、务实的精神，开辟了一条和平解决南海争端的新途径，并为其他有类似情形的国家做出了示范。

相信只要南海区域内的国家积极开展切实合作，坚持“搁置争议，共同开发”的原则，将南海变成和平、稳定、友好以及合作之海的目标就一定能实现。

此外，为推行“搁置争议、共同开发”的提议，中国已经与东盟签署了一系列协议，其中包括《中国与东盟关于非传统安全领域合作联合宣言》和《东南亚友好

3 泰马谅解备忘录（1979）。

合作条约》。通过这些条约的签署,双方建立了互信。此外,通过自由贸易区的建立,中国与东盟扩大了双边经济合作。随着类似举措的推进,“搁置争议,共同开发”的提议将在国际社会更具说服力。

四、结　论

虽然南海争端海域的“共同开发”已经一定程度上得到了认同,并且近些年也有了实践上的推进,但由于南海争端的复杂性,目前仍存在诸多障碍。首先,南海国家在此的地缘政治利益以及他们对经济发展所需资源的争夺已经使得该区域的形势更加复杂。虽然关于合作、发展、共赢协议的共识已经达成,但南海区域内的安全问题依然存在。尽管《南海各方行为宣言》已经签订,诸如通过武装力量恶意逮捕和驱逐他国合法作业的渔民的事件仍在不断发生。联合南海域内外势力以限制中国的战略格局也依旧存在。

其次,南海区域外主要势力的介入使得南沙争端国际化、复杂性加剧,为“共同开发”的实施设置了潜在阻碍。由于美国在东南亚具有巨大的战略利益,因此美国也便成为南海争端中最有影响力的参与方。9•11 恐怖袭击后,美国政府以反恐的名义加强了在南海地区的军事干预和军事控制力度。由于日本国内政治右翼和军国主义的发展,日本已违反了其对《和平宪法》的承诺,甚至派兵前往伊拉克,这方便了日本保护其在东南亚的经济和军事利益。通过与一些东盟国家开展非传统安全领域的合作,日本已经将军事力量扩张到了南海地区。伴随着这些最新的发展情况,南海安全局势已变得更加复杂,并使得在这一问题上的国际环境发生了巨大变化。印度成为有核国家后,也逐渐开始实施“大国”政策,提高在区域和国际事务上的影响力。通过利用东南亚作为推进其“东向”政策的突破口,印度已经在很大程度上改善了其与东盟的整体关系。考虑到地缘政治因素,印度担心中国在东南亚日益增大的影响力会对印度乃至整个东南亚的安全造成威胁。因此,印度认为防止中国将其势力范围扩张到印度洋至关重要。尽管印度希望通过限制中国在南海的地位来阻碍中国向印度洋扩张,但印度已然成为南海争端中的最新参与方。

第三,南海地区主权主张的重叠使在南海划定共同开发的范围很困难。重叠包括领土主张和管辖权主张的重叠以及对岛、礁、洲、滩的主权主张的重叠。因此,对于共同开发区域的划定严重影响了南海共同开发的实现。

除了以上因素,南海区域外石油公司的参与也为共同开发带来了困难。截至目前,已经有 200 多家石油公司参与了南海的油气开采,绝大多数来自美国、荷兰、英国、日本、法国、加拿大、澳大利亚、俄罗斯、印度、挪威以及韩国。这些石油公司已经在南海投入了大量的资金和技术。而他们的参与无疑会加剧南海争端的复

杂化和国际化程度，并且会成为南海共同开发的潜在障碍。

为了维护南海争议海域的和平稳定，除了油气的共同开发外，还应当在其他方面做出努力。应该鼓励多元的区域合作，具体而言，应当包括：渔业开发和保护，海洋研究和海洋环境保护、灾难预防和搜救，以及海洋运输等方面的合作。截至目前，中国已经与其他国家在石油、渔业、海洋环境保护和海洋气候等方面开展了合作，这将有助于中国同其他相关国家一起找到能促进合作、积累经验的解决模式。此外，相关各方应当尊重《南海各方行为宣言》中确立的原则，维护南海安全，从而建立一个更有利的国际局势，促进社会和地区经济的可持续发展。

（中译：王小伟　单位：厦门大学）

An Analysis on the Legal Effects of the Exclusion Declaration Issued by China in Accordance with Article 298 of the United Nations Convention on the Law of the Sea

GU Junfeng*

Abstract: It is the consistent and basic position of the Chinese Government that any maritime disputes between States shall be resolved through peaceful negotiations. However, the settlement procedures provided under Part XV of United Nations Convention on the Law of the Sea are quite mandatory in nature. In order to address this issue, the Chinese Government recently made a declaration in accordance with Article 298 of the Convention, stating that disputes covering such important areas as maritime delimitation, military activities, and enforcement of laws on fisheries and scientific research will not be subject to any international judicial or arbitral jurisdiction under Part XV, Section 2 of the Convention. Such a declaration will certainly have a significant impact on the future resolution of China's maritime disputes with other States. Nonetheless, the legal effects of China's declaration cannot be interpreted simply with the word "exclusion". On the contrary, the legal significance of the declaration is richer and more complex. This article, in accordance with the Convention, seeks to make a detailed analysis of the legal effects of the declaration made by China and its substantive implications for the resolution of China's maritime disputes with other States.

Key Words: Article 298 of United Nations Convention on the Law of the Sea; Exclusion declaration; Legal effects

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* GU Junfeng, international law Ph.D. candidate of School of Law, Xiamen University.

I. Introduction

On August 25, 2006, China, pursuant to Article 298 of the United Nations Convention on the Law of the Sea[1] (hereinafter referred to as the "Convention"), submitted the following written declaration to the UN Secretary-General:

> *The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1(a) (b) and (c) of Article 298 of the Convention.)*[2]

This declaration will have important implications for the resolution of the maritime disputes involving China: without the consent of the Chinese Government,

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1 According to Paragraph 1 of Article 298 of the Convention (Optional exceptions to applicability of section 2), "[w]hen signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission; (ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree; (iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties; (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3; (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention."

2 Division for Ocean Affairs and the Law of the Sea, United Nations, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20after%20ratification, 2 October 2007.

disputes involving China on many important areas, including maritime delimitation, military activities, fisheries, law enforcement, and scientific researches, shall not be submitted to the mandatory third-party settlement procedures provided for under the Convention, and can only be settled through political channels such as bilateral negotiations. This declaration is entirely consistent with the basic consistent position of China on the settlement of maritime disputes through negotiations, and is an important manifestation of the efforts of the Chinese government to protect its own position by actively applying the provisions under the Convention.

Initially at the Third United Nations Conference on the Law of the Sea, the Head of the Chinese Delegation pointed out that it was the consistent position of the Chinese Government that any disputes between States shall be resolved through negotiations between parties to the disputes on the basis of equality and mutual respect for sovereignty and territorial integrity.[3] China's position on dispute settlement has not changed since its ratification of and accession to the Convention in 1996. In a public speech in 2005, Liu Zhenmin, the director of Department of Treaty and Law, Ministry of Foreign Affairs at the time, expounded once again the basic position of China on the settlement of maritime disputes through negotiations.[4] However, the dispute settlement procedures stipulated under Part XV of the Convention are excessively mandatory: where no settlement has been reached by recourse to peaceful means, any dispute should be submitted at the request of any party to the dispute to compulsory procedures entailing binding decisions.[5] Moreover, contracting States to the Convention shall not make any reservations to this Convention,[6] which renders the dispute settlement procedures even more obligatory in nature. In spite of the inconsistency of China's position on the issue of dispute settlement and the provisions provided under the Convention, China, as a contracting State to the Convention has to comply with the Convention. Hence, there is no other way for China to reconcile this contradiction but to devise a tactical use of the mechanisms under the Convention.

Fortunately, the dispute settlement procedures under the Convention are not absolutely mandatory, for Section 3 of Part XV thereof has also provided

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3 Chen Degong, *Modern International Law of the Sea*, Beijing: China Social Sciences Press, 1988, p. 476. (in Chinese)

4 Liu Zhenmin, The Basic Position of China on the Settlement of Maritime Disputes through Negotiations, *China Oceans Law Review*, No. 2, 2005, pp. 18~23. (in Chinese)

5 Article 286 of the United Nations Convention on the Law of the Sea.

6 Article 309 of the United Nations Convention on the Law of the Sea.

"limitations on and exceptions to applicability of Section 2": as far as certain categories of disputes are concerned, they can automatically be exempted from the mandatory procedures provided under Section 2; with respect to some other categories of disputes, a State party may declare in writing that it does not accept any one or more of the procedures provided for under Section 2. Specific categories of the latter type of disputes have been listed under Article 298 of the Convention, covering such important areas as maritime delimitation, military activities, and enforcement of laws on fisheries, etc. The Chinese government has excluded these disputes from the mandatory dispute settlement procedures in the way provided for under the Convention, which not only helps China to maintain its position but also will certainly have a significant impact on the resolution of China's maritime disputes with other States. In consideration of the diversity and complexity of international maritime disputes and the complexity of the dispute settlement mechanisms under the Convention, this article seeks to make a detailed analysis of the legal effects of the exclusion statement made by China and its substantive implications for the resolution of China's maritime disputes with other States.

II. An Overview of the Dispute Settlement Mechanism under the Convention

The dispute settlement mechanisms provided for under Part XV of the Convention first show their respect for national sovereignty than their mandatory nature. Section 1 of Part XV of the Convention provides that any dispute between States shall, first of all, be settled by any peaceful means of their own choice as indicated in Article 33, Paragraph 1 of the UN Charter, including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.[7] If the States parties to a dispute have agreed to seek settlement of the dispute by a peaceful means of their own choice, the mandatory dispute settlement procedures provided for under Section 2 apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.[8] In addition, if the States parties to a dispute have agreed, through a general, regional or bilateral agreement or otherwise that such dispute shall, at the request of any

7 Articles 279 and 280 of the United Nations Convention on the Law of the Sea.
8 Article 281 of the United Nations Convention on the Law of the Sea.

party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in Section 2, unless the parties to the dispute otherwise agree.[9] As provided for in Paragraph 1 of Article 183, the States parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement through negotiation.[10] The Convention further provides that, either of the state parties to a dispute may, on a voluntary basis, invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, Section 1, or another conciliation procedure. However, as the conciliation procedure under Annex V, Section 1 is not mandatory, if the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated.[11] The foregoing provisions shall also apply to any dispute arising from the activities in the Area, and apply *mutatis mutandis* if an entity other than a State party is a party to such a dispute.[12] In practice, only when no settlement has been reached through diplomatic approaches, will a dispute between States be submitted to a third party for settlement in accordance with a mandatory procedure that entails a binding decision. This reflects a general attitude among States that they hope to participate in and control the dispute settlement procedure as independently as possible while equally being reluctant or cautious about surrendering their national sovereignty and interests in the process of settling international disputes. Therefore, the resort to the application of law was established by the Convention as the second step in the dispute resolution procedures.[13]

If no settlement has been reached through any peaceful means according to the choices of the parties to the dispute, any party to the dispute can initiate the mandatory dispute settlement procedures provided for under Section 2 of Part XV of the Convention. The mandatory nature of the dispute settlement procedures is indicated in the fact that any party to the dispute can submit the dispute to the international court or arbitrary tribunal provided for under Section 2 of Part XV of the Convention for settlement without the consent of the other party or parties.

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9 Article 282 of the United Nations Convention on the Law of the Sea.
10 Article 283 of the United Nations Convention on the Law of the Sea.
11 Article 284 of the United Nations Convention on the Law of the Sea.
12 Article 285 of the United Nations Convention on the Law of the Sea.
13 Wu Hui, An Analysis of the Practice of Resolving International Maritime Delimitation through Legal Approaches, in Xiamen University Center for Ocean Policy and Law ed., *A Collection of Academic Papers from the Symposium on the 20th Anniversary of the Signing of the United Nations Convention on the Law of the Sea*, August 2002, p. 38. (in Chinese)

As provided for under paragraph 1 of Article 287 of the Convention, a contracting State to the Convention shall be free to choose at any time, by means of a written declaration, one or more of the following means for the settlement of disputes: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; or (d) a special arbitral tribunal constituted in accordance with Annex VIII. A State party to a dispute, which has not made any choice or has not been covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII. A State party's choice may also be withdrawn by means of a written declaration at any time. Such a declaration shall remain in force until three months after a notice of revocation has been deposited with the Secretary-General of the United Nations. Although the four dispute settlement institutions are equal in status, a dispute may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree if, for the settlement of the dispute: (a) the two parties have chosen different courts or tribunals; (b) only one of the parties has made the choice; (c) the two parties have made declarations which have not yet come into force; or (d) neither party has made the choice.[14] Therefore, the arbitral tribunal under Annex VII plays the role of a standby institution.

However, not all maritime disputes may be submitted to a mandatory dispute settlement procedure that entails a binding decision, because limitations and exceptions to the mandatory procedure under Section 2 have been provided for under Section 3 of Part XV of the Convention, specifically, paragraphs 2 and 3 of Article 297, and two paragraphs of Article 298. Paragraphs 2 and 3 of Article 297 can be referred to as "automatic exception provisions" as they have provided the categories of disputes which can automatically be excluded from the mandatory procedures, while Article 298 "optional exception provisions" stipulating the categories of disputes which can be excluded from the procedure only by means of a declaration in writing by a State party.

According to Article 297(2) of the Convention, disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled through the mandatory procedures, with the exception that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of: (a) the exercise by the coastal State

14 Article 287(3) to (6) of the United Nations Convention on the Law of the Sea.

of a right or discretion in accordance with Article 246 (Marine scientific research in the exclusive economic zone and on the continental shelf) of the Convention; or (b) a decision by the coastal State to order suspension or cessation of a research project in accordance with Article 253 (Suspension or cessation of marine scientific research activities) of the Convention. Article 297(2) of the Convention also provides that a dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under Articles 246 and 253 in a manner compatible with this Convention shall be submitted, at the request of either party, to conciliation under Annex V, Section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in Article 246(6), or of its discretion to withhold consent in accordance with Article 246(5).

In accordance with Article 297(3) of the Convention, the coastal State shall not be obliged to accept the submission to settlement through the mandatory procedures of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

The Convention has excluded disputes concerning the development of fishery resources in the exclusive economic zone from the mandatory dispute settlement procedures, which is the result of the insistence on their positions by the vast majority of developing States in the United Nations Conference on the Law of the Sea as well as a manifestation of the respect of the Convention for the sovereign rights and jurisdiction of coastal States over their exclusive economic zones.[15] However, it is not in the interest of major fishing States to exclude disputes concerning the determination of the allowable catch, the harvesting capacity, the allocation of surpluses in the exclusive economic zone from the mandatory dispute settlement procedures, for in international fisheries practice the most abundant fishery resources are often concentrated in the exclusive economic zone

15 Third United Nations Conference on the Law of the Sea, Official Records, Vol. V, p. 18. Ecuador, Peru, Argentina, India, Pakistan, Nepal, Mauritius and other States have advocated that the International Tribunal for the Law of the Sea (ITLOS) shall exercise jurisdiction only over matters relating to the international seabed area. The representatives of India stressed that costal States shall have full jurisdiction over the development of the resources, the establishment of facilities, and the conduction of scientific researches and other economic uses in their exclusive economic zones and continental shelves.

stretching from the baseline out to 200 nautical miles from the coast of a State.[16] Therefore, as a compromise, Article 297(3) has provided for the mandatory dispute conciliation procedures. Specifically, where no settlement has been reached by recourse to peaceful means under Section 1 of Part XV, a dispute shall be submitted to conciliation under Annex V, Section 2, at the request of any party to the dispute, when it is alleged that: (a) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered; (b) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or (c) a coastal State has arbitrarily refused to allocate to any State, under Articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

Coastal States are not obliged to submit a large part of matters relating to their exercise of sovereign rights and jurisdiction in their exclusive economic zones to the mandatory dispute settlement procedures. Also, States parties to the Convention are granted the right to exclude certain categories of disputes from such procedures in compliance with Article 298 of the Convention. When signing, ratifying or acceding to the Convention or at any time thereafter, a State may declare in writing that it does not accept any one or more of the procedures provided for in Section 2 with respect to one or more of the following categories of disputes: (a) disputes concerning the interpretation or application of Articles 15 (delimitation of territorial sea), 74 (delimitation of the exclusive economic zone) and 83 (delimitation of the continental shelf) relating to sea boundary delimitations, or those involving historic bays or titles; (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, Paragraph 2 or 3; (c) disputes in respect of which the Security

16 Third United Nations Conference on the Law of the Sea, Official Records, Vol. V, p. 23. The United States, Spain, the Netherlands, Luxembourg, Belgium, Federal Republic of Germany, New Zealand and other States have contended that the mandatory dispute settlement procedures shall not only apply to the sea areas beyond national jurisdiction, but also those within national jurisdiction.

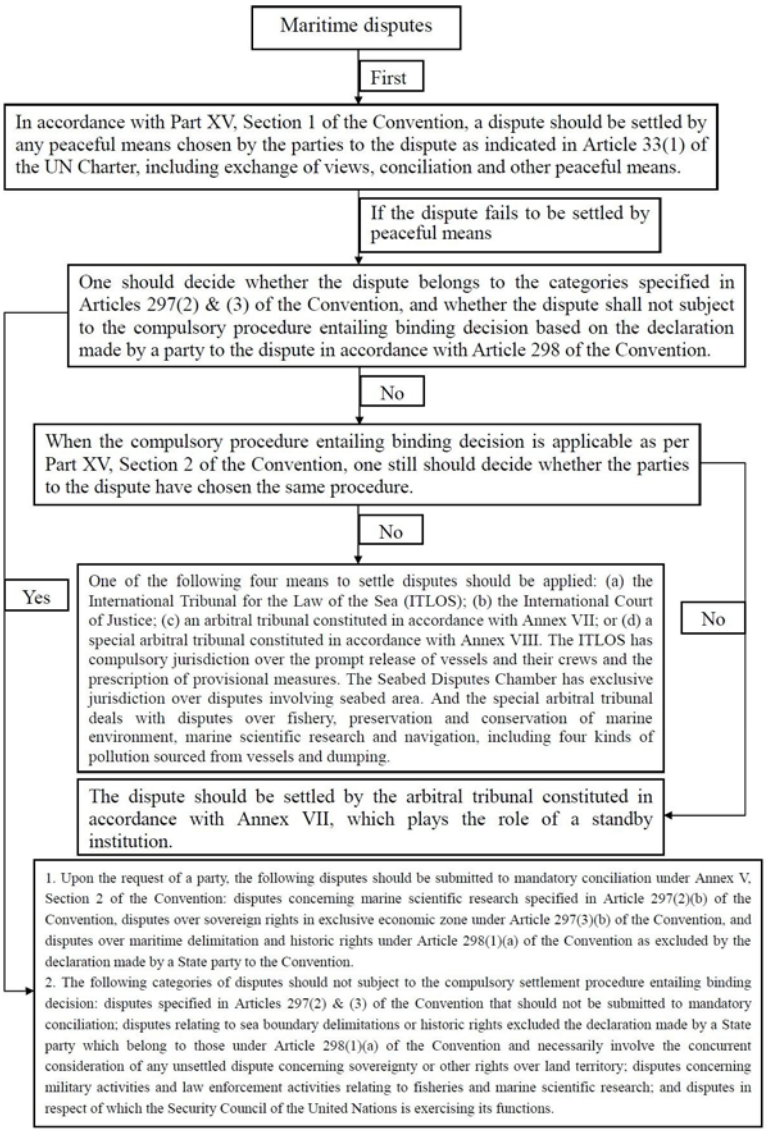
Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. However, if certain conditions are met, disputes relating to sea boundary delimitations, and historic bays or titles as specified under item (a) above shall be submitted to the mandatory dispute settlement procedure at the request of a State.[17] Once a State party has made a declaration, it shall neither be obliged to submit the categories of excepted disputes to any international court or tribunal or subject to their jurisdiction, nor "be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party."[18]

We can use the following *Flow Chart of the Dispute Settlement Process* (see next page) to illustrate the complicated dispute settlement mechanisms under the Convention.

III. Categories of Disputes Excluded by China's Declaration Made in Accordance with Article 298 of the Convention

Article 298 of the Convention allows State parties to exclude certain categories of disputes from the mandatory dispute settlement procedures, which is the result of a "package deal" made in the drafting of the Convention. If there is no such optional exception as provided under Article 298, many States will not accept the mandatory dispute settlement procedures provided for under Part XV, and thus refuse to accede to the Convention. States parties opposing the mandatory dispute settlement mechanisms of the Convention can make declarations by actively applying Article 298. Since the exclusion declaration currently made by the Chinese government covers all issues specified under Article 298, maritime disputes involving China which relate to such issues shall not be subject to the jurisdiction of the mandatory dispute settlement procedures provided for under Part XV, Section 2 of the Convention.

17 Article 298, Paragraph 1 of the United Nations Convention on the Law of the Sea.
18 Article 298, Paragraph 3 of the United Nations Convention on the Law of the Sea.



Flow Chart of the Dispute Settlement Process Provided in Part XV of the Convention[19]

19 Wu Hui, An Analysis of the Practice of Resolving International Maritime Delimitation through Legal Approaches, in Xiamen University Center for Ocean Policy and Law ed., *A Collection of Academic Papers from the Symposium on the 20th Anniversary of the Signing of the United Nations Convention on the Law of the Sea*, August 2002, p. 37. (in Chinese)

A. Disputes Concerning Maritime Delimitation and Historic Rights[20]

According to Article 298 (1)(a), the first category of disputes which can be excluded by State parties through making a declaration includes disputes applicable to the interpretation or application of Articles 15 (delimitation of territorial sea), 74 (delimitation of the exclusive economic zone) and 83 (delimitation of the continental shelf) relating to sea boundary delimitations, or those involving historic bays or titles.

1. Disputes Concerning Maritime Delimitation

Maritime delimitation includes the delimitation of the territorial sea, the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts. As for the delimitation of the territorial sea, a specific principle − the principle of "equidistance plus special circumstances" − has been provided for under Article 15 of the Convention.[21] According to this principle, the line of delimitation between the territorial seas of two States is generally the median line, every point of which is from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured. While under special circumstances, 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. However, apart from "historic title", the Convention fails to specify other special circumstances. In practice, it may cause controversy among interested States as to whether the existence of offshore islands and the shape of coastline may be considered as "special circumstance," or even whether a State is entitled to "historic title" in specific cases or not. In the case of the delimitation of the exclusive economic zone and the continental shelf, the provisions under both Article 74 and Article 83 of the Convention use almost an identical wording:

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20 Although the concept of "title" is translated as " 所有权 " in the Chinese version of the Convention, this translation seems to be wrong and impalpable, for the concept of "historic title" and that of "historic right" have no essential difference. Hence, the concept is referred to as " 历史性权利 " in this article to facilitate readers' understanding.

21 Article 15 of the United Nations Convention on the Law of the Sea provides, "[w]here 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 seas 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."

"The delimitation of the exclusive economic zone (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." However, the two articles fail to provide any specific rule except the fact that interested States should be required to conduct delimitation by agreement on the basis of international law for the purpose of equitable (fair) solution.[22] This is a final compromise reached after heated debates between the two opposing groups of States at the Third United Nations Conference on the Law of the Sea: one group advocated the principle of "equidistance/median line" while the other vouched for "equitability". Due to the failure of the Convention to provide for specific delimitation rules, there exist at the same time in State practice two opposing propositions, namely, the principle of "equidistance/median line", and the principle of "equitability". Hence, the delimitation of the exclusive economic zone and the continental shelf between two states whose coasts are adjacent or opposing to each other is without doubt an issue at high risk of disputes.

As maritime delimitation involves national sovereignty or essential sovereign rights, fundamental national interests may be jeopardized in the process of submitting disputes concerning maritime delimitation to third-party settlement procedures that entail binding decisions. Previous judicial precedents on maritime delimitation indicate that international courts or tribunals generally make judgments by considering and balancing various factors relating to the delimitation (such as the shape of the coastline, the existence of offshore islands, and coastline length, etc.). It is difficult to predict the final judgments since courts or tribunals often enjoy considerable discretion in determining which factors to consider and what degree of importance to attach to these factors; and this is exactly why many scholars (and even some judges at the international tribunals) believe that courts or tribunals do not conduct delimitations in accordance with certain legal principles but actually on the principles of ex aequo et bono.[23] For interested States,

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22 Although the term "equitable" is translated as "gongping (公平)" in the Chinese version of the United Nations Convention on the Law of the Sea, a scholar has pointed out "hengping (衡平)" as the proper translation (See Kuen-chen Fu, *Equitable Ocean Boundary Delimitation under International Law of Sea*, Taipei: San Min Book Co., Ltd., 1992.) This article uses " 衡平 " when expounding its views while retaining " 公平 " when quoting positions of the Chinese government and related provisions of the Chinese version of the Convention.

23 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 190.

it is better for them to maintain the initiative to resolve the dispute in their own hands by adopting relatively more flexible political negotiations or consultation procedures than to submit the disputes to a third party procedure whose process is uncontrollable and whose outcome is unpredictable.

Taking into account the importance of maritime delimitation to national interests, many States have voiced their objections to the proposal of unconditional submission of disputes in this regard to international courts or arbitral tribunals during the drafting stage of the Convention. Some socialist States pointed out that if the Convention contains provisions stipulating that maritime delimitation shall be submitted to mandatory settlement procedures entailing binding decisions, they would not accept such provisions and even the entire Convention. The issue is made even more prominent by the provision that, contracting States to the Convention shall not make any reservations or exceptions to this Convention. Therefore, as the final compromise, the Convention provides that disputes concerning maritime delimitation and historic rights shall be submitted to the framework of mandatory settlement which, however, may be excluded by contracting States through making a declaration but shall be submitted to mandatory settlement if certain conditions are met.[24]

2. Disputes Concerning Historic Rights

There are many provisions under the Convention that recognize the historic rights of coastal States to certain sea areas, including Article 10, Article 15, Article 47, and Article 51, with the first two articles respectively on historic bay and territorial sea delimitation and the last two articles on archipelagic waters of archipelagic States. Paragraphs 1 to 5 of Article 10 ("Bays") of the Convention have provided the criteria of a bay and the general rules governing the delimitation of internal waters of a bay, while Paragraph 6 thereof also provides that even if a historic bay of a coastal State does not meet the criteria of a bay, it is still applicable to regime of internal waters as an exception. However, the Convention fails to provide for the concept of a "historic bay". Although the concept is generally deemed to refer to a bay which has been governed by a coastal State as its internal waters, there exist no clear and specific criteria for it, which may easily lead to controversy in practice. In spite of the fact that at this point about 20 States have already announced claims to their historic bays, many of such claims are met with

24 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 256.

opposition by other states. For example, Russia's claim to Peter the Great Bay was opposed by the UK, the US and some other States; Vietnam's claim to the Gulf of Tonkin and the Gulf of Thailand is confronted with opposition by France, Thailand, China and the US.[25]

The principle regarding historic rights can also be applied to other waters outside the historic bay, such as the strait waters, archipelagic waters, and other waters within national jurisdiction.[26] As provided under Article 47 of the Convention, if a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighboring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected. Besides, according to Article 51 of the Convention, an archipelagic State shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States in certain areas that fall within archipelagic waters. In addition to the previously mentioned historic rights as explicitly recognized under the Convention, historic rights or historic waters are also claimed by some coastal States to some sea areas in national practice. For example, in a letter published in December 1973, the Canadian Ministry of Foreign Affairs stated that, "due to historical reasons, Canada insists that the waters of the Canadian Arctic Archipelago be internal waters of Canada, although there is not a similar expression in any treaty or by means of any law"; since 1973, the Royal Government of Tonga, in accordance with the Royal Proclamation of 1887, has maintained a "historic waters" claim to a rectangular piece of sea area which is entitled to the legal status of "archipelagic waters; in 1974, after years of negotiations, India and Sri Lanka signed the Agreement between the Republic of India and the Republic of Sri Lanka on the Boundary in Historic Waters between the Two States and Other Related Matters.[27] Questions centered on historic rights are likely to trigger international disputes: as for historic rights explicitly recognized under the Convention, what are their constituent elements and are these constituent elements met in a specific case? With regards to other historic rights

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25 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 44.

26 Juridical Regime of Historic Water Including Historic Bays − Study Prepared by the Secretariat, UN Documents, A/CN.4/143, 9 March 1962, para. 34.

27 Zhao Jianwen, United Nations Convention on the Law of the Sea and China's Acquired Right in the South China Sea, *Chinese Journal of Law*, No. 2, 2003. (in Chinese)

which have not been provided for under the Convention, do claims of related States comply with the stipulations of international law?

Historic rights also play an essential role in maritime delimitation. Article 15 of the Convention provides explicitly that, by reason of historic title or other special circumstances, the delimitation of the territorial seas shall not be conducted according to the principle of equidistance/median line. About the delimitation of the exclusive economic zone and the continental shelf, although the principle of "historic right" fails to be incorporated explicitly into Article 74 and Article 83 of the Convention, the historic rights and interests of related States can be deemed as one of the factors that should be taken into account in actual delimitation practice.[28] There are already some judicial precedents in previous maritime delimitation practice where historic rights have become one of the factors taken into consideration, such as the *Libya-Tunisia Continental Shelf Case* (1998)[29] and the *Eritrea-Yemen Arbitration* (1998).[30] Therefore, disputes arising from historic rights may become part of the intricate maritime delimitation disputes.

The claim of historic rights by a State may often affect the interests of not only its neighboring States but also other States. For instance, if a coastal State's claim of a bay as its historic bay is established, vessels of any other States cannot be entitled to the right of innocent passage. If such a dispute must be submitted to the mandatory third-party settlement procedures, it is likely for it to be repeatedly filed for lawsuits or arbitrations by the coastal State or other interested States. Since the judgments given by courts or tribunals are binding only on the parties to the dispute,[31] coastal States which claim historic bays may be involved repeatedly in a series of disputes over the same issue with other States, which may be submitted over and over again to the mandatory settlement procedures without ever reaching an ultimate resolution. In addition to disputes over historic bays, those over historic archipelagic waters or historic internal waters, and so on, may also give rise to

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28 Kuen-chen Fu, Equitable Considerations in International Cases on Maritime Delimitation, in Kuen-Chen Fu, *Essays on International Law of the Sea*, Xiamen: Xiamen University Publishing Company, 2004, pp. 160~180. (in Chinese)

29 Continental Shelf Case (Tunisia v. Libya), Judgment of 24 February 1982, *ICJ Reports*, 1982.

30 Eritrea-Yemen Arbitration, Award, Phase I: Territorial Sovereignty and Scope of Dispute, Chapter IV − Historic Title and Other Historical Considerations, 9 October1998.

31 Article 296, Paragraph 2 of the Convention, Article 59 of the Statute of the International Court of Justice, Article 33 of the Statute of the International Tribunal for the Law of the Sea, and Annex VII (Arbitration), Article 11 and Annex VIII (Special Arbitration), Article 4 (Annex VII applies *mutatis mutandis*) of the Convention.

the same problem. Besides, disputes over historic rights relating to maritime delimitation, as an actual part of maritime delimitation disputes, are not all suitable for submission to the third party mandatory settlement procedures.

3. Mandatory Conciliation

In accordance with Article 298 1(a)(i) of the Convention, disputes relating to sea boundary delimitations, or those involving historic rights, shall be excluded from submission to mandatory international judicial or arbitrational procedures in line with the declaration made by the State parties at any time. However, the dispute shall be submitted to mandatory conciliation procedures provided for under Annex V, Section 2, if the following three conditions are met: 1) such a dispute arises subsequent to the entry into force of the Convention; 2) no agreement is reached in negotiations between the parties within a reasonable period of time; or 3) such a dispute does not fall into the category "that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory".

For the first condition, it is generally agreed that the time of occurrence of the dispute is the time when the opposing points of view have been clearly put forward by the parties to the dispute, which in practice depends on the specific facts that the different views have been officially stated publicly for the first time by State parties to the dispute. If a maritime delimitation dispute or a dispute involving historic right occurred prior to November 16, 1994, the effective date of the Convention, such a dispute does not have to be submitted to the mandatory conciliation procedures.

In line with the second condition, only when no agreement is reached within a reasonable period of time, can the dispute be submitted for mandatory conciliation, which is actually a restatement of the basic principle of resolving a dispute through negotiation. However, there remains the need for clarification as to how to interpret the wording "within a reasonable period of time". In 1969, the International Court of Justice pointed out during the *North Sea Continental Shelf Cases* that, concerning the issue of maritime delimitation, "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation." [32] If related facts demonstrate that State parties to the disputes have no intention of reaching any agreement and are

32 North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), *ICJ Report*, 1969, para. 85.

only going through a formal process of negotiation, it can be considered that the first condition − "no agreement is reached within a reasonable period of time" − is met. Undoubtedly, if a party refuses to go through even a formal process of negotiation, it can be considered without doubt that, "no agreement is reached within a reasonable period of time".

With respect to the third condition, the maritime delimitation dispute should not concur with sensitive territorial disputes over lands. Since the ownership and jurisdiction of a State over oceans are land-based, if the territorial dispute over land concurring with a maritime delimitation dispute has not been resolved, the results of maritime delimitation and even the ownership of historic rights will be affected. Besides disputes over lands, territorial disputes over islands will also have a significant influence on maritime delimitation. As provided under Article 121 of the Convention, except rocks that cannot sustain human habitation or economic life of their own, an island shall have its exclusive economic zone and continental shelf. Therefore, it is self-evident that the sovereignty over islands is of extremely high importance. Since disputes over territorial sovereignty are highly sensitive matters in international relations, if such disputes should exercise a decisive impact on the results of maritime delimitation and the ownership of historic rights, the latter had better not be submitted to any mandatory procedures, including the mandatory conciliation procedures before the former has been resolved. However, there may still be two more special exceptions: either all parties to the delimitation dispute unanimously agree to give zero effect to disputed islands (i.e., the disputed island does not have its exclusive economic zone and continental shelf);[33] or the maritime boundary may be temporarily established somewhere beyond which the disputed sea area may have effect in the current phase of the delimitation.[34] In the above cases, where the maritime delimitation dispute will not "necessarily involve the concurrent consideration of" unresolved territorial disputes over lands, even if there remains to be territorial disputes over lands, the maritime delimitation disputes can be submitted to mandatory conciliation procedures.

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33 For example, in the delimitation of the continental shelf between Iran and the United Arab Emirates in 1974, Abu Musa, a small island in the Persian Gulf, was given zero effect in delimitation. See Yuan Gujie, *Theories and Practice of International Maritime Delimitation*, Beijing: Law Press China, 2001, pp. 35~40. (in Chinese)

34 For example, in the delimitation of the continental shelf between Japan and South Korea, the boundary is established on the south of Takeshimas, an island over which the two countries have sovereignty dispute. See Choon-Ho Park ed., *Central Pacific and East Asian Maritime Boundaries*, Beijing: Law Press China, 1994, pp. 158~162. (in Chinese)

When all of the three conditions mentioned above are met, if any party to a dispute submits the dispute to the conciliation procedures in accordance with Annex V, Section 2, the other party shall be obliged to accept such conciliation procedures.[35] The functions of the conciliation commission include, "hearing the parties, examining their claims and objections, and making proposals to the parties with a view to reaching an amicable settlement."[36] The report presented by the conciliation commission, although is only recommendatory and not legally binding, can serve as the basis for further negotiations in the future. The Convention provides that the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to international judicial or arbitral procedures .[37]

However, it is seemingly contentious as to whether the parties to the dispute should be obliged to submit the dispute to the mandatory third-party procedures if further negotiations based on the report of the conciliation commission fails to result in an agreement, for the Convention has used contradictory wording on this matter. The Convention, on the one hand, requires that parties to the dispute "shall … submit the question" while on the other hand, sets up the condition that, this should be done under the premise of " mutual consent". It is thus no wonder that a certain scholar remarked that, it was "one of the most puzzling provisions of the entire Convention".[38] Some other scholars hold that, besides the use of "shall" here to convey the idea of obligation, Article 300 of the Convention also requires States parties to the Convention to fulfill in good faith the obligations assumed under the Convention. Therefore, if a party refuses to consider submitting the dispute to the mandatory dispute settlement procedures, it will violate its obligation to resolve the dispute in good faith.[39] Others hold that the wording "shall, by mutual consent" is used only to reinforce this notion that, if a State party has chosen to make an exclusion declaration, the mandatory third-party arbitral or judicial procedures does not apply to the disputes over maritime delimitation or historic rights.[40]

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35 Annex V, Article 11 of the United Nations Convention on the Law of the Sea.
36 Annex V, Article 6 of the United Nations Convention on the Law of the Sea
37 Article 298, Paragraph 1(a)(2) of the United Nations Convention on the Law of the Sea.
38 Jr. John King Gamble, The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?, *Boston University International Law Journal*, Vol. 9, No, 39, 1991.
39 See e.g. Anne Sheehan, Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes, *University of Queensland Law Journal*, Vol. 24, No. 1, 2005.
40 See e.g. Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 262.

The author agrees with the latter view. Firstly, according to the logical relation between the two wordings in the Convention, i.e., the parties "shall…submit the question to" mandatory settlement procedures provided that such submission is conducted "by mutual consent", we can conclude that if the condition (mutual consent) fails to be met, the dispute may not be submitted to the mandatory settlement procedures. Secondly, such logical relation can also be confirmed by Article 299, Paragraph 1 of the Convention which provides, "a dispute excluded under [A]rticle 297 or excepted by a declaration made under [A]rticle 298 from the dispute settlement procedures provided for in section 2 may be submitted to such procedures only by agreement of the parties to the dispute." Hence, the intended object of both the obligation expressed by the word "shall" and the obligation of "to fulfill in good faith" is the process, rather than the result of the negotiation over the possibility of submitting the dispute to mandatory settlement procedures. In other words, if the parties to the dispute fail to reach agreement on substantive issues on the basis of the report presented by the conciliation commission, and although they are not obliged to reach an agreement, they shall at least be obliged to conduct negotiation "in good faith" over whether to submit the dispute to mandatory third-party settlement procedures or not. If the negotiation fails to result in an agreement, the parties to the dispute shall only be under the obligation to proceed expeditiously to an exchange of views regarding its settlement by further negotiation or other peaceful means as per Article 283 of the Convention.[41]

B. Disputes Concerning Military Activities

Although the Convention intends to regulate issues concerning the use of the oceans during peacetime, this does not mean that it is not concerned about the military activities at sea.[42] Peacetime military activities at sea are related to various functions of naval vessels: firstly, carrying out daily law enforcement activities in waters under national jurisdiction, usually involves the enforcement of laws on fisheries, customs and immigration;[43] secondly, making preparations for

41 Shabtai Rosenne and Louis B. Sohn eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, p. 134.

42 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 421.

43 However, maritime law enforcement on naval vessels cannot be deemed as disputes concerning military activities referred to under Article 298, Paragraph 1(b) of United Nations Convention on the Law of the Sea.

the performance of other functions such as military exercises or weapon testing which the navy usually carries out at sea; and thirdly, maritime States boost their global military influence through the use of their naval powers.[44] Various military activities carried out by States at sea will undoubtedly become a trigger for a variety of disputes. Particularly, the Convention, although having established different regimes for different waters, fails to make specific provisions on which military activities may be permitted in specific waters and how to regulate the permitted military activities. For example, upon the establishment of the exclusive economic zone regime in accordance with the Convention, Brazil, Cape Verde, India, Malaysia, Pakistan, Uruguay and other States declared immediately that foreign States shall not conduct military exercises or place military installations within their exclusive economic zones without their consent; while some maritime States such as Germany, Italy, and the Netherlands, expressed opposition to such a declaration. The crux of the problem lies in the fact that, although the Convention has retained other States' freedoms of navigation, overflight, and other legitimate uses of the oceans within the exclusive economic zones, it fails to clarify whether such activities as weapon testing should be included in such freedoms.[45]

Given the high level of political sensitivity of disputes over military activities as well as the possibility of military secrets disclosure in the judicial process, States may exclude such disputes from submission to mandatory dispute settlement procedures, which is stipulated under Part XV, Section 2 of the Convention by making a declaration in accordance with Article 298 of the Convention. However, it should be noted that "military activities" mentioned herein do not include maritime law enforcement activities conducted by naval vessels or military aircrafts. From the drafting history of Article 298 of the Convention, one can see that, during its drafting, the dispute concerning maritime military activities has been clearly distinguished from the dispute concerning maritime law enforcement activities as one of the issues which can be optionally excluded from the mandatory dispute settlement procedures. Pursuant to Article 17, Paragraph 3(c) of the document (U.N. Doc. Gp/2nd Session/No. 1/Rev. 5) made by the Informal Working Group on the Settlement of Disputes in 1975, a State may make a declaration about "disputes concerning military activities, including military activities by government vessels

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44 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 426.

45 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester: Manchester University Press, 1999, p. 427.

and aircrafts engaged in non-commercial service, but excluding the law enforcement activities carried out in accordance with of the Convention."[46] At the sixth session of United Nations General Assembly held in 1977, some States raised objections to the document, holding that it might result in unfair consequences: foreign military activities in the exclusive economic zone of a State may be excluded from third party dispute settlement procedures; in contrast, law enforcement activities of coastal States are subject to mandatory international dispute settlement procedures. In the end, the document was amended by the president of the Assembly so as to "give law enforcement activities similar immunity to military activities."[47] According to the amended document, both disputes concerning law enforcement activities and those concerning military activities may equally be excluded from mandatory third party settlement procedures.[48] In subsequent sessions of the Assembly, the categories of disputes concerning law enforcement activities that can be optionally excluded were restricted to those relating to fisheries and marine scientific research.[49]

C. Disputes Concerning Fisheries and Marine Scientific Research Law Enforcement Activities

According to Article 298, Paragraph 1 (b) of the Convention, the categories of disputes which can be excluded also include "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3", i.e., disputes concerning law enforcement activities relating to fisheries in the exclusive economic zone and those relating to scientific research in the exclusive economic zone and on the continental shelf.

Article 297 of the Convention has made provision for categories of disputes which may be excluded automatically. Such disputes include those concerning fisheries and maritime scientific research. However, not all disputes concerning fisheries and maritime scientific research may be excluded automatically. The

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46 SD. Gp/2nd Session/No.1/Rev. 5 (1975, mineo.), Art. 17(3)(c).
47 A/CONF.62/WP.10/Add.1(1977), VIII Off. Rec. 65, 70 (President).
48 A/CONF. 62/WP. 10 (ICNT 1977), Art. 297(1)(b), VIII Off. Rec. 1, 48.
49 Shabtai Rosenne and Louis B. Sohn eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, pp. 135~137.

categories of fisheries disputes which can be excluded from submission to the mandatory settlement procedures under Part XV, Section 2 of the Convention without a making declaration are restricted only to disputes "relating to its [coastal State] sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."[50] Other categories of fisheries disputes, such as disputes arising from fishing activities on high seas, may also be submitted to mandatory settlement procedures. Similarly, the categories of disputes concerning maritime scientific research in the exclusive economic zone and on the continental shelf which can be excluded automatically are limited only to disputes "arising out of the exercise by the coastal State of a right or discretion" in accordance with Article 246", or the disputes arising from "a decision by the coastal State to order suspension or cessation of a research project" in accordance with Article 253.[51] Obviously, the categories of disputes which may be excluded automatically need not be excluded by means of a declaration,[52] while those should be excluded in accordance with Article 298 of the Convention are disputes arising out of law enforcement activities relating to such categories of disputes.

The coastal State may, in the exercise of its sovereign rights to fishery resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.[53] The inspection of suspected vessels may involve such specific measures as hot pursuit and arrest. Other fisheries enforcement measures which may be taken by coastal States in practice include: designating sea lanes for in-transit fishing vessels, requiring fishing vessels to report their entering into and leaving of the exclusive economic zone as well as their routes, and demanding fishing vessels to put away their fishing equipment when in transit.[54] Coastal States'

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50 Article 297, Paragraph 3(a) of the United Nations Convention on the Law of the Sea

51 Article 297, Paragraph 2(a) of the United Nations Convention on the Law of the Sea

52 However, some of the disputes shall be submitted to the mandatory conciliation procedure. See Article 297, Paragraph 2(b) and Paragraph 3(b) of United Nations Convention on the Law of the Sea.

53 Article 73, Paragraph 1 of the United Nations Convent*i*on on the Law of the Sea.

54 Burke William T., *New International Law of Fisheries: UNCLOS 1982 and beyond*, Oxford: Clarendon Press, 1994, pp. 315~335.

penalties on fishing vessels that have violated fisheries laws and regulations in the exclusive economic zone "may not include imprisonment, or any other form of corporal punishment", and the coastal State shall be obliged to "promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed".[55] Though disputes concerning coastal States' sovereign rights over fishery resources in their exclusive economic zones may be excluded automatically, disputes concerning law enforcement activities for the purpose of ensuring the realization of these rights shall be excluded only by means of making a declaration.

In the cases where vessels are arrested, arrested vessels and their crew shall promptly be released upon the posting of reasonable bond or other security.[56] If the detaining State fails to do so, the dispute may be submitted to a court or tribunal accepted by the detaining State under Article 287 or to the International Tribunal for the Law of the Sea (regardless of whether the detaining State is under its jurisdiction or not), without the consent of the flag State of the arrested vessel.[57] However, the prompt release procedures provided for under Article 292 of the Convention can deal only with procedural issues, i.e., whether the conditions for release are met and whether the arrested vessel should be released, "without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crews".[58] Therefore, although the detaining of foreign fishing vessels by a coastal State is categorized as fisheries law enforcement activities in the exclusive economic zone, the optional exclusion declaration on such disputes shall be bound by the prompt release procedures provided for under Article 292 of the Convention, and the disputes over whether the arrested vessel and its crews shall promptly be released or not should still be subject to mandatory third party settlement procedure.

There are no provisions under the Convention on law enforcement activities relating to marine scientific research, but just as in fisheries enforcement activities, coastal States may also take such enforcement measures such as, expulsion, arrest, and punishment in accordance with their domestic laws so as to exercise their discretion to approve or reject a scientific research application, or implement their

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55 Article 73, Paragraph 3 and Paragraph 4 of the United Nations Convention on the Law of the Sea.
56 Article 73, Paragraph 2 of the United Nations Convention on the Law of the Sea.
57 Article 292, Paragraph 1 of the United Nations Convention on the Law of the Sea.
58 Article 292, Paragraph 3 of the United Nations Convention on the Law of the Sea.

decision to suspend or cease a research project. The dispute arising out of the aforesaid enforcement measures can be excluded in writing by any contracting party to the Convention. However, such exclusion applies only to the coastal State but not to the other party to the dispute. If these enforcement measures involve the detaining of vessels, as mentioned above, the provisions on mandatory dispute settlement for the prompt release of vessel under Article 292 of the Convention still apply.

It should be particularly noted that the exclusion declarations on fisheries law enforcement activities and those related to marine research disputes made by contracting States to the Convention have legal effect only on coastal States and do not apply to flag States and other non-coastal States. As per Article 297, Paragraphs 2 and 3 of the Convention, whether in a fisheries dispute, or a dispute concerning marine scientific research, the coastal State shall not be obliged to accept the submission to mandatory settlement procedures.[59] This means that only the coastal State can be "automatically excepted" in accordance with of Article 297 of the Convention while the other party to the dispute, i.e., the non-coastal State, shall still be subject to mandatory settlement procedures. Hence, corresponding to the provisions under Article 297, the provisions on "optional exceptions" under Article 298 − "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3" − apply only to coastal States, but not to the non-coastal States. In this connection, under the premise that either party to the dispute has made an exclusion declaration, if the flag State party or any other non-coastal State party requests to submit the dispute to the mandatory settlement procedures, the coastal State shall not be obliged to accept such submission; however, if it is the coastal State that makes such request, the other party shall be obliged to accept that submission.

D. Disputes with Regards to Which the Security Council of the United Nations Is Exercising the Functions Assigned to It by the Charter of the United Nations

In order to avoid conflicts with the UN Security Council's operations to

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59 Article 297, Paragraph 2(a) and Paragraph 3(a) of the United Nations Convention on the Law of the Sea.

maintain international peace and security, Article 298, Paragraph 1(c) of the Convention provides that a State may declare in writing that it does not accept any one or more of the procedures provided for in Section 2 of Part XV with respect to disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations. The Charter of the United Nations stipulates that, if the persistence of the dispute between State parties may threaten the maintenance of international peace and security, "the Security Council may … recommend appropriate procedures or methods of adjustment."[60] The stipulation indicates that, in resolving an international dispute, the Security Council only has the right to provide recommendations but not the right to make decisions. As such, unless the State parties to a dispute decide on their own to comply with the recommendations made by the Security Council on the settlement of the dispute, the choice of dispute solutions actually does not necessarily conflict with the Security Council's operations within its purview. Therefore, the Convention provides that such disputes may be excluded optionally rather than automatically. State parties can exclude such disputes by means of a declaration from the mandatory dispute settlement procedures under the Convention so as to avoid conflict between the compliance of the Security Council's recommendations and their obligations under the Convention. However, in practice, the Security Council may also decide afterwards to remove a disputed matter from its agenda or call upon the parties to settle it by the means provided for in the Convention. Under both circumstances, the exclusion declaration on such disputes made by contracting parties to the Convention shall be invalidated.[61]

IV. Substantive Implications of the Exclusion Declaration Made by China for the Solutions of the Current Maritime Disputes Involving China

A. Disputes Concerning Historic Waters and Maritime Delimitation in the Waters Surrounding China

China finds itself in a relatively unfavorable marine geographical location

60 Article 36, Paragraph 1 of Charter of the United Nations.
61 See the proviso of Article 298, Paragraph 1(c) of the United Nations Convention on the Law of the Sea.

with its exclusive economic zone and continental shelf connected to those of its neighboring States, consequently resulting in clashes over delimitation with those States. It is involved in delimitation disputes with South Korea and North Korea in the Yellow Sea,[62] with Japan and South Korean (the northern part of the East China Sea) in the East China Sea, and in the South China Sea with Vietnam, the Philippines, Malaysia, Brunei, and Indonesia. Among all of the above delimitation disputes, those implicating the South China Sea are particularly more complicated, involving sovereignty disputes over islands and historic waters with various States.

Is there any possibility for these protracted maritime disputes to be submitted to the mandatory disputes settlement procedures under the Convention, especially the highly complicated issue of delimitation in the South China Sea as well as the dispute between China and Japan on the delimitation in the East China Sea, on which both parties hold a different stance? Based on the foregoing analysis, since China has made an exclusion declaration in accordance with Article 298 of the Convention, these disputes shall not be submitted to any international court or tribunal without the consent of China; however, we cannot rule out the possibility that these disputes would be submitted to the mandatory conciliation procedures under Annex V, Section 2 of the Convention. All of the three conditions mentioned previously for submission to the mandatory conciliation procedures shall be met before disputes concerning maritime delimitation or over historic rights shall be submitted to such procedures. Should any of the three conditions fails to be met, the State parties may refuse submission to the procedures.

1. The Issue of Delimitation in the Yellow Sea and the Northeastern Part of the East China Sea between China and South Korea

China and South Korea are faced with the problem of delimitation of the continental shelf and the exclusive economic zone in the Yellow Sea and the northeastern part of the East China Sea. The two States had started consultations on the law of the sea regarding the issue since 1996, and they had conducted 11 consultations until November 2007. However, except the preliminary agreement reached at the tenth consultation held in December 2005 on the scope of the targeted sea area of the first phase of delimitation which is free of any claim from a third party, no other achievements has been made on other substantive

62 Since North Korea has not ratified and acceded to the United Nations Convention on the Law of the Sea, the settlement of the dispute concerning the delimitation of the Yellow Sea is not subject to the mechanisms of the Convention. The dispute will not be discussed in this article.

matters concerning the delimitation.[63] In respect of the principle of delimitation, China advocates for the conducting of delimitation on "the principle of equity" provided that all relevant factors have been taken into consideration, while South Korea asserts the "median line principle." According to a report from Yonhap News Agency on the eleventh consultation held in December 2006, the China-South Korean negotiation was faced with difficulties due to the divergent stance taken by the two States: the South Korean delegation still stuck to the principle of "equidistance", which means that the median line between the coastline of China and that of South Korean should be set as the boundary between the exclusive economic zone of China and that of the South Korean, while China adhered to its proposal that factors such as the total length of coastline and the number of coastal residents should be taken into consideration during the delimitation of the exclusive economic zone.[64]

Since both China and South Korea have already made their exclusion declaration in accordance with Article 298 of the Convention,[65] unless the two parties otherwise agree, the delimitation dispute between them shall not be submitted to any international court or tribunal. However, if the dispute between the two States is protracted, is there any possibility of submitting it to the mandatory conciliation procedures in the future? In view of the current progress of negotiations between the two States, we cannot rule out the possibilities that due to too much divergence, the two States may terminate bilateral negotiations or only go through a formal process of negotiation in the future. If this becomes the reality, whether the dispute shall be submitted to the mandatory conciliation procedures at the request of any State party may depend on whether the two States are involved in any sovereignty dispute over land territory concurring the maritime delimitation and whether the dispute first occurred prior to November 16, 1994, the effective date of the Convention. As for the former condition, there is no

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63 Director of Department of Treaty and Law of the Ministry of Foreign Affairs' Remark on Maritime Negotiations in Diplomatic Work, at http://www.fmprc.gov.cn/chn/wjb/zzjg/tyfls/wjzdtyflgz/zgzhyflydgz/t255489.htm, 10 November 2007. (in Chinese)

64 South Korean Media Concerns about the Exclusive Economic Zone between China and South Korea, *International Herald Tribune*, No. 225, 8 December 2006, p. A2. (in Chinese)

65 South Korea made a declaration excluding matters listed under Article 298, Paragraph 1(a), 1(b), and 1(c) from submission to the mandatory settlement procedures provided for under Part XV, Section 2 of the Convention. Division for Ocean Affairs and the Law of the Sea, United Nations, at http://www.un.org/Depts/los/convention_agreements/conventiondeclarations.htm, 2 October 2007.

territorial sovereignty dispute between China and South Korea. While the recent years have seen the two States involved in sovereignty disputes over Suyan Rock, a submerged rock 4.6 meters below sea level in the northern part of the East China Sea.[66] The rock, which is not a land territory of any State, does not have any effect in the maritime delimitation, therefore we cannot deny the fact that the two parties do not have any sovereignty disputes over land territory. In his speech delivered on September 14, 2006, the Spokesperson of the Chinese Foreign Ministry made it clear that, "as Suyan Rock is a submerged rock underwater in the northern part of the East China Sea, China and South Korea do not have any territorial dispute."[67] As such, the question depends totally on whether the latter condition is met, i.e., whether the dispute first occurred prior to the effective date of the Convention.

The time of occurrence of the dispute is the time when the opposing points of view have been clearly and officially put forward by the parties concerned. Many facts evidence that China and South Korea put forward opposing stances on the issue of continental shelf prior to 1994. In the Statement by the President on Sovereignty over Adjacent Waters released early in 1952 by Syngman Rhee, the president of South Korea at that time, South Korea made a claim to sovereignty over the continental shelf surrounding the entire Korean Peninsula. In 1970, South Korea promulgated the Submarine Mineral Resources Development Act. Subsequently in the same year, it issued the Korean Presidential Decree No. 5020 (Enforcement Decree on Submarine Mineral Resources Development Act), which

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66 Suyan rock (coordinates: 32°07′22.63″N 125°10′56.81″E) is a submerged rock 4.6 metres below sea level and part of the extension of the continental shelf stretching out to sea from Jiangsu. It is located in the northern part of the East China Sea, about 150 nautical miles from the east of Nantong of Jiangsu and Chongming Island of Shanghai, and 133 nautical miles from Tong Island at the easternmost side of the the Zhoushan Islands. Though Suyan rock has been a fishing ground for Chinese fishermen throughout history, it is now within the disputed sea area to which China and South Korea have made overlapping claims to exclusive economic zone. Starting from the second half of 2000, South Korea, regardless of repeated protestations from China, built the Ieodo Ocean Research Station on the rock, which cost over 23 billion KRW (approximately 24 million US dollars) and was as high as a 15-story building. The station was completed and put into use in June 2003. As an oceanic platform, the station boasts such facilities as a helipad, a satellite-based radar and decks. Eight researchers are arranged to work there and they will take a shift every 15 days. The South Korean government has been insisting on its position that Suyan rock is closer to South Korea and should be its exclusive economic zone. See South Korean Media Concerns about the Delimitation of Exclusive Economic Zone between China and South Korea, *International Herald Tribune*, No. 225, 8 December 2006, p. A2. (in Chinese)

67 Foreign Ministry Spokesperson Qin Gang's Answers to Reporters' Request at the Routine Press Conference on 9 September 2006, at http://www.mfa.gov.cn/chn/xwfw/fyrth/t271883.htm, 10 November 2006. (in Chinese)

stated that seven seabed mining blocks should be established, with the median line between China and South Korea roughly as the western sea boundary of Block I, II, and III in the Yellow Sea as well as Block IV and VII in the northern East China Sea shelf margin.[68] In early 1973, the South Korean authorities approved a series of drilling activities conducted by a Panamanian deep sea-drilling vessel and several attendant vessels leased by U.S. Gulf Oil in its claimed mining block. In response to this, the Chinese Ministry of Foreign Affairs made a statement to express its objection to the matter on March 15 of the same year declaring, "all seabed resources in China's coastal waters belong to China and the issue of jurisdiction over the Yellow Sea and the East China Sea between China and its neighboring States has not yet been resolved. The Chinese government reserves all right to take action against all possible consequences incurred by the South Korean authorities' open and unilateral introduction of foreign oil companies to conduct drilling activities in the above areas."[69] On January 30, 1974, South Korea and Japan signed the Japan-South Korea Agreement Concerning Joint Development of the Continental Shelf, pursuant to which a large area of continental shelf in the northeastern part of the East China Sea was unilaterally designated as part of the Japan-South Korea Joint development zone. In May 1980, the two States also conducted trial mining activities in the joint development zone. In response, the Chinese government made repeated public protestations against the signing, ratification, and the exchange of Japan-South Korea Agreement Concerning Joint Development of the Continental Shelf as well as the trial mining activities successively in 1974, 1977, 1978 and 1980: "in line with the basic principle that the continental shelf is the natural prolongation of a State's land territory, the People's Republic of China has infrangible sovereign rights over the continental shelf of the East China Sea. The part of the East China Sea continental shelf to which China and some other States have made overlapping claims shall be delimited through consultations between China and other interested States. On no account will the Chinese government accept Japan's acts of infringement which goes against China's sovereignty by signing the Japan-South Korea Agreement Concerning Joint Development of the Continental Shelf with South Korea without the consent of China as well as unilaterally designating disputed waters as part of the Japan-South

68 Gao Jianjun, *China and the International Law of the Sea*, Beijing: China Ocean Press, 2004, p. 93. (in Chinese)

69 Gan Yanping, *Ocean and the Future of China: An Introduction*, Beijing: China Ocean Press, 2001, pp. 23~24. (in Chinese)

Korea Joint Development Zone.[70]

As seen from the accounts above, China and South Korea formally established their opposing positions on the continental shelf of the Yellow Sea and the northeastern part of East China Sea at least prior to the 1980s. South Korea has been insisting on its claims to the sovereignty over the continental shelf of the Yellow Sea and the East China Sea through actual actions such as exploration and development of the area as well as the signing of the agreement with Japan, while China has been adhering to the opposite position by means of making public protestations. In conclusion, since the continental shelf delimitation dispute between China and South Korea occurred before the Convention came into force, even if the two States terminate their negotiations or only go through a formal process of negotiation in the future, the dispute shall not be submitted to the mandatory conciliation procedures under Annex V, Section 2 of the Convention.

However, there is no clear evidence that the opposing positions of the two parties over the exclusive economic zone were formally established prior to 1994. Since the regime of the exclusive economic zone was created after the Third United Nations Conference on the Law of the Sea, States' claims to the exclusive economic zone appeared relatively late. Besides, it is generally believed that the exclusive economic zone is not an integral part of the territorial sea of a coastal State and can be claimed only after it has been announced in certain forms. The Chinese legislation regarding the establishment of exclusive economic zone and that of South Korea were released and came into force respectively in 1998 and 1996. Moreover, the Exclusive Economic Zone Act of South Korea fails to provide specific principles on delimitation and has only provided that delimitation involving other States "shall be effected by agreement with other States concerned based on international law".[71] Therefore, in the case where the dispute between China and South Korea on the delimitation of the exclusive economic zone is protracted, the dispute may be submitted to the mandatory conciliation procedures at the request of any State party. However, this is unlikely to happen in actual practice. Firstly, it is the current practice of the two parties as well as the general practice of international maritime delimitation that the delimitation of the continental shelf and the exclusive economic zone are negotiated together and it is quite likely that

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70 Cheng Xiaoxia ed., *Reference Material for Learning Public International Law*, Beijing: Central Radio and TV University Press, 1985, pp. 237~238. (in Chinese)

71 Exclusive Economic Zone Act of the Republic of Korea, Art. 2(2).

the continental shelf and the exclusive economic zone will share a boundary line. Therefore, if the dispute on the delimitation of the continental shelf shall not be submitted to the mandatory conciliation procedures, it is unlikely that the dispute on the delimitation of the exclusive economic zone will be submitted separately to the mandatory conciliation procedures. Secondly, the two States signed the Agreement on Fisheries between the People's Republic of China and the Republic of Korea in 2000 as an interim arrangement before the formal completion of the delimitation. The agreement has designated the waters in transitional arrangements co-managed by the two States which roughly covers all disputed waters in the Yellow Sea and the East China Sea, and also the "transitional waters" on both sides of the "waters in transitional arrangements" which will be gradually transformed into the exclusive economic zone.[72] Since the agreement has provided favorable conditions for the delimitation of exclusive economic zone through consultations, it is unlikely for the dispute to be submitted to mandatory third-party conciliation.

2. The Delimitation between China and Japan in the East China Sea

China and Japan need to delimit the continental shelf and the exclusive economic zone in the East China Sea. The two States started consultations on the law of the sea in 1995 and signed the Agreement on Fisheries between the People's Republic of China and Japan in 1997 as the provisional arrangement on fisheries issues before the formal completion of the delimitation. Besides, the two States started special consultations on the exploration and exploitation of the oil and gas field on the continental shelf of the East China Sea from October 2004, and up until November 2007 they have conducted 10 special consultations in just a period of three years. However, Japan has been insisting on the "median line principle"; in contrast, China has been adhering to its consistent "principle of natural prolongation" on the maritime delimitation. In order to ease the conflict, China put forward the proposal of shelving disputes and seeking joint development of the East China Sea. In view of the current progress of the consultation, however, the negotiation is beset with difficulties, for the two States hold rather divergent views on the targeted waters for joint development.[73]

Just like the delimitation disputes between China and South Korea, since China has made an exclusion declaration, unless with the consent of China, the dispute

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72 Articles 7 and 8 of the Agreement on Fisheries between the People's Republic of China and the Republic of Korea.

73 Divergences Remains after 3 Years of Consultations between China and Japan, *International Herald Tribune*, No. 305, 15 October 2005, p. A5. (in Chinese)

between China and Japan concerning the delimitation in the East China Sea shall not be submitted to any international court or arbitral tribunal. As for the question whether the dispute may be submitted to mandatory conciliation, disputes involving continental shelf delimitation and disputes concerning exclusive economic zone delimitation should also be treated differently. With regard to the dispute involving continental shelf delimitation, although the two parties have greatly different views and their negotiations tend to fail, the dispute shall not be submitted to mandatory conciliation. That is because the two parties are also involved in the territorial dispute over the Diaoyu Islands in the East China Sea and that the dispute occurred prior to the effective date of the Convention.

The dispute over the sovereignty of the Diaoyu Islands relates the continental shelf delimitation dispute to the review of pending territorial issues. The Diaoyu Islands (referred to as "the Senkaku Islands" in Japan) is located on the northwest side of the Okinawa Trough, 190 kilometers to the northeast of Keelung, China Taiwan, composed of 11 islands such as the Diaoyu Island, Huangwei Island, Chiwei Island, Nanxiao Island and Beixiao Island. Since the Diaoyu Islands are located on the continental shelf claimed by China, if Japan's claim to the sovereignty over the Islands were confirmed, the Islands would be given full effect in the future delimitation of the East China Sea continental shelf and China's continental shelf would be reduced by about 36,000 square kilometers, about the same area as China Taiwan.[74] Therefore, the issue as to who owns the sovereignty over the Islands will have a direct influence on the delimitation results. However, such an influence is not absolute, since the delimitation results will not be affected by the Diaoyu Islands issue under the following circumstances: firstly, the two parties reach a prior agreement that the areas to be delimited at this phase will not include the areas that may be affected by the disputed territory, that is, to leave the disputed waters arising out of territorial disputes over islands for future solution in concurrence with the territorial dispute. Secondly, the two parties reach an agreement that the Diaoyu Islands will not claim its exclusive economic zone and continental shelf during the delimitation of the sea areas and give the

74 Kuen-chen Fu, Delimitating the Chinese Continental Shelves: Ways and Issues, *Journal of Ocean University of China (Social Science Edition)*, No. 3, 2004. (in Chinese)

Diaoyu Islands zero effect in the delimitation arrangement.[75] Under any of the above circumstances, the condition − not necessarily involving the concurrence of consideration of any unsettled sovereignty dispute − will be satisfied.

Even if the above maritime delimitation is not connected with territorial disputes, the continental shelf delimitation dispute between the two States shall not be submitted to mandatory conciliation either, since the dispute occurred prior to the effective date of the Convention. In the aforesaid 1974 Agreement on the Joint Development of the Continental Shelf between the Republic of Korea and Japan, Japan unilaterally designated a Sino-Japanese median line as the boundary line of the joint development zone on the side facing China and left China with a continental shelf only as wide as 140 to 180 nautical miles.[76] As mentioned earlier, the Chinese government has made repeated protestations against this action by Japan and declared its principle of natural prolongation which it has always been adhering to in dealing with the East China Sea continental shelf issue. On April 16, 1982, the Japanese Embassy to China submitted a map to the Chinese Ministry of Transport, explicitly proposing to adopt the median line to delimit the maritime boundary between Japan and China.[77] All these events occurred prior to the effective day of the Convention.

However, similar to the exclusive economic zone dispute between China and South Korea, no clear evidence shows that the exclusive economic zone delimitation dispute between China and Japan occurred prior to the effective date of the Convention. After the large-scale fisheries dispute between China and Japan in the 1950s, China and Japan signed a series of non-governmental agreements on fisheries through a series of non-governmental negotiations. After the normalization of their diplomatic relations in 1972, the two States concluded the official agreement on fisheries. However, the legal basis of all these agreements is the

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75 As stipulated under Article 121 of the United Nations Convention on the Law of the Sea, "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." However, as for such island as the Diaoyu Island, the biggest island of the Diaoyu Islands, where there is drinking water but no human residence, it remains controversial as to whether such an island can be deemed as "rocks which cannot sustain human habitation or economic life of their own". This question remains to be settled through bilateral negotiations.

76 Lu Zhenlin and Zhaoxin eds., *Chinese Navy and the Law of the Se*a, Beijing: Navy Publishing House, 1990, p. 79. (in Chinese)

77 Zhang Tianfei, *Study on the Sea Delimitation between China and Its Adjacent Nations and Opposite Nations by the Cases Concerning Maritime Delimitation of the ICJ* (Master's thesis), Jilin: Jilin University, 2007, p. 20. (in Chinese)

traditional principle of the freedom of fishing on the high seas under international law. As reflected in these agreements, notwithstanding the legal regime of the exclusive economic zone was already being formed in the international community after the 1970s, the two States continued to apply the principle of the freedom of fishing on the high seas under the traditional international law of sea.[78] Even though the Japanese Law on Provisional Measures Relating to the Fishing Zone issued in 1977 has provided for the establishment of a fishing zone as wide as 200 nautical miles, it also stipulates that the fishing zone should not be extended to the western side of the Sea of Japan and the East China Sea.[79] It is after the Convention became effective that both China and Japan established their own regimes of the exclusive economic zone. The Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf has expressed its principle for the delimitation of the exclusive economic zone and the Japanese equivalent has also made clear its principle for such delimitation (China put forward the principle of equity against Japan's principle of the median line).[80] The two laws were promulgated and became effective in 1998 and 1996 respectively, posterior to the effective date of the Convention.

Meanwhile, as has been analyzed in previous parts of this article on the relationship between the sovereignty dispute over the Diaoyu Islands and the delimitation of the continental shelf, under the two circumstances where territorial disputes do not concur with maritime delimitation disputes, the delimitation of the exclusive economic zone does not necessarily involve the concurrence of a review of unsettled territorial disputes. Therefore, purely from a legal point of view, the possibility exists that if disputes concerning the delimitation of the exclusive economic zone are not resolved within a reasonable time, the other party may submit such disputes to the mandatory conciliation procedures. However, in view of the Japan's current position on maritime delimitation, it is quite unlikely for this possibility to be actualized. Firstly, since Japan has been insisting on resolving the dispute concerning the exclusive economic zone delimitation in concurrence with that concerning the continental shelf delimitation by drawing only a boundary

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78 Zhang Liangfu, The Initial Establishment of New Fisheries Relationship between China and Its Ocean Neighbors, *China Oceans Law Review*, No. 2, 2005. (in Chinese)

79 Zhang Liangfu, The Initial Establishment of New Fisheries Relationship between China and Its Ocean Neighbors, *China Oceans Law Review*, No. 2, 2005. (in Chinese)

80 Article 2 of the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf and Articles 1 and 2 of the Law of Japan on the Exclusive Economic Zone and the Continental Shelf.

line for both the exclusive economic zone and continental shelf, if the dispute concerning the continental shelf delimitation cannot be submitted to mandatory conciliation, it is then impossible for Japan to submit only the dispute concerning the exclusive economic zone delimitation to the procedures. Secondly, Japan has been insisting on its claim that the Diaoyu Islands currently under its actual control may have its exclusive economic zone and continental shelf, and the Islands should be given full effect in delimitation, for the purpose of circumventing the Okinawa Trough which may have effects unfavorable to Japan on maritime delimitation and directly claiming rights over the continental shelf of the East China Sea. From the above, we can see that the Japanese side may willingly separate the issue of Diaoyu Islands from the issue of maritime delimitation. Moreover, even if the Japanese side is willing to separate the two disputes, it should duly request for the consent of China. Therefore, there is quite low probability that Japan will unilaterally submit the dispute concerning the delimitation of exclusive economic zone to mandatory conciliation.

3. Disputes over South China Sea Delimitation and Historic Rights

China is facing a more complicated situation with regards to the maritime delimitation in the South China Sea. It should delimit the western part of the South China Sea with Vietnam, the eastern part with the Philippines, and the southern part thereof with Malaysia, Indonesia and Brunei. Since such maritime delimitation concurs with the territorial disputes over the Xisha and Nansha Islands between China and the above States, it is of great difficulty for negotiations on maritime delimitation between China and these States to make much progress. Currently, the only progress made is the conclusion of the Sino-Vietnam Agreement on the Delimitation of the Territorial Seas, Exclusive economic Zones and Continental Shelves in the Gulf of Tonkin. As for the delimitation of other sea areas of the South China Sea, since the conditions are not yet mature, China has not put forward any specific proposals but only stated the general dispute settlement guideline of "shelving disputes and seeking joint development". Besides, in 1947, China released the *Map of the Locations of the South China Sea Islands* including a U-shaped dotted boundary line known as the "U-shaped line". The line is regarded as China's claim to historic waters in the South China Sea, within which China should be entitled to historic rights such as fishing rights and rights to control

navigation.[81] The line met no oppositions and challenges by States surrounding the South China Sea until the late 1970s when oil was discovered off the shores of the South China Sea. It was at that point that China became involved in disputes over historic rights to the South China Sea with its neighboring States .

After China made its exclusion declaration, delimitation disputes in the South China Sea and those involving historic rights would not be submitted to any international court or arbitral tribunal unless otherwise agreed. Again, such maritime delimitation disputes concur with unresolved territorial disputes which not only involve a lot of States but also face complicated situations and therefore cannot be resolved separately. As a result, all such maritime disputes can not be submitted to the mandatory conciliation procedures, thus should be left for resolution by means of bilateral or multilateral negotiations. However, in reality, some States surrounding the South China Sea have far more interests in the exploitation of resources than in delimitation negotiations. In order to prevent the risk of potential conflicts in the South China Sea, States surrounding the South China Sea are faced with two options. Firstly, they can participate in the joint development programs in the regions without any boundary line by force or mutual agreement. The first option does not involve any delimitation or other legal efforts but requires high-level political wisdom. The second option involves detailed delimitation efforts, whether all State parties to the dispute have reached an agreement on provisional measures or one on the final equitable resolution of the delimitation dispute.[82]

B. Disputes over Maritime Military Activities Involving China

As expatiated by the above paragraphs, the Convention fails to make explicit provisions on the legality of military activities in specific sea areas, making national military activities at sea one of the areas that are most prone to give rise to disputes. Every day around the world, warships and military aircrafts of major marine powers perform military tasks including power projection, gathering of military intelligence, showing off of their forces, and conducting strategic deterrent

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81 Kuen-chen Fu, China's Historic Waters in the South China Sea and China Taiwan's Legal Position, in Kuen-chen Fu, *Legal Issues on Ocean Management*, Taipei: Wensheng Publishing House, 2003, pp. 466~526. (in Chinese)

82 Kuen-chen Fu, Delimitating the Chinese Continental Shelves: Ways and Issues, *Journal of Oceans University of China (Social Science Edition)*, No. 3, 2004. (in Chinese)

activities, which undoubtedly have met with strong opposition from coastal States which, in response, have taken corresponding measures. China has frequently been involved in such conflicts in the waters near its coasts with these sea powers, especially the United States, for example, the 1994 "Kitty Hawk issue" in the Yellow Sea; the China-U.S. Aircraft Collision Incident of 2001 in the South China Sea; the hydrographic survey ship USNS Bowditch incident of 2002 in the Yellow Sea, and so on. However, with the forthcoming ratification of the Convention by the US,[83] the settlement procedure for maritime military disputes between China and the US will be bound by the Convention in the future.

After China made the exclusion declaration, disputes concerning military activities involving China were not bound by the mandatory settlement procedure under the Convention, and thus should not necessarily be submitted to the international judicial or arbitrary procedures provided for under Part XV, Section 2 of the Convention. Nevertheless, considering the fact that military activities at sea are conducted by naval vessels in the course of navigation and military aircrafts when flying over the sea, it may be controversial as to whether the disputes between China and the naval vessel – or aircraft – owning States in specific cases should be deemed as disputes over military activities or as those over the right of navigation and overflight.

There are two typical categories of such disputes in practice: firstly, disputes arising from military activities such as military reconnaissance and monitoring carried out by foreign naval vessels passing through or foreign military aircrafts flying over China's exclusive economic zone; secondly, disputes over the right of innocent passage by foreign warships when passing through China's territorial waters. In the first category of disputes, parties to the disputes may have different views on the determination of the nature of the dispute: the Chinese side usually accuses foreign warships and military aircrafts of threatening China's national security by conducting military activities; while the other side holds that the tracking and interception by China infringes its freedom of navigation or its right of overflight. To take the USNS Bowditch incident as an example, the Chinese Government issued a diplomatic note to the State Department of the United

83 On October 31, 2007, the United States Senate Committee on Foreign Relations decided by 17 votes to 4 to submit the United Nations Convention on the Law of the Sea to the plenary session of the United States Senate for ratification. See Joseph R. Biden, Opening Statement: Senate Foreign Relations Business Considers the Convention on the Law of the Sea, at http://biden.senate.gov/newsroom/details.cfm?id=286463&&, 5 November 2007.

States protesting that the American oceanographic survey ship had intruded into the exclusive economic zone of China and conducted military activities such as monitoring and reconnaissance; while some officials of the United States Department of Defense censured China's protest as unreasonable for the reason that the Bowditch which was operating in the "high seas" about 100 kilometers from the coast of China was entitled to the right of free navigation.[84] A similar confrontation of opinions occurred in the China-U.S. military aircraft collision incident. The latter category of disputes arises out of ambiguity of the Convention *per se*.[85] On one hand, China holds that "the provisions on the right of innocent passage under the United Nations Convention on the Law of the Sea do not impair the right of the coastal State to require, in line with its law and regulations, foreign warships to get permission from or give notice to the coastal State prior to their navigation in the coastal State's territorial sea."[86] On the other hand, in their declarations upon accession to the Convention, major maritime powers such as Germany and Italy stated that any provision under the Convention should not authorize coastal States to subject the right of innocent passage of foreign vessels to the prior permission of or prior notice to coastal States. The UK and the US also held similar positions.[87] Hence, due to opposing positions of different States, there is likely to be such disputes relating to the right of innocent passage of foreign vessels in the territorial sea of China in the future. Furthermore, there still remains the question of how to rightly determine the nature of such disputes: disputes concerning maritime military activities or those relating to the freedom of navigation.

The determination of the nature of such disputes is of great importance to the application of dispute settlement procedures. State parties can exclude disputes concerning maritime military activities from the mandatory settlement procedure

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84 Ding Chengyao, An Analysis of the Intrusion of USNS Bowditch into the Exclusive Economic Zone of China from the Perspective of International Law, *Journal of East China University of Political Science and Law*, No. 2, 2003. (in Chinese)

85 For more information about the ambiguity of the application of the right of innocent passage stipulated in the UNCLOS, please see Zhao Jianwen, On the Interpretative Declaration of State Parties to the UNCLOS concerning the Passage of Warships through Territorial Sea, *China Oceans Law Review*, No. 2, 2005. (in Chinese)

86 For more information about the declaration made by China upon its ratification of the UNCLOS, please see the Decision of the NPC Standing Committee on the Ratification of the UNCLOS,15 May 1996.

87 Zhao Jianwen, Zhao Jianwen, On the Interpretative Declaration of State Parties to the UNCLOS concerning the Passage of Warships through Territorial Sea, *China Oceans Law Review*, No. 2, 2005. (in Chinese)

by making a declaration but cannot do the same for disputes relating to the freedom of navigation and the right of overflight. Article 297, Paragraph 1 of the Convention explicitly stipulates that, disputes with regard to the exercise of freedoms and rights of navigation and overflight in the exclusive economic zone shall be subject to the mandatory settlement procedures provided for under Part XV, Section 2 of the Convention.

As a matter of fact, one cannot rule out the possibility that disputes with regard to the freedom of navigation for warships and the right of overflight for military aircrafts may be deemed as disputes concerning maritime military activities in nature. Instead, the navigation of warships and the overflight of military aircrafts around the world are for the purpose of carrying out their military tasks such as deterrence or protection. In order to perform such tasks, these military forces shall have the capacity to maintain continuous presence and high mobility.[88] In other words, since navigation or overflight is only a means to perform military tasks, the nature of an action should be determined by its purpose rather than its means. Therefore, as long as the warships and military aircrafts are not used for commercial purposes, their navigation or overflight shall be deemed as a constituent part of a military activity, and the dispute arising therefrom falls into the category of disputes concerning the maritime military activities which can be excluded by making a declaration. Apparently, it is more true of the cases where preliminary evidences show that warships and military aircrafts have been involved in military activities such as reconnaissance, detection or monitoring during their navigation or overflight. In conclusion, Article 297, Paragraph 1 of the Convention shall be construed as applicable only to disputes concerning the freedom of navigation of non-military vessels in and the right of overflight of non-military aircrafts over the exclusive economic zone.

Furthermore, although it is clear from Article 298, Paragraph 1(b) of the Convention that possible subjects of military activities include not only warships and military aircrafts but also government vessels and aircrafts engaged in non-commercial services, the provision fails to take into consideration the following case so as to give a complete list of all the possible subjects. If a non-military vessel or aircraft exercising its right of navigation or overflight is performing military tasks, or engaged in both commercial activities and military activities such

88 Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge: Cambridge University Press, 2005, p. 262, note 288.

as intelligence gathering at the time the dispute arises, such navigation or overflight should be deemed military activities and the dispute arising therefrom should be considered dispute concerning maritime military activities which may be excluded by China's declaration.

C. Disputes Concerning Fisheries Law Enforcement in the Exclusive Economic Zones between China and Its Neighboring States

Different from other disputes mentioned above, disputes concerning fisheries law enforcement may occur in the exclusive economic zone of China or those of other States and in disputed sea areas under national jurisdiction. In the latter situation, the problem is even more prominent, for it is more often the case that Chinese fishing vessels in these sea areas are arrested and detained by the law enforcement authorities of other States for various reasons: having strayed into the exclusive economic zone of other States due to mechanical failure or other force majeure events, pirate fishing in the exclusive economic zone of other States without permit, operating in disputed sea areas, or merely passing through the exclusive economic zone of a coastal State. Whether or not such arrest or detention is caused by prior illegal behaviors of Chinese fishing vessels, fisheries law enforcement by coastal States may infringe on the lawful rights of Chinese fishing vessels, which is mainly manifested in the following aspects:[89] a) Chinese vessels in transit are seized by coastal States in case of insufficient evidence; [90] b) excessive use of force is exercised by coastal States when taking control measures against

89 Li Yi, Disputes concerning Fisheries in Exclusive Economic Zones Involving China and Their Solutions, *Northeast Asia Forum*, No. 2, 2007. (in Chinese)

90 For example, on 30 September 2004, a Chinese refrigerated cargo ship owned by a Zhejiang company, when passing through the exclusive economic zone of Russia, was detained by the Russian authorities for it was suspected of illegal fishing. The Chinese Consulate-General in Khabarovsk, at the knowledge of the incident, negotiated with the Russian authorities and pointed out that the cargo ship was exercising its right of innocent passage through the exclusive economic zone of Russia, for it had gone through all necessary formalities and that it cannot be suspected of illegal fishing as there was no fishing tools on the ship. After further investigation had proved that the cargo ship was not engaged in illegal fishing, the Russian authorities unconditionally released the ship on 9 October 2004.

Chinese fishing vessels;[91] c) coastal States fail to timely notify the relevant party or extend the detention of Chinese vessels and their crews after having taken control measures.[92]

In response to the above disputes which may seriously infringe on the rights of Chinese fishermen, apart from diplomatic approaches, the Chinese Government, in the case where the authorities of the detaining State refuse the release of the detained vessels or their crews, may apply, in compliance with Article 292 of the Convention, for the prompt release of the detained vessels and their crews to the International Tribunal for the Law of the Sea or a court or tribunal accepted by the detaining State under Article 287. Meanwhile, as cases concerning the application for prompt release in line with Article 292 of the Convention shall not be excluded by a declaration, the Chinese government should also be prepared for joining the lawsuits as a defendant. Nevertheless, lawsuits filed in accordance with Article 292 of the Convention only address the procedural issue of whether to promptly release detained vessels and their crews. As for substantive issues of such disputes, since the declaration made by China has ruled out the possibility for the flag State of the vessel to submit them to an international tribunal or any arbitral tribunal unless the parties otherwise agree or such disputes fall into the category of disputes of

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91 For example, on 1 September 2005, the Chinese fishing vessel "Fuyuanyu 1320" was chased and attacked with artillery by the Indonesian Navy in the waters surrounding Papua in the Arafura Sea, causing 1 death and 2 injuries. According to the investigation, both its letter of recommendation granted by the Ministry of Agriculture of China and its permission for fishing in the territorial sea of Indonesia had expired. Although related papers had been mailed to an Indonesian agency in June 2005, as the vessel owner failed to pay taxes to the Indonesian government, the agency failed to complete all the extension formalities for the vessel to continue fishing in the territorial sea of Indonesia.

92 For example, from 31 January to 6 February 2002, five Chinese fishing vessels from Hainan Province which had strayed into the territorial sea of the Philippines for fishing were detained by the Philippines Coast Guard. Later, another Chinese fishing vessels from Taishan, Guangdong Province, was also detained in the same sea area. There were 136 Chinese fishermen, including 14 juveniles, were imprisoned in Puerto Princesa City Jail in Palawan. After repeated negotiations between China and the Philippines authorities, the "package of framework agreements" on the release of Chinese fishermen was finally reached between the Chinese Embassy to the Philippines and the Filipino Minister of Justice in July 2002. Later, however, the Philippines unilaterally broke the agreement and made further political demands under the excuse of oppositions from some senators and environmental organizations. Even after the Chinese fishermen had accepted the penalty of both fine and the confiscation of their fishing vessels, the period of detention was extended until 5 October when the Chinese fishermen were finally released. Even though the released Chinese fishermen joined the lawsuit as defendants, cumbersome and lengthy procedures coupled with the low efficiency of the Filipino Authorities infringed on the lawful rights and interests of the Chinese fishermen.

dual nature as will be described in the following paragraphs, such disputes shall be settled mainly through diplomatic approaches such as bilateral negotiations.

In practice, the nature of the disputes arising out of fisheries enforcement activities should also be determined, mainly because fisheries enforcement activities of coastal States in their exclusive economic zones may conflict with the freedom of navigation of fishing vessels of other States. For example, the Chinese fishing vessels, for the purpose of innocent passage, are entitled to the freedom of navigation in the exclusive economic zones of other States. However, such right may be infringed on by foreign authorities who may take such law enforcement measures as boarding, inspection and arrest against Chinese fishing vessels in transit. In fact, such incidents have occurred many times. However, opinions may be divided as to whether the disputes incurred therefrom should be categorized as disputes concerning fisheries enforcement activities or as those relating to the freedom of navigation in the exclusive economic zone. For example, a Chinese fishing vessel in its passage through the exclusive economic zone of a foreign State was arrested by the law enforcement authorities of a foreign State who suspected the fishing vessel of pirate fishing. Such a dispute may be categorized as a dispute concerning fisheries enforcement activities in the exclusive economic zone by the coastal State but as a dispute concerning the freedom of navigation by the Chinese side, holding that the abuse of law enforcement power by the coastal State has infringed on the freedom of navigation of the Chinese fishing vessel. Contrarily, if foreign fishing vessels had been detained by the Chinese law enforcement authorities in Chinese exclusive economic zone, the two sides would have reacted the other way around. Therefore, before relevant facts are clarified, such disputes should be recognized as disputes of dual nature which can be deemed as disputes concerning fisheries law enforcement or as those relating to the right of navigation. However, the categorization of such disputes is of great significance to the application of dispute settlement procedures. If a dispute falls into the former category, then it is already excluded by China's declaration and shall not be submitted by the flag State of the detained vessel to third-party mandatory settlement. If the dispute falls into the latter category, in accordance with Article 297, Paragraph 1 of the Convention, it can be submitted to the mandatory settlement procedure at the request of either party to the dispute in the case where no agreement has been achieved within a reasonable period of time. Given that the Convention fails to make any explanation on the relationship between Article 297 and Article 298 thereof, it is not clear what to do in case of a conflict between

the two articles. However, the nature of such disputes shall be determined in order to solve the issue concerning the jurisdiction of international dispute settlement agencies.

The author believes that the nature of such disputes should be determined on a case-by-case basis. In the first case, due to the fact that the legislation of a foreign State on the exclusive economic zone violates relevant provisions under the Convention, the State has unilaterally deprived fishing vessels from other States of the freedom of navigation which they are supposed to be entitled to. For example, the Philippines Fisheries Code as amended in 1998 prohibits fishing and navigation by any foreign individual, enterprise, and organization in waters under the jurisdiction of the Philippines, and stipulates that any presence of foreign fishing vessels in the territorial sea or the exclusive economic zone of the Philippines should be deemed as having been engaged in pirate fishing regardless of whether the vessel is fishing and whether there is any catch on board at the time when it is found.[93] In this case, such disputes arising from the measures taken by fisheries law enforcement authorities should be categorized as disputes concerning the right of navigation, for the focus of such disputes is not whether the law enforcement measures are lawful and proper, but whether the legislation depriving foreign fishing vessels of the freedom of navigation is in violation of provisions under the Convention. Therefore, such disputes fall into the category of disputes provided for under Article 297, Paragraph 1, which may be submitted to mandatory procedures entailing a binding decision.

In the second case, a dispute is not caused by fisheries law enforcement measures taken based on laws and regulations in violation of the Convention, but by illegal or improper means of taking such measures. Such disputes are complicated, the nature of which should be determined based on the interpretation of the Convention in good will, after taking into consideration different consequences of different categorizations. In fact, no matter which category a dispute is determined to be, it is inevitable for the parties to the dispute to abuse their rights. If a dispute is categorized as a dispute arising from law enforcement activities, the coastal State may use its exclusion declaration as its protective umbrella to refuse to submit their action of interfering with or impeding the freedom of navigation of other States by abusing their law enforcement power to international agencies

93 Li Yi, Disputes concerning Fisheries in Exclusive Economic Zones Involving China and Their Solutions, *Northeast Asia Forum*, No. 2, 2007. (in Chinese)

for review. In the event that a dispute is categorized as a dispute concerning the freedom of navigation, the flag State of the fishing vessel may force the coastal State which is reluctant to submit the dispute to third-party settlement to give up lawful law enforcement measures against illegal fishing of the flag State by threatening to submit the dispute to an international tribunal or an arbitral tribunal. However, the provision on "prima facie" under Article 294 of the Convention can effectively prevent the abuse of rights by the flag State of the fishing vessel. Specifically, a court or tribunal to which an application is made in respect of a dispute (including the dispute concerning the right to the freedom of navigation in the exclusive economic zone) referred to in Article 297(1) shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case.[94] The very purpose of this provision is to prevent the exercise of sovereign rights by coastal States over their exclusive economic zones from being infringed on by other States through the abuse of legal process.[95] Considering the fact that the abuse of the rights of the flag State is constrained by Article 294 of the Convention, while there is no provision under the Convention to constrain the abuse of rights of coastal States, the author prefers to categorize such disputes of dual nature as disputes concerning the freedom of navigation which can be submitted to an international tribunal or an arbitration tribunal for mandatory settlement.

While such categorization will make China's exclusion declaration ineffective, it is essentially more favorable to China in the settlement of disputes since it is more often the case in such disputes that Chinese fishermen end up as the disadvantaged victims, thus implicating China as the flag State of their fishing vessels. As already analyzed in previous parts of this article, even if such disputes are categorized as disputes concerning fisheries law enforcement activities, China's exclusion declaration is only binding on coastal States, but China, as the flag State, is still subject to the mandatory settlement procedures under the Convention. Conversely, if such disputes are categorized as disputes concerning the freedom of navigation, China will be in a favorable position to resolve the dispute effectively

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94 Article 294, Paragraph 1 of the United Nations Convention on the Law of the Sea.

95 Shabtai Rosenne and Louis B. Sohn eds., *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 1989, pp. 76~77, 101.

as the flag State. In practice, foreign authorities in an advantageous position tend to deliberately delay the settlement of the disputes, or ignore the legitimate demands from the Chinese side, thus causing more damages to the rights and interests of Chinese fishermen. In this regard, the Chinese side may impose reasonable pressure on the other party to force him to handle the matter properly as soon as possible by duly expressing its intention to submit the dispute to international arbitration in diplomatic negotiations.[96] The foreign authorities, who are well aware that they are in the wrong, will naturally, be reluctant and hesitant to submit the dispute to international agencies. In this way, it is completely up to China to decide whether or not to submit the dispute to international arbitration. Certainly, even if China has submitted the dispute to an international arbitral tribunal, the nature of the dispute should be finally determined by the arbitral tribunal. That is because according to Article 288, Paragraph 4 of the Convention, in the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Regarding the above three main categories of disputes, in case that China volunteers to reach an agreement with the other State party in a specific case, any dispute excluded by China's declaration can also be submitted to an international court or arbitral tribunal or to mandatory conciliation.[97] Hence, we can come to the conclusion that the Chinese government has the initiative, to a large extent, to determine what procedures these disputes should be submitted to.

V. Conclusion

The legal effects of China's exclusion declaration made in accordance with Article 298 of the Convention cannot be interpreted simply with the word "exclusion". On the contrary, the legal significance contained in the declaration is richer and more complex. In conclusion, first, having made a declaration does not mean that disputes excluded by the declaration no longer become subject to the

96 Since China fails to make its choice on the dispute settlement agency provided for under Article 287 of the Convention, the only standby mandatory settlement agency is the arbitration procedures under Annex VII.

97 According to Article 298, Paragraph 2 of United Nations Convention on the Law of the Sea, "[a] State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention."

mandatory settlement procedures. If certain conditions are met, certain categories of disputes shall also be submitted to the mandatory settlement procedures, and some procedural issues are still subject to the mandatory jurisdiction of international tribunals. With respect to the Sino-South Korea and Sino-Japan disputes concerning the delimitation of the exclusive economic zones, it is still possible, at least at the technical level, for such disputes to be submitted to the mandatory settlement procedure under Annex V, Section 2 of the Convention.[98] However, disputes over the prompt release of vessels and their crews relating to law enforcement activities on fisheries and marine scientific research shall be subject to the mandatory jurisdiction of the International Tribunal for the Law of the Sea.[99] Secondly, regarding disputes concerning law enforcement activities on fisheries and marine scientific research, the exclusion declaration is binding only on coastal States, not on the other party to a dispute. If the coastal State intends to submit such a dispute to the mandatory settlement procedures with China as the other party to the dispute, the application of such mandatory settlement procedures will not be excluded by China's declaration.[100] Finally, due to the complexity of maritime disputes, the nature of many disputes is difficult to determine. However, the determination of nature is vital to the application of dispute settlement procedures. Since disputes involving China concerning both military activities and fisheries law enforcement activities may involve disputes over the freedom of navigation, if such disputes are submitted to an international court or an arbitral tribunal, the nature of such disputes should be finally decided by the accepting institution.[101]

China's strategies on the settlement of maritime disputes should be differentiated based on the different legal effects of its exclusion declaration made in accordance with Article 298 of the Convention.

First, for disputes excluded by China's declaration, China should adhere to its basic principle of resolving the disputes through peaceful consultations. In the case where the positions of the two parties are so divergent that the dispute cannot be resolved in the near future, China can follow the flexible principle of "persisting in sovereignty, putting aside disputes, and seeking joint development".

Second, as for disputes concerning the delimitation of the exclusive economic zone which may be submitted to mandatory conciliation, if the other party intends

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98 Please find a detailed analysis in III(A)(3) and IV(A)(1) and (2) of this article.
99 Please find a detailed analysis in III(C)(4) of this article.
100 Please find a detailed analysis in III(C)(6) of this article.
101 Please find a detailed analysis in IV(B) and (C) of this article.

to make such submission while China does not, China may, in order to rule out the possibility for such disputes to be submitted to mandatory conciliation, take the position that both the exclusive economic zone and the continental shelf should be delimited together and the dispute over territorial sovereignty should be resolved in concurrence with the dispute over maritime delimitation. In the case where the above positions should not be taken in consideration of the substantive issues of such disputes, China should be prepared for the submission to the mandatory procedure under Annex V, Section 2 of the Convention.

Third, with regards to disputes of dual nature, if China intends to avoid the submission of such disputes to mandatory settlement, it should propose to categorize the disputes relating to both the freedom of navigation and overflight and those concerning military activities as disputes concerning military activities. Regarding disputes concerning fisheries law enforcement activities where Chinese fishing vessels are detained repeatedly and unreasonably, China should propose to categorize such disputes as disputes concerning the freedom of navigation so as to impose reasonable pressure on the other party by expressing its intention of submitting such disputes to international dispute settlement agencies which possess the appropriate mandatory jurisdiction.

Also, in terms of the disputes concerning the detention of vessels and their crews where Chinese fishing vessels are the victims, China should actively apply the procedures of prompt release in accordance with Article 292 of the Convention.

Finally, as for disputes which cannot be excluded by China's declaration, China should conduct active consultations with the other party in an effort to resolve such disputes by means of bilateral negotiations. Since China fails to choose a dispute settlement agency provided for under Article 287 of the Convention, China will have no choice but to join the arbitration procedures under Annex VII of the Convention if the other party to the dispute submits such disputes to mandatory settlement procedures. Therefore, China should carefully study the arbitration procedures so as to be prepared for possible international arbitration in the future.

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The Legal Status of Foreign Warships in Territorial Seas

TIAN Shichen*

Abstract: As a State organ, a warship is entitled to immunity from the jurisdiction of the coastal State in its territorial sea. This will however, generate conflicts with the jurisdiction of coastal States over their territorial seas, which shall be settled according to the provisions on the legal status of foreign warships in territorial seas in both international law and domestic law. From the perspective of international law, we should first consider whether there is any agreement between the flag State of the warship and the coastal State on this issue; if there is no special agreement, we should consider the provisions of generally recognized international laws. From the perspective of domestic law, with regard to the rights and obligations of foreign warships within territorial seas, the domestic law formulated by the coastal State in accordance with the UNCLOS and other rules of international law should be taken into account.

Key Words: Warships; Territorial sea; Legal Status; United Nations Convention on the Law of the Sea

I. Foreword

As a State organ, armed forces stand for the sovereign power of a country. In peacetime, if a country's armed forces intend to appear legally on the land territory of another country, whether for transit, stationing or other military cooperative activities, they require the consent of the receiving State by signing a Status of Forces Agreement. However, as part of the maritime armed forces of a country,

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* TIAN Shichen, Master of Laws and assistant research fellow at Research Office of Policy for Maritime Security, Naval Military Academic Institute. Any views or positions presented in this paper are solely those of the author and do not necessarily represent those of the institute.

warships have a different status from land and air forces, although they are also a State organ. Due to various reasons, navy warships can often traverse foreign territorial sea or enter foreign ports, without signing a Status of Forces Agreement with coastal States.[1]

As a State organ, a warship is entitled to sovereign immunity. This will however, generate conflicts and contradictions between the sovereignty of coastal States over territorial sea and jurisdictional immunities of the warship's flag State. When land armed forces are involved, such conflicts and contradictions are usually resolved by signing a bilateral or multilateral Status of Forces Agreement by the parties concerned. If the provisions of such an agreement also apply to the navy, there will be no foregoing conflicts and contradictions between the coastal State's sovereignty over territorial sea and the flag State's jurisdictional immunity provided to the warship. However, it's often not necessary for foreign warships to sign an agreement before they enter the territorial seas of coastal States, so there is no Status of Forces Agreement that applies to any navy. Therefore, a coastal State is placed in a position to deal with this issue every time a foreign warship enters its territorial seas. In practice, a number of customary laws have been developed regarding the legal status of foreign warships within a territorial sea. However, the legal status of the crew aboard foreign warships after they go ashore is still

1 The navy has this advantage mainly because of its right of innocent passage in territorial seas of coastal States, combined with its own mobility and the physical flowability of the ocean. In addition, unless otherwise particularly prohibited, the navy can also enter a port in internal waters of a country. Although this right of innocent passage has not formed a customary international law, and many coastal States have provided that exercise of this right shall be subject to prior approval or notification, in the absence of the foregoing restrictive provision in the internal legislation of a coastal State, the territorial seas of such State is open to any warship of any country. In terms of a port of a coastal State, despite its legal status of internal waters, it is also open to any warship of any country as long as such warship is not prohibited from entering such port by any special international treaty or any special law of the coastal State. In contrast, naval warships' right of innocent passage in territorial seas and their right to enter a port in internal waters on the premise that there is no restrictive condition are not available to air forces and the army. Unless otherwise agreed by a coastal State, foreign army and air forces are not entitled to enter the territorial sea or airspace of such country.

uncertain,[2] but this matter is not within the scope of this article. While recognizing the special legal status of foreign warships within territorial seas, international law also lays down some provisions on the jurisdiction of coastal States within their territorial seas. In particular, the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) lays down certain rules that may apply to foreign warships within territorial seas. This provides a basis for the formulation of domestic legislation by coastal States regarding the status of foreign warships within their territorial seas. Therefore, the rights and duties of foreign warships in territorial seas should be determined by taking into consideration both the provisions under international treaty law and customary international law and the provisions of domestic legislation of coastal States.

II. Rules of Treaty Law concerning Legal Status of Foreign Warships in Territorial Seas

A. Regulating the Legal Status of Foreign Warships in Territorial Seas through the Conclusion of Status of Forces Agreement

The conclusion of Status of Forces Agreement between countries has become a widespread State practice,[3] the purpose of which is usually to promote international cooperation on military security and to implement arrangements of cooperation on national defense. If a foreign warship visits a port in the internal waters of a coastal State or passes through its territorial sea or is stationed in a coastal State for a long time as part of the visiting army, under normal circumstances, the warships' status is regulated by the Status of Forces Agreement

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2 In 1898, the Institute of International Law passed the Rules for Legal Status of Ships and Their Crew at Foreign Ports, of which Article 8 to Article 24 refer to the status of warships in foreign territorial seas. In 1928, similar rules were passed, whose Article 10 to Article 26 establish the status of warships and their crew at foreign ports in peacetime. These provisions reflected the rules of the international laws at that time. See Robert Jennings and Arthur Watts KCMG QC eds., Wang Tieya et al. trans., *Oppenheim's International Law (Book II, Volume I)*, Beijing: Encyclopedia of China Publishing House, 1995, p. 603. (in Chinese)

3 In 1951, the countries of NATO signed the NATO Status of Forces Agreement. After NATO's enlargement, in 1995, member countries in the Partnership for Peace Programme signed another Status of Forces Agreement (PfP SOFA). All of the countries of the former Warsaw Treaty Organization had signed the Status of Forces Agreement with the former Soviet Union. After World War II, the United States signed the Status of Forces Agreement with such allies as Japan, South Korea, Australia, the Philippines, etc. as well as other non-allies.

concluded between the countries concerned. Status of Forces Agreement is an international treaty carried out between a sending State and a receiving State to adjust the status of the armed forces of the sending State which perform their duties with the approval of the receiving State within its territory. The Status of Forces Agreement has explicit provisions regarding the division of jurisdiction between the receiving State and the sending State, civil claims and other issues. Therefore, unless there is any completely opposite provision, the Status of Forces Agreement shall be fully applicable to the navy of the sending State which is part of the visiting army. Taking the Treaty on the Temporary Stay of the Army of One Party in the Territory of the Other Party during the Period of Joint Military Exercises between the People's Republic of China and the Russian Federation as an example, if a military ship of the People's Republic of China or the Russian Federation temporarily entered the territorial seas of the other party as part of the forces in the joint military exercises, its status within the territorial seas and the status of the crew aboard such a military ship after they go ashore shall be fully applicable to the relevant provisions of the foregoing treaty. For another example, the United States has signed a Status of Forces Agreement with many States, including Japan, South Korea, etc. Therefore, when a US military ship is stationed in a host country in accordance with the Status of Forces Agreement, its status within the territorial sea of the host country and the status of the crew of such a military ship after they go ashore shall be fully regulated by the relevant provisions of the Status of Forces Agreement.

B. Regulating the Legal Status of Foreign Warships in Territorial Seas through the UNCLOS of 1982

The UNCLOS of 1982 has established the legal status of a variety of maritime waters as well as the rules and regulations applicable to various activities in developing and utilizing seas and oceans, including laws and rules concerning the legal status of foreign warships in territorial seas.

1. General Provisions

The rules concerning the legal status of foreign warships in territorial seas are presented mainly in Section 3 Innocent Passage in the Territorial Sea of Part II of the UNCLOS,[4] where a multitude of rights and duties of foreign warships in

4 Article 17 to Article 32 of the UNCLOS, 1982.

the territorial seas of coastal States have been detailed. In particular, Subsection C Rules Applicable to Warships and other Government Ships Operated for Non-Commercial Purposes offers an explicit definition of warships and presents details regarding the non-compliance by warships with the laws and regulations of the costal State, responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes, immunities of warships and other government ships operated for non-commercial purposes, etc. Due to the limited space of this paper, these aspects will not be illustrated here in detail.

2. Impact of the Regime of Passage through Territorial Straits on the Legal Status of Foreign Warships in Territorial Seas

Territorial straits, within the territorial seas of the coastal States, have the same legal status as territorial seas by nature. However, the legal nature of the seas connected to both ends of territorial straits, the conditions of borders and the density of ships for international navigation through territorial straits will vary with each case. Therefore, the regime of innocent passage and the regime of transit passage will apply to different territorial straits based on specific circumstances. This will have a direct impact on the right of navigation of warships.

a. Territorial Straits Applying the Regime of Innocent Passage

The territorial straits connecting a part of the high seas or an exclusive economic zone and the territorial sea of a country shall apply the regime of innocent passage. Such straits are the so-called "dead end" straits stipulated in Article 45 of the UNCLOS and mainly include the Strait of Tiran, Hurd Haber Waterway, Bahrain-Saudi Arabia Waterway, the Strait of Georgia and the Gulf of Honduras. If the strait is formed by an island of a State bordering the strait and its mainland, the regime of innocent passage shall also apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.[5] The innocent passage through the foregoing straits shall be continuous. When a submarine passes through such territorial straits, it shall navigate on the surface of waters; when a warship passes through the two kinds of territorial seas mentioned above, it shall comply with the relevant provisions in the UNCLOS concerning the regime of innocent passage.

b. Territorial Straits Applying the Regime of Transit Passage

Territorial straits which are used for international navigation between one

5 Article 38(1) of the UNCLOS, 1982.

part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone shall apply the regime of transit passage. This regime applies to all ships and aircraft, including warships and military aircraft. There is no clear definition of "straits which are used for international navigation" under the UNCLOS. According to the judgment of the International Court of Justice on the *Corfu Channel*, the decisive criterion of an international strait is the geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation, rather than its volume of traffic passing through the strait or its greater or lesser importance for international navigation. Transit passage means the exercise in accordance with the relevant international laws and the specific laws and regulations of the States bordering the strait of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. As long as the ship transits in its usual manner, it should not be obstructed. That is to say, a submarine can navigate underwater and a fleet can navigate in a team because these are their usual manner. While enjoying the freedom of navigation and overflight, the ships and aircraft engaged in transit passage should also comply with their relevant duties under the UNCLOS as well as the provisions of domestic legislation formulated by the countries bordering the straits in accordance with the UNCLOS and other rules of international law.

3. Impact of the Regime of Archipelagic Sea Lanes Passage on the Legal Status of Foreign Warships in Territorial Seas

In general, the legal status of warships within territorial seas of archipelagic States should conform to the relevant rules of the regime of innocent passage. An archipelagic State may designate sea lanes and air routes thereabove (called archipelagic sea lanes), suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea. As such, all ships and aircraft, including warships, submarines and military aircraft, enjoy the right of archipelagic sea lanes passage in such sea lanes and air routes. Such sea lanes and air routes shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters. Therefore, within the waters of territorial seas of archipelagic countries where the foregoing archipelagic sea lanes traverse, the status of foreign warships should

conform to the relevant rules of the regime of archipelagic sea lanes passage.[6]

C. Impact of Other Treaties on the Legal Status of Foreign Warships in Territorial Seas

States with opposite or adjacent coasts may have special security interests in the opposite or adjacent territorial seas between them, especially the territorial seas within a particular strait. Generally, these States will sign a special treaty to prescribe the regime of passage through such territorial seas, which will have an impact on the right of navigation of foreign warships through such waters. It is specially stipulated in Article 35 of the UNCLOS that the straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits shall not rely on the regulations of the regime of transit passage. Therefore, although a strait may be within the territorial sea of a coastal State, when a foreign warship passes such a strait, it shall comply with the relevant provisions of the conventions specifically relating to such a strait. For examples, in the Montreal Convention of 1936, there are multiple provisions generally accepted by the international community concerning the Dardanelles Strait and the Bosphorus Strait connecting the Sea of Marmara and the Aegean Sea between the European part and the Asian part of Turkey, including many provisions on the right of passage of warships during peacetime and wartime;[7] the rules concerning the Strait of Magellan connecting the Pacific and the Atlantic between the southern tip of mainland South America and Tierra del Fuego and other islands are provided for in Article 5 of the Boundary Treaty between Chile and Argentina.

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6 The right of archipelagic sea lane passage refers to the right to exercise in accordance with the UNCLOS of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. Such sea lanes and air routes shall be defined by a series of continuous axis lines from the entry points of passage routes to the exit points. Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane.

7 Jia Bingbing, *The Regime of Straits in International Law*, New York: Oxford University Press, 1998, pp. 110~115.

III. Rules of Customary International Law concerning the Legal Status of Foreign Warships in Territorial Seas

Whether in the high seas or the territorial seas or internal waters of a foreign State, warships have a special legal status, which has formed a number of rules of customary international law.[8] The particularity of the legal status of warships lies in the privileges and immunities they may enjoy.[9] First, warships are considered State property, and thus cannot be the object of any judicial execution and can be exempt from arrest or seizure. Second, warships have the attributes of State territory and are often called "floating territory of the flag State" from the perspective of legal fiction. Therefore, they may enjoy jurisdictional immunity from any other country except the flag State. Police and any official of any port agency or coastal State may not board warships without the express approval of the commander of the ship. The personnel and materials aboard a warship shall be under the exclusive jurisdiction of the State to which the warship belongs, even in the territorial seas or internal waters of a foreign State. Any criminal behavior of any serviceman on a warship shall be under the exclusive jurisdiction of the captain of the warship and the authority of the flag State. Finally, a warship is a State organ itself and its act belongs to a State act. A warship may enjoy the sovereign immunity of the State to which it belongs from the jurisdiction of other countries. Warships cannot be boarded, searched or inspected. In accordance with the provisions of the UNCLOS, warships shall comply with the traffic control of coastal States as well as their provisions on sewage, sanitation, quarantine, etc. However, even if a warship violates these provisions, the measures a coastal State can take are limited to asking the warship to exit its territorial seas.

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8 The significance of researching the rules of customary international law for the legal status of foreign warships in territorial seas of a country lies in the following two aspects: on one hand, customary international law is applicable to all countries, no matter whether the coastal State or the flag State of the warship is a party to a treaty. On the other hand, customs coexist with treaties; even if a treaty law norm has exactly the same content as customary law norms, to incorporate customary law norms into the treaty law does not preclude the independent applicability of customary law norms.

9 Robert Jennings and Arthur Watts KCMG QC eds., Wang Tieya et al. trans., *Oppenheim's International Law (Book II, Volume I)*, Beijing: Encyclopedia of China Publishing House, 1995, p. 589 (in Chinese); Gong Renren, *A Comparative Study of State Immunity: A Common Subject among Contemporary Public International Law, Private International Law and International Economic Law*, Beijing: Peking University Press, 2005, pp. 19, 295 (in Chinese); Article 21 of United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004.

IV. Domestic Legislation on the Legal Status of Foreign Warships in Territorial Seas

As mentioned earlier, foreign warships have a special legal status in the territorial seas of coastal States and may enjoy State sovereign immunity. However, this does not mean that foreign warships may act arbitrarily in the territorial seas of coastal States, free from the jurisdiction of any domestic legislation of any coastal State. In fact, a civil or criminal case may be settled through diplomatic means when involving foreign warship that enjoys judicial immunity.[10] While recognizing the immunity that foreign warships and other governmental ships may enjoy, the 1982 UNCLOS also lays down detailed provisions on coastal States' formulation of laws and regulations and exercise of jurisdiction within their respective territorial seas. In accordance with the relevant provisions of the UNCLOS and other rules of international law concerning the jurisdiction of coastal States within their respective territorial seas, coastal States have formulated various laws and regulations to govern the rights and obligations of foreign military ships entering their territorial waters.

A. Main Modes of Legislation of Coastal States on the Legal Status of Foreign Warships in Territorial Seas

The legislation of coastal States on foreign warships in their territorial seas involves many aspects. Some parts of legislation are included in unified legislative documents, while other parts are scattered in different legislation. Based on a survey of the practices of coastal States, the main modes of legislation of coastal States regarding the legal status of foreign warships in territorial seas are as follows: (1) formulating domestic legislation named "Visiting Forces Law",

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10 The privileges and immunities enjoyed by foreign warships are restricted at least in the following aspects. Firstly, these privileges and immunities are mainly applicable in peacetime and not applicable when two countries are at war. At wartime, warships are of course military targets and can be attacked with military forces. Secondly, respect for the privileges and sovereign immunities of warships is applicable mainly when warships enter a countries' territorial seas legally. It's another cup of tea for warships that invade territorial seas illegally. Finally, any damage resulted from a warship's breach of a coastal State's law when entering the territorial seas should be borne by the flag State of the warship. See Tian Shichen, On China's Regulating Foreign Military Ships in Its Territorial Seas: Some Reflections on the Incident of Iran's Seizure of British Navy Soldiers, *China Oceans Law Review*, No. 1, 2007. (in Chinese)

implementing Status of Forces Agreement and stipulating that "Visiting Forces Law" is also applicable to naval ships and navy personnel of visiting forces, which are mainly practices of the Commonwealth member States. (2) formulating special legislation on visits to coastal States by military ships and aircraft in time of peace and the relevant approval procedures.[11] (3) prescribing the status of foreign warships in territorial seas specifically in other domestic legislation, which is often the unified maritime codes, legislation on State border management or territorial sea,[12] or the reservations or declarations made by various States when they signed or ratified the 1982 UNCLOS.

B. Main Contents of Legislation of Coastal States on the Legal Status of Foreign Warships in Territorial Seas

Some of the laws and regulations formulated by coastal States concerning their respective territorial seas specifically regulate the legal status of foreign warships in territorial waters, while others apply to all ships, including warships. The following part hereof will focus on the rules that are related directly to the legal status of foreign warships in territorial seas and which will have a direct impact on their rights and obligations.

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11 Examples of such type of national legislation practice may include Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, Decree No. 55/CP of October 1, 1996 of the Government on the Activities of Foreign Warships Visiting the Socialist Republic of Vietnam Clearance Procedures for Visits to United States Ports by Foreign Naval and Public Ships, Indonesian Government Regulation No. 37 on the Rights and Obligations of Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lane Passage through Designated Archipelagic Sea Lanes, 28 June 2002, etc.

12 The majority of countries laying down provisions in comprehensive maritime codes are eastern European countries. For example, the Act concerning the Coastal Sea and the Continental Shelf of Yugoslavia, 23 July 1987, the Maritime Space, Inland Waterways and Ports Act of Bulgaria, 28 January 2000, the Maritime Code of Croatia, 1994, the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998, the Maritime Zones Act of Seychelles, 16 March 1999, the Maritime Code of Slovenia, 3 March 2001, the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania, 7 August 1990, etc. The majority of the countries laying down provisions in their national legislation on border management are the former Soviet republics. For example, the Statute of Ukraine concerning the State Frontier, 4 November 1991, the Law on the State Boundary of the Republic of Lithuania, 25 June 1992, the Act on the State Border of the Russian Federation, 1 April 1993, etc. In addition, there are many countries laying down such provisions in legislation on territorial seas but most of them are provisions in principle and will not be listed herein.

1. Approval and Notification System and Regime of Innocent Passage of Entry into or Passage through Territorial Sea by Warships

Whether foreign warships can pass through or enter the territorial seas of coastal States and whether foreign warships can enjoy the right of innocent passage are always believed to be the same problem, but in fact that is not the case. The first instance refers to whether foreign warships require the approval of the coastal States or to notify in advance their presence in such territorial waters. The second issue refers to the right of foreign warships to traverse territorial seas under the provisions of the regime of innocent passage. With regard to the foreign warships that may enter the territorial sea of coastal States only after being approved and those which may enter and leave the territorial sea of coastal States freely without being approved by such coastal States, the regime of innocent passage they need to comply with is the same.

The 1982 UNCLOS does not formulate any specific provisions regarding this issue of whether foreign warships should require the coastal States' approval or notify their intention to pass through or enter territorial seas. There has also been no unified State practice, let alone the formation of customary law. Based on a survey of the legislation of coastal States, there are three main types of practices: (1) Foreign warships shall be required to notify the Ministry of National Defense, the Ministry of Foreign Affairs or the Ministry of Communications of coastal States and obtain their approval some time (there is no uniform provision on such time) before they pass or enter the territorial seas of such coastal States.[13] (2) If a foreign warship intends to enter the territorial sea of a State, it shall notify such State in

13 Article 6 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, 1992; Article 3 of the Territorial sea and Maritime Zones Act of Bangladesh, 1974; Article 7 of the Decree No. 47 of December 17, 1977 concerning Territorial sea, Exclusive Economic Zones, Continental Shelves and other Maritime Zones of Yemen; Article 10 of the Maritime Zones Act of St. Vincent and Grenada, 1983; Article 9 of the No. 28 Law of November 8, 2003 of Syria; Article 16 of the Maritime Zones Act (No. 2 Decree in 1999) of Seychelles, 1999; Article 4 of the Proclamation of June 3, 1996 concerning the Admission to Swedish Territory of Foreign Naval Ships and Military Aircraft; Article 5 of the Maritime Zones (Establishment) Act of Sierra Leone, 1996; Article 8 of the Act on Territorial sea and the Continental Shelf of Sudan, 1970; Article 21 of the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania, 7 August 1990.

advance.[14] Generally speaking, the foreign warship shall notify the Ministry of Foreign Affairs or the Ministry of National Defense of such State of the name, type and official number of the warship; purpose of passage as well as passage route and schedule, etc. 24 hours or three days in advance.[15] (3) Foreign warships may enter and pass through the territorial seas of coastal States freely without notifying or being approved by such coastal States.[16]

The provisions of coastal States concerning the regime of innocent passage, including what innocent passage is, the obligations the ships shall comply with when they exercise the right of innocent passage, the measures against violations of the regime of innocent passage, etc., are basically duplicates of the relevant provisions of the UNCLOS and will not be illustrated in detail herein.

2. Sea Lanes and Traffic Separation Schemes in Territorial Seas

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. This provision in Article 22 of the 1982 UNCLOS has the main purpose of ensuring the safety of navigation and conserving the marine ecological environment. The coastal States shall give due publicity to all such sea lanes and traffic separation schemes in the "Notices to Mariners". There are similar provisions in the domestic legislation of many States[17] and a number of them are applied specifically to military ships.[18]

3. Stopping and Anchoring

Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary

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14 Article 4 of Enforcement Decree of Territorial Sea and Contiguous Zone Act Presidential Decree No. 9162, 20 September 1978 amended by Presidential Decree No. 17803, 18 December 2002; Article 23 of Maritime Code of Croatia, 1994; Article 17 of Act concerning the Coastal Sea and the Continental Shelf of Yugoslavia, 23 July 1987.

15 The foreign warship shall notify the Minister of Foreign Affairs and Trade of South Korea not later than three days in advance; foreign warships shall notify the Minister of Foreign Affairs of Croatia not later than 24 hours in advance; the foreign warship shall notify the Federal Administrative Agency of former Yugoslavia not later than 24 hours in advance.

16 This proposition is supported by the United States, Russia and other marine powers.

17 Article 25 of the Maritime Code of Croatia, 1994; Article 13(5) of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998.

18 Article 20 of the Act concerning the Coastal Sea and the Continental Shelf of Yugoslavia, 23 July 1987; Article 13(4) of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998.

navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. These are the provisions concerning the regime of innocent passage in the UNCLOS.[19] The provisions of domestic legislation of coastal States are basically duplicates of the relevant provisions of the UNCLOS.[20] However, the exceptions for stopping and anchoring in domestic legislation of some States do not include rendering assistance to persons, ships or aircraft in danger or distress, whereas ships witnessing the accident are required to report to the director of the nearest port immediately in all possible ways.[21]

4. Special Rules for Submarines within Territorial Seas

It is stipulated in Article 20 of the 1982 UNCLOS that "[i]n the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag." This rule certainly applies to submarines which belong to warships. There are similar provisions in the domestic legislation of many States.[22] However, as for what measures should be taken against those submarines that have violated this rule, in the legislative practices of various States, there are usually no specific provisions. If a submarine cannot surface because it has suffered damage, it is usually required to send out a signal in any possible way.

5. Rights of Protection of the Coastal State

The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent. 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

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19 Article 18 of the UNCLOS, 1982.

20 Article 22 of the Maritime Code of Croatia, 1994; Article 17 of the Act concerning the Coastal Sea and the Continental Shelf of Yugoslavia, 23 July 1987; Article 14 of the Maritime Code of Slovenia, 2001; Article 10(2) of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998.

21 Article 28 of the Maritime Space, Inland Waterways and Ports Act of Bulgaria, 28 January 2000.

22 Article 29 of the Maritime Code of Croatia, 1994; Article 25 of Maritime Space, Inland Waterways and Ports Act of Bulgaria, 28 January 2000; Article 21 of the Act concerning the Coastal Sea and the Continental Shelf of Yugoslavia, 23 July 1987; Article 9 of the No. 28 Law of November 8, 2003 of Syria; Article 16 of the Maritime Zones Act (No. 2 Decree in 1999) of Seychelles, 1999; Article 19 of the Maritime Code of Slovenia, 2001; Article 13(3) of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998; Article 22 of the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania, 7 August 1990.

essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published. These are the rights of protection of coastal States stipulated in Article 25 of the UNCLOS. There are similar or more detailed provisions in the domestic legislation of many coastal States concerning their rights of protection.[23] These measures are usually determined by such State organs as the Ministry of Foreign Affairs, Ministry of Defense, Ministry of Communications, Ministry of the Interior or the President, or can be determined jointly by several of the foregoing State organs through consultations. These State organs also have the right to specify which States' ships may pass through the specified areas in which innocent passage is temporarily suspended and under what conditions. The foregoing decision shall be published in the "Notice to Mariners". If there are such provisions in the domestic legislation of any coastal State, the foreign warships within its territorial seas shall respect the measures taken by such coastal State in accordance with the above provisions.

The rights of protection of the coastal States are closely related to the systems of military restricted zones and restricted navigation zones.[24] As appellations in domestic legislation, both military restricted zones and restricted navigation zones are established in accordance with Article 25(3) of the UNCLOS. The main difference between them is that the military restricted zones focus on the protection of military security of coastal States, while the restricted navigation zones focus on ensuring the safety of navigation. For example, it is stipulated in Article 7 of the Law of the People's Republic of China on the Protection of Military Installations that "[t]he State shall designate military restricted zones and military administrative zones respectively in accordance with the nature, the function, the security requirements and the requirements for effective utilization of military installations." Articles 8 and 9 of the Law of the People's Republic of China on the Protection of Military Installations prescribe a method to determine and the limits of the military restricted zones and the military administrative zones. The limits of

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23 Article 22 of the Maritime Space, Inland Waterways and Ports Act of Bulgaria, 28 January 2000; Article 30 of the Maritime Code of Croatia, 1994; Article 22 of the Act concerning the Coastal Sea and the Continental Shelf of Yugoslavia, 23 July 1987; Articles 12 and 13 of the No. 28 Law of November 8, 2003 of Syria; Article 16 of the Maritime Zones Act (No. 2 Decree in 1999) of Seychelles, 1999; Article 20 of the Maritime Code of Slovenia, 2001; Article 12(2) of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998;

24 Article 15 of Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998.

the water military restricted zones and military administrative zones shall be jointly designated by military area commands and people's governments of provinces, autonomous regions and municipalities directly under the Central Government, or by military area commands and people's governments of provinces, autonomous regions, municipalities directly under the Central Government and the relevant departments of the State Council. The limits of water military restricted zones of utmost importance shall be designated by the State Council and the Central Military Commission. It is stipulated in Article 21 of the Maritime Traffic Safety Law of the People's Republic of China that "[t]he designation of restricted navigation zones in coastal waters must be approved by the State Council or the competent authority. However, the designation of restricted navigation zones for military purposes shall be approved by the competent department of the State in charge of military affairs."

6. The Number of Warships with the Same Nationality in Territorial Seas

The number of warships with the same nationality within territorial seas was originally restricted in a rule in the Law of Sea Warfare,[25] with the purpose of preventing increased number of warships belonging to belligerent States from entering the ports of the same neutral State. At this moment in time, this rule is extended to peace times and is included in the legislation of many States.[26] It is generally stipulated that no more than three warships with the same nationality shall be allowed to simultaneously traverse the territorial seas of a coastal State.

7. Foreign Nuclear-powered Ships and Ships Carrying Nuclear or Other Inherently Dangerous or Noxious Substances

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.[27] As most of the nuclear-powered ships are warships, under normal circumstances, this rule of the UNCLOS also applies to warships. For the purpose of protecting the marine environment, preserving the marine safety and implementing national nuclear policies, many coastal States have formulated rules for this category of

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25 Article 15 of the 1907 Hague convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War.

26 Article 27 of the Maritime Code of Croatia, 1994; Article 20 of the Act concerning the Coastal Sea and the Continental Shelf of Yugoslavia, 23 July 1987; Article 13(2) of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998.

27 Article 23 of the UNCLOS, 1982.

ships.[28] In addition to the provisions duplicating those of the UNCLOS, some States also formulate certain provisions requiring such ships to use specific sea lanes during their passage, to comply with the traffic separation schemes of the territorial seas, to satisfy the conditions concerning the safeguard of the safety of navigation and the prevention of pollution of the marine environment, to give prior notice, to obtain pre-approval and so on.[29]

8. Danger Entry and Assistance Entry

Danger Entry refers to the right of entry into the territorial sea or territorial airspace by ships or aircraft in case of danger, without the costal State's permission. Assistance Entry refers to the right of entry into the territorial sea by ships or, under certain circumstances, aircraft without the costal State's permission, in order to engage in *bona fide* efforts to render emergency assistance to those in danger or distress at sea.[30] These two categories of rights are exceptional cases in which ships or aircraft may enter the territorial sea in emergency without permission of the coastal State and are specified in domestic legislation of only a few States.[31]

9. Non-compliance by Warships with the Laws and Regulations of the Coastal State

Article 30 of the UNCLOS prescribes the measures coastal States may take against warships that don't comply with the laws and regulations thereof, which states that if any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately. Based on this rule, more detailed rules

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28 Article 24 of the Maritime Space, Inland Waterways and Ports Act of Bulgaria, 28 January 2000; Article 28 of the Maritime Code of Croatia, 1994; Article 20 of the Act concerning the Coastal Sea and the Continental Shelf of Yugoslavia, 23 July 1987; Article 13(4) of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998.

29 Article 9 of No. 28 Law of November 8, 2003 of Syria; Article 16 of the Maritime Zones Act (No. 2 Decree in 1999) of Seychelles, 1999; Article 18 of the Maritime Code of Slovenia, 2001.

30 "2.3.2.5 Assistance Entry", from The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1

31 Article 20 of the Proclamation of June 3, 1996 concerning the Admission to Swedish Territory of Foreign Naval Ships and Military Aircraft; Articles 3 and 5 of the Decree of May of 1999 concerning the Admission to Danish Territory in Peacetime of Foreign Naval Ships and Military Aircraft; Article 9 of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998.

have been formulated in domestic legislation of many States.[32] In legislative practices, in addition to violations of the laws and regulations of the coastal State regarding the regime of innocent passage, measures may also be taken in cases of violations of generally accepted international regulations relating to the prevention of collisions at sea. The law enforcement agencies that may require foreign warships to leave include the police and the army of the coastal State as well as the ships and aircraft of other authorized agencies. The coastal State may require the non-compliant foreign ships to leave the territorial sea thereof, while there is generally no provision on the measures that may be taken against the ships which refuse to leave.[33]

10. Responsibility of the Flag State for Damage Caused by a Warship

It is stipulated in Article 31 of the 1982 UNCLOS that "[t]he flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law." Because the UNCLOS does not specify the form of such international responsibility, in domestic legislative practices, some provisions require the flag State of the warship to bear the responsibility of compensation,[34] while some provisions are the same as those in the UNCLOS.[35]

V. Conclusion

In accordance with the principle that the special law is superior to the common law, when the legal status of foreign warships in territorial seas is studied from

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32 Article 35 of the Maritime Space, Inland Waterways and Ports Act of Bulgaria, 28 January 2000; Article 29 of the Maritime Code of Croatia, 1994; Article 21 of the Maritime Code of Slovenia, 2001; Article 19 of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998; Article 23 of the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania, 7 August 1990.

33 Article 19(3) of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation, 16 July 1998 provides that counter-measures may be taken against any foreign warship using force.

34 Article 36 of the Maritime Space, Inland Waterways and Ports Act of Bulgaria, 28 January 2000.

35 Article 24 of the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania, 7 August 1990.

the perspective of international law, we should first consider whether there is any agreement between the flag State of the warship and the coastal State. In practice, the legal status of foreign warships is often regulated by the Status of Forces Agreement between the States concerned; if there is no special agreement, we should consider the provisions of generally recognized international laws, such as the 1982 UNCLOS which has a multitude of provisions regulating the legal status of foreign warships within territorial seas; as for the legal status of foreign warships in specific areas of territorial seas, the provisions of long-standing international conventions in force specifically relating to such areas shall be taken into account. From the perspective of domestic law, with regard to the rights and obligations of foreign warships within territorial seas, the domestic law formulated by the coastal State in accordance with the UNCLOS and other rules of international law should be taken into account.

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Legal Issues Related to the Management of Genetic Resources in International Seabed Area

JIANG Jiadong*

Abstract: The progress in biotechnology has led to increasingly fierce contest among the international community for genetic resources in the international seabed area (hereinafter "the Area"). So far, there have been no international conventions defining the legal status of genetic resources in the Area, yet the principle of "common heritage of mankind" should apply to such resources, in accordance with the purpose of the UNCLOS. This principle would impose appropriate restrictions on the utilization of such genetic resources. When dealing with this issue, the international community should give into full play the role of the International Seabed Authority, and should manage such resources in the Area and the relevant activities and further negotiate over them. Additionally, China should emphasize more the issue by making greater endeavors to conduct bilateral and multilateral cooperation. Only in this way may China, in the field of development and utilization of genetic resources in the Area, occupy a position matching its status in the world.

Key Words: International seabed area; Genetic resources; UNCLOS; Common heritage of mankind

The twenty-first century is an era of seas and oceans. The development and exploitation of marine resources has been one of the highlights over which the marine powers worldwide hotly compete with each other. Therefore, the genetic resources in the international seabed area (hereinafter "the Area") have garnered global attention. The research and utilization of genetic resources in the Area is of

* JIANG Jiadong, Master of Law, is a teacher of China Maritime Police Academy. His main research interest includes international law of the sea and management of maritime law enforcement.

vital importance in revealing the secrets of the origin of life, exploring the specific life processes and mechanisms under the interplay between marine organisms and marine environment, and using these resources for industrial, medical and military purposes and for environmental protection. It is beyond doubt that the development and exploitation of genetic resources in the Area is becoming a reality in this century.

The world continues to undergo social, economic and scientific & technological progress. As a result, human activities such as marine scientific research, deep-sea exploration and mining, biological sampling and exploration and tourism & sightseeing activities have damaged the ecological systems in the Area. With the successful commercial development and exploitation of genetic resources in the Area, further issues would arise, such as how to gain access to and share benefits from utilizing these resources, how to transfer technology, and protect intellectual property rights, etc. Therefore, the management of genetic resources in the Area is increasingly gaining worldwide attention.

I. A Brief Introduction to Deep-Sea Genetic Resources

While the 1982 United Nations Convention on the Law of the Sea (hereinafter "the UNCLOS" or "the Convention") does not define the term genetic resources, the Convention on Biological Diversity does give an indirect definition. As defined in Article 2 of the Convention on Biological Diversity, biological resources include "genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity". Genetic resources, in particular, are defined as "genetic material of actual or potential value", and genetic material is defined as "any material of plant, animal, microbial or other origin containing functional units of heredity". That is to say, genetic resources refer to any material of plant, animal, microbial or other origin containing functional units of heredity with actual or potential value and are a type of biological resources. In light of recent developments in the field of genetics, genetic resources can include plant seeds, animal gametes, cuttings or individual organisms, as well as DNA extracted from a plant, animal or microbe, such as a chromosome or a gene, with actual or potential value for humans in light of their

genetic characteristics.[1] Genetic resources in the Area are a type of biological resources. According to Frida M. Armas-Pfirter, Vice-chairwoman of the Legal and Technical Commission of the International Seabed Authority, biological resources in the Area refer to living organisms either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil beyond the areas of national jurisdiction.[2]

Analyses of selected deep sea floor systems have led some scientists to predict that the whole deep sea floor could perhaps harbor several million species, and that 60% of the deep sea floor is located beyond areas of national jurisdiction.[3] Such genetic resources at deep sea floor are closely related to or cannot be separated from the environment that harbors deep sea mineral resources. With the continuous development of science and technology, a variety of human activities may potentially damage deep sea ecosystems. Such activities include marine scientific research, deep-sea exploration and mining, biological sampling and exploration and tourism & sightseeing activities.

The first of these four activities, marine scientific research, is necessary for mankind to learn more about marine ecosystem, to discover sustainable ways to use biological resources, and to assess the impact of other maritime activities. If scientific research is not conducted in a cautious and prudent manner, however, it would adversely affect marine biological diversity and ecosystems. According to the 2003 Report of the UN Secretary-General on Oceans and the Law of the Sea, the impacts of marine scientific research at hydrothermal vents may lead to habitat loss and organism mortality as a result of: removing chimneys and rocks for geological investigations or chemical sampling; noise, light, or the use of manned submersibles or thrusters, which may damage the fauna etc.[4]

As regards deep sea exploration and mining, the International Seabed Authority has identified three varieties of human activities that may impact the environment: (1) exploration of mineral sea beds with commercial value; (2) small-scale

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1 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, paras. 5~6.

2 Frida M. Armas-Pfirter, Legal Implications Related to the Management of Seabed Living Resources in the Area under UNCLOS, at http://www.globaloceans.org/globalconferences/2006/pdf/FridaArmas-Pfirter.pdf, 12 December 2006.

3 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 13.

4 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/58/65, 3 March 2003, para. 195.

experiment and prototype testing by commercial mining systems; and (3) metallurgy process experiments in international seabed areas.[5] Nevertheless, polymetallic nodule exploration is not expected to result in severe damages to biodiversity in sea basins. It is hard to predict the impact of cobalt-rich ferromanganese crust exploration on the environment of seamount biome. Polymetallic sulfide exploration may furthermore lead to more severe environmental problems than polymetallic nodule exploration.

Biological sampling and exploration is a central method for exploring the deep sea floor, whether for marine scientific research or commercial purposes. Frequent biological sampling and large-scale exploration activities would directly and negatively impact hydrothermal vents and seamount biome. Some creatures may have difficulties in surviving in such environment. Furthermore, sampling in particular living environment may indirectly introduce alien species and lead to extinction of the existing species.

Finally, tourism & sightseeing activities may also adversely impact the deep sea floor. Deep-sea hydrothermal vents are visually spectacular; they contain extreme environments and a large number of endemic and unusual species. For such reasons, vent ecosystems have generated widespread public interest.[6] Some commercial entities intend to use vent ecosystems as sightseeing places to inform the public about earth processes and the way in which scientists work. MIR submersible vessels leased from Russia are commercially used for tourism and sightseeing activities amongst deep-sea hydrothermal vents. At present, such activities could be conducted without restraints by law or approval by any international organization. If such activities are undertaken on a large scale, they would undoubtedly disturb the normal life of the biomes of deep-sea hydrothermal vents.[7]

All in all, the deep sea floor, richly endowed with natural resources, is one of the most unknown ecosystems on the earth.[8] With the evolution of new technologies and techniques, scientists would have to change their concepts on the ope-

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5 Jin Jiancai, Management of Deep Seabed Biodiversity and Genetic Resources, *Advances in Earth Science*, No. 1, 2005. (in Chinese)

6 International Seabed Authority, Summary Presentations on Polymetallic Massive Sulphide Deposits and Cobalt-rich Ferromanganese Crusts, ISBA/8/A/1, 9 May 2002, para. 19.

7 Jin Jiancai, Management of Deep Seabed Biodiversity and Genetic Resources, *Advances in Earth Science*, No. 1, 2005. (in Chinese)

8 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/54/429, 1999, para. 509.

ration and functions of marine ecosystems. Because knowledge of deep sea biodiversity remains limited, we are still unable to estimate the quantities of species in any seabed area and the geographic scope within which these species inhabit. Therefore, we should endeavor to learn about these ecosystems for the sake of promoting their conservation and sustainable use.

II. The Existing International Legal Framework for the Management of Genetic Resources in the Area and the Limitations of This Framework

The discovery of complex and diverse ecosystems beyond areas of national jurisdiction, along with developments in biotechnology, have both increased global interest in deep sea biogenetic resources beyond areas of national jurisdiction and activities related to such resources. Strengthening the management of these genetic resources by law has therefore been on the agenda of the international community.

A. The Existing Legal Framework for the Management of Genetic Resources in the Area

1. UNCLOS

The 1982 UNCLOS establishes a legal order for all the activities in connection with the oceans. It facilitates international communication, and promotes peaceful use of the oceans, equitable and efficient utilization of ocean resources, conservation of living resources, and the study, protection and preservation of marine environment. Although the UNCLOS does not include specific provisions related to biological and genetic resources, its jurisdictional framework and general principles are also applicable to the management of genetic resources in the Area.

The UNCLOS divides the ocean space horizontally and vertically into many areas while formulating a set of rules for maritime activities. According to the seaward extension of baselines, horizontally, the ocean space can be divided into internal waters, territorial seas, and exclusive economic zones, where the States enjoy exclusive sovereignty or sovereign rights, and two areas beyond national jurisdiction, namely high seas and international seabed area.

Article 87 of the UNCLOS provides that the high seas are open to all States, and freedom of the high seas shall be exercised with due regard to the interests

of other States in their exercise of freedom. Freedom of the high seas shall be exercised under the conditions laid down by this Convention, including the articles on the conservation and management of the living resources of the high seas (Section 2, Part VII), and general obligations related to the protection and preservation of the marine environment (Part XII).

In terms of international seabed areas, the UNCLOS Part XI and the 1994 Agreement provide that the Area and its resources[9] are the common heritage of mankind. The International Seabed Authority is the organization through which States Parties to the Convention shall organize and control activities in the Area, particularly with a view toward administering the resources of the Area and sharing the benefits arising from relevant activities.

As to marine scientific research conducted beyond the areas of national jurisdiction, the UNCLOS Part XIII makes provisions on the framework for such activities. Especially Article 257 states that all States and competent international organizations have the right to conduct marine scientific research in the high seas. Its Article 143 and Article 256 stipulate that marine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole, in accordance with Part XIII. State Parties may carry out marine scientific research in the Area and shall promote international cooperation in marine scientific research in the Area. They may do so by ensuring that programmes are developed through the International Seabed Authority or other international organizations, as appropriate for the benefit of developing States and technologically less developed States, and by disseminating the results of research and analysis when available.

The UNCLOS has generally required the States to conserve and manage marine living resources within and beyond areas of national jurisdiction (Articles 61 to 67 and Articles 116 to 119), and to protect and preserve the marine environment (Articles 192 to 237). States shall take all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source. Such measures shall include those necessary to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species and other forms of marine life (Article 194(5)).

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9 According to Article 133 of the UNCLOS, "resources" means all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules.

States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto (Article 196 (1)).

Article 145 of the UNCLOS provides that necessary measures shall be taken with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. The Council of the International Seabed Authority shall have the power to issue emergency orders, which may include orders for the suspension or adjustment of operations for the sake of preventing serious harm to the marine environment arising out of activities in the Area (Article 162). The Legal and Technical Commission shall make recommendations to the Council to disapprove areas for exploitation in cases where substantial evidence indicates the risk of serious harm to the marine environment (Article 165).

2. The Convention on Biological Diversity

The Convention on Biological Diversity (hereinafter "the CBD") also makes provisions for the conservation and sustainable use of deep seabed biodiversity beyond areas of national jurisdiction, which could also be applicable to the management of genetic resources in the Area. According to Article 3 of the CBD, the CBD is complementary to the UNCLOS in relation to its specific objectives: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources including by appropriate access to genetic resources, by appropriate transfer of relevant technologies, taking into account all rights over those resources and technologies, and by appropriate funding.[10]

The CBD makes different provisions for its jurisdictional applicability: 1) different provisions between "components of biological diversity" and "processes and activities"; and 2) different provisions between the areas within national jurisdiction and the areas beyond national jurisdiction.[11] In areas within national jurisdiction, the provisions of the CBD apply to components of biological diversity

10 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 185.

11 Policy and Legal Framework concerning the Management of Biodiversity beyond Areas of National Jurisdiction, at http://china-isa.jm.china-embassy.org/chn/hdxx/P020070115223111563710.pdf, 9 January 2007. (in Chinese)

and also to processes and activities carried out under national jurisdiction or control. But in the area beyond national jurisdiction, according to Article 4, the provisions of the CBD only apply to processes and activities carried out under national jurisdiction or control that may have an adverse impact on biodiversity. That means the CBD does not apply to components of marine biological diversity in the area beyond national jurisdiction. Nonetheless, according to Article 5, Contracting Parties to the CBD shall cooperate directly or through competent international organizations for the conservation and sustainable use of biological diversity in the areas beyond national jurisdiction.

As to the second object of the CBD, its Article 2 defines "sustainable use" as "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations". Two elements in the definition – way and rate are interdependent and the rate largely depends on the purpose of the utilization.[12]

The CBD's third object is the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Except for the equitable consideration and reward for knowledge and financial contributions, one of the aims of benefit-sharing is to set incentives for the conservation and sustainable use of biodiversity. Benefit-sharing is particularly related to genetic resources on the deep sea floor, which have great potential scientific and economic value but cannot be available to the States whenever possible because of scientific and technological limits. While personal data and property right interests are protected through IPR, personal interests must also be balanced against the benefit of mankind through promoting scientific knowledge.[13] In respect of access to and transfer of technology (including biotechnology), each Contracting Party shall provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity, or make use of genetic resources. Access to and transfer of technology to developing countries shall be provided under fair and most favourable terms (Articles 2 and 16). As for the handling of biotechnology and distribution of its benefits, measures shall be taken

12 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/59/62/Add.1, 18 August 2004, para. 255.

13 Policy and Legal Framework concerning the Management of Biodiversity beyond Areas of National Jurisdiction, at http://china-isa.jm.china-embassy.org/chn/hdxx/P020070115223111563710.pdf, 9 January 2007. (in Chinese)

to provide for the effective participation in biotechnological research activities by those Contracting Parties, which provide the genetic resources for such research, and promote and advance priority access on a fair and equitable basis by Contracting Parties to the results and benefits arising from biotechnologies based upon genetic resources provided by those Contracting Parties (Article 19).

3. The Conventions and Treaties Related to Intellectual Property Rights (IPR)

As to IPR protection, the intensified efforts in IPR protection in the field of life sciences have aroused wide attention. Relevant international organizations have been conducting research on the relationship between the regimes of genetic resources in the Area and IPR regimes.

a. Relevant Conventions of World Intellectual Property Organization (WIPO)

WIPO has 180 member States and administers 23 international treaties related to different aspects of IPR protection. The Patent Cooperation Treaty (PCT) makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an "international" patent application. In the international IPR regime, increase in patent applications under the PCT can be seen. The Patent Law Treaty, another treaty related to IPR protection, aims to harmonize and streamline formal procedures with respect to national and regional patent applications and patents, making those procedures more user-friendly.

An invention is required to be disclosed for the grant of a patent. Appropriate disclosure of an invention means that sufficient details of the invention should be given so that persons skilled in the art may also carry out the invention. When an invention involves a microorganism or the use of a microorganism, disclosure is not possible in writing but can only be effected by depositing a sample of the microorganism at a specialized institution. The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (hereinafter "the Budapest Treaty") provides that if a deposit is necessary for the purpose of description under the provisions related to a microorganism or the use of a microorganism under patent law, then a sample of the microorganism should be deposited in an international depositary authority.[14] Such deposits allow individuals other than the inventor to access to the microorganism for the purposes

14 Up to January 2005, there are altogether 36 international depositary authorities: seven in the United Kingdom; three respectively in Russia and South Korea; two respectively in China, Italy, Japan, Poland and the U.S.; one respectively in Australia, Belgium, Bulgaria, Canada, Czech Republic, France, Germany, Hungary, Latvia, India, Holland, Slovakia and Spain.

of testing or experimentation, or commercial utilization after the patent expires. Any Contracting State which allows or requires the deposit of microorganisms for the purposes of patent procedure must recognize, for those purposes, a deposit made in any international depositary authority, wherever that authority may be. There is no clear definition of "microorganism" in the Budapest Treaty, so the term may be interpreted broadly. According to previous interpretations, "microorganism" refers to genetic material the deposit of which is necessary for the purposes of disclosure for patent application, in particular regarding patent relating to the food and pharmaceutical fields.[15]

b. The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS sets out the minimum standards of protection to be provided by each Member and aims to reduce distortions and impediments to international trade, to promote effective and adequate protection of IPR and to ensure that measures and procedures to enforce IPR do not themselves become barriers to legitimate trade. Article 7 of the TRIPS explicitly provides that the protection and enforcement of IPR should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 27(3)(b) of the TRIPS stipulates that members may also exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.[16] According to Article 28 of the TRIPS, a patent shall confer on its owner the following exclusive rights: to prevent third parties that do not have the owner's consent from making, using, offering for sale, selling, or importing for these purposes a patented product; to prevent third parties not having the owner's consent from using a patented process, and from using, offering for sale, selling, or importing for these purposes the product obtained directly by that process. Patent owners shall also have the right to assign the patent or transfer it by succession, and to conclude licensing contracts. Its Article 29 further provides that an applicant for

15 Policy and Legal Framework concerning the Management of Biodiversity beyond Areas of National Jurisdiction, at http://china-isa.jm.china-embassy.org/chn/hdxx/P020070115223111563710.pdf, 9 January 2007. (in Chinese)

16 TRIPS requires a review of its Article 27(3)(b) four years after it takes effect. At present, the review is under way.

a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and the applicant may be required to indicate the best mode for carrying out the invention known to the inventor at the filing date or, at the priority date of the application.

B. Limitations of the Current International Legal Framework

1. Limitations of the UNCLOS and the CBD

In March 2003, a study report co-compiled by the CBD Secretariat and the U.N. Division of Ocean Affairs and the Law of the Sea indicated that although the provisions of the UNCLOS and the CBD are mutually complementary with respect to the conservation and sustainable use of marine and coastal biological diversity, there is a big lacuna in the legal regime for commercially oriented activities for deep seabed genetic resources.[17] On one hand, when the regime of the Area was discussed in the Third United Nations Conference on the Law of the Sea, the conditions, scope and value of genetic resources in the Area are little known, and the regime of the Area under the UNCLOS does not relate to the activities with respect to genetic resources on the deep seabed. Debate among the States grew increasingly fierce over whether the genetic resources on the deep sea floor beyond the limits of national jurisdiction should be categorized as an issue in the regime of the Area or the regime of high seas under the provisions of the UNCLOS. On the other hand, although the UNCLOS has identified the rights of the States and international organizations to conduct marine scientific research in the high seas and the Area, it does not define "marine scientific research". Therefore, it is hard to clearly differentiate between marine scientific research and commercially oriented activities relating to genetic resources (generally referred to as "bioprospecting"). Moreover, CBD's provisions on the access to resources and sharing of the benefits only apply to marine biological resources discovered in areas within the limits of national jurisdiction (Article 15). But CBD does not apply to components of marine biological diversity in areas beyond the limits of national jurisdiction. Because Contracting Parties do not enjoy sovereignty or jurisdiction over the resources in the areas beyond the limits of national jurisdiction, they have no direct obligations

17 CBD Secretariat, Study of the Relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with Regard to the Conservation and Sustainable Use of Genetic Resources on the Deep Seabed, UNEP/CBD/SBSTTA/8/INF/3/Rev.1, 22 February 2003, para. 9.

toward the conservation and sustainable use of the components of marine biological diversity in these areas. Obviously, there is still no international agency that shoulders the definite responsibilities of supervising and managing the activities relating to biological resources in the Area.

2. Conflicts between the UNCLOS and the CBD

Although the UNCLOS and the CBD have created mutually complementary regimes for the access to and the management of deep-sea biological resources, there are conflicts in their regimes. Both the UNCLOS and the CBD require States to cooperate on the conservation of biological resources. Their provisions both include freedom of marine scientific research on biological resources in areas beyond the limits of national jurisdiction, and both call on the exchange of information.[18] However, the UNCLOS and the CBD adopt different methods for managing biological resources: the CBD makes specific provisions on the efforts to conserve the biodiversity of genetic resources while the UNCLOS limits conservation to species or populations of specific species.[19] Furthermore, the CBD adopts an "ecosystem approach" for conservation and intends to define "healthy" ecosystem in its preamble, whereas the UNCLOS does not adopt ecosystem approach. While the CBD includes precautionary principles, the UNCLOS makes no such provisions.[20] All these differences may lead to conflict when these conventions are interpreted or applied. In instances of conflict, it also remains unclear which convention should prevail.

If there is any conflict between the rights and obligations of the Parties to these two conventions, the interpretive rules under the Vienna Convention on the Law of Treaties shall serve as guidelines for resolution of such conflict. According to the *pacta sunt servanda* rule, the obligations specified by every treaty must be performed by its parties in good faith. When the provisions of a treaty are ambiguous or obscure, the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context

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18 Article 87(1)(f), Article 143 and Part XII of the UNCLOS; Articles 5, 17, 18 and 22 of the CBD.

19 Article 119(1)(b) and 119(2) of the UNCLOS.

20 But Article 5 and Article 6 of the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks and Article 31 of the International Seabed Authority's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area have specifically adopted the precautionary approach.

and in the light of its object and purpose. When a treaty specifies that it is not to be considered as incompatible with an earlier treaty, the provisions of the earlier treaty shall prevail. Therefore, according to Article 311(2) of the UNCLOS and Article 22 of the CBD,[21] the provisions of UNCLOS shall prevail over those of the CBD.

In light of the actions taking from the conclusion of the CBD until now, however, the Conference of Parties to the CBD does not consider the CBD a supplement to the UNCLOS in terms of deep-sea biological resources. In a CBD Secretariat's report of work submitted to U.N. Division of Ocean Affairs and the Law of the Sea in 1996, the Secretariat noted "given that it [was] unclear whether, or how, UNCLOS, or the common heritage principle, applie[d] to the genetic resources of the deep sea-bed", thus "an in-depth study on how to best address the use of these resources" was required.[22] The report clearly advocated the controlling of the access to genetic resources in the Area, although the UNCLOS and the CBD did not authorize such control.[23] The formal meeting between CBD Secretariat and U.N. Division of Ocean Affairs and the Law of the Sea started in March 1999, including discussions on bioprospecting of genetic resources on the deep seabed.

In 1999, the UN General Assembly endorsed a resolution to create a new procedure for cooperation on international issues relating to oceans, which had been recommended by the Commission on Sustainable Development (CSD) in 1997. This procedure stated there should be a "periodic intergovernmental review by the Commission of all aspects of the marine environment and its related issues as described in Agenda 21, and for which the overall legal framework is provided by the United Nations Convention on the Law of the Sea".[24] The UN General

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21 According to Article 311(2) of the UNCLOS, this Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention. Article 22 of the CBD provides that: 1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity, and 2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.

22 CBD Secretariat, Bioprospecting of Genetic Resources of the Deep Sea-Bed, UNEP/CBD/SBSTTA/2/15, September 1996, para. 2.

23 CBD Secretariat, Bioprospecting of Genetic Resources of the Deep Sea-Bed, UNEP/CBD/SBSTTA/2/15, September 1996, para. 6.

24 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/54/429, 30 September 1999, para. 5.

Assembly, as the competent international authority for maritime affairs and the law of sea, may consider the CSD's result of review and the UN Secretary General's annual Report on Oceans and the Law of Sea. Therefore, in terms of the possible conflicts between the UNCLOS and the CBD and their implementation, the UN General Assembly, UN Secretary General and CSD would work out solutions together.

III. The Legal Status of Genetic Resources in the Area and the Issues Arising Therefrom

Compared with deep seabed mineral resources beyond the areas of national jurisdiction, genetic resources in the Area boast three special features. First, mineral resources are *in situ* tangible resources and their future development would be real-time and openly-conducted field activities; in contrast, genetic resources are resources that would not be developed *in situ* and need subsequent handling: once the biological sample is collected, its development may be conducted in the lab, covertly in different times and places.[25] Second, genetic resources are under the protection of international patent law in their development and application; anyone who extracts genetic resources from a biological sample by the use of biotechnology would enjoy priority in patents. The third feature is that the preservation of genetic resources involves both living and non-living organisms. Because of the above-mentioned features, the primary issue to manage genetic resources is to define their legal status.

A. Legal Status of Genetic Resources in the Area

The author believes that the legal status of genetic resources in the Area would be inevitably influenced by the legal status of the Area itself; it is therefore necessary to define the legal status of the Area and its resources established under existing international conventions. According to Article 136 of the UNCLOS, the Area and its resources are the common heritage of mankind. Article 137 of the UNCLOS and the 1994 Agreement further note the legal status of the Area and its resources.

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25 Jin Jiancai, Management of Deep Seabed Biodiversity and Genetic Resources, *Advances in Earth Science*, No. 1, 2005. (in Chinese)

Since the UNCLOS Part XI and the 1994 Agreement have created the regime of "common heritage of mankind" for "the Area" and its resources, an analysis should be made on what type of resources such regime would be applicable to. Article 133 of the UNCLOS provides that "'resources' means all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules". In contrast to the definition of "natural resources" in Part IV (Continental Shelf),[26] resources in the Area are defined in a much narrower sense, only referring to minerals instead of other non-biological resources or sedentary species or other types of biological resources; there are no definitions of genetic resources in these two articles. Therefore, it is clear that Article 133 does not include marine biological resources in its definition of "resources"; it lacks the expression "*inter alia*" for any expanded meaning as contained in Article 87. From this perspective, it is impossible to draw a direct conclusion that, according to the rule of interpretation "*ex-pressio unius est exclusio alterius*", the regime of "common heritage of mankind" applies to genetic resources in the Area.

1. Debate over the Legal Status of Genetic Resources in the Area

The discovery of highly complex and diverse ecosystems beyond the limits of national jurisdiction and the biotechnological progress have led to a growing interest in genetic resources beyond the limits of national jurisdiction and an increase of relevant activities. Moreover, the legal gap in the existing international instruments with respect to the status of genetic resources in the Area has added momentum to current debates among the States.

G77 and China argue that the principle of "common heritage of mankind" should first be taken into consideration and that benefits arising from the development of genetic resources in the Area should not be given to economically and technologically developed States in priority. Instead, G77 and China propose a new international legal regime enabling such benefits to be shared amongst developing States. More specifically, while a few developing States advocate utilizing and expanding the functions of the International Seabed Authority, some other States hold that due regard should also be paid to establishing a new legal

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26 According to Article 77(4) of the UNCLOS, the natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

framework.[27]

The United States and Japan, however, clearly oppose the application of the UNCLOS Part XI to genetic resources in the Area. They believe that the UNCLOS has given clear-cut definitions on such resources, so the regime of "common heritage of mankind" should only apply to mineral resources, and that the activities related to such resources should be subject to the principle of freedom of the high seas. The EU holds that genetic resources in the Area are beyond the functional scope of the International Seabed Authority and that the regime of fisheries in the high seas is also not applicable to these resources. The EU also stresses that the legal status of such resources should be researched and clarified, and believes that the precautionary principle and ecosystem approach should be adopted to ensure effective marine environment management.[28]

As to the above issue, the States hotly debated their stances at the meeting of the "*Ad Hoc* Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction", held in February 2006. The attendees believed that the one-week meeting was far from sufficient to make a conclusion on the issue, so they tended to set aside their controversies over the principles and legal status of the resources and focused on seeking practical approaches instead.[29] The United States and Mexico, who held opposite opinions on the issue, agreed to this practice. The EU attempted a compromise by suggesting attendees work out operation guidelines for activities related to genetic resources in the Area. The United States and Canada proposed to formulate a code of conduct to regulate marine scientific research, with a view to avoiding any negative effects on marine ecosystems. The UN Secretary General noted in one report that the status of these resources should be clarified, in

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27 United Nations *Ad Hoc* Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction (BBNJ), at http://china-isa.jm.china-embassy.org/chn/xwdt/t240388.htm, 16 June 2007. (in Chinese)

28 United Nations *Ad Hoc* Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction (BBNJ), at http://china-isa.jm.china-embassy.org/chn/xwdt/t240388.htm, 16 June 2007. (in Chinese)

29 United Nations *Ad Hoc* Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction (BBNJ), at http://china-isa.jm.china-embassy.org/chn/xwdt/t240388.htm, 16 June 2007. (in Chinese)

the light of the general principles contained in the UNCLOS.[30]

2. The Legal Status of Genetic Resources in the Area from the Perspective of the General Principles under the UNCLOS

Merely viewed from the text, the regime of "common heritage of mankind" in the UNCLOS Part XI does not involve biological resources. Some scholars, however, believe that the Convention may be analyzed in the context and in the light of its object and purpose, according to the rule of interpretation specified in the Vienna Convention on the Law of Treaties.

According to Article 31(2) of the Vienna Convention on the Law of Treaties, the context for the purpose of the interpretation of a treaty shall include its preamble and annexes in addition to the text. The preamble of the UNCLOS helps to make expanded interpretations on the regime of "common heritage of mankind" in Part XI. The preamble states:

> *[T]he 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 ...*
>
> *Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries.*

Viewed from its preamble, the UNCLOS actually have included the mineral resources in the Area in the regime of "common heritage of mankind". Moreover, the preamble also

> *desires by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared inter alia that the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction,*

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30 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 201.

as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States.

But the preamble fails to define or limit the term "resources" in the above provisions.

According to Article 32 of the Vienna Convention on the Law of Treaties, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when interpretation according to Article 31 leaves meanings ambiguous or obscure.

The minutes and the documents of the Third United Nations Conference on the Law of the Sea show that, in the discussions, there were two main opinions on seabed resources. On one hand, producing and exporting countries as well as importers greatly emphasized the economic value of the minerals and the whole discussion on the regime was focused on mining activities. On the other hand, some countries attempted to have a regime of the living resources of the superjacent waters similar to that of the seabed. In this regard, many delegations sought to prevent the freedom of fishing from being affected, so they opposed to any inclusion of living resources in the regime applicable to the common heritage of mankind.[31] Therefore, these States tended to believe that deep seabed resources should include living resources and non-living resources. Nevertheless, neither the negotiations of the Third United Nations Conference on the Law of the Sea nor the works of the Seabed Committee considered that these "sedentary species from the Area" should be included in the high seas regime. It was unlikely, these sources stated, that economically relevant living resources might exist beyond the continental margin. To legislate over these species would therefore have no practical consequences.

After fierce negotiations up to the Third Session in 1975 by the States, "resources" were defined as *in situ* resources. This definition was different from that of "mineral resources", which included different categories of minerals. Both terms had accordingly been defined for the purposes of the text. In the Fourth Session,

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31 Frida. M. Armas-Pfirter,, The Management of Seabed Living Resources in "the Area" under UNCLOS, at http://www.estig.ipbeja.pt/~ac_direito/F.Armas(reeil1).pdf, 11 February 2007.

pursuant to a proposal for amendments submitted by the United States, "resources" was limited to *in situ* mineral resources. However, the scope of the definition was at the same time limited to "for the purpose of this Part", that is the regime of the Area. In fact, at the Fourth Session in 1976, it was established that: "Resources means mineral resources *in situ*". At the Tenth Session it was adopted as it was finally introduced in the UNCLOS.[32] Article 133 of the UNCLOS sets out that it applies only for the purposes of Part XI. In the preparatory works of Article 133, other resources were mentioned specifically and separately. Yet, bearing in mind the exiguous information available, the Conference decided not to include them; the Conference decided not to limit the concept of "resources" and consequently only made a special reference to polymetallic nodules.[33]

It can be seen that when the hydrothermal vents and their ecosystems were discovered in 1977, the definition of "resources" which was made for the application of the contents subsequently to be the UNCLOS Part XI, has been adopted. Although the negotiation on the UNCLOS continued for five years after such discoveries, we have to admit that it is impossible for delegates from the States to re-negotiate the agreement. In addition, it is rather difficult for negotiators to understand new scientific and technological knowledge, relevant laws & regulations, and to incorporate them into the ongoing negotiation. Therefore, the regime of the Area in the UNCLOS does not involve deep seabed biological resources and relevant activities.

3. Conclusion

After analysis of relevant articles in the UNCLOS and currently accessible information on deep seabed biological resources, the author believes that resources in the Area should be considered more broadly to include mineral and biological resources, and that the principle of "common heritage of mankind" should also apply to genetic resources in the Area, on the basis of their purpose in the UNCLOS Part XI.

Firstly, the principle of "common heritage of mankind" insists no State may

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32 Frida M. Armas-Pfirter, The Management of Seabed Living Resources in "the Area" under UNCLOS, at http://www.estig.ipbeja.pt/~ac_direito/F.Armas(reeil1).pdf, 11 February 2007. The text of the Convention was introduced by the Chairman of the First Committee with an explanatory note indicating that this was due to a technical and legal reason. "Resources" in general and "mineral resources" were often used interchangeably, leading to confusion when dealing with technical questions.

33 Frida M. Armas-Pfirter, The Management of Seabed Living Resources in "the Area" under UNCLOS, at http://www.estig.ipbja.Pt/~ac_direito/F.Armas(reeill).pdf, 11 February 2007.

claim or exercise sovereign rights over any part of the Area or its resources. Genetic resources, because of their functional genetic units, would have intrinsic effects on biodiversity. Hence, even if biological entities are privately owned, their genetic information should be considered as part of the "common heritage of mankind" because of their public benefits, let alone that living resources in the Area are not subject to the sovereignty of any State.

Secondly, the Area and its resources as part of the "common heritage of mankind" must be considered as a whole and managed by the global community through an agency or organization. For example, the International Seabed Authority, which manages the mineral resources in the Area, would be able to comprehensively manage both biological and mineral resources in a broad and unified manner if the regime of "common heritage of mankind" also applies to biological and genetic resources. This is important because deep seabed genetic resources and deep-sea mineral resources often appear in closely related environments; exploitation and development of mineral resources would consequently impact genetic resources, and vice versa. If a single agency could manage all such resources and directly or indirectly influence activities related to those resources, it would significantly help avoid jurisdictional conflicts as well as management overlap among different agencies. It would make such managerial activities more effective.

Thirdly, the principle of "common heritage of mankind" requires that the benefits arising from the development and utilization of common heritage should be shared for the benefit of mankind as a whole on a fair and equitable basis. The UNCLOS provides that the regime of benefit-sharing from the Area includes both economic benefits derived from deep-sea mining activities and other benefits from development activities, such as the transfer of technology, and the training of developing States' personnel for such States' benefit. Because of the economic and technological gaps between the States, the developing States are incapable of developing the genetic resources of precious application values in the Area on equal conditions with developed States. Therefore, benefit-sharing approaches in the regime of "common heritage of mankind" should be adopted to ensure the equitable distribution of benefits for the interests and needs of mankind as a whole. Considering the differences between mineral and biological resources, it would be inappropriate to mechanically adopt the existing provisions of the UNCLOS; instead, a new mode for benefit-sharing for genetic resources should be created to fit in with their features.

All in all, the principle of "common heritage of mankind" has made two important restrictions on the utilization of genetic resources in the Area: 1) All States in the global community are entitled to those resources; and 2) development activities should take into account their impacts on the global community and its members. Such restrictions would greatly improve conservation and sustainable development of biological and genetic resources in today's interdependent world.

B. Relevant Issues Arising from the Legal Status of Genetic Resources in the Area

Although the author believes that the regime of "common heritage of mankind" should apply to genetic resources in the Area, so far there have been no international conventions that define the status of such genetic resources. Whether the regime analogous to that of living resources of the high seas, or the regime of common heritage of humankind should apply, may only be clarified by the Parties to the UNCLOS themselves.[34] In this context, the undefined legal status of such genetic resources has led to the lack of clarity in the status of exploitation and development activities related to such resources. Such undefined status also leads in turn to several legal issues.

1. Differences between Marine Scientific Research and Bioprospecting

There are currently no definitions for the terms "marine scientific research" and "bioprospecting" under international treaties. Defining these terms, however, is crucial in determining the legal regime applicable to activities related to the genetic resources in the Area.

Bioprospecting is neither used nor defined in the CBD or UNCLOS. According to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area prepared by the International Seabed Authority, "prospecting" means the search for deposits of polymetallic nodules in the Area, including estimation of the composition, sizes and distributions of polymetallic nodule deposits and their

34 United Nations University Institute of Advanced Studies, Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects, June 2005. p. 30.

economic values, without any exclusive rights.[35] Although this definition only applies to mineral resources, its underlying principle may also apply to genetic resources on deep seabed. CBD's Secretariat also notes in a report at its conference, "biodiversity prospecting" is the exploration of biodiversity for commercially valuable genetic and biochemical resources. It can be defined as the process of gathering information from the biosphere on the molecular composition of genetic resources for the development of new commercial products.[36] According to a report on bioprospecting from the United Nations University Institute of Advanced Studies, possible elements under the definition of "bioprospecting" include: systematic search, collection, gathering or sampling of biological resources for purposes of commercial or industrial exploitation; screening, isolation, or characterization of commercially useful compounds; testing and trials; and further applications and developments of isolated compounds for commercial purposes, including large-scale collections, development of mass culture techniques, and conduct of trials for approval for commercial sale.[37] Some people suggest that the phase of preliminary research and data collection may be referred to as "bio-discovery" and the term "bioprospecting" may include the phase of data collection for further survey and for eventual commercial application.[38]

While the UNCLOS Part XIII provides for a marine scientific research (MSR) regime, it does not define what MSR is. With regard to the rights of coastal States to withhold consent to MSR projects proposed by other States or international organizations in their exclusive economic zones (EEZ) or on their continental shelves, the UNCLOS draws a distinction between MSR intended to increase scientific knowledge of the marine environment for the benefit of all humankind, and MSR "of direct significance for the exploration and exploitation of natural resources." The distinction between those two types of research is not made with regard to MSR undertaken beyond national jurisdiction. The difficulty

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35 International Seabed Authority, Decision of the Assembly Relating to the Regulation on Prospecting and Exploration for Polymetallic Nodules in the Area, ISBA/6A/18, October 2000, Regulation 1(3)(e).

36 CBD Secretariat, Progress Report on the Implementation of the Programmes of Work-Information on Marine and Coastal Genetic Resources Including Bioprospecting, UNEP/CBD/COP/5/INF/7, May 2000, para. 6.

37 United Nations University Institute of Advanced Studies, Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects, June 2005. p. 15.

38 Food and Agriculture Organization of the United Nations, Deep Sea 2003, an International Conference on Governance and Management of Deep-sea Fisheries, Fisheries Report No. 722, 2005.

of distinguishing, in practice, between those two types of research prompted the drafters of the UNCLOS to include a specific provision requesting States "to promote through competent international organizations the establishment of general criteria and guidelines to assist States in ascertaining the nature and implications of marine scientific research".[39] To date, such criteria and guidelines have not been developed. A report prepared by the CBD Secretariat and U.N. Division of Ocean Affairs and the Law of the Sea states that:

> *in the absence of a formal definition, marine scientific research could be defined as an activity that involves collection and analysis of information, data or samples aimed at increasing mankind's knowledge of the environment, and is not undertaken with the intent of economic gain.*[40]

The UNCLOS Part XIII provides for a MSR regime, so its provisions are applicable to scientific research on genetic resources in the Area. The UNCLOS, however, does not make specific provisions on commercially oriented activities related to these genetic resources, such as bioprospecting. The author contends that a common distinction is made between scientific research undertaken for non-commercial purposes, also called "pure scientific research," and commercially-oriented purposes, also called "applied scientific research."[41] Bioprospecting in the marine environment could be considered a form of applied marine scientific research. Since pure scientific research and applied scientific research share the same object, such as sampling of biological organisms, the distinction between those two types of activities resides mainly in their intent and purpose, that is, in the use of knowledge and results of such activities, rather than in the practical nature of the activities themselves.[42] Therefore, MSR for genetic resources in the Area shall be conducted in accordance with the general principles under the UNCLOS

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39 Article 251 of the UNCLOS.

40 CBD Secretariat, Study of the Relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with Regard to the Conservation and Sustainable Use of Genetic Resources on the Deep Seabed, UNEP/CBD/SBSTTA/8/INF/3/Rev.1, February 2003, para. 47.

41 United Nations University Institute of Advanced Studies, Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects, June 2005, p. 15.

42 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 202.

Part XIII.[43] MSR is a part of freedom of the high seas as provided in Article 87 and Article 257 of the UNCLOS, but should be subject to general principles of Part XII. According to Article 143 and Article 256, MSR in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole, in accordance with Part XIII. The International Seabed Authority may carry out MSR concerning the Area and its resources, and may enter into contracts for that purpose. The Authority shall promote and encourage the conduct of MSR in the Area, and shall coordinate and disseminate the results of such research and analysis when available. States Parties to the UNCLOS may carry out MSR in the Area and shall promote international cooperation in MSR in the Area by participating in international programmes and by encouraging cooperation in MSR by personnel of different countries and of the Authority. State Parties should ensure that programmes are developed through the Authority or other international organizations as appropriate for the benefit of developing States and technologically less developed States with a view to: (i) strengthening their research capabilities; (ii) training their personnel and the personnel of the Authority in the techniques and applications of research; (iii) fostering the employment of their qualified personnel in research in the Area. In addition, State Parties should effectively disseminate the results of research and analysis when available, through the Authority or other international channels when appropriate.

2. Access to Genetic Resources in the Area and Benefits Sharing

Access to genetic resources and benefits sharing is one of the CBD's three main objectives. The two terms are closely interrelated and interact with one another. They are actually the basic exchange relationship established by the CBD: while the States that provide the genetic resources allow other States and their biological technology enterprises to have access to and utilize these resources, those States and enterprises shall ensure the fair and equitable sharing of the benefits arising out of the utilization of genetic resources with the States providing such resources, as the consideration or trading terms for utilization.[44] That is to say, access to such resources is the prerequisite and basis for benefits sharing; the latter is the outcome and requirement of the former.

Although the CBD makes provisions on the access to genetic resources,

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43 Articles 240 to 242 and Article 244(1) of the UNCLOS.

44 Qin Tianbao, *Research on Legal Issues concerning Access to and Benefit-sharing of Genetic Resources*, Wuhan: Wuhan University Press, 2006, p. 346. (in Chinese)

transfer of technology, technical and scientific cooperation, financing and handling of biotechnology,[45] such provisions governing access to genetic resources and sharing of benefits are only applicable to marine biological resources discovered in areas of national jurisdiction, rather than the genetic resources in the Area. The Bonn Guidelines on Access to Genetic Resource and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization (hereinafter "Bonn Guidelines"), adopted by the Conference of Parties to the CBD, is also only applicable to marine genetic resources discovered within areas of national jurisdiction. These voluntary guidelines are not legally binding and are only intended to guide policymakers and genetic resource users and providers. They are applicable to CBD-defined genetic resources, and sharing of benefits as arising from the commercial or other utilization of such genetic resources, except human genetic resources.

It can be concluded that there are no internationally agreed provisions on the access to genetic resources in the Area and the benefit-sharing. These biological and genetic resources are not subject to the sovereignty of any State. The ways to access these resources and benefit-sharing differ from those provided in the CBD; there are no definitions of "access" or "benefit-sharing" in the CBD, nor are there any notes on those terms from the Conferences of Parties to the CBD or Bonn Guidelines. The continuous development activities of deep seabed biological resources have made it an urgent task to regulate the issue by international law.

3. Technology Transfer and IPR with Respect to Genetic Resources in the Area

Any technological progress and innovations in biological development made by relying on modern knowledge could be protected by patent or other forms of IPR. The development of genetic resources in the Area is no exception. In order to share the benefit arising from the access to biological and genetic resources in the Area in a fair and equitable way, when accessing to such resources and distributing such benefit, the contributions to biological development and transfer of technology by users of genetic resources shall be recognized and protected and their rights should be balanced.

According to the general principles in Part XIV of the UNCLOS, States, whether directly or through competent international organizations, shall cooperate

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45 Article 15 to Article 21 of the CBD relate to the access to genetic resources, access to and transfer of technology, exchange of information, technical and scientific cooperation, handling of biotechnology and distribution of its benefits, financial resources and financial mechanism.

to actively promote the development and transfer of marine science and marine technology on fair and reasonable terms and conditions, which shall benefit the developing countries in particular. States shall endeavor to foster favorable economic and legal conditions for the transfer of marine technology for the benefit of all parties concerned on an equitable basis (Article 266). The UNCLOS also encourages the States to establish, particularly in developing coastal States, national and regional marine scientific and technological research centres and strengthen existing centres, in order to stimulate and advance the conduct of MSR (Article 275(1)). The functions of such regional centres shall include training and educational programmes at all levels on various aspects of marine scientific and technological research, especially marine biology, including conservation and management of living resources (Article 277). Article 267 of the UNCLOS provides that States, in promoting the development and transfer of marine technology, shall have due regard for all legitimate interests including the rights and duties of holders, suppliers and recipients of marine technology. Article 144 and Article 170 of the UNCLOS take special note of the Area, and provide that the International Seabed Authority shall take measures to acquire technology and scientific knowledge relating to activities in the Area, and to promote and encourage the transfer of such technology and scientific knowledge to developing States and the Enterprise.

In terms of the access to and transfer of technology (including biotechnology), each Contracting Party to the CBD shall provide and/or facilitate the conservation and sustainable use of biological diversity or the access to and transfer of technology for utilization of genetic resources (Article 2 and Article 6(1)). Access to and transfer of technology to developing countries shall be provided and/or facilitated under fair and most favorable terms. In the case of technology subject to patents and other IPR, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of IPR (Article 16(2)). Article 19 is related to the handling of biotechnology and distribution of its benefits. It provides that measures should be taken to provide for effective participation in biotechnological research activities by its Contracting Parties, and to promote and advance priority access on a fair and equitable basis by Contracting Parties, to the results and benefits arising from biotechnologies based upon genetic resources provided by those Contracting Parties. The Bonn Guidelines stress that benefit-sharing and technological transfer and IPR regimes should be mutually complementary.

Meanwhile, the rise of patent protection in the life sciences has aroused diverse and substantive concerns. Several concerns include whether the extension of patent protection to genetic material is justifiable on ethical grounds; whether the "identification", "isolation" or "purification" of genetic material meets the criteria of "inventive step" or constitutes mere "discovery" for the purposes of determining patentability; whether claimed inventions meet the criteria of being capable of industrial application. Other concerns include the impact of permitting patent claims that are very broad in scope; the economic evidence upon which the extension of biological and genetic material patentability has been based and the implications for competition and innovation; the impacts of multiplying patent protection claims for public health, agriculture, development, scientific research, industry and trade, etc.[46] Several relevant international organizations have conducted a range of activities relating to the correlation between the regime for genetic resources under the CBD and the regimes for IPR.[47]

All in all, IPR protection is a necessary incentive mechanism to encourage research, development, application and transfer of new technology. In an era of biotechnology, more powerful protection is needed to promote arduous research and development activities in the biotechnology industry.[48] With the continuous expansion and enhancement of IPR in the global context, IPR is likely to become an obstacle to the fair and equitable sharing of the benefits arising from the use of genetic resources. Due to the particular location of genetic resources in the Area, there are only users of those resources, but without any providers. The excessive protection by the existing IPR regime on the results of research and development related to genetic resources does not favor fair distribution of the benefits arising out of the utilization of such resources and for the benefit of mankind as a whole. Certainly, to prevent genetic resources users from making IPR claims would never be the best solution; such a practice would also discriminate against the common and long-term benefits of the global community. Therefore, a reasonable solution should be to encourage the resource developers to claim for IPR and bring into full play the positive effects of IPR, and meanwhile place certain restrictions by legal

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46 CBD Secretariat, Global Status and Trends in Intellectual Property Claims: Genomics, Proteomics and Biotechnology, UNEP/CBD/WG-ABS/3/INF/4, February 2005, p. 20.

47 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, paras. 273, 301~304.

48 Qin Tianbao, *Research on Legal Issues concerning Access to and Benefit-sharing of Genetic Resources*, Wuhan: Wuhan University Press, 2006, p. 494. (in Chinese)

means. Nowadays, when the potential values of genetic resources in the Area are becoming increasingly prominent, it would be one of the issues on top agenda for the global community to better bring into play the positive effects of IPR in the development of such resources.

IV. Improving the Management Regime for Genetic Resources in the Area

The twenty-first century is an era of seas and oceans. Seas and oceans would be the main battlefield for the development of new resources. Of these new resources, genetic resources in the Area have been one of the most eye-catching ones. Currently, there is no internationally-agreed definition on the legal status of the genetic resources in the Area. And there is a large lacuna for the laws governing the commercial activities related to such resources. The increasing importance of such resources has demanded the global community make legal improvements; recent years in turn have witnessed such efforts at global level.

A. Global Efforts on Improving the Management Regime for Genetic Resources in the Area

Ocean affairs have been top on the United Nations' agenda. In addition to various documents adopted under the support of United Nations, such as the UNCLOS and the CBD, the UN General Assembly and other UN agencies for years have also endorsed a large number of decisions related to marine environment and biodiversity, including the Rio Declaration on Environment and Development and Agenda 21. In recent years, the General Assembly, through the informal consultative process established by its resolution 54/33 of 24 November 1999, has addressed several issues relating to the conservation and sustainable use of marine ecosystems and biodiversity (including those in the Area) under its agenda item on oceans and the law of the sea. The meeting of the *Ad Hoc* Open-ended Informal Working Group, established by the General Assembly to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, had before it the report of the Secretary-General (A/60/63/Add.1), which had been prepared in response to the request contained in paragraph 74 of Assembly resolution 59/24. The Secretary-General's report concluded that the time had come for the international community to address in greater depth and

to clarify, if necessary, various complex issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, in the light of the general principles under the UNCLOS. In February 2006, the Working Group met in the United Nations building and included into the meeting's report annexes the "Summary of trends prepared by the Co-Chairpersons" and "List of specific studies referred to in the discussions of the Working Group".[49]

The Conferences of Parties to the CBD have also done a large amount of work. In terms of the conservation and sustainable use of deep seabed genetic resources beyond areas of national jurisdiction, the Conferences of Parties to the CBD have reviewed the work of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), and have requested the Secretariat to make consultations with the Parties to the CBD, other governments and competent international organizations, so as to gather the information with respect to the identifying, evaluating and monitoring of such resources beyond areas of national jurisdiction; to gather and sum up the information concerning the status-quo and trends of such resources, including identifying the threats to such resources and the technological options to protect these resources. The Conferences of Parties to the CBD have also requested the States to detect the activities or processes within their jurisdiction or control that may cause severe adverse effects on deep seabed ecosystem and species beyond the areas of national jurisdiction, so as to perform Article 3 of the CBD. In terms of access to genetic resources and benefit-sharing, the Conferences of Parties to the CBD in the year 2000 established the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, and adopted the Bonn Guidelines and Resolution VII/19D, aiming to build up a global regime for access to genetic resources and benefit-sharing through negotiations.

WIPO, as a specialized UN agency promoting and supporting IPR, has reviewed IPR issues related to genetic resources. In 1998, UNEP and WIPO co-prepared a study report, indicating the role of IPR in the sharing of the benefits arising out of the utilization of biological resources. In 2000, the WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to deal with the issues concerning the relationship between IPR and genetic resources. At the request of

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49 United Nations, Report on the Work of the United Nations *Ad Hoc* Open-ended Informal Working Group to Study Issue Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, A/61/65, March 2006, Annex I, Annex II.

the Sixth Conference of Parties to the CBD in 2002, WIPO prepared a technical study report, indicating the regulations regarding the disclosure of patents related to genetic resources and traditional knowledge.[50] And at the request of the Seventh Conference of Parties to the CBD in 2004, WIPO examined the relation between access to genetic resources and disclosure requirements in IPR applications.

The 2001 Doha Declaration, instructed the TRIPS Council to examine the relationship between the TRIPS and the CBD in its review of Article 27(3)(b) of the TRIPS. In 2002, the WTO Secretariat prepared a summary of the issues raised and points made by delegations in the Council on the relationship between the TRIPS and the CBD. The Council raised several topics in its discussions: ways of applying provisions of the TRIPS on patenting biological inventions, including the extent to which life forms should be patentable; ways to implement the TRIPS and CBD together and whether the TRIPS should be amended to avoid potential conflicts; whether patents should disclose the source of genetic material; and finally the type of approval necessary prior to using genetic material.[51]

The global community has taken or is taking action to improve the management regime for genetic resources in the Area. These actions can be summarized in five points: (1) within the UN and relevant international agencies, increase the member States' awareness of the threats and risks to deep seabed ecosystem and biodiversity, and promote through publicity efforts the public's knowledge of marine biodiversity and its importance, thereby enabling them to learn about the benefits arising out of the conservation and sustainable use of marine biodiversity beyond the areas of national jurisdiction; (2) within the context of existing international treaties, the global community must make appropriate arrangements with a view to ensure the access to marine genetic resources and sharing of the benefits arising out of the utilization of such resources on a fair and equitable basis; (3) the global community must strengthen cooperation and coordination among relevant agencies, and make appropriate provisional arrangements to improve the management on their sectors' activities that would impact marine biodiversity beyond areas of national jurisdiction, including enhancing the management and accountability mechanism of relevant sectoral and regional organizations; (4) on the basis of the current international law, the global community must

50 CBD Secretariat, Technical Study on Disclosure Requirements Related to Genetic Resources and Traditional Knowledge, UNEP/CBD/WG-ABS/2/INF/4, December 2003.

51 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 304.

encourage relevant States to formulate and implement action plans for the protection and sustainable utilization of marine biodiversity; (5) the global community must bring into full play the role of non-governmental organizations and scientific research institutes, encourage them to establish constraint mechanism and to conduct cooperation in scientific research, and motivate the scientists and scientific research institutes to play their part in such issues as standards, exchange of samples etc.

B. Ways to Improve Management of Genetic Resources in the Area

In light of the inadequate management regimes for genetic resources in the Area, along with the actions over such regimes the global community has taken or is taking, the author believes that the management may be improved in the following three ways:

First, we must lay down an international treaty to identify and protect all vulnerable ecosystems beyond the areas of national jurisdiction, including in the Area. At present, existing treaties and mechanisms largely focus on practices of sectoral management, without clear and definite mechanisms and policies to promote cooperative and coordinated protection for certain sensitive marine ecosystems. With this perspective, we may usher in a new international treaty as both a medium and long term effort to manage genetic resources in the Area. This new international treaty may in turn provide a legal framework for enhanced cooperation, as well as comprehensive conservation and management of such resources. Such a treaty would assuage the fractures in the frameworks of international supervision and management, as well as fragmented operations amongst its sectors. The primary goals for such a new treaty would be to determine the legal status of genetic resources in the Area as well as for the principles for developing and utilizing such resources. Because biological resources in the Area have particular traits, we may use principles under the UNCLOS such as those of "common heritage of mankind" as well as "freedom of the high seas" as reference to determine the legal status of such resources. Moreover, the new treaty should be developed on the basis of the existing treaties within the UN framework, implementing the agreed ways related to marine environmental protection under the UNCLOS and the CBD and formulating an international treaty for the management and protection of all the vulnerable ecosystems beyond the areas of national jurisdiction. Specifically, some common principles and concepts under the two

conventions may be referenced, such as the responsibilities of the States, ecosystem approach, establishment of marine protected areas, exchange of information, environmental impact assessment, sustainable use, fair and equitable sharing of benefits and etc.[52]

Second, we must coordinate efforts from relevant international organizations as well as from States involved in research, and take into consideration of the applicability of relevant coordinative mechanisms, existing treaties, and other international instruments. Because it generally takes a long period of time to promulgate a new international treaty, a more practical option for the management of genetic resources in the Area is to better apply the relevant international instruments already in place, including the principles and ways of such international instruments such as the prudence principle and ecosystem approach. It is a short-term effort that could be made to improve the management of such resources. Relevant States should be foremost urged to regulate the actions of their researchers in the Area. Moreover, coordination and cooperation among international organizations, as well as among competent sectors should be improved; the States should conform to the cooperation duties governed by the UNCLOS, and make further cooperation in the development of liability rules, including strict liabilities for harm to vulnerable deep-sea ecosystems from various activities.[53]

Third, we must encourage the international scientific community to formulate codes of conduct regulating the activities of competent agencies and individuals in the Area, in parallel to legislation and inter-governmental coordination by the international community. The international scientific community is experiencing and developing a voluntary code of conduct, which aims to reduce potential conflicts at hydrothermal vents along with threats to biological species arising from scientific research. Some possible measures include to establish screening standards for deep seabed biodiversity, as generally accepted by the international scientific community and to enter into a voluntary agreement on international exchange of samples.[54] Such measures may help to restrain the excessive exploitation of

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52 Jin Jiancai, Management of Deep Seabed Biodiversity and Genetic Resources, *Advances in Earth Science*, No. 1, 2005. (in Chinese)

53 United Nations, Report on the Work of the United Nations *Ad Hoc* Open-ended Informal Working Group to Study Issue Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, A/61/65, March 2006, paras. 51~53.

54 Lin Xiang, Exploration and Development of Biological and Genetic Resources in the "Area" of the High Seas, *International Seabed*, No. 2, 2002. (in Chinese)

resources on deep seabed especially at hydrothermal vents caused by the legal lacuna in this regard, and in turn may serve further as exemplars for making and completing new treaties.

It is noteworthy that the role of the International Seabed Authority should be brought into full play in improving the management regime of genetic resources in the Area. In face of challenges posed by non-biological and biological resources coexisting in the Area, a regime must be established to protect the ecosystems and to sustainably develop and utilize these two types of resources. Such challenges also offer an opportunity for the International Seabed Authority to take advantage of its responsibilities for protecting the environment to expand its management of biological resources in the Area, while managing the Area's mineral resources. Ambiguities in the traits and legal status of biological resources have made it difficult for the Authority to successfully manage the development and utilization of genetic resources in the Area. However, according to Articles 143, 145 and 162(2)(x) of the UNCLOS, it is groundless to believe the Authority is not entitled to make provisions on the protection of biodiversity in the Area. It is also groundless to argue that the Authority should not set out relevant standards to designate particularly sensitive areas on the deep seabed as reserved areas such as environment reference zones.[55]

In fact, the International Seabed Authority, according to Article 165(2)(e), has for almost a decade hosted a series of seminars relevant to deep seabed environments and their resources. It has also provided newly acquired scientific information on deep seabed resources and ecosystems, laying objective and scientific bases for Authority-formulated regulations and guidelines with respect to activities in the "Area".[56] The Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, as formulated and adopted by the International Seabed Authority, have included articles concerning the effective protection and preservation for the marine environment from harmful effects that may arise from activities in the Area. The Legal and Technical Commission has also issued relevant environmental guidelines. According to Regulations' articles, in the exploration

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55 Jin Jiancai, Management of Deep Seabed Biodiversity and Genetic Resources, *Advances in Earth Science*, No.1, 2005. (in Chinese)

56 Abstract of the Speech by Satya N. Nandan (Secretary General of International Seabed Area) at Meeting of United Nations *Ad Hoc* Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction (BBNJ), at http://china-isa.jm.china-embassy.org/chn/hdxx/t236720.htm, 30 September 2007. (in Chinese)

stage, the contractor is required to gather environmental data and to establish environmental baselines, so as to assess the likely effects of its exploration activities on the marine environment, as well as to work out environmental monitoring programs and to establish a regime to report on such effects. The contractor shall cooperate with the Authority to establish and implement such monitoring programs. The Authority is currently reviewing regulations on prospecting and exploration for polymetallic sulfides and cobalt-rich ferromanganese crusts. The Authority is also, through its regulations on prospecting and exploration, in the process of establishing a framework to manage threats to the marine environment and its biodiversity from activities in the Area.[57]

V. China's Current Involvement in Development and Utilization of Genetic Resources in the Area and Its Improvement Measures

With the progress in marine science and technology and biotechnology, the scientific research and development activities in the Area and deep seabed have witnessed the following trends: Resource and environmental assessments have become more interrelated; mineral and biological resources are now both objects of research and development; disciplines have become more integrated; and more regimes and regulations are being formed or improved. If any State limits its attention only to mineral resources in the Area and fails to pay due regard or concerns to its biological resources and their living environment and diversity, it would be rather difficult for that State to maintain an advantageous position in activities or in affairs concerning the Area. Such are the effects of these rapid developments in science and technology.

A. China's Current Involvement in Utilizing and Developing Genetic Resources in the Area

Up to now, China has undertaken several relevant activities concerning the resources in the Area. These include signing a polymetallic nodule exploration contract with the Authority, while entitle China to the exclusive right to explore

57 United Nations, Oceans and the Law of the Sea: Report of the Secretary-General, A/60/63/Add.1, 15 July 2005, para. 283.

an area of polymetallic nodule deposits, gathering and analyzing data concerning polymetallic sulfides, and conducting surveys on cobalt-rich ferromanganese crusts. The Authority views China as a contractor of the polymetallic nodule exploration contract and as one of the major countries to conduct research and survey on cobalt-rich ferromanganese crusts. Yet the Authority has not listed China amongst the States that have conducted surveys on polymetallic sulfides.[58] Although China has also gathered environmental data and biological samples while conducting surveys on mineral resources, it is only just beginning deep sea biological research. China, due to limited technologies in exploration and sample collection, is still underdeveloped in deep sea biological research; its extent and scale of research are scarcely comparable to those of Western countries, and its research approaches and systematization are not congruent with practices generally accepted amongst the global community.[59]

China retains several insufficiencies in deep sea biological research. These include: insufficient surveys on and understandings of deep-sea biological resources and biodiversity; being underdeveloped in technology, equipment and personnel; and weak endeavors to international law research. These insufficiencies have led to China's rather limited involvement and influence with respect to relevant treaties, regulations and regimes. For example, in terms of the Draft Codes of Conduct for the Sustainable Use of Hydrothermal Vent Sites to regulate research and sampling activities at hydrothermal vents, several Western countries have been playing a dominant role in the processes of deliberation, regime building and upcoming implementation.[60] Such Codes of Conduct can be viewed as reflections of the trend of the time for protecting the deep seabed biodiversity, as well as barriers to newcomers created by the developed States to ensure their scientific and technological advantage and to maintain economic benefits after completing biological sampling for deep seabed genetic resources research.

The foregoing insufficiencies have placed or would place China at a disadvantageous position. First, in terms of biological exploration and sampling

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58 International Seabed Authority, Consideration Relating to the Regulation for Prospecting and Exploration for Hydrothermal Polymetallic Sulphide and Cobalt-rich Ferromanganese Crusts in the Area, ISBA/7/C/2, May 2001, paras. 6~7.

59 Yang Xiaoguang and Fan Jie, Research on China's Industrialized Model and Measures for Deep-sea Resources, *Mining Research and Development*, No. 1, 2004. (in Chinese)

60 Permanent Mission of the People's Republic of China to the International Seabed Authority, The International Seabed Authority Striving for Dominance over Biodiversity and Genetic Resources in the Area, *Bulletin on International Seabed*, No. 12, 2003. (in Chinese)

at deep sea hydrothermal vents which have drawn international concern, such insufficiencies would place China under increasing pressure from prohibitions and limitations on sampling, making it increasingly difficult for China to collect biological samples for deep seabed genetic resources research. Moreover, since China is a large country with increasing influence on international and multilateral affairs, it would be unfavorable for China to foster its diplomatic image as a responsible State, and to share practical benefits from the utilization of genetic resources in the Area, if it does not propose any specific opinions or programs regarding the protection of biodiversity in the Area and the sharing of benefits arising from the utilization of genetic resources. Finally, China is insufficiently capable of participating in international cooperation projects and scientific discussions within the International Seabed Authority and has no say in formulating new regulations. It is also hard to assess, in terms of China's exclusive rights to explore polymetallic nodules, how economically China may develop such resources, and the effectiveness of China's technology systems.

B. How China May Improve Its Involvement in Developing and Using Genetic Resources in the Area

1. China Should Track Developments in International Law and Improve Research on Relevant Regulations

Within the global context, we must pay close attention to developments in international law of the sea. We must organize legal personnel to track trends and conduct surveys and research, and proactively participate in the drafting and discussions of both UN General Assembly resolutions and programs on deep seabed biodiversity. Within the International Seabed Authority, we must conduct preliminary research on regulations under development with respect to deep seabed resources. We must pay due regard to regulations concerning environment and biodiversity protection in the Area, define MSR and biological exploration activities, and develop codes of conduct with the Authority to the extent possible. In the scientific community, as China actively participates in the research on mid-ocean ridge programs[61] and deep-sea drilling programs, China should also closely

61 Mid-ocean ridge is where new oceanic crusts are created and the true ocean "treasures" are located. As early as a few years ago, InterRidge has worked out a science and structure plan for ridge research 2004–2013, which specifies seven scientific questions needed to be focused efforts upon.

track developments in codes of conducts for mid-ocean ridge programs. It should also encourage researchers to become proactively involved, especially in the drafting of relevant criteria.

2. China Should Focus on Deep Seabed Mineral and Biological Resources at the Same Time

Based on previous work, we must timely shift our focus to surveys on polymetallic sulfides and biological resources at deep-sea hydrothermal vents. We must also pay due regard to biodiversity surveys and research on polymetallic nodule sea basins and cobalt-rich ferromanganese crust seamounts. Future plans would emphasize research and development of biological resources at hydrothermal vents. We would also emphasize active participation in forerunning deep sea science development, as well as international frontier research based on previous work.

3. China Should Accelerate Capacity-Building as It Conducts Research at Deep-Sea Hydrothermal Vents

Following the principle of capacity building through long & short term developments, we must improve construction of research and development bases for deep seabed biological resources, and develop manned submersibles. At the same time, we must, through different ways, endeavor to develop capacity in biological sampling at deep-sea hydrothermal vents. We must also include human resource development as an important aspect of capacity building. Finally, we must also take into account our research and development capacities at the frontiers of deep-sea science, as well as China's capacity building in terms of involvement in and influence on the drafting of international treaties and regulations. Such improvements must aim to support China's research and development of deep seabed resources via strong technology and outstanding personnel.[62]

4. China Should Enhance Industrialized Operation of Deep-sea Resources Development

We must further regulate and improve the advantages of China Ocean Mineral Resources R&D Association in mobilizing social forces to support China's research and development in the Area. We must give more importance to and coordinate major programs, such as industrialized development of deep-sea resources, national strategies for marine development, and national high-tech development

62 Jin Jiancai, Management of Deep Seabed Biodiversity and Genetic Resources, *Advances in Earth Science*, No. 1, 2005. (in Chinese)

plans. China must also successfully integrate strategic goals and harmonize its work plans. Through an expert advisory system, we must also bring into full play the government in advising Area-related decision-making in terms of diplomatic, investment, resources, scientific & technological plan. The government must also make decision making more democratic and strategic planning more scientific. Starting from the development of deep-sea general technologies, we must also gradually establish and improve holistic technological systems to explore and develop deep seabed mineral resources and genetic resources, to develop and improve a variety of technologies and equipment for exploration, development and processing of deep sea resources. Finally, we must also give priority to research on designing, processing and deepsea experiments prior to the commercial-oriented exploitation of resources with commercial prospects, aiming to increase the core-competitiveness and sustainability of China's industries.[63]

VI. Conclusion

With recent developments in biotechnology, interest has increased in genetic resources in the Area and relevant activities have become more in the global community. It is increasingly significant and imperative to manage those resources better from a legal perspective.

In terms of the legal status of genetic resources in the Area, the principle of "common heritage of mankind" should apply to those resources according to the purpose in the UNCLOS Part XI. The principle has made two important restrictions on the utilization of such resources: 1) All the States in the global community are equally entitled to those resources; and 2) development activities should take into account their impact on the global community and its members. In an interdependent world, such principle would significantly aid the conservation and sustainable development of biological and genetic resources.

So far, there have been no international conventions defining the legal status of genetic resources in the Area. Whether the regime analogous to that of living resources of the high seas, or the regime of common heritage of mankind should apply may only be clarified by the Parties to the UNCLOS themselves. In this context, the global community must negotiate further to solve the legal issues

63 Yang Xiaoguang and Fan Jie, Research on China's Industrialized Model and Measures for Deep-sea Resources, *Mining Research and Development*, No. 1, 2004. (in Chinese)

arising from the exploration and development activities of genetic resources. One practical option would be to specify the applicability of the existing treaties and relevant international instruments. By applying the existing legal provisions, relevant States would coordinate to take measures directly, especially in due regards to their obligations under the UNCLOS and the CBD. In this regard, the International Seabed Authority should play a significant role; the CBD executive bodies and the Authority should administer the conservation and sustainable development of genetic resources in the Area.

China is a vastly populated country that consumes great amounts of energy. In addition to its own systems of survey, scientific research and industry, China should make great endeavors to conduct bilateral and multilateral cooperation, and promote the educating and training of professionals. Such endeavors may support the research and development strategy for the resources in the Area through strong technologies and competent personnel. Only in this way may China, in the field of development and utilization of genetic resources in the Area, occupy a position matching its international status.

Translator: YE Lin
Editor (English): Andrew Kong-Yu Yang

Defining the Precautionary Principle within the Chinese Language

CHU Xiaolin*

Abstract: At present, Chinese scholars do not maintain consistent translations of "precautionary principle". Loosely translated, "precautionary principle" can have four meanings: " 预防原则 ", " 风险预防原则 ", " 审慎预防原则 " and " 预警原则 ." However, the translation of legal terms should be rigorous and precise. Given the meaning of "precautionary", the conceptual idea of the precautionary principle, the difference between the precautionary principle and other related concepts, and the origin of the precautionary principle, the author concludes that the precautionary principle means that we ought to take prudent and wise measures to deal with certain potential hazards and that it is distinct from its synonym, the preventive principle. Therefore, to translate "precautionary principle" as " 预警原则 " is the best choice since it can precisely reflect the difference between the "precautionary principle" and "preventive principle" and accurately highlight the features of the precautionary principle.

Key Words: Precautionary Principle; 预警原则 ; Preventive Principle; 预防原则

The precautionary principle is one of the most innovative, influential and significant newly-emerging concepts in environmental law within the past 20 years. Chinese scholars are far behind in research on the precautionary principle in relation to that of Western nations. Chinese scholars began researching the precautionary principle at the end of 20th century and the beginning of 21st century, whereas the concept originated from German domestic environmental law during the middle and late 1900s. The precautionary principle guides us to control potential healthy and environmental problems prudently while implementing effec-

* CHU Xiaolin, Ph.D. Candidate in International Law at Xiamen University, School of Law.

tive measures to prevent environmental damage in spite of a lack of scientific evidence.

After systematically collecting and analyzing domestic research regarding the precautionary principle, the author discovered that domestic scholars used different translations of "precautionary principle". Some scholars translate "precautionary principle" as " 预防原则 ",[1] some prefer " 风险预防原则 ",[2] some use " 预警原则 ",[3] while others choose " 审慎预防原则 ";[4] however, the majority of scholars

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1 The following articles translate "precautionary principle" into " 预防原则 ": Bureau of Life Science and Biological Technology, Chinese Academy of Sciences, The French Public Health and Safety Protection System, *Journal of Life Science Research Letters*, No. 22, 18 June 2003 (in Chinese); Liu Hong, The Comparison of Precaution Principle between China and America, *Journal of Environment and Occupation Medicine*, No. 4, 2004 (in Chinese); Fan Chunliang, The Rise of Science and Governance and Its Significance, *Journal of Scientific Research*, No. 1, 2005 (in Chinese); Niu Huizhi, Research of Precaution Principle: Efforts and Controversies of Environmental Risk Issues on the Disposal under International Environmental Law without Scientific Evidence, *Journal of Taiwan University Law Review,* No. 3, 2005 (in Chinese); Li Hui, WTO Transgenic Agricultural Products Trade Dispute: Is America a Real "Prevailing Party"?, at http://www.iolaw.org.cn/showarticle.asp?id=1795, 20 September 2007 (in Chinese). The World Ethic Committee of Scientific Knowledge and Technology, *Precautionary Principle*, Paris: The United Nations Educational, Scientific and Cultural Organization, 2005 (in Chinese) etc.

2 The following articles translate "precautionary principle" into " 风险预防原则 ": Hu Bin, On the Precautionary Principle of International Environmental Law, *Journal of Law and Administration*, No. 6, 2002 (in Chinese); Wang Xi and Yang Xing, On the Development of the Law of International Water Resources Utilization and Protection, *Journal of Law Forum*, No. 1, 2005 (in Chinese); Wang Yuexian and Li Yuhan, Research on Legislation of the Invasion Alien Species, *Journal of Heilongjiang Institute of Administrative Cadre of Politics and Law*, No. 5, 2005 (in Chinese); Ma Ying, Scientific Research Management and Precautionary Principle, *Journal of Science and Technology Management Research*, No. 10, 2005 (in Chinese); Chen Haisong and Tan Ying, Precautionary Principle in International Environmental Legislation, *Journal of Hubei Radio & Television University,* No. 7, 2006 (in Chinese); Zhu Jiangeng, *Precautionary Principle and Marine Environment Protection*, Beijing: The People's Court Press, 2006 (in Chinese) etc.

3 The following articles translate "precautionary principle" into " 预警原则 ": Yu Kongjian, Sustainable Environment and Development Planning Approach and Its Effectiveness, *Journal of Natural Resources*, No. 1, 1998 (in Chinese); Kuen-chen FU, The Precautionary Principle in International Fisheries Management Law, in *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2003 (in Chinese); Zhang Luoping, Chen Weiqi and Hong Huasheng, The Application of Precautionary Principle in Environment Planning and Management, *Journal of Xiamen University (Natural Science Edition)*, No. 8, 2004 (in Chinese); Xiao Xiao, Study on Precautionary Principle of EU Food Safety, *Chinese Animal Quarantine,* No. 12, 2004 (in Chinese) etc.

4 The following articles translate "precautionary principle" into " 审慎预防原则 ": Wang Mingyuan, Analysis on GMO Safety Concepts, at http://www.biosafety.com.cn/Html/Article/TransgenicBio-Safety/ztzs/293.html, 20 September 2007. (in Chinese)

adopt " 风险预防原则 ". With multiple definitions found within the literature it is important to properly translate "precautionary principle" and determine which of these translations is the best for use within the Chinese context.

The primary principle of the translation of legal terms is preciseness, meaning that the translation of a source word should be entirely faithful to the representation of all messages contained in the source word, without omission, addition and ambiguity.[5] According to the principle of preciseness, the translation of "precautionary principle" can be discussed from the following aspects.

I. Analysis of the Meaning of "Precautionary"

In *Black's Law Dictionary*, "precaution" means "previous action; proven foresight; care previously employed to prevent mischief or to secure good result; or a measure taken beforehand; an active foresight designed to ward off possible problems, accidents, liability, or secure good results."[6] That is to say, "precaution" may mean, to adopt a cautious attitude in order to prevent potential hazards from happening. Although *Black's Law Dictionary* does not provide the meaning of "precautionary", since it is an adjective derived from "precaution", the two words should share similar meanings. Thus, "precautionary" may also mean "cautious and preventive."

The *Oxford Dictionary of Modern Legal Usage* defines "precautionary" as "suggesting or advising provident caution; or of relating to, or of the nature of a precaution."[7] In the *Longman Synonym Dictionary*, "precautionary" has synonyms of "provident, prudent, wise, sagacious, provisional, preventative."[8] *Webster's New Collegiate Dictionary* defines "precaution" as "care taken in advance, foresight; a measure taken beforehand to prevent harm or secure good."[9] Hence, "precautionary" can also mean "provident and preventive".

According to the definitions of "precautionary", it can be shown that "precautionary" includes "preventive" (预 防) within its definition, but it is not

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5 Jiang Dan, On the Features of Legal Terms and the Translation Principle, *Journal of University of International Relations*, No. 3, 2005. (in Chinese)

6 Henry Campbell Black, *Black's Law Dictionary*, Minnesota: West Publishing Co., 1979, p. 1059.

7 Garner, *The Oxford Dictionary of Modern Legal Usage*, Beijing: Law Press, 2002, p. 680.

8 Longman Group Limited, *Longman Synonym Dictionary*, Great Britain: Longman House, 1986, p. 917.

9 *WEBSTER'S New Collegiate Dictionary*, Springfield: Merriam-Webster, 1996, p. 916.

equal to “preventive”. “Precautionary” also means to take measures beforehand in order to mitigate the potential dangers before disasters occur. This aspect of the definition is not contained in “preventive”. Therefore, the two words have a similar meaning however, they are not identical. While translating “precautionary principle”, we should pay attention to the subtle differences between these two words and attempt to express the unique meaning of “precautionary”.

In my view, it is inaccurate to translate “precautionary principle” into “预防原则” since this is equivalent to “preventive principle” in English. It is also improper to translate “precautionary principle” as “风险预防原则” since this is a form of explanation with “风险” before “预防原则”. Literally, the message given by “风险预防原则” is similar to that given by “预防原则”, however neither translations captures the significant differences between “precautionary” and “preventive”. Translating “precautionary principle” as “审慎预防原则” is slightly better than “预防原则” and “风险预防原则” since it indicates the meaning of “provident” contained within “precautionary”, however, it does not maintain the essence of the principle, to take cautious measures to prevent potential dangers beforehand. In my opinion, “预警原则” is preferable since “预” means “preventive” and “警” contains the meaning of “vigilant” which includes taking caution in the face of uncertainty. Thus the word “预警” is succinct and can reflect the connotation of “precautionary”.

II. Analysis of the Concept of “Precautionary Principle”

Due to the difficulty in finding a Chinese translation whose meaning is identical to “precautionary principle” we typically adopt explication.[10] In doing so, the translator acts as a drafter who must collect first hand material in order to understand the true meaning of the source term. Therefore, we should analyze the conceptual background of the precautionary principle before we are able to translate the term successfully.

Within many international conventions and organizations we can find definitions of the precautionary principle. For example, Principle 15 of the Rio Declaration states that, “in order to protect the environment, the precautionary approach

10 Explication is an effective way to translate a word due to the lack of an equivalent, which means using neutral language within the target language to express the meaning of the source language.

shall be widely applied by States according to their capabilities. When there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Many scholars believe that this is the most authentic expression of the precautionary principle.[11]

Other definitions explicitly include mention of environmental protection. For example, the Article 3 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area of 1992 defines the precautionary principle as a stance in which all States shall "take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects."

The Convention for the Protection of the Marine Environment of the North-East Atlantic, or OSPAR Convention, regulates that each contracting party apply the precautionary principle to prevent waste and traffic pollution. The OSPAR Convention defines the precautionary principle as "preventive measures [which] are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects."

In regards to the conservation and management of living resources, Article 6 of the United Nations Fish Stock Agreement in 1995 regulates the use of the precautionary principle, such that "States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures."

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11 Simon Marr, *The Precautionary Principle in the Law of the Sea-Modern Decision Making in International Law*, The Hague: Kluwer Law International, 2003, p. 2.

In 1995, the Food and Agricultural Organization (FAO) incorporated the precautionary principle into the Code of Conduct for Responsible Fisheries as part of general principles. These general principles regulate that "States and sub-regional and regional fisheries management organizations should apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment, taking account of the best scientific evidence available. The absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment."

Although each international treaty and organization has varying regulations concerning the precautionary principle, each regulation refers to the elements of the precautionary principle as follows:

First, it requires us to take caution prior to receiving adequate scientific evidence. Most predictions regarding the environment are uncertain due to the absence of adequate scientific information and few accurate models to refer to. Therefore, if the available information indicates a potential environmental hazard then a precautionary approach should be taken even at some cost.[12]

Second, the precautionary principle requires us to create rigorous regulations. On the basis of present scientific knowledge, it is impossible for humanity to predict which activities will impact or cause damage to the environment. Therefore it is necessary to carefully evaluate the impact on the environment caused by related activities and make stringent environmental policy in order to prevent damage to the environment and resources caused by human activities.[13]

Third, the precautionary principle shifts the burden of proof. According to traditional environmental law, it is a general rule that the party who advocates for environmental protection is responsible for proving that some related activities will cause damage to the environment. However, by virtue of the precautionary principle, the burden of proof is shifted to the party who initiates these related activities. This party is assigned the responsibility of proving that their activities will not damage the environment.

Fourth, the precautionary principle encourages us to balance the costs and

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12 Tim O'Riordan, James Cameron and Andrew Jordon eds., *Reinterpreting the Precautionary Principle*, Kent: Cameron May International Law & Policy, 2002, p. 20.

13 Tim O'Riordan, James Cameron and Andrew Jordon eds., *Reinterpreting the Precautionary Principle*, Kent: Cameron May International Law & Policy, 2002, p. 20.

benefits under the proportion principle. The adoption of the precautionary principle is bound to be a costly endeavor, and so it is necessary to calculate and estimate the cost and benefit of adopting the tenets of the principle. That is to say, during the preparation and application of the precautionary principle, we should also adopt the proportion principle and cost-benefit principle so as to better analyze, compare and balance the cost and benefit caused by fulfilling the responsibilities found within the precautionary principle.

Fifth, the precautionary principle requires that we create a buffer in relation to environmental issues. At present, we do not know the levels of resilience to the damage and change caused by humans found within local environments. Since this is the case, it is necessary to limit our environmental impact to act as a buffer for the mistakes and omissions made by human beings during environmental management.[14]

Through this analysis, we can conclude that the essence of the precautionary principle includes that, when we experience serious or irrevocable hazards, even if there is inadequate scientific evidence to indicate the causal relationship between the related activities and subsequent hazards, it is still necessary to take appropriate measures to reduce potential hazards in consideration of the cost and benefit produced by these measures. Accordingly, translating the "precautionary principle" as " 预警原则 " reflects the essence of the precautionary principle faithfully since the two words " 预 " and " 警 " incorporate the meaning that "preventive measures should be taken to deal with uncertain hazards so as not to cause irreversible damage." In contrast to " 预警原则 ", the translations of " 预防原则 ", " 风险预防原则 " and " 审慎预防原则 " are less accurate since the message they carry focuses solely on the meaning of " 预防 " and neglect the key meaning of the precautionary principle, that mankind should be more cautious and vigilant to potential environmental hazards. The word " 警 " within " 预警原则 " remedies the defects found within other translation and accurately reflects the essence of the precautionary principle.

III. The Difference between the Precautionary Principle and Related Concepts

14 Tim O'Riordan, James Cameron and Andrew Jordon eds., *Reinterpreting the Precautionary Principle*, Kent: Cameron May International Law & Policy, 2002, p. 20.

The meaning of "preventive principle" ("preventive principle" is typically translated in Chinese as " 预防原则 "; however some scholars translate it as " 防止原则 " or " 损害预防原则 ", the author will collectively call " 预防原则 " within this article.) is close in definition to "precautionary principle". Although they both incorporate a prevention of damage, they are distinct from each other.

Although at present there is no precise definition of the concept of the precautionary principle, its core content is clear, that is, when there are serious or irreversible threats of damage to the environment, a lack of scientific certainty shall not be used as a reason to postpone or for failing to take preventive measures. The preventive principle is an extension of other principles which state that the State's sovereigh right to exploit national resources coexists with a responsibility not to damage the overseas environment. This emphasizes that, when a State is exerting its sovereign right to exploit resources within its boundaries, it shall not damage overseas environments and has a duty to take preventive measures in order to prevent, restrict or minimize environmental damage and control any activities or actions that may cause further damage to the environment.[15]

The preventive principle was first described in the case of T*rail Smelter Arbitration*[16] in 1941, which concluded that, according to the principles of international and American laws, no single State has the right to use or allow the use of their territory in such a way that the pollution, in this case smog, from such activities causes damage to any other State's territory, people or property. In this respect, a State should take the same measures to protect the peoples of other States as they would to protect their own people.[17]

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15 Qin Tianbao, Preliminary Study on the Basic Principles of International Environmental Law, *Journal of the Science of Law*, No. 10, 2001. (in Chinese)

16 The case of *Trail Smelter Arbitration*: The Trail Smelter in Columbia, Canada is the biggest lead and zinc smelter in North America, which is over 10 kilometers away from the Canada–US border. American farmers have suffered from mass emissions of sulfide emitted from the smelter since it was set up in 1986. Initially, the smelter operators appeased local sufferers in the form of paying fines and compensation. However, the case was raised again in 1925 and the Citizens' Protective Association was set up. America and Canada have had many diplomatic negotiations over the issue since 1927. The issue has since been passed over to the International Joint Commission in charge of Canada–US border environmental issues, however no agreement has been reached. The two States created a three-person Arbitral Tribunal to resolve the dispute in 1935. Negotiation and the resulting litigation and arbitration were settled in 1941. See Zhu Jiangeng, Precautionary Principle and Marine Environment Protection, Beijing: People's Court Press, 2006, p. 20. (in Chinese)

17 Zhu Jiangeng, *Precautionary Principle and Marine Environment Protection*, Beijing: People's Court Press, 2006, p. 20. (in Chinese)

There is an essential difference between the precautionary principle and preventive principle: the precautionary principle focuses on preventing environmental risk without adequate scientific evidence, whereas the latter aims to prevent damage due to proven scientific risk. Second, each principle includes different regulations regarding the burden of proof. Within the preventive principle, it is the responsibility of the movement organizer to provide proof of the environmental hazard. In most situations the movement organizer is the victim of environmental pollution. In contrast, the precautionary principle requires that the burden of proof rests on the party which is carrying out such hazardous activities. In order to illustrate this, let us look at the current dispute regarding the PX Project in Xiamen, Fujian Province. In this case, if we were to adopt the precautionary principle, it is the operator of the PX Project who should prove that the project will not cause damage to environment. In doing so, the project operator is urged to consider the environmental impacts and preservation of the picturesque environment of Xiamen. Third, the status of each principle within international law is different. The preventive principle was established earlier and is universally acknowledged as a principle of customary international law by international communities. The precautionary principle was created much later, and its status within international law remains controversial.[18]

As a result, although the precautionary and preventive principles share the meaning of preventing environmental dangers, there remain distinct differences between them. The former primarily copes with environmental hazards in the absence of adequate scientific evidence, whereas the latter does not include the situation. The translation of "precautionary principle" should aim to reflect this difference. Chinese translations, such as " 预防原则 ", " 风险预防原则 " and " 审慎预防原则 ", do not show this essential difference between the precautionary principle and the preventive principle, which may cause confusion between the two. However, translating "precautionary principle" as " 预警原则 " embodies the essential difference, such that the former aims to prevent damage without certain scientific evidence. What's more, the translation also literally differentiates the two since "precautionary" is written as " 预警 " and "preventive" as " 预防 ", allowing us to avoid confusion and misunderstanding.

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18 At present, academics hold three views about the status of the precautionary principle in international law: First, it is believed that the precautionary principle has become a principle of customary international law; second, it is not yet a principle of customary international law; third, it is a forming principle of customary international law.

IV. Analysis of the Origin of the Precautionary Principle

The precautionary principle first originated within German domestic law in 1970–80s. The German Clean Air Act of 1970 and a German government decree in 1976 both gave voice to the concept of the precautionary principle. The German government decree in 1976 regulates that, "environment policy can't be carried out through avoiding the approaching damage or the damage that has happened. Precautionary environment policy requires more cautious attitudes to protect natural resources and carrying out the requirements given to them."[19] In German domestic law, "precautionary principle" is translated into the German word "vorsorgeprinzip." The German word "vorsorge" is equal to the English word "precaution", which aims at the prevention of uncertain hazards. The German equivalent of "prevention" (预 防) is "prävention", which aims at preventive measures which deal with confirmed hazards. In German, the word "precautionary" is equivalent to "vorsorge", which has a different meaning from "prevention" whose German equivalent is "prävention". Therefore, when translating "precautionary principle" into Chinese, we should focus on the original idea found within German law while simultaneously reflecting the particularity of the precautionary principle.

The Chinese translations of " 预防原则 ", " 风险预防原则 " and " 审慎预防原则 " each include " 预防 ", which does not represent the monopoly and particularity of "Vorsorgeprinzip". Using " 预防 " as a translation may also create confusion between "vorsorge" with "prävention". The phrase " 预警原则 " literally differs from " 预防原则 " and the word " 警 " can bring clarity regarding the difference between "vorsorge" and "prävention" in connotation.

V. Conclusion

At present, Chinese scholars use various translations for "precautionary principle". These include " 预防原则 ", " 风险预防原则 ", " 审慎预防原则 ", " 预警原则 " and others. Each of these definitions has a slightly different meaning, so how should we properly translate "precautionary principle" into Chinese? This article analyzes the meaning of "precautionary", the concept of the precautionary

19 Arie Teouwborst, *Evolution and Status of the Precautionary Principle in International Law*, London: Kluwer Law International, 2002, p. 17.

principle, the differences between the precautionary principle and related concepts and its origin. Through this analysis the author concludes that the precautionary principle requires us to be cautious when dealing with environmental hazards without adequate scientific evidence and to take effective measures to handle them. According to the precautionary principle, the burden of proof ought to shift to the initiator of such hazardous activities, who shall prove that their activities will not cause damage to the environment. The precautionary principle and preventive principle have essential differences. These two principles also have different equivalents in German, from which the precautionary principle originated. Thus, the precautionary principle is a new and distinct concept in relation to the preventive principle.

Finally, the author concludes that " 预警原则 " is the best Chinese translation of "precautionary principle" since it can reflect the exact connotation of the precautionary principle and is concise and clear enough to allow the audience to differentiate between the precautionary and preventive principles.

Translator: ZHOU Fengyun
Editor (English): David Devlaeminck

Establishing a Cross-Strait Marine Environment Protection System: A Focus on Fujian-Taiwan Cooperation

LIN Wanling*

Abstract: Based on the fact that the two sides of the Taiwan Strait comprise one ecosystem, this paper affirms the necessity of a marine environment protection system for the strait at the outset and analyzes the feasibility and significance of such cooperation. The author then proposes a blueprint for the cooperation system, including the establishment of a Kinmen-Xiamen water environment joint management demonstration system, a Taiwan Strait Environmental Protection Zone, a permanent agency for management and coordination, and an information exchange center for cross-strait environmental protection.

Key Words: Ecosystem; Taiwan Strait environmental protection zone; Taiwan Strait tunnel

I. Necessity for Cross-Strait Cooperation in Environmental Protection

The Taiwan Strait stretches northeast-southwest, meeting the East China Sea in the north and the South China Sea in the south. It is 200 nautical miles long and between 70 and 221 nautical miles wide, with an average width of 108 nautical miles. Situated at the juncture between the East China Sea and the South China Sea, its northern frontier begins at Beijiao, Fujian and ends at Fugui Island in China Taiwan and its southern frontier runs from Nan'ao Island in Guangdong and ends at E'luanbi in China Taiwan. The area is also the northern frontier of the natural dis-

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* LIN Wanling, master candidate of International Law at School of Law, Xiamen University. This article is one of the results of the research on the Study on Laws Related to Taiwan, a sub-program of the program titled Research Program on Taiwan of Xiamen University, which is funded by the Philosophy and Social Science Innovation Base of 985 Project.

tribution of the coral reef and redwood ecosystems. The Tropic of Cancer cuts through the Taiwan Strait, and the area has a typically subtropical climate. Under the cross influences of the East China Sea and South China Sea longshore currents and the Kuroshio Current, the hydrological conditions of the Taiwan Strait are very complex. Its unique location has created an area of high biodiversity, with three major fishing areas at eastern, central, and southern Fujian province. Due to the overdevelopment of the ocean, the marine environment and the functioning of the ecological system have deteriorated. The littoral zones and the shallow seas have been developed beyond capacity, resulting in recurring disease in fish, shrimp, shellfish, and algae. There is severe eutrophication at estuaries and in harbors. The mass deaths of farmed fish are a frequent occurrence, and alien species have invaded parts of the sea area.[1] At the center of western Pacific navigation routes, the Taiwan Strait is an important maritime transportation nexus between China and other Pacific nations. Ships traveling between the East China Sea and the South China Sea and those heading to the eastern Chinese coast from Europe, Africa, South Asia, and Oceania all pass through the strait, so do those coming from the Atlantic Ocean, the Mediterranean Sea, the Persian Gulf, and the Indian Ocean to the Sea of Japan. Therefore, the strait's location is of great significance. China Taiwan, Fujian, and Zhejiang either border the strait or are completely surrounded by water. Their inhabitants all live near and have close relationships with the water. These provinces' common challenges have led to a growing consensus on the urgency of cross-strait cooperation on marine environmental protection.

The two sides of the strait form one ecological community, and marine ecological systems have their own existence beyond human political divisions. Even if there was the slightest possibility for the two sides of the strait to continue operating in closed, self-sustaining economies, a virtuous cycle in the strait ecology cannot be achieved if we ignore the natural connections between ecological communities and do not jointly manage the ecosystem. Many areas that border the strait are densely populated, and the sea occupies an important place among the people's food sources. Thus, the deterioration of the ecosystem and environmental pollution, especially those caused by harmful substances, will not only turn the strait into a giant garbage patch but also threaten the health and lives of inhabitants

1 Wang Miao et. al., The Current State of China's Marine Pollution and Its Causes and Management, *Journal of the Ocean University of China (Social Sciences Edition)*, No. 5, 2006. (in Chinese)

on land.

A. Land-Sourced Pollution

According to media reports, a floating belt of trash of more than two kilometers long appeared along Cihu Beach on Kinmen Island in June 2006. This trash from Xiamen, which included unnerving items like syringes and pharmaceuticals, ruined the views at the tourist attraction. Meanwhile, the grimy dregs from the Kinmencheng brewery also caused severe pollution in the sea near Xiamen. While the people of Xiamen and Kinmen had long looked forward to the Mini Three Links, these unexpected "mini links" were certainly unwelcome.[2] At the Xiamen harbor, ships are deployed to collect the garbage from the water every day, but this kind of remedial action is simply not enough. Kinmen, on the other hand, does not yet have similar measures. This "exchange through trash" between the two shores has attracted attention from the Kinmen county government and the Xiamen city government, whose joint intention has been to establish a "common living area" between Kinmen and Xiamen.

The unsolicited "mini three links" between Xiamen and Kinmen are only a corner of the iceberg of the environmental problems in the strait. There are 11 major rivers and more than 50 smaller rivers within the north-south span of Fujian that flow into the ocean, carrying many floating objects; large amounts of industrial, agricultural, and residential wastewater; and solid waste. The majority of Fujian's industrial wastewater flows into the Minjiang and Jiulongjiang Rivers areas and into the Taiwan Strait, exerting drastic effects on the quality of the environment in the estuary area. As measured by Category II water quality standards, both rivers contain excessive amounts of pollutants, mostly organics. The quality of the Fuzhou section of the Minjiang River, the middle section of the Jiulongjiang River, and the estuary of the Jinjiang River are all Category III or below. On the opposite shore in China Taiwan, the six major rivers that are longer than 100 kilometers all basically flow into the Taiwan Strait, and the pollution in all six is rather severe. Water currents have a significant influence on the dispersion, movement, and dilution of water pollutants. The movement of the pollutants around Fujian is mainly affected by the longshore currents bordering Fujian and Zhenjiang and, secondly, by the

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2 Trash: The Unexpected Mini Three Links on the Kinmen and Xiamen Beaches, at http://www.southcn.com/news/hktwma/hot/200206210713.htm, 25 July 2006. (in Chinese)

longshore currents at the shores of eastern Guangdong and the Taiwan Strait Warm Current (a mix of the South China Sea water mass and the invading waters from the Kuroshio Current entering the Taiwan Strait). As a result, Fujian's marine pollutant concentration contour line is almost parallel to the seashore, with the density gradually decreasing as it gets further away from shore. The strong tidal estuaries of Fujian feature reversing currents, which move the pollutants to and fro and multiply the pollution. This has been a major cause of the severe inshore water pollution in Fujian.[3] It is becoming more and more urgent to prevent and control the environmental pollution at the estuaries and harbors of the Taiwan Strait.

B. Ship-Sourced Pollution: Oil Spills

Most of Fujian's sea areas face more than 20 days of fog every year, with advection fogs (sea fogs) as the most prevalent type. Their extensive reach, long duration, as well as the poor visibility are a cause of many accidents at sea and a main cause of oil spills. There are also frequent strong winds and typhoons on the Fujian coast. In the past 30 years, 232 typhoons (or an average of 7.7 per year) have either landed on or affected the Fujian coast. The frequency is second only to that in Guangdong and China Taiwan. In addition, there is significant variation in typhoon activity from year to year. In these 30 years, there were 7 with more than 10 typhoons and 14 in 1989, posing serious threats to navigational safety and the marine environment.

Since the opening of trial direct transport links between China Taiwan and China Mainland in April 1997, the shipping industry and environmentalists have paid close attention to navigational safety and the prevention of oil spills in the Taiwan Strait. Several academic conferences have been held on both coasts to discuss cooperation in ship accident rescue efforts and the prevention of oil spills. The Taiwan Strait is an important strait in international navigation routes and sees tankers carrying tens or hundreds of thousands tons of oil. For instance, many Japanese ships setting off for the Middle East for oil choose to go through the Taiwan Strait. Compared to the other side of the strait, this side of the Taiwan Strait is much safer. And on the way back, the sea areas around the Penghu Islands are an even better option as the Kuroshio Current saves the ships a lot of fuel and time.

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3 Xu Zhuhua et. al., Red Tides on Fujian's Coast: Characteristics and Prevention, *The Taiwan Strait*, No. 1, 2006. (in Chinese)

However, an oil spill involving over a thousand tons would be disastrous, leading to irreversible economic loss along the coasts and a catastrophe for the marine environment. With such high shipping volumes in the strait, these risks cannot be underestimated. A large oil spill will cause tremendous damage to the ecological environment, the shipping industry, and the fishing industry. To take fishery resources as an example, waters contaminated by organic substances will upset the ecological balance, damage the fishing environment, and affect the growth and reproduction of fish, leading to great losses or even the complete disappearance of fishery resources. Therefore, it is imperative to promptly establish and implement emergency response plans for oil spills. This will provide a favorable environment for the development of the maritime economy in the strait and forge a new path on cross-strait cooperation on rescues at sea and the prevention of oil pollution.

C. Red Tides and the Destruction of Species

The Taiwan Strait boasts notable geographic advantages. Its varied water depth, sea currents, and water temperatures all contribute to its biodiversity, which creates significant economic, ecological, and aesthetic value. However, this area is witnessing a drastic reduction in the number and variety of marine animals and other organisms. The problem mainly stems from overfishing, but contamination and the introduction of alien species have added to it. On the western coast of the strait, red tides appear more and more frequently every year, and the severe threat they pose to the ecological environment of the entire strait is by now beyond dispute. The frequency of red tides has drawn growing attention to the health of the Taiwan Strait's ecological environment. With the development of the "Blue Industries" (coastal and maritime industries) and the ocean, the Taiwan Strait has paid an ecological price due to the marine environment pollution, disorganized farming, and overfishing.[4] In addition, there are many medium-sized and large ports on both sides of the strait, such as Xiamen, Quanzhou, Zhangzhou, Kaohsiung, and Keelung. Many foreign cargo ships traversing these ports have brought alien red tide species in their ballast waters that damage the ecological balance of the native marine environment. This phenomenon requires strict control and in-depth research. The growing frequency and geographic reach of red tides translate into

4 Hopes for the Joint Protection of the Taiwan Strait, *China Ocean News*, 6 June 2003. (in Chinese)

more serious threats to the seawater farming, fishing, and coastal tourism industries. In addition, attention should be paid to the proliferation of alien red tide species that has resulted from newly-introduced farmed species as well as rising sea levels.

II. The Current State and Deficiency of Environmental Protection Management on the Two Sides of the Strait

A. Existing Policies on China Mainland: Fujian and Xiamen as Examples

China's Marine Environment Law states in Article 4 that "all entities and individuals have the responsibility to protect the marine environment." In recent years, many provinces and cities bordering the Taiwan Strait have intensified their efforts in this respect, the most representative of them being Fujian. In 2002, Fujian led the way in issuing the Fujian Province Regulations for the Protection of the Marine Environment, which established a strict system for evaluating the environmental impact of projects involving the sea and sought to strengthen the protection of the marine environment and the management of marine pollution. The Regulations promote the creation of marine nature preservation areas. There are currently 14 preservation areas in the province covering an area of 181,600 hectares, and 39 wetland preservation areas covering 187,300 hectares. The Regulation mandate extensive monitoring of water quality in its sea area, establishing 4 red-tide monitoring areas that total 6,300 square kilometers. Red tide detection rate reaches 100%. The Regulations also strengthen the monitoring of 45 major seaward outlets of land-based pollutant sources in the province and completed a rather reasonable basic network for monitoring the marine environment.[5] It should be noted that, in 2000, Fujian also proposed a contingency plan for oil spills in the strait. The plan names Fujian's deputy governor as the central commander of the Taiwan Strait oil spill emergency central command, whose member agencies include the provincial environmental protection bureau as well as members of the provincial marine rescue center. Once an oil spill occurs, all agencies must work closely with the Marine Safety Administration under the leadership of the provincial government and coordinate with related agencies

5 At http://www.fzen.com.cn/Fujian_w/news/bc/big5/20060925/fjbd105165.html, 25 July 2005. (in Chinese)

and entities like the army, the Ministry of Transport, search and rescue, oceanic administration, the public safety bureau, the fishing industry, port administration, communications authorities, weather agencies, public sanitation departments, and the petroleum administration to clean up the pollution and reduce financial losses. This shows that marine environment protection is a systematic project, in which the various levels of government play the major role and marine departments, other agencies and entities, and individuals have to take on their own respective responsibilities. It is fair to say that Fujian is a leader in China Mainland in marine environment protection and related projects.

At the municipal level, Xiamen is certainly a key city on the strait for environmental protection. Facing the Taiwan Strait, it has unique advantages in its marine environment with a water area of 344 square kilometers and a coastline of 275 kilometers. The sea is the lifeblood of Xiamen's economy. Faced with problems and challenges, the Xiamen city government restructured its economy and bolstered its efforts to protect the marine environment by issuing a series of laws. For example, the Xiamen People's Municipal Government's Practical Suggestions on Improving the Environment and Promoting the Harmonious Development of People and Nature require the establishment of inshore water quality monitoring centers at the Taiwan Strait, increased monitoring of nuclear radiation, and the reinforcement of monitoring, emergency warning, and response capabilities in sudden environmental pollution incidents. The Suggestions also allocate funds from waste management fees to improving and standardizing environmental monitoring systems.[6] The Taiwan Strait inshore water monitoring station, built in Xiamen in April 2003, is the first of its kind in China Mainland around the strait. The Xiamen government's attention to marine environment protection can also be noted in the construction of wastewater processing plants, the overhaul of its management of the western sea areas, the comprehensive management of the Jiulongjiang River drainage basin, and the establishment of nature preservation areas for Chinese white dolphins, lancelets, egrets, and redwoods.

From the above, we can see that Fujian and Xiamen have relatively advanced marine environment protection systems and ancillary facilities in place. But there is still a lot to be done in the details. For instance, there are only 100 full – or part

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6 Xiamen People's Municipal Government's Practical Suggestions on Improving the Environment and Promoting the Harmonious Development of People and Nature (trial version), Xiafu [2004] No. 141.

– time staff members in the whole province responsible for cleaning up oil spills. The cleaning equipment can only be used in small oil spills inside the harbor and, in the short term, it is not possible to amass the funding for offshore oil cleanup equipment and ships that can respond to large oil spills.[7] Although the Xiamen city government has begun to slow down the deterioration of the marine environment in its jurisdiction by investing large amounts of human, material, and financial resources, the siltation that resulted from unreasonable development is still serious; the construction of a wastewater pipe network has been delayed, and some wastewater still goes directly into the sea. There is still a great deal of trash and floating objects in the sea, and the environment in its sea areas does not meet the standards for their functional areas.

B. Existing Policies in China Taiwan

Laws that touch on the protection of the marine environment in China Taiwan include the Marine Pollution Prevention Law, the Wildlife Conservation Act, the Fisheries Law, and the Water Pollution Prevention and Control Law, among others. The Marine Pollution Prevention Law, which went into effect in 2000, seeks to "prevent and control marine pollution, protect the marine environment and marine ecology, and safeguard the health of citizens and the sustainability of marine resources." Article 59 of the law distinguishes between the prevention of land-sourced pollution, pollution from maritime construction projects, pollution from the disposal of waste at sea, and ship-sourced pollution, dedicates specific chapters to each type, and defines the liability of the parties responsible for the pollution. With respect to major oil spills, the law requires the "Executive Yuan" to create a special task force and the "Environmental Protection Administration" to develop a contingency plan and submit it to the "Executive Yuan" for approval.

According to the author's research, the current problems that Taiwan faces in the protection of its marine environment include the following: 1) There is a lack of legal basis for marine environment protection; 2) responses to oil spills are not sufficiently prompt, the capabilities for executing a response are flawed, and there is no oil spill contingency plan in place; 3) there are no facilities for the processing

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7 Chen Zhiwu, Protecting This Blue Sea: A Discussion on the Drafting and Implementation of the Taiwan Strait Oil Spill Contingency Plan, *China Water Transport*, No. 9, 2000. (in Chinese)

and disposal of oil and other waste at the harbors; 4) abandoned and stranded ships; 5) insufficient personnel for the monitoring of water quality, and the inconsistency of the monitoring; 6) no comprehensive usage of the monitoring data and no warning system; 7) not making full use of information available internationally on marine environment protection.[8]

C. Brief Summary

We can see from the overview above that both sides of the strait have made great progress in the management of their marine environments, but there is still room for improvement and for learning from each other. For instance, the legal system for protecting marine biodiversity in China Taiwan is not as comprehensive as that of China Mainland. It is relatively unorganized, and there is no clear division of responsibility or cooperative mechanism between the agencies with jurisdiction on the issue. There are no marine environment protection projects that are jointly managed by the two sides, but only passive conflicts that result from a management vacuum. Many familiar political and policy issues have restricted the exchange and cooperation on marine environment protection between Fujian and Taiwan considerably, and there has been no breakthrough in the exchange efforts to date. In addition, scientific research on marine environment protection on both sides lags behind the development of marine resources and economic and social advances on the coasts, which is one of the major factors contributing to pollution and damage to the ecological environment. Therefore, on top of promoting research on the marine environment and technological innovation, it is necessary to strengthen management and cooperation between the two sides of the strait, achieve a balance between economic development and the capacity of the marine environment and its resources, and thereby create a virtuous cycle.

III. Feasibility of Cooperation and Its Implications

A. Foundation and Efforts

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8 See Chang Jung-Chein, Law for the Marine Biodiversity Conservation and Management, (Master's Degree Thesis), Keelung: Taiwan Ocean University Institute on the Law of the Sea, pp. 171~172, June 2001 (in Chinese). The author has modified this slightly.

Although there has been no breakthrough for the exchange on marine environment protection due to limitations at the policy level, a different perspective reveals a promising future for such exchanges and cooperation between Fujian and Taiwan.[9] With the easing of political tensions, there has been rapid growth in economic interactions between the two sides, and many non-governmental communication channels have been firmly established. With the return of Hong Kong and Macau to China, the conditions for cooperation in protecting the environment of the Taiwan Strait have gradually matured. Based on the understanding that both sides of the strait already have their own foundational systems, the affected regions and society at large should work together to kick off cooperation on a Taiwan Strait environmental protection program. A common understanding and long-term vision from the governments will be crucial in the process.

Currently the leading impetus for cross-strait environmental protection is academic exchange. An example was the Cross-Strait Four-Community Environmental Forum, a nongovernmental academic event organized by the Chinese Society for Environmental Sciences and jointly sponsored by the Open University of Hong Kong, the Macau Environmental Committee, and Taiwan's China Green Productivity Association. The Cross-Strait Environmental Protection Conference was a high-level academic conference organized by scholars and visionaries in the field and the Overseas Chinese Environmental Engineers and Scientists Association (OCEESA).[10] In these forums and conferences, experts and academics on both sides of the strait express their opinions on their common concerns on the environment and engage in in-depth discussions on cross-strait environmental management, environmental safety and health, water pollution control and marine management, the assessment of impacts on the environment, ecological preservation and biodiversity, the reasonable use of environmental technology and resources, cyclical economies, and sustainable development. They also caution that the strait should not be allowed to become the Golden Triangle of environment protection. The proposals and common understanding that result from these extensive

9 Zhuang Shijian, Ideas on Strengthening Exchange and Cooperation on Environmental Protection in the Taiwan Strait, *Chinese Journal of Environmental Management*, No. 5, 1994. (in Chinese)

10 Interviews on the 8th Phase of the Strait – The Old Professor: Taiwan's Environmental Issues and Cooperation between the Two Sides of the Taiwan Strait, at http://www.people.com.cn, 27 February 2004. (in Chinese)

conversations not only provide technical and policy assistance to the authorities, but also lay a solid foundation for cross-strait cooperation on the protection of the marine environment.

B. The International Trend toward Regionalization in the Cooperation on Environmental Protection

The globalization and regionalization trends in the economy also affect environmental protection. Pollutants have expanded their geographic reach and often cross domestic administrative and international borders. Some rivers flow through multiple countries, and air pollution can almost be considered global. Therefore, many instances of environmental pollution spread to other countries or regions as soon as they appear, turning into regional and even global environmental issues. The pollution and damage to the ecology in the Taiwan Strait demonstrate that the problem is regional, as they are caused by the economic and social activities by people in both Fujian and Taiwan. Accordingly, policies for preventing environmental pollution and restoring ecological balance are also often regional and international. In recent years, proposals and conferences by regional and international organizations have become increasingly common. The Vision for the Asian Environment is one such example in Asia. Protection of the marine environment has been a major item on the agenda in every one of the comprehensive marine management forums of the Asia-Pacific Economic Cooperation. Outside Asia, the 21st Century Agenda and the United Nations' International Environmental Organization are examples. In particular, the International Organization for Standardization (ISO) has issued the ISO 14000 environmental management standards to measure the environmental impact of industrial activities worldwide, making it possible to gauge the extent of environmental pollution across different countries with one set of standards.[11] Meanwhile, support has grown for the establishment of regional and international environmental safety mechanisms. Thus, the joint management of the environment of the Taiwan Strait between China Mainland and China Taiwan is an inevitable step in this trend.

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11 Jin Hongfan, Sustainable Development and the Taiwan Strait Environmental Protection Belt, *Environmental Protection and Economic Development of the Asia Pacific Region*, No. 1, 1998. (in Chinese)

C. The Relationship between Environmental Protection and Economic Competitiveness

Currently, the Taiwan Strait has a robust regional economy. However, environmental protection lags behind economic development, and yet environmental protection is a key measure of competitiveness in a sustainable regional economy. Thus, more attention must be paid to environmental protection and ecological balance, especially that of the Taiwan Strait, which affects the economic development of coastal areas from the southern East China Sea to the northern South China Sea, including Fujian, Taiwan, Guangdong, Hong Kong, and Macau. Due to longstanding political tensions between the two shores of the strait, the environment has been neglected, and joint protection has been a pipe dream. Without any intervention, the Taiwan Strait will become a polluted strait, not only harming the economic competitiveness of Fujian and Taiwan but also affecting the economic and social development in the surrounding areas and the ecological balance of the western Pacific Ocean.[12] It is evident that the protection of the Taiwan Strait environment is an urgent issue that must be addressed. If the two sides of the strait can overcome their political differences, work together to manage the marine environment, and place the region on the road of sustainable development by combining economic development with environmental protection, the economic competitiveness of Fujian and Taiwan will receive a significant boost.

Fujian and Taiwan share one sky and one strait, as well as close economic, cultural, and environmental ties. With increasing contact and communication, the existing regional exchanges on the environment will certainly lead to regional environmental protection efforts. The emergence of cooperation on protecting the marine environment is only a matter of time.

IV. A Blueprint for Cooperation

A. Build a Joint Management Demonstration System for the Kinmen-Xiamen Marine Environment

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12 Jin Hongfan, Sustainable Development and the Taiwan Strait Environmental Protection Belt, *Environmental Protection and Economic Development of the Asia Pacific Region*, No.1, 1998. (in Chinese)

The Kinmen-Xiamen sea area, under Fujianese jurisdiction, plays a crucial role in the sustainable development of the economies, societies, and environments of both shores. Therefore, it is important to improve the management of its marine environment and protect it. Some scholars have analyzed the complementary and interactive relationship between Kinmen and Xiamen's marine environment management systems and come up with suggestions for optimizing resources and establishing a management system coordinated by the two jurisdictions, thereby solving the conflicts between the separate management systems and the common goal in managing the Kinmen-Xiamen sea area. The author will present their ideas briefly.

At the outset, strategic goals for the Kinmen-Xiamen marine environment management system should be identified. First, the Kinmen-Xiamen sea area is a single body of water. Thus, the management of this area means the comprehensive development, protection, and utilization of marine transport, tourism, biological, and other types of resources. Second, marine environment protection in this area is an issue that also concerns surrounding areas. Kinmen and Xiamen should work together and improve the comprehensive management and protection of this area. Third, marine environment protection in this area is inextricably linked to Kinmen and Xiamen's economic and social development. In developing the sea, the health of the marine environment should be maintained to support the sustainable development of the economy, society, and environment.

The main elements of the joint management should include the management of the sea, the waterworks and waste disposal. A coordinated management system should be built to combine efforts and optimize resources by using each side's advantages to compensate the other's shortcomings. To this end, resources on both two sides should first be separately organized and then integrated into a Kinmen-Xiamen marine environment management experts' committee, which will be a bridge between the two sides' resources, coordinate goals, and strengthen cooperation. Second, joint environmental consultation, information, and monitoring systems should also be established. A Kinmen-Xiamen Marine Development Forum can be held with the participation of experts, academics, and marine management personnel, and websites can provide a platform for the exchange of information and data and to promote the formation of a shared marine resource and information system. A jointly-managed marine environment monitoring and coordinating agency would allocate responsibilities and resources and prepare to

take the monitoring, evaluation, and complementary relationships to the next level. Third, the exchange of scientific and technological information and coordination in other aspects of sea area management should gradually become more extensive.[13]

With respect to supporting laws and regulations, some scholars believe that the joint management system should have a legal foundation. On one hand, by comparing Kinmen and Xiamen's existing laws, regulations, policies, and water management systems, common ground can be sought while differences can be respected. The two legal systems should look for areas of compatibility and connection. On the other hand, both sides should move forward with drafting and revising the laws on marine management and issue and implement regional and local management regulations that provide support to national law, such as the Xiamen-Kinmen Sea Area Development and Management Law and the Regulations on the Management of the Kinmen-Xiamen Coastal Area. These initiatives would lay a solid legal foundation for the joint management system.[14]

A Kinmen-Xiamen joint marine area management structure will proivde a significant boost to Xiamen's goal of becoming a "garden by the bay," Kinmen's momentum toward the vision of itself as an "ecological county," and the sustainable development of their economies, societies and environments. It will also strengthen communication between Xiamen and Kinmen and, of course, promote further development. To the author's knowledge, the Chinese white dolphin rescue station located on Gulangyu Island at Xiamen is the only one of its kind. If any injured or dead white dolphin is found in Kinmen, it can be sent to Xiamen for care. The two sides also have some informal, basic cooperation on the issues arising from fishermen fishing beyond each other's administrative borders. With regards to land-sourced pollution, if the two sides can cooperate and share the costs of extending the waste disposal channels in the Xiamen-to-Kinmen direction further to the Taiwan Strait, the momentum of the Kuroshio Current can be used to carry away the waste, and the above-mentioned, sarcastically-named "unexpected mini three links" will be a phenomenon of the past. The joint management system will also be significant in its role as a pioneering model as China Mainland and China Taiwan explore the possibility of building an entire Taiwan Strait joint marine environment management system. With the current smooth operation of the "mini

13 Chen Xicheng et. al., Ideas on a Kinmen-Xiamen Demonstration Region Marine Environment Joint Management System, *Fujian Environment*, No. 5, 2003. (in Chinese)

14 Chen Xicheng et. al., Ideas on a Kinmen-Xiamen Demonstration Region Marine Environment Joint Management System, *Fujian Environment*, No. 5, 2003. (in Chinese)

three links" and the general expectation for the "three direct links," the conditions for building a Kinmen-Xiamen joint marine environment management system are ripe. In the near future, many of its specific measures and system designs can be implemented on a broader level in the Taiwan Strait joint marine management system, which may even be a model for other countries and regions of the world. The Intergovernmental Conference on the Prevention and Management of Marine Pollution in the East Asian Seas has named Xiamen as a project demonstration zone. So a region that has the need and capability can take the lead, obtain concrete results, and later gradually implement the results of their cooperation on a deeper and more extensive level.

B. Establish a Taiwan Strait Environment Protection Belt

A scholar from China Mainland has proposed the establishment of a "Taiwan Strait Environment Protection Belt."[15] The author fully supports this idea. The scholar envisions the protection belt as a zone jointly established by regional governments and nongovernmental organizations. There are two reasons for calling it a protection belt rather than protection zone. First, the Taiwan Strait resembles a belt; second, "belt" denotes a loose cooperative relationship, which is less systemic than the relationship represented by the word "zone," and better reflects the current situation. A Taiwan Strait Environment Protection Belt can be driven by conference-style cooperative organizations. The relevant regional environmental management departments and nongovernmental environmental organizations and entrepreneurs can periodically or aperiodically discuss issues and goals surrounding the Taiwan Strait's environment and ecological balance and coordinate to realize set goals. In the beginning, the movement should be driven by individuals and nongovernmental entities and gradually become a joint project between the governments and the societies at large. Because the Fujian-Taiwan regional economy includes economies operating under different political and economic systems, voluntariness should be the overarching principle even in conference-style cooperative organizations. We can realize the expected results only with a consensus.

According to the scholar, the specifics of establishing a Taiwan Strait Environ-

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15 Jin Hongfan, Sustainable Development and the Taiwan Strait Environmental Protection Belt, *Environmental Protection and Economic Development of the Asia Pacific Region*, No. 1, 1998. (in Chinese)

mental Protection Belt should be based on a combination of the guidelines in the UN's Agenda 21 and the realities of the Taiwan Strait. The agenda points out that the sea "forms an integrated whole that is an essential component of the global life- support system and a positive asset that presents opportunities for sustainable development." Agenda 21 proposed seven program areas for the sustainable development of the marine environment:

(A) Integrated management and sustainable development of coastal and marine areas, including exclusive economic zones;

(B) Marine environmental protection;

(C) Sustainable use and conservation of marine living resources of the high seas;

(D) Sustainable use and conservation of marine living resources under national jurisdiction;

(E) Addressing critical uncertainties for the management of the marine environment and climate change;

(F) Strengthening international, including regional, cooperation and coordination; and

(G) Sustainable development of small islands.

Most of the above program areas are applicable to managing the environmental protection and ecological balance of the Taiwan Strait. In addition, managing the pollution of the strait is also a important part of the project. Most of the pollutants in the Taiwan Strait come from the land, and currently the rivers flowing into the strait from Fujian and Taiwan are severely contaminated. This scholar recommends that the sources of pollution on land, especially the pollution of rivers, should be tackled first in establishing the Taiwan Strait Environment Protection Belt. Cooperation in studying and remedying the problem is the best way to address it.[16]

The author believes that the environmental protection belt advocated by this scholar can be a first step as the two sides begin their cooperation. This proposal is well-suited to the current circumstances. A Taiwan Strait Environment Protection Belt and enhanced regional cooperation on environment protection will greatly benefit both Fujian and Taiwan's economic development and environmental protection efforts, and will also increase the competetitiveness of the regional

16 Jin Hongfan, Sustainable Development and the Taiwan Strait Environmental Protection Belt, *Environmental Protection and Economic Development of the Asia Pacific Region*, No. 1, 1998. (in Chinese)

economy. As a result, the Fujian-Taiwan regional economy will continue to advance at a fast clip with a new 21st-century model: economic development combined with environmental protection. After the cooperation on the Taiwan Strait Environment Protection Belt reaches a more advanced stage, the two sides can consider moving the cooperation to a systematized and more structured level. However, considering the current political environment, it is difficult to estimate the amount of time this process may take.

C. Establish a Standing Coordination and Management Organization and Exapnd Sources of Funding

To make the most of the current favorable situation, the governments of the coastal provinces and their environmental departments should work together to strengthen communication and cooperation and attempt to resolve the environmental problems in the Taiwan Strait. Possible steps include environmental cooperation agreements, environmental protection policies and pollution management plans that balance the needs of the economy and the environment, and the designation of environmental function zones and the pollutant disposal standards applicable to each, and the setting of the goal of total pollution emission and the reduction initiative. Further, to achieve long-term, regular, and fruitful communication and cooperation, Fujian and Taiwan's environmental protection organizations and communities should come to cooperation agreements, establish a single permanent coordination and communion management agency, and continually explore sources of funding dedicated to communication and cooperation on the environment. The communication and cooperation can only be normalized, and problems arising in the process – such as with respect to funding and the transfer of technology – can only be solved with guarantees in funding and organization.

D. Establish a Cross-Strait Environmental Information Exchange Center

To strengthen environmental exchange and cooperation, the exchange of information cannot remain on the level of individual exchanges. Instead, at an appropriate time in the future, a Fujian-Taiwan environmental protection information exchange center with databases and other types of information repositories should be established for sharing information. This regular channel

would allow the Taiwanese to introduce to China Taiwan China Mainland's latest research results, materials, photographs, illustrated reports, audio materials, and publications on environmental protection, as well as the prompt presentation and dissemination in Fujian, or in China Mainland through Fujian, of technology and related information and various types of news and multimedia publications from Taiwan. This center can also serve as a consulting organization and a bridge for interactions on the environment, economy, and trade between China Mainland and China Taiwan and provide comprehensive informational services. Temporary expert committees can also be convened under aegis of this center for the purpose of providing strategies and professional advice in the legal and environmental aspects of the cooperative relationship.

E. Major Joint Environmental Protection Projects

1. Oil Spills

Oil spills are a major issue in the protection of the Taiwan Strait environment. Fujian and Taiwan each has its own management system for controlling oil spills. More cooperation and technical exchange are needed to develop a cooperative cross-strait oil spill emergency plan. First, an Oil Pollution Risk Map of the Taiwan Strait should be created on the basis of research and risk identification. As for the basic indicators of oil pollution risk, some scholars have named the following: 1) the volume of ship traffic; 2) the traffic situation at sea; 3) the incidence of accidents in different sea areas; 4) the locations of oil refineries; 5) the distribution of the terminals for loading and unloading oil; 6) the locations of offshore marine resource exploration and development facilities or underwater oil pipelines.[17] Because Fujian and Taiwan are most familiar with the oil pollution risks in their own sea areas, their governments can create a more complete map of risks together by filling in each other's knowledge gaps. Second, the two sides should work on the joint development of a Taiwan Strait major oil pollution incident emergency information system and cooperate on the research on the prevention of and responses to major disasters such as oil tankers running up against rocks, oil tanker collisions or collisions of ships carrying toxic chemicals that result in oil spills or

17 China Taiwan "Ministry of Transportation and Communications," Transportation Research Institute, Building Marine Oil Spill Prevention Capabilities and International Cooperation, p. 37, November 1997. (in Chinese)

toxic leaks. A detailed database for keeping track of the times and locations for potential oil spills or toxic leaks, as well as an emergency response system that includes rescue, environmental monitoring, and prevention systems should be established. Third, an oil spill emergency consultation team made of experts from both sides should be created. An ad-hoc organization, the expert consultation team can be formed by experts hired according to the needs of the particular incident by the joint temporary command center or their branches. The experts team would be charged with providing technical assistance with the emergency response to the oil spill and should include experts from the maritime administration, shipping companies, and the agencies in charge of port affairs, rescue and salvaging, ship inspection, environmental protection, fisheries, petroleum and chemicals, public safety, firefighting, insurance, law enforcement, and scientific research, as well as experts from colleges and universities. The experts' consultation fee will come from the compensatory damages paid in connection with the incident.[18] A battery of computer experts for emergencies can modernize the managemnet of oil spill incidents, and Fujian and Taiwan can pool their existing efforts and expand them as a single system. Finally, a joint compensatory mechanism and compensation fund should be explored. This can begin as a grassroots initiative, with ship owners providing part of the funds, and gradually rise to an official level.

In addition, at the current stage, galvanizing the people on both coasts and improving their awareness of risks are effective ways to protect sensitive areas in the strait's environment. With the assistance of the maritime affairs departments, fishermen can learn some basic skills to prevent and respond to oil spills, such as stockpiling hay, sugarcane dregs, coconut shells, palm leaves, and other materials that absorb oil and learning to make fences for walling off oil during emergencies. In this respect, non-governmental organizations can serve as effective role models.

Currently, China Mainland and China Taiwan each handles oil spills based on the following documents: (1) the United Nations Convention on the Law of the Sea, MARPOL 73/78 (International Convention for the Prevention of Pollution from Ships); OPRC 1990 (International Convention on Oil Pollution Preparedness, Response and Co-operation); (2) the China Marine Oil Spill Emergency Response Plan and the Taiwan Strait Marine Oil Spill Emergency Response Plan; and (3)

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18 Chen Zhiwu, Protecting This Blue Sea: A Discussion on the Drafting and Implementation of the Taiwan Strait Oil Spill Contingency Plan, *China Water Transport*, No. 9, 2000. (in Chinese)

Taiwan's Major Marine Oil Spill Emergency Response Plan. [19]

2. The Joint Prevention of Natural Disasters

The two sides should consider establishing an environmental disaster monitoring system and marine stereoscopy warning system for the Taiwan Strait. In addition, through a "digital sea" platform, they should expedite the building of a basic marine spatial geographical information system and complete a forecasting, warning, and command system for marine weather, storms, red tides, tsunamis, and other marine disasters, thereby improving their ability to prevent and reduce the impact of disasters as well as to respond to emergencies. In areas where red tides appear frequently (such as Xiamen), multiple marine water quality testing stations and other automatic or manual testing stations should be in place to provide timely information about water pollution. Research on the prediction, warning, and responses to red tides should be initiated; warning tide lines should be drawn in sea areas of major red tide occurrences close to the coasts; the third phase in the construction of the weather disaster warning system should be expedited; the marine forecast and warning systems and the emergency response system can be improved; and typhoon and tide warning systems should be built. To improve the capability to predict red tides, monitoring zones should be demaracated in Sandu'ao, the mouth of the Minjiang River, the Pingtan coast, and the sea areas near coastal Xiamen, Kinmen, Kaohsiung, Keelung, Mazu, and other areas, and emergency response plans on the provincial, municipal, and county levels should be prepared. Further, a system for preventing and treating disease in marine animals and for ensuring the quality and safety of fishery products should be improved upon and perfected. In addition, cities on both coasts should accelerate the construction of basic environmental infrastructure, especially drainage systems for processing wastewater, and improve the ecological environment of the sea in a short period of time.

3. Protection of the Flora and Fauna

Marine pollution directly affects every kind of marine life. The Taiwan Strait was originally home to a great number of species, including rare species such as the black-faced spoonbill, Chinese white dolphin, and lancelet. The black-faced spoonbill in particular is an endangered species that hatches in the summer

19 Guo Weimin and Lin Xiaohong, The Current State of Oil Spill Prevention in the Taiwan Strait and the Outlook for Cooperation, *Safety and Health*, No. 8, 2005. (in Chinese)

in Shichengdao, Dalian and migrates to Taiwan for the winter.[20] More than a few Chinese white dolphins have been found injured or dead in the Xiamen-Kinmen sea areas in recent years. With respect to this issue, the author proposes a single Taiwan Strait biodiversity protection network that includes environmental protection managers, scientists, academics, and environmental activists. A list of rare and endangered species can prioritize protection for animals like the Chinese white dolphin, egret, and lancelet. This network can evaluate the soundness of the ecological system with structural indicators such as biodiversity, changes in the structure and number of important species and groups (like fluctuations in the number of members and the replacement of less advanced groups), the state of economically significant species in specified regions and their quality, and the frequency of red tides. In addition, the possibilities of a marine animal conservation and rescue center in Taiwan's offshore islands such as Kinmen and Mazu, and a national genetic database for endangered marine species should be considered.

4. Environmental Issues of a Taiwan Strait Tunnel

The feasibility of a Taiwan Strait tunnel, first proposed by Tsinghua Unversity expert engineer Professor Wu Zhimin, was once a hot topic among academics on both coasts. One of the first considerations in initiating such a major construction project is environmental pollution. Many are concerned that building the underwater tunnel will cause land and marine pollution. But Professor Wu pointed out, "as long as we take environmental protection seriously, the negative environmental effects of building the tunnel can be kept to a minimum." In fact, this method of increasing land area is much more environmentally friendly than first digging up the ground, destroying land and wooded areas in the process, to fill up the ocean with soil and rocks. China Mainland's southeastern coast and China Taiwan are both too densely populated. At the same time that pollution on land is being brought under control, the development of additional land has become a necessity. Moreover, the tunnel would provide an environmentally-friendly way of crossing the strait. The tunnel would allow passing trains to carry cars. According to estimates, people in the coastal and surrounding areas will own more than 10 million vehicles by 2030. Directing these vehicles through the tunnel would

20 The Rare and Precious Black-Faced Spoonbill: Star Ambassador between the Two Sides of the Strait, *Dalian Evening Post*, at http://www.fjms.net/swdyx/news.aspx?class=HYDT&id=1317, 13 July 2005. (in Chinese)

greatly reduce energy consumption.[21] The length of the tunnel would be about 150 kilometers, three times that of the tunnel in use in Europe. It would offer great advantages for moving cargo and passengers, stimulate interaction between the two coasts, and become a new factor in the growth for their economic development. However, the author remains skeptical about the tunnel. At present, the project still lacks adequate support from environmental experts and other scientists, and a simplistic comparison with other environmentally-destructive methods of achieving similar goals does not make it harmless to the ecological environment. Extreme care should be taken when considering such a huge construction project that affects people's lives and the environment on both coasts.

F. Conclusion

This article only presents some preliminary ideas on cross-strait cooperation on environmental protection, and many aspects of these ideas still require improvement and revision. To sum up, the cooperation and exchange on environmental protection between the two sides form a highly complementary relationship. On the basis of equality and mutual benefit, they can fill in each other's gaps, exchange information, invigorate regional cooperation, and orient development in a healthy direction. Enhancing mutual cooperation and exchange will not only protect the people's common interests, but also expand the international influence of the regional environmental protection efforts in the strait and promote the development of environmental technology and management in the region. This approach will accelerate progress on both sides, who will share an important role on the world stage. The uncertain and disorganized manner of regional cooperation in the past should move toward a multi-level and close cooperation.[22] As some scholars have pointed out, "to protect something as deep and expansive as the ocean, we must broaden our vision and strengthen our knowledge. More importantly, we need a sense of responsibility that pushes us to act anytime the need arises."[23] The two sides of the strait constitute one ecological community and a community

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21 Driving across the Taiwan Strait: Ideas on the Taiwan Strait Tunnel, at http://cul.book.sina.com.cn/s/2005-04-01/118773.html, 1 October 2006. (in Chinese)

22 Zhuang Shijian, Ideas on Strengthening Exchange and Cooperation on Environmental Protection in the Taiwan Strait, *China Environmental Mangement*, No. 5, 1994. (in Chinese)

23 Chang Jung-Chein, Law for the Marine Biodiversity Conservation and Management, Keelung: Taiwan Ocean University Institute of the Law of the Sea, June 2001, p. 220. (in Chinese)

with common interests. Protecting the strait requires a vision of sustainable development, and cooperation and exchange between the two coasts have become an irreversible trend of our time. With efforts from government and the people, this great systemic project will accelerate the process of solving the environmental and developmental issues in the Taiwan Strait and even become a model marine environmental protection project under the "one country, two systems" framework in the international arena.

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Cross-Strait Cooperation for the Protection of Underwater Cultural Heritage

LI Jiali*

Abstract: This article aims to provide a legal platform for cooperation between China Mainland and China Taiwan in order to protect their shared underwater cultural heritage. The author analyzes the legal basis for cross-Strait cooperation on the protection of underwater cultural heritage, proposes fundamental principles and premises on which China Mainland and China Taiwan currently cooperate, and discusses at length the potential scope and content of cross-Strait cooperation. Ultimately, the author drafts a plan for cross-Strait cooperation for the protection of underwater cultural heritage.

Key Words: Underwater cultural heritage; Protection; Cross-Strait cooperation

I. Introduction

China has a long-standing history as the birthplace of ancient civilizations, leaving today's generations a rich cultural heritage, however how to properly protect China's historical wealth is an urgent issue that must be confronted. Among many problems in connection with underwater cultural heritage faced by China, the protection of underwater cultural heritage in the Taiwan Strait is especially difficult, not only because of the geographical and hydrological challenges of the region but also because of the presence of political and legislative conditions between China Mainland and China Taiwan, which are relatively segregated. In this article the author searches for a viable path through these issues, and offers some suggestions for cross-Strait cooperation on the protection of shared underwater cultural heritage.

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* LI Jiali, master candidate of International Law, Xiamen University. This article is an interim achievement of "Taiwan-related Law Research", a subproject of "Taiwan Research Project of Xiamen University" – "Project 985" Innovation Base for Philosophy and Social Science.

II. The Legal Basis for Cooperation between China Mainland and China Taiwan

There is basis for the cross-Strait cooperation on the protection of underwater cultural heritage. From the perspective of China Mainland, as early as 1989, the State Council of China Mainland enacted the Regulations of the People's Republic of China concerning the Administration of the Protection of Underwater Cultural Relics (hereinafter "the Regulations").[1] In spite of the short length of this document, these Regulations cover all aspects of the protection of underwater cultural relics in China. One of the most outstanding characteristics of the Regulations is that it identifies the ownership of cultural relics within the waters under the jurisdiction of the People's Republic of China,[2] and confirms the preferential rights of the State to dispose of cultural relics salvaged by it in its waters.[3] Such characteristic can also be seen in *lex superior* of the Regulations, Law of the People's Republic of China on Protection of Cultural Relics (hereinafter "the Law of Cultural Relics").[4] This characteristic is closely related to the special current situation of the protection of cultural relics in China.

First, China has an abundant underwater cultural heritage. Throughout history China was a powerful maritime trading country, and many cultural objects were of a long history and significant cultural and archaeological values.[5]

Second, the underwater cultural heritage of China is scattered in a special manner, including many of those left in waters of Southeast Asian countries, Japan

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1 Regulations of the People's Republic of China concerning the Administration of the Protection of Underwater Cultural Relics, at http://www.chinalaw.gov.cn/jsp/jalor/disptext.jsp?recno=1&&ttlrec=1, 10 October 2006. (in Chinese)

2 It is provided in Article 3 of the Regulations that the ownership of underwater cultural relics specified in Items (1) and (2) of Article 2 of these Regulations shall reside in the State and the State shall exercise jurisdiction over them.

3 As stipulated in Article 6, "any units or individuals that have discovered by any means underwater cultural relics specified in Items (1) and (2) of Article 2 of these Regulations shall report promptly to the State Administration for Protection of Cultural Relics or to the administrative departments for cultural relics in the localities and those that have been fished up shall be handed over promptly to the State Administration for Protection of Cultural Relics or to the administrative departments for cultural relics in the localities to be properly dealt with."

4 Law of the People's Republic of China on Protection of Cultural Relics, at http://www.chinalaw.gov.cn/jsp/jalor/disptext.jsp?recno=1&&ttlrec=3, 10 October 2006. (in Chinese)

5 Chen Yan, Maritime Silk Road, *Civilization*, No. 4, 2004. (in Chinese)

and South Korea.[6] Determining the ownership of these artifacts is increasingly complicated due to existing conflicts over marine delimitation.[7] In light of this, China Mainland adopts a policy that aims to gain ownership of its underwater cultural heritage.

Third, the theft and salvage of underwater cultural artifacts is highly prevalent. China must take a safe and conservative path so as to protect its underwater cultural heritage.[8]

In terms of China Taiwan, it in 1982 enacted the Cultural Heritage Preservation Act[9] which includes underwater cultural heritage, especially the ownership thereof, primarily in Articles 17 and 32. China Taiwan's regulations concerning underwater cultural heritage are generally the same as those found within China Mainland. In relation to rules in principle, such as the determination of ownership of underwater cultural heritage, punishment of illegal acts and the attitude toward the discovery of pieces and sites, China Mainland and China Taiwan hold a similar stance.[10] This commonality forms the basis of cross-Strait cooperation. Although there are similarities there are also differences, mainly reflected by the disposal of some specific issues, for instance, the definition of cultural relics[11] and the attitude toward cultural relics in private collections.[12]

In addition to the respective laws of China Mainland and China Taiwan, there

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6 Geng Sheng, Studies on "Maritime Silk Road", 2001 in China (I), *Southeast Asian Affairs*, No. 1, 2003. (in Chinese)

7 For example, China and Japan currently have disputes over issues related to the East China Sea. There are also various disputes concerning the South China Sea between China and the Southeast Asian States.

8 News about illicit excavation of underwater cultural heritage in the coastal areas of China frequently emerges. For a typical case, please refer to Zhao Jiabin, the On-the-Spot Salvage Record of the Sunken Boat Wanjiao No.1, *China Cultural Heritage*, No. 6, 2005 (in Chinese).

9 China Taiwan Cultural Heritage Preservation Act, at http://db.lawbank.com.tw/FLAW/FLAWDAT01.asp?lsid=FL009589, 10 October 2006. (in Chinese)

10 For example, both China Mainland and China Taiwan claim ownership of underwater cultural relics located within their respective waters, have strong positions against illegal acts directed at cultural relics, and oppose the commercial exploitation of underwater cultural relics. See Porter Hoagland, Managing the Underwater Cultural Resources of the China Seas: A Comparison of Public Policies in Mainland China and Taiwan, *The International Journal of Marine and Coastal Law*, Vol. 12, No. 2, 1997, pp. 265~283.

11 See the definition of cultural heritage found within Article 3 of the Cultural Heritage Preservation Act which is more exhaustive than that of China Mainland.

12 Taiwan is more lenient towards private cultural relics in comparison with China Mainland. See Porter Hoagland, Managing the Underwater Cultural Resources of the China Sears: A Comparison of Public Policies in Mainland China and Taiwan, *The International Journal of Marine and Coastal Law*, Vol. 12, No. 2, 1997, pp. 265~283.

are a series of international conventions which include the protection of underwater cultural heritage, such as the influential United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on the Protection of the Underwater Cultural Heritage (hereinafter "the Convention").

As the constitution for the oceans, the UNCLOS, concluded in 1982, contains direct provisions regarding underwater cultural heritage, specifically Articles 149 and 303.

Article 149 specifically deals with objects of an archaeological and historical nature found in the international seabed area (hereinafter "the Area").[13] In contrast, Article 303 is a general provision widely applied in various areas, thus directly affecting the protection of underwater cultural heritage in the area covered in this paper. Article 303(1) specifically provides that "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose."[14] Article 303(2) empowers coastal States to control the traffic of objects of an archaeological and historical nature found at sea.[15] Article 303(3) and 303(4) allow exceptions in the protection of underwater cultural heritage, stating that "[n]othing 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."[16] However, the UNCLOS does not clearly define "the rights of identifiable owners", "the law of salvage" or "other rules of admiralty". This vague exception gives rise to many disputes regarding the protection of underwater cultural heritage.

These disputes were also considered during the preparation of the United

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13 Article 149 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."

14 Article 303(1) provides that: "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose."

15 Article 303(2) provides that: "In order to control traffic in such objects, the coastal State may, in applying article 33, 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."

16 Article 303(3) provides that: "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." Article 303(4) provides that: "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."

Nations Convention on the Protection of the Underwater Cultural Heritage.[17] A compromise was proposed in the finalized Convention. That is, the law of salvage or law of finds can apply provided that certain limitations are met.[18] By granting States the right to define the law of salvage and law of finds, the ambiguity found within their concepts is reduced and this proves to be more beneficial to the protection of underwater cultural heritage. Simultaneously, it closes the gap in Article 303(2) of the UNCLOS regarding the protection of artifacts, and offers all-around protection for underwater cultural heritage in contiguous zones.[19] Those who created the Convention attached emphasis on its practicality, attracting more States to participate in and thus expanding its scope of application. The attitude towards its relationship with the UNCLOS, however, was ambiguous, providing that "[t]his 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."[20] Every State Party may derive a different conclusion from this clause subject to its current situation. Therefore, it does not help to identify the relationship between the Convention and the UNCLOS.

The making of the Convention was the "first codification of international science and technology rules and standards for underwater cultural heritage regulation and protection."[21] The Convention establishes general principles for the protection of underwater cultural heritage, including: (1) protection of public benefits, (2) preservation *in situ*, (3) prohibition of commercial exploitation, (4) international cooperation, (5) appropriate protection or proper preservation, and

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17 For these disputes, see Zhao Yajuan, *Study on UNESCO Convention on the Protection of the Underwater Cultural Heritage* (doctoral dissertation), Xiamen: Xiamen University, pp. 80~100. (in Chinese)

18 Article 4 of the Convention on the Protection of the Underwater Cultural Heritage provides that: "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 authorized 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."

19 Kuen-chen FU and Song Yuxiang, *International Legal Protection of the Underwater Cultural Heritage: Introduction of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, Beijing: Law Press China, 2006, p. 71. (in Chinese)

20 Article 3 of the Convention on the Protection of the Underwater Cultural Heritage.

21 Robert C. Blumberg, International Protection of Underwater Cultural Heritage, speech in the Conference on New Developments of the Law of the Sea and China, Xiamen, China, 9-12 March 2005.

(6) respect for the existing situation of international law.[22] To make these principles a reality, the Convention accordingly developed jurisdiction, defined underwater cultural heritage, created limitations on the application of the law of salvage and the law of finds, seizure and disposition of underwater cultural heritage and mechanisms of dispute settlement, etc.[23] The Convention, if it comes into force, "will be the most fundamental legal tool for protecting underwater cultural heritage in the world."[24] Moreover, the universal nature of the Convention will prompt many rules to evolve into customary international laws, affecting even those who do not participate. "In fact, nations which abstain from participating in or even oppose the Convention also make certain arrangements in consideration of the potential of the Convention to become effective and the possibility of approving or participating in the Convention, when they stipulate bilateral, regional or multilateral agreements regarding the protection of sunken vessels. The rules they made on technological protection are astonishingly similar to those in the Convention."[25] The protection of underwater cultural heritage is a long term goal for both China Taiwan and China Mainland. In the foreseeable future, the Convention will generate practical and profound impacts for both parties. In this regard, cross-Strait cooperation on the protection of underwater cultural heritage should also take the Convention as one of the most important legal foundations.

III. Basic Principles for Cooperation

A. Equal Negotiation

In order to facilitate cooperation, both subjects and the process of cross-

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22 Kuen-chen FU and Song Yuxiang, *International Legal Protection of the Underwater Cultural Heritage: Introduction of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, Beijing: Legal Press China, 2006, p. 53. (in Chinese)

23 For details of the said rules, see Kuen-chen FU and Song Yuxiang, *International Legal Protection of the Underwater Cultural Heritage: Introduction of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage 2001*, Beijing: Law Press China, 2006, pp. 194~218. (in Chinese)

24 Kuen-chen FU, Some Comments on the UNESCO Convention on the Protection of the Underwater Cultural Heritage, *Xiamen University Law Review*, Vol. 5, No. 2, 2003, pp. 210~230. (in Chinese)

25 Kuen-chen FU and Song Yuxiang, *International Legal Protection of the Underwater Cultural Heritage: Introduction of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, Beijing: Law Press China, 2006, p. 63. (in Chinese)

Strait cooperation must be based upon equality. In this case, the subjects are China Mainland and China Taiwan.[26] The process of cross-Strait cooperation should be based upon equal negotiation, including all prior negotiation between parties to seek the best scheme for the protection of underwater cultural heritage and the post-event negotiation to settle relevant disputes.

B. Consistency as the Basic Objective

The specific goal of such cross-Strait cooperation between China Mainland and China Taiwan is to protect underwater cultural heritage in the cooperation area. This basic objective also functions as the basis for the parties to settle disagreements, for "consistency" does not mean "identical." In actuality, it is impossible for China Mainland and China Taiwan to reach identical opinions regarding the protection of underwater cultural heritage. Instead, consistency acts as a compass for cross-Strait cooperation, dismissing the divergence of China Mainland and China Taiwan caused by different legislations and ideals of protection. Consistency between the two sides lies in their several sub-objectives.

1. Appropriate Protection of Underwater Cultural Heritage

Protection of underwater cultural heritage is the primary objective of such cooperation, and all activities conducted for cross-Strait cooperation should follow this rule. Protection here means, in a narrow sense, to keep underwater cultural heritage intact. In many respects, underwater cultural heritage has significant value including archeological, historical, economic, artistic and cultural value. In order to realize this value we must preserve our underwater cultural heritage. When the protection of underwater cultural heritage conflicts with other uses of the sea, we ought to prioritize the protection of underwater cultural heritage, however, in practice there are many difficulties in reaching this objective without compromise and in many cases it is inadvisable. For this reason, China Mainland and China Taiwan should aim to find balance if such conflict arises. Such balance is also the

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26 There are similar precedents. For example, China Mainland concluded similar agreements with Hong Kong and Macao. The Mainland and Hong Kong Closer Economic Partnership Arrangement and its annexes were signed by the Central Government and Hong Kong Special Administrative Region in Hong Kong respectively on June 29, 2003 and September 29, 2003; the Mainland and Macao Closer Economic Partnership Arrangement was signed by the Central Government and Macao Special Administrative Region in Macao on October 17, 2003, at http://www.china.org.cn/chinese/zhuanti/2004CEPA/493574.htm, 10 October 2006. (in Chinese)

solution to such conflicts found within the Convention. The Convention states that, "[e]ach State Party shall 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."[27] What is considered to be "the best practicable means" is dependent upon the reasonable consideration of each State subject to their current situation. China Mainland and China Taiwan should also prepare a "best practicable" plan for the protection of underwater cultural heritage which takes into consideration the conditions of each side.

2. Consistency in the Ownership of Underwater Cultural Heritage

Neither the UNCLOS nor the Convention contains any provision regarding the ownership of underwater cultural heritage, but this does not mean that the States cannot declare their ownership of underwater cultural heritage. (The author will discuss this issue later in this article.) In fact, China Mainland and China Taiwan have expressed their explicit, and generally similar, attitude on this issue,[28] paving the way for them to take a same position in respect to the ownership of underwater cultural heritage. Specifically, in cooperation areas, for underwater cultural heritage which China as a whole is the identified owner, China Mainland and China Taiwan should determine that such cultural heritage belongs to China and then conduct further negotiations regarding its ownership. For objects whose owner is unidentifiable or is a foreign State, China Mainland and China Taiwan ought to exercise jurisdiction or negotiate with the State, maintaining China's ownership regarding underwater cultural heritage to the greatest extent. However, this is not absolute and the protection of underwater cultural heritage ought to remain a priority.

IV. The Object and Area of Cooperation

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27 Article 5 of the Convention on the Protection of the Underwater Cultural Heritage.

28 For example, Article 3 of the Regulations of the People's Republic of China concerning the Administration of the Protection of Underwater Cultural Relics provides that: "The ownership of the underwater cultural relics specified in Items (1) and (2) of Article 2 of these Regulations shall reside in the State and the State shall exercise jurisdiction over them; with respect to underwater cultural relics specified in Item (3) of Article 2 of these Regulations, the State shall have the right to identify the owners of the objects." Article 16 of China Taiwan's Law on the Territorial Sea and the Contiguous Zone provides that: All objects of a historical nature or relics found in its territorial sea and the contiguous zone, while undertaking archaeological and scientific research, or other activities, shall belong to China Taiwan and be administered by its Government in accordance with related laws and regulations.

Cross-Strait cooperation primarily involves two aspects, the object and the area. The object of cooperation is the underwater cultural heritage, and the area of cooperation refers to the Taiwan Strait. Such a scope is anything but explicit, and problems will occur during the process of cross-Strait cooperation. In order to minimize these issues, further explanation is required.

China Mainland, China Taiwan and the Convention have different definitions of underwater cultural heritage.

China Mainland provides, in Article 2 of the Regulations, that the term "underwater cultural relics" referred to in these Regulations denotes the human cultural heritage that has historic, artistic and scientific value and that remains in the following waters:

(1) all the cultural relics of Chinese origin, or of unidentified origin, or of foreign origin that remain in the Chinese inland waters and territorial waters;

(2) cultural relics that are of Chinese origin or of unidentified origin that remain in sea areas outside the Chinese territorial waters but under Chinese jurisdiction according to the Chinese law;

(3) cultural relics of Chinese origin that remain in sea areas outside the territorial waters of any foreign country but under the jurisdiction of a certain country, or in the high seas.

The provisions in the preceding items shall not cover objects that have remained underwater since 1911 and that have nothing to do with important historical events, revolutionary movements or renowned personages.

This definition brings about two issues:

First, not all underwater cultural heritage is protected under the Regulations. Instead, only human cultural heritage that has historic, artistic and scientific value which can be classified into cultural relics is protected. (Does it mean the human cultural heritage that has no historic, artistic and scientific value cannot be protected under the Regulations?) However, the term "cultural relic" is not defined in the Regulations. The *lex superior* of the Regulations, the Law of the People's Republic of China on Protection of Cultural Relics, also lacks conceptual provisions in this regard, but defines the protected cultural relics by listing them. Meanwhile, the task to develop standards and methods for identification of cultural relics is placed upon

the administrative authority of the State Council.[29]

Second, the cultural relics protected under the Regulations are limited to a specific timeframe. Objects that have remained underwater since 1911 and that have nothing to do with important historical events, revolutionary movements or renowned personages are not protected under the Regulations.[30] However, there is no clear definition of "important historical events, revolutionary movements or renowned personages" and "having nothing to do". This will limit the ability of China Mainland and China Taiwan to rapidly and effectively protect cultural relics remaining underwater since 1911.

China Taiwan's Cultural Heritage Preservation Act does not define underwater cultural heritage either, but "uses an ineffective but more flexible definition" under which "an antique is any object that can be used for appreciation, research, development and promotion and thus has historic or artistic value or which is designated by the 'Ministry of Education'."[31] The legal status of antiques is left to the discretion of the "Ministry of Education". At the same time, China Taiwan does not set a time limit on cultural relics as China Mainland does, and allows for broader protection of cultural relics.

Different definitions of underwater cultural heritage or relics given by China Taiwan and China Mainland complicate cross-Strait cooperation. Apart from

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29 Article 2 of the Law of the People's Republic of China on Protection of Cultural Relics provides that: "The State places under its protection the following cultural relics within the boundaries of the People's Republic of China: (1) sites of ancient culture, ancient tombs, ancient architectural structures, cave temples, stone carvings and murals that are of historical, artistic or scientific value; (2) important modern and contemporary historic sites, material objects and typical buildings that are related to major historical events, revolutionary movements or famous personalities and that are highly memorable or are of great significance for education or for the preservation of historical data; (3) valuable works of art and handicraft articles dating from various historical periods; (4) important documents dating from various historical periods, and manuscripts, books and materials, etc. that are of historical, artistic or scientific value; and (5) typical material objects reflecting the social system, social production or the life of various nationalities in different historical periods. The criteria and measures for the verification of cultural relics shall be formulated by the administrative department for cultural relics under the State Council and submitted to the State Council for approval."

30 The final item of Article 2 of the Regulations provides that: "The provisions in the preceding items shall not cover objects that have remained underwater since 1911 that have nothing to do with important historical events, revolutionary movements or renowned personages."

31 Kuen-chen FU, Some Comments on the UNESCO Convention on the Protection of the Underwater Cultural Heritage, in Xiamen University Center for Oceans Law ed., *Proceedings of the Academic Symposium to Commemorate the 20th Anniversary of the UNCLOS*, August 2002, pp.159~160. (in Chinese)

those cultural relics that are accepted by the laws of one party but not the other, even relics protected under laws of both parties are protected in different manners subject to the respective standards of each party. For this reason, determining a conceptual category of underwater cultural heritage that is consistent and accepted by both parties will be helpful to reduce differences in the process of cooperation between the parties.

When considering how such a conceptual category ought to be determined there are two approaches. First, the use of provisions of the Convention to modify provisions regarding underwater cultural heritage in the laws of both parties. Article 1(1) of the Convention provides that: "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."[32] This definition limits underwater cultural heritage to a specific timeframe, more flexible in comparison to the time point used by China Mainland, but also has limitation in respect of actual content. The Convention can provide a relatively unified standard for both China Mainland and China Taiwan to define underwater cultural heritage due to its complete classification[33] of underwater cultural heritage and its broad applicability. The second approach is to adopt all provisions of China Mainland and China Taiwan on underwater cultural heritage without regard to time period or classification, and to extend the cooperative protection to all underwater cultural heritage protected by either China Mainland, China Taiwan, or by both parties. Such a way will maximize the effects of underwater cultural heritage protection within the region, however it is difficult to reach agreement since both parties have a different conceptual understanding of underwater cultural heritage.

To put it simply, the cooperative region refers specifically to the Taiwan Strait, however, the Taiwan Strait is closely related to relevant internal waters, territorial seas, contiguous zones and exclusive economic zones. There are several candidate plans for cooperation in such multiple sea areas with different legal status. According to Plan A, cooperation may be conducted across the entire sea areas of Taiwan Strait. This is a good plan which would allow both sides to realize the collective management of all underwater cultural heritage in this region, but

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32 Details of the Convention on the Protection of the Underwater Cultural Heritage, at http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO_TOPIC&URL_SECTION=201.html, 10 October 2006.

33 Article 1 of the Convention on the Protection of the Underwater Cultural Heritage.

pitifully there is little possibility to achieve integration with such extensive scope due to the blocked waterways connecting China Mainland and China Taiwan and separate administration.[34] In Plan B, underwater cultural heritage within the respective territorial seas of China Mainland and China Taiwan will be managed by each side separately, and cooperation will be conducted only within exclusive economic zones. This suits the Taiwan Strait better than Plan A in consideration of its current situation. Even after a reunion between China Mainland and China Taiwan, this can still be a good choice. Plan C is to establish regions where a lot of underwater cultural heritage is located as special protection zones, and achieve an all-around management of underwater cultural heritage in such special protection zones. While key protection may be provided to underwater cultural heritage through this plan, it is hard to divide the area into special zones. Moreover, this plan is also hindered by the current administration of the Taiwan Strait as is Plan A. In addition to these plans, there is another temporary plan suitable at the present stage, which is, the parties do not change their respective administration, but cooperate temporarily within zones where underwater cultural heritage lies. Such cooperation can be conducted at a high level, however there is yet a long distance from this plan to the final objective of this cooperation, and therefore it will be adopted only at the early stage of the cooperation.

V. Preconditions for Cooperation: Determination of Ownership of Underwater Cultural Heritage

Both China Mainland and China Taiwan are specific about the ownership of underwater cultural heritage within their respective territorial seas.[35] Disputes frequently arise due to claims of ownership regarding underwater cultural heritage

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34 The Status Quo of the "Three Direct Links" across the Straits and the Problems to Be Solved, at http://tw.people.com.cn/GB/14864/14919/2253360.html, 10 October 2006. (in Chinese)

35 According to Article 3 of the Regulations of the People's Republic of China concerning the Administration of the Protection of Underwater Cultural Relics, the ownership of the underwater cultural relics of Chinese origin, or of unidentified origin, or of foreign origin that remain in the Chinese inland waters and territorial waters shall reside in the State and the State shall exercise jurisdiction over them. Article 16 of China Taiwan's Law on the Territorial Sea and the Contiguous Zone provides that: All objects of a historical nature or relics found in its territorial sea and the contiguous zone, while undertaking archaeological and scientific research, or other activities, shall belong to China Taiwan and be administered by its Government in accordance with related laws and regulations.

found outside the territorial seas (contiguous zone, exclusive economic zone and the continental shelf) of both sides.[36] The Convention does not mention the ownership of underwater cultural heritage.[37] Negotiators of the Convention managed to avoid the issue of underwater cultural heritage ownership, claiming that "the Convention is a public international convention and would be better not to deal with sensitive property issues."[38] In reality, disputes over underwater cultural heritage ownership have not decreased as a result of this missing information within the Convention since ownership of underwater cultural heritage is an important aspect or cause of disputes over underwater cultural heritage.[39] Discussing the protection of underwater cultural heritage without paying attention to the ownership of those artifacts typically has little effect.

Determination of the ownership of underwater cultural heritage is one of the objectives of such cooperation. Besides, determining the ownership of underwater cultural heritage will decide how closely China Mainland and China Taiwan will cooperate. There are three reasons for this: First, determining the ownership of

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36 According to the Regulations of the People's Republic of China concerning the Administration of the Protection of Underwater Cultural Relics, the ownership of the underwater cultural relics of Chinese origin, or of unidentified origin that remain in sea areas outside the Chinese territorial waters but under Chinese jurisdiction according to Chinese law shall reside in the State. With respect to cultural relics of Chinese origin that remain in sea areas outside the territorial waters of any foreign country but 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. Article 16 of Taiwan's Law on the Territorial Sea and the Contiguous Zone provides that: All objects of a historical nature or relics found in its territorial sea and the contiguous zone, while undertaking archaeological and scientific research, or other activities, shall belong to China Taiwan and be administered by its Government in accordance with related laws and regulations. China Taiwan's Law on the Exclusive Economic Zone and the Continental Shelf contains no provisions relating to this issue.

37 Article 7 of the Convention on the Protection of the Underwater Cultural Heritage provides that State Parties "have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea." Such exclusive right is actually a jurisdiction, rather than ownership. The rights in other waters (contiguous zone, exclusive economic zone and continental shelf) are much narrower than those in territorial sea, not even close to ownership.

38 Roberta Garabello and Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, Leiden: Brill Academic Publishers, 2003, p. 106.

39 There are many similar cases. The well-known one is the shipwreck of "Notre Dame de la Deliverance", a Spanish treasure-hunting vessel with substantial treasures aboard sunken in waters near Florida, the United States. And as the vessel was owned by France, three countries – the United States, Spain and France were involved in the fight for the shipwreck. At http://www.people.com.cn/GB/paper68/8225/775917.html, 10 October 2006. (in Chinese)

cultural artifacts will help clarify the parties' responsibilities over that artifact, which is especially critical when determining reasonable protective measures. In comparison with other actors, the owner of underwater cultural heritage shoulders more fundamental responsibilities. Second, the determination of ownership directly affects how much input each party will make, including the input of funds, labour, material resources and technology. In case of uncertain ownership, neither party is certain about how much input they ought to contribute and is reluctant to devote too many resources. Third, determining ownership will help parties reach agreements on the disposal of underwater cultural heritage. Upon the determination of ownership, parties will pay more attention to the cooperative protection of underwater cultural heritage.

As mentioned above, there is little difference in the attitude of China Taiwan and China Mainland towards the ownership of underwater cultural heritage within their respective territorial seas. The primary difference between them is derived from the exclusive economic zone. Underwater cultural heritage in an exclusive economic zone is classified into three categories: those originating from China, those originating from foreign countries and those of uncertain origin. For underwater cultural heritage of different origins, different policies ought to be implemented.

For the underwater cultural heritage with certain ownership originating from China, China Mainland and China Taiwan should hold consistent positions, namely claiming that it is owned by China and on this basis negotiating to determine its actual ownership (as suggested above). For underwater cultural heritage with controversial ownership, the parties may put aside their controversy and conduct joint protection. For underwater cultural heritage originating from foreign countries, China may recognize the ownership of underwater cultural heritage by the foreign country of origin if the foreign country also agrees to recognize the ownership of underwater cultural heritage originating form China found within its exclusive economic zones. For underwater cultural heritage whose State of origin does not include an agreement on the recognition of mutual ownership with China or whose State of origin remains uncertain, then such an artifact would be protected as the common underwater culture heritage of humankind.

It is worthwhile to note that we cannot equate the determination of ownership of underwater cultural artifacts with the exercise of jurisdiction over such artifacts.

According to the principle of "preservation *in situ,*"[40] the territorial jurisdiction of each State concerning underwater cultural heritage is still preferential, and the separation of jurisdiction and ownership does not conflict with the tenets of the Convention.[41] So long as ownership is precluded, jurisdiction stays a prevailing consideration of the Convention.

More than that, the determination of ownership detaches from the political situations of China Mainland and China Taiwan. It is just a tool for the purpose of facilitating the protection of underwater cultural heritage. Fundamentally, underwater cultural heritage belonging to either China Mainland or China Taiwan belongs to Chinese people.

VI. Content of the Cooperation

A. Structural Improvement

1. Establish a Cooperative Organization

It is necessary to establish an organization responsible for coordinating effective cooperation between China Mainland and China Taiwan for the protection of underwater cultural heritage. The nature and authority of this coordinating body would be largely dependent on the desire of both parties to cooperate. Nevertheless, a coordinating organization like this should be authorized at least to exercise all possible powers that China Mainland and China Taiwan can confer for the administration of underwater cultural heritage. This would ensure the alignment of powers and responsibilities for the protection of underwater cultural heritage and improve the efficiency of such protection. The powers of this organization would continue to expand as cross-Strait cooperation deepens.

2. Establish an Information Sharing System

Although China Mainland and China Taiwan have their own respective rules and regulations for the registration and classification of cultural relics, they have

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40 Article 2(5) of the Convention on the Protection of the Underwater Cultural Heritage 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."

41 The Convention does not provide that State Parties have the ownership of underwater cultural heritage, but that "a State Party 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 interferences with its sovereign rights or jurisdiction."

proven to be inadequate for the protection of underwater cultural heritage. First, China Mainland and China Taiwan do not have complete information regarding underwater cultural heritage.[42] Second, this limited information is not entirely open, and communication on this problem between China Mainland and China Taiwan has been restricted, making cross-Strait cooperation more difficult. Therefore, it is necessary for the two parties to establish an information sharing system regarding underwater cultural heritage. Such an information sharing system should cover not only the distribution and conditions of underwater cultural heritage, but also information regarding archaeological investigations, excavation and protection, as well as illicit excavation of underwater cultural heritage and the corresponding laws and regulations. With this information sharing system, cross-Strait cooperators would be able to have a complete picture of the protection of underwater cultural heritage and provide references and experience for further cross-Strait cooperation.

As this information sharing system develops it could expand globally. The Convention contains a rule about cooperation and information-sharing.[43] We can exchange information regarding underwater cultural heritage owned by China Mainland and China Taiwan with other State Parties to the Convention then we can increase the available information for the protection of underwater cultural heritage, provided that such an exchange does not violate the laws of China Mainland or China Taiwan.

3. The Establishment of a Reporting and Awarding Mechanism and a Foundation for the Protection of Underwater Cultural Heritage

Both China Mainland and China Taiwan have laws providing mechanisms for the reporting and awarding in regards to the discovery of underwater cultural heritage, though it is usually ineffective at hindering illicit excavation activities. This is typically caused by a large gap[44] between the substantial economic value of underwater cultural heritage and the government's nominal award. There is no solution to this at present. It is impossible for the government to unlimitedly increase the reward for the discovery of underwater cultural heritage. The government is currently struggling to fund the protection of underwater cultural

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42 Relevant data are primarily directed at onshore cultural relics, and data about underwater cultural heritage are rare.

43 See Article 19 (Cooperation and information-sharing) of the Convention on the Protection of the Underwater Cultural Heritage.

44 Zhao Yajuan, *Study on UNESCO Convention on the Protection of the Underwater Cultural Heritage* (doctoral dissertation), Xiamen: Xiamen University, p. 160. (in Chinese)

heritage, let alone to award those who find it. In spite of this, improving these rewards may be a viable option until we find a more suitable solution. As to the sources of such rewards, the author of this article believes that it cannot rely on grants alone. China Mainland and China Taiwan may attempt to jointly create a foundation called "Foundation for the Protection of Underwater Cultural Heritage" or similar with funds contributed by the authorities administering the protection of underwater cultural heritage and its beneficiaries. The government may consider raising funds through a variety of methods. For example, they may raise funds from visitors and exhibitions of underwater cultural heritage, by taking a portion of the profits received by those who benefit from the protection of underwater cultural heritage such as auction firms or other institutions, or through acquiring a certain portion of fines paid by illicit excavators or a certain percentage of taxes, and then contributing such funds to the work of this foundation. In fact, China Mainland has already adopted some of these practices.[45] This foundation can be used to award those who find underwater cultural heritage and protect underwater cultural sites, so as to replenish the protection funds. Similar systems have long since existed in Western European countries. In Western Europe, funds for the protection of cultural heritage come from a variety of sources. This diversity means that "the management expenses of a cultural heritage organization may be of a government or non-government source. Government sources include financial budgets and subsidies that come directly from the government and financial policies through which the government provides indirect support. Non-government sources include donations made by private companies, institutions and individuals and revenues raised by the heritage organization."[46] However, due to the differences between the economic conditions of China Mainland and China Taiwan as well as the complexity and differences of cultural artifact management systems, it is still up to the parties' further negotiations whether or not, and to what extent, those systems will be adopted.

To supplement the above measures, China Mainland and China Taiwan should implement strict penalties so as to stop illicit excavation of underwater cultural

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45 In 1997, the State Council of China enacted the Circular concerning the Strengthening and Improvement of the Work Related to Cultural Relics (Guo Fa [1997] No. 13), demanding to incorporate the protection of cultural relics into financial budget. See Zhang Wenbin, Legislation concerning the Administration of China's Cultural Relics in New Era, *Social Sciences in China*, No. 1, 2003, p. 334.

46 XU Songling, *The Third National Policy: Discussion on the Chinese Culture and Natural Heritage Conservation*, Beijing: Science Press, 2003, p. 81. (in Chinese)

heritage at two ends.

Through the reporting system, which is based on the information sharing system mentioned above, China Mainland and China Taiwan can notify each other of information regarding the discovery of underwater cultural heritage, and then jointly draft a protection plan.

4. Establish a Licensing System

The licensing system mentioned here primarily refers to the licensing system in the process of archaeological excavation and scientific research. It also includes licensing in connection with those activities which may unknowingly affect underwater cultural heritage. The former is meant to be a complete set of regulations covering the protection of underwater cultural heritage, influencing the overall environment of cultural heritage preservation, qualifications for archaeological excavation and scientific research and so on. China Mainland and China Taiwan should to the greatest extent reach an agreement on the complete set of standards. For the latter, one of the licensing conditions for other marine activities is to set certain standards to prevent the damage of underwater cultural heritage.

5. Improve the Dispute Settlement Mechanisms

In the process of cross-Strait cooperation on the protection of underwater cultural heritage, disputes are inevitable. As stated above, the parties may dispute the ownership of underwater cultural heritage or be unable to reach an agreement regarding the action taken during cooperation. These disputes should be settled by both parties through mechanisms of equal negotiation.

In instances where a dispute cannot be settled by the parties through negotiation, China Mainland or China Taiwan may consider filing the dispute for judicial settlement which, however this relies on the establishment of a judicial relationship. At present, difficulties remain in solving disputes over underwater cultural heritage in a judicial manner due to poor judicial communication between China Mainland and China Taiwan. In spite of this, we can foresee that the judicial settlement of such issues will be more viable after China Mainland and China Taiwan reunite and establish better judicial exchange systems.

B. Content Improvement

1. Protection and Management i*n situ*

In the Convention, "protection *in situ*" is one of the basic principles for the

protection of underwater cultural heritage, and China Mainland and China Taiwan should also take it as one of the basic principles of cross-Strait cooperation. This is, on one hand, because the "deep sea allows better protection of underwater cultural relics especially organics. Underwater sediment undoubtedly functions as the protective film or antiseptic of relics which are usually better preserved than underground cultural relics."[47] On the other hand, any activity involving underwater cultural heritage risks damaging such heritage. Therefore, "protection *in situ*" is the best option to protect underwater cultural heritage and establishing reserve areas is a good way to practice the principle of protection *in situ*.

Both China Mainland and China Taiwan have corresponding regulations concerning protection *in situ* or reserve areas. Article 22 of the Marine Environment Protection Law of the People's Republic of China provides that, "[i]n an area that possesses one of the following characteristics, a marine nature reserve may be established: … (5) Other areas which call for special protection."[48] In notes to this law, it writes that, "other areas which call for special protection include: … (4) historic and archaeological areas which, due to their historic or archaeological value, require protection, particularly areas where relics of human's marine activities and ancient sunken vessels, shipwrecks, and relics of ancient marine wars are located."[49] More directly, Article 5 of the Regulations states that, "On the basis of the value of underwater cultural relics, the State Council and the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government may in accordance with the pertinent procedures specified in the provisions in Chapter II of the Law of the People's Republic of China on Protection of Cultural Relics, determine the underwater cultural relics protection units and underwater cultural relics reserves at the national or provincial levels and publicly announce them." In Article 9 of the Administrative Measures concerning the Innocent Passage of Foreign Ships through the Territorial Sea of the China Taiwan states that, foreign ships shall stow their fishing gear and keep

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47 See Yoshio Oe, Wang Jun trans., *An Introduction to Underwater Archaeology*, Beijing: Cultural Relics Press, 1996, p. 129. (in Chinese)

48 Office of Policy and Regulation, State Oceanic Administration ed., *Collection of the Sea Laws and Regulations of the People's Republic of China*, Beijing: Law Press China, 2001, p. 20. (in Chinese)

49 Legislative Affairs Commission, the Standing Committee of the National People's Congress of the People's Republic of China ed., Zhang Haoruo and Bian Yaowu ed., *Interpretations of Marine Environmental Protection Law of the People's Republic of China*, Beijing: Law Press China, 2000, p. 44. (in Chinese)

it out of the water while they pass through the territorial sea of China Taiwan. Though it is designed for the protection of China Taiwan's fisheries, this provision is objectively helpful to the protection of underwater cultural heritage.

There are two types of reserve areas. The first kind is where temporary protection of unconfirmed underwater cultural heritage is conducted. The second is where permanent reserve areas are established to protect sites of confirmed underwater cultural heritage. Although their objectives are different, the establishment and management of both types of reserve areas require the authorization of the coordinating organs or the respective authorities of China Mainland and China Taiwan. Meanwhile, further negotiation is needed on the authority and specific management of these reserve areas.

The establishment of relevant reserve areas or protection *in situ* is likely to encounter other problems. For instance, the protection of cultural heritage is not a circumstance of cancellation, change or suspension of fishery rights as listed in Article 29 of Taiwan Fishery Law.[50] When controversies arise between fishing activities and the protection of underwater cultural heritage, the relevant authority is likely not to concede to the protection of underwater cultural heritage according to fisheries law. Moreover, subject to the principle that *lex superior* takes priority over *lex posterio*r, specific legal clauses, such as the Regulations cannot take priority if they conflict with laws governing other marine purposes. Therefore, in the establishment of underwater cultural reserve areas or measures related to the protection *in situ*, priority should be given to the incorporation of such principles into applicable *lex superior* and additionally their coherence with other marine purposes.

Where reserve areas cannot be established, China Mainland and China Taiwan must negotiate a method for protection *in situ*.

2. Exploitation

Exploitation of underwater cultural heritage refers to activities with these artifacts as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.[51] It actually involves activities in two aspects, underwater archaeology or scientific activities and

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50 At http://www.taxchina.cn/StatuteLib_statuteDetail.asp?StatuteId=2600043&key, 27 December 2006.

51 Kuen-chen FU and Song Yuxiang, *International Legal Protection of the Underwater Cultural Heritage: Introduction of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, Beijing: Law Press China, 2006, p. 8. (in Chinese)

commercial development activities. With these different natures in mind we ought to treat the various forms of exploitation differently.

a. Underwater Archaeology and Scientific Activities

China Mainland permits the exploitation of underwater cultural heritage for the purpose of the protection of cultural relics and scientific research only. Any units or individuals that intend to conduct such activities in China Mainland's waters are subject to the approval of the State Administration for Protection of Cultural Relics. Foreign organizations and persons that intend to conduct such activities in China Mainland's waters are even required to obtain the approval of the State Council of the People's Republic of China.[52] China Taiwan's provisions regarding these cases are much more ambiguous.[53] Meanwhile, it is worthwhile to note that, with China's acceptance of the Convention, its attitude towards exploitation will affect the extent China Mainland and China Taiwan develop the underwater cultural heritage. According to the Convention, "underwater cultural heritage shall not be commercially exploited," and "no authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of" Article 10.[54] The only exception is that, "[a] State Party 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 as provided for by international law including the United Nations Convention on the Law of the Sea."[55] The article of

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52 See Article 7 of the Regulations of the People's Republic of China concerning the Administration of the Protection of Underwater Cultural Relics, at http://210.34.12.1/cols/Web/Marine%20Law/LAW11.htm, 10 October 2006. (in Chinese)

53 China Taiwan's Cultural Heritage Preservation Act contains no provisions prohibiting the exploitation of cultural relics, but some ambiguous rules. For example, Article 10 provides that: Materials of cultural heritage subsidized by the government, such as drawing plans with explanatory illustrations, photos, samples or reports obtained in the course of any investigations, excavations, maintenance, restoration, reuse, teachings and documentations, shall be submitted to the appropriate competent authority for collection and preservation. The content of materials set forth in the preceding paragraph, shall be disclosed to the public by the competent authority, unless the disclosure involves the safety of the cultural heritage or otherwise provided by other laws and regulations.

54 Articles 2(7) and 10(1) of the Convention on the Protection of the Underwater Cultural Heritage, at http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html, 10 October 2006.

55 Article 10(2) of the Convention on the Protection of the Underwater Cultural Heritage, at http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html, 10 October 2006.

the Convention prohibiting commercial exploitation empowers every State Party to conduct archaeological excavation and scientific research in its own exclusive economic zone or on its continental shelf. However, it also provides that, when a State Party intends to commit an act of exploitation in its exclusive economic zone or on its continental shelf, it shall consult all other State Parties concerned.[56] This shackles the State Parties in regards to the exploitation of underwater cultural heritage. In terms of the protection of underwater cultural heritage in China Mainland and China Taiwan, this restriction is reflected in two situations: for underwater cultural heritage owned by China Mainland, China Taiwan or solely related to China Mainland and China Taiwan, the coordinating mechanism of the Convention equals the coordination between China Mainland and China Taiwan to prepare and follow uniform standards for archaeological excavation and scientific activities related to underwater cultural heritage. If they cannot prepare uniform standards, cooperative exploitation should be conducted on the premise that the standards of both parties for underwater cultural heritage are satisfied. Each party should be cooperative if the other party prohibits archaeological excavation and scientific research. In cases of archaeological excavation and scientific research where a third party is involved, cooperation should be conducted in consultation with the third party, and if no agreement can be reached then the excavation plan should be temporarily suspended.

It should be noted that, to excavate a relic is to damage it. Seabed investigations are particularly harmful to underwater relics no matter how carefully the work is done.[57] For archaeological excavation, China Mainland and China Taiwan should create corresponding procedures for the implementation of protection measures, covering prior approval, process supervision and post-event report and inspection. The parties may negotiate on specific operational issues in procedural affairs, such as establishment of approving standards, scope and method of supervision, content of the report and inspection method.

b. Commercial Exploitation

Article 2(7) of the Convention states that, "underwater cultural heritage shall not be commercially exploited," taking the prohibition of commercial exploitation

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56 Article 10(3) of the Convention on the Protection of the Underwater Cultural Heritage, at http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html, 10 October 2006.

57 Yoshio Oe, Wang Jun trans., *An Introduction to Underwater Archaeology*, Beijing: Cultural Relics Press, 1996, p. 142. (in Chinese)

as one principle for the protection of underwater cultural heritage. However, the Convention does not provide a clear definition of commercial exploitation.

China Mainland's legislation shares a different attitude towards commercial exploitation than the style of the Convention, only prohibiting commercial exploitation of underwater cultural heritage during excavation and salvage. In fact, Chinese citizens and vessels flying the flag of China rarely conduct commercial salvage of underwater cultural heritage. In addition to the legal prohibition, conducting commercial salvage in Chinese waters is difficult to undertake due to the low level of development of deep sea salvage technologies and a shortage of financial resources.[58] With increasing economic development in China, however, these constraints on commercial salvage will become less significant, and China's laws in this regard will change accordingly.

China Mainland's legislation does not contain any law concerning whether or not salvaged underwater cultural heritage can be commercially utilized.[59] China Taiwan also has ambiguous provisions concerning commercial exploitation.

The provisions of China Mainland and China Taiwan are quite different from those of the Convention. Predictably, conflicts will be inevitable when the Convention enters into effect in the future. China Mainland and China Taiwan should amend their respective laws in a timely manner to align with the Convention. Simultaneously, since the Convention does not provide a clear definition of commercial exploitation, China Mainland and China Taiwan should consider defining the commercial exploitation when they amend this part of the laws and consulting with each other on this matter to achieve consensus.

3. The Import and Export of Underwater Cultural Heritage

In the wake of the exploitation of underwater cultural heritage follows the issue of import and export of these artifacts. Article 40 of China Taiwan's Statutes Governing Relation between Peoples of the Taiwan Area and the Mainland Area, states that, "goods of the Mainland Area shipped or brought into the Taiwan Area shall be treated as imports."[60] Both China Mainland and China Taiwan strictly

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58 Kuen-chen FU and Song Yuxiang, *International Legal Protection of the Underwater Cultural Heritage: Introduction of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, Beijing: Law Press China, 2006, p. 225. (in Chinese)

59 Kuen-chen FU and Song Yuxiang, *International Legal Protection of the Underwater Cultural Heritage: Introduction of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, Beijing: Law Press China, 2006, p. 225. (in Chinese)

60 Chen Zhang-zhi and Lee Yung-fen eds., Collection of Transboundary Laws, Taipei: San Min Book Co., Ltd., 2002, p. 1135. (in Chinese)

restrict the export of underwater cultural heritage,[61] but turn a blind eye to its importation. Consequently, their respective underwater cultural heritage may flow into the other party's territory. In response, the parties should return underwater cultural heritage belonging to the other party while they simultaneously take measures to halt the export of underwater cultural heritage. Besides, they should register their respective stolen or lost underwater cultural heritage under the information sharing system to jointly track their whereabouts.

4. Cooperation between Law Enforcement

In order to have effective cross-Strait cooperation regarding the protection of underwater cultural heritage, joint action to combat against illicit theft, trade or the destruction of underwater cultural heritage and the actors committing such acts is indispensable. The success of cooperation relies to a large extent on the cooperation between the marine law enforcement organizations of the parties and their judicial coordination. Therefore, the parties should improve regulations concerning judicial coordination as soon as possible. Whether or not a joint marine law enforcement organization can be established is further up to the wills of the parties.

VII. Conclusion

From the discussions above, we can see that there is room for the parties to expand and enhance their cooperation in this area. However, this does not mean that results can be achieved quickly. It's actually very difficult to implement in-depth cooperative measures in a short time due to the relative separation of China Mainland and China Taiwan. For now, the most viable plan is to conduct partial cooperation. That is, the parties should, under the administration of their respective competent authorities, cooperate on some, but not all, aspects of the protection

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61 China Taiwan's Cultural Heritage Preservation Act, Article 71, at http://db.lawbank.com.tw/FLAWFLAWDAT01.asp?lsid=FL009589, 10 October 2006. (in Chinese) Article 10 of the Regulations of the People's Republic of China concerning the Administration of the Protection of Underwater Cultural Relics provides that: "Those who, in violation of the provisions in Articles 5, 6 and 7 of these Regulations, damage underwater cultural relics, or explore, excavate or dredge up underwater cultural relics without authorization, or hide, share secretly, traffic in, illicitly sell or illicitly export underwater cultural relics, if the circumstances are found to be those specified in the provisions in Article 30 and 31 of the Cultural Relics Protection Law of the People's Republic of the China, shall be given administrative sanctions or have their criminal liability investigated in accordance with the law," at http://210.34.12.2/cols/Web/Marine%20Law/LAW11.htm, 10 October 2006. (in Chinese)

of underwater cultural heritage. This could include actions such as joint combat against illicit traffic and joint underwater archaeological surveys.

Once parties are cooperating in some respects, the separation of the two sides will be lessened. They may consider overall cooperation since the parties have accumulated mutual experience concerning the protection of underwater cultural heritage and the judicial assistance and the level of understanding between the parties have been further heightened. Such overall cooperation is still general in nature, but offers a unanimous perspective for cross-Strait cooperation. For instance, both parties could establish a coordinating organization with the parties' authorization to coordinate and dispose of issues related to the protection of underwater cultural heritage in China Mainland and China Taiwan. This coordinating organization could be private or quasi-governmental, and may consider the overall condition of protection-related issues, make suggestions and even take some actions in a unified way while the parties reserve the right to make final decisions on key issues. On this basis, China Mainland and China Taiwan can also cooperate legislatively by formulating the same or similar laws.

Should further cooperation develop and the political and judicial separations between the parties lessen, they may establish a collective institution to manage their underwater cultural heritage (or even an institution to collectively manage the underwater cultural heritage located in China Mainland, China Taiwan, Hong Kong and Macau). This institution may take control of all affairs related to the management of underwater cultural heritage on both sides. The creation of such an institution does not deprive the parties' respective competent organs of their powers, and, on the contrary, may serve as an official coordinating institution to make cooperation more effective. We can also expect the establishment of an organization to carry out cross-Strait marine law enforcement whose functions may include issues related to underwater cultural heritage.

As first stated, China is a country with a rich history and in abundance in historic and cultural relics. The underwater cultural heritage, which is full of cultural atmosphere and historic value, is one of China's most precious resources. Its loss and damage would be a loss for the Chinese nation and even the world. China Mainland and China Taiwan should put aside their differences and cooperate on this issue to reap the long-term benefits.

Translator: LI Shaoning
Editor (English): David Joseph Devlaeminck

提单仲裁条款效力的案例研究

张丽英 *

内容摘要: 随着中国对外贸易和海事活动的发展，关于一国的仲裁管辖权与另一国的司法管辖权之间的冲突不断增加。简要回顾了中国在提单仲裁条款效力方面的司法实践后，笔者建议海事法官应该对提单载有或并入的仲裁条款给予充分的宽容，这是解决海事争端管辖权冲突的适当方法。

关键词: 仲裁条款　提单　管辖权冲突

随着中国对外贸易和海事活动的快速发展，近年来我国国际贸易和海事争端的数量也有所增加。与此同时，关于一国的仲裁管辖权与另一国的诉讼管辖权之间的冲突案例显著上升。然而，鉴于相关实践经验的缺乏，在这点上我国仍缺少完备、充分的规章制度。[1] 为了更有效地保护中国当事人的利益，大部分国内法院都倾向于坚持自身的司法管辖权，[2] 从而导致了管辖权冲突。此类行为通常引起平行诉讼，这对我国的投资环境造成了负面影响。

由于提单和租船合同的特点，有多种理论都否认载于或并入提单的仲裁条款的效力。因此，若坚持中国法院的管辖权将不利于中国的长期对外开放政策和对外贸易。而大部分的西方国家对于管辖权冲突已经有相当完备的规章制度。本论文致力于提出笔者对于解决仲裁管辖权与司法管辖权之间的冲突的意见。

一、提单下法律关系的复杂性和管辖权冲突

提单下法律关系的复杂性也导致了海事领域大量的管辖权冲突。虽然载于或并入提单的仲裁条款的效力已经在国际实践和国内实践中得到承认，但仍然存在

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* 张丽英，中国政法大学国际法学院副院长、教授，中国海事仲裁委员会仲裁员。张教授的主要研究领域和专长为海商法、世贸组织法和国际经济法。

1 只有一个条款与该问题相关，即 1992 年最高人民法院《关于适用〈中华人民共和国民事诉讼法〉若干问题的意见》第 305 条。

2 张晓梅：《我国涉外海事诉讼管辖权之研究》，下载于 http://www.cnki.net/oldcnki/index4.htm，2007 年 11 月 15 日。

提单仲裁条款被认定无效的部分情形。例如，由于提单只要求一方签名，基于无法满足相关法规对于书面形式的要求，仲裁条款往往被视为无效。同时，如果租船合同中的仲裁条款不能有效地并入提单，该条款即无法适用于提单持有人。此外，一些提单之外的原因所引起的争议也常被援引为仲裁条款无效的抗辩理由，如海难救助、提单的陆运区段、共同海损、个人伤害、代理和保险等问题。类似案例在中国都存在。举例来说，海难救助的发生可能与提单运输有联系，那么问题就在于提单的仲裁条款是否适用于救助合同引起的争议。在某真实案例中，提单背面条款规定“本提单项下所产生的任何纠纷应在伦敦仲裁”，但中方当事人依然将争议提交至中国法院，声称海难救助不应被视作“提单项下的”纠纷，故而引发了两国仲裁管辖权与司法管辖权之间的冲突。[3]

虽然中国法院给予仲裁协议以全效力，但中国对仲裁条款的司法态度并不明朗。在大多数提单仲裁条款被认定无效的案例中，中国法院倾向于保护中国当事人的利益。许多学者认为，如果一国确实要在法律案件中保护其国民，应当尊重他国的仲裁管辖权；否则，同一案件提交 2 个管辖（机构）实际上构成了有关各方之间的重复诉讼，而不是保护当事人的利益。现今，许多中国法院与美国法院在 1967 年 Indussa 案中所采取的立场相同，[4] 尽管提单载有仲裁条款或法院选择条款，仍坚持中国法院具有管辖权。因此，有些案例被中国法院受理的同时也开始在其他国家起诉。此外，中国也缺乏相关的法律法规和原则。

二、提单仲裁条款的效力

有关海运的诉讼和仲裁冲突主要是由提单仲裁条款纠纷引起的。如今似乎并没有很多关于提单仲裁条款效力的纠纷。然而，对这些条款效力的接受实际上经历了一个相当漫长的过程。因此，中国对于提单仲裁条款的承认并非绝对有保证的。实践中，部分中国法院仍然否认这些条款的效力并坚持其自身的管辖权，从

3 “Joanna V”号案件。货船“Joanna V”号（悬挂塞浦路斯国旗）由一家中国贸易公司承租，用于将大豆从阿根廷圣洛伦索运至中国宁波港。当货船离开圣洛伦索时搁浅了，随后又根据 LOF 1995 格式合同得到救助。船东宣布为共同海损。船舶脱浅后救助人要求提供担保，船舶一直被滞留到货物的保险公司（中国）提供相应的担保。中国货方的保险公司在中国起诉船东因疏忽大意导致搁浅，要求追偿救助费用。被告基于提单仲裁条款申请暂缓在中国的诉讼程序。中国法院驳回被告的请求并提出 LOF 合同下的救助索赔不在提单仲裁条款的范围内。被告上诉到上级法院，诉讼请求因相同的理由再次被驳回。同时，根据提单仲裁条款规定的提单项下的所有纠纷应提交伦敦仲裁，船东将与货方之间的纠纷提交伦敦仲裁。仲裁庭裁决中国保险公司应当支付分担的共同海损费用总计 367000 美元和因扣押造成的共计 28500 美元的损失及其利息。中国保险公司对在英国的仲裁程序提出异议并向伦敦高等法院申请暂缓仲裁程序，但被驳回。

4 Indussa Corp. v. S. S. Ranborg (1967) AMC 589.

而导致了外国仲裁或司法管辖和中国司法管辖之间的冲突。

提单分为2种类型。一种是基于当事人之间的租船合同签发的租船合同提单，另一种是由承运人和托运人签订的班轮提单。对前者来说，提单仲裁条款的效力取决于提单中的并入条款是否能够使仲裁条款列入租约；对后者而言，由于提单是由承运人单方面签发，提单往往受承运人居住地仲裁管辖。这显然是对承运人有利，因为他们更熟悉当地法律环境并且可以有效地降低司法成本。因此，对于货物所有人是不公平的。

在不同国家，提单仲裁条款的效力也不同。部分国家如澳大利亚和意大利，清楚地排除了其有效性；而部分国家则视其为协议管辖而承认其效力；还有一些国家采用互惠原则来决定其效力，但更多国家对该问题并没有明确的立场，既不明确承认其有效性也不完全否认其效力，而是在很大程度上留给法官在具体案件审判中自由裁量（尤其是中国）。

欧洲大陆国家的主流观点是基本承认提单的仲裁条款或法院选择条款的效力。迄今为止，在荷兰、法国、德国和其他欧洲大陆国家裁定的涉及中国远洋运输集团的所有案件中，均未否认仲裁条款的效力。

提单仲裁条款的效力主要涉及 2 个问题，一个是提单是否符合法律规定的书面形式的要求，另一个是非直接提单关系的当事人是否受提单管辖权条款的约束。

从多国的司法实践中来看，提单仲裁条款已经获得了广泛的承认，这可以由中国海商法协会于 1993 年做的问卷调查的统计数据证实。英国海商法协会的回答是，提单仲裁条款如果是清楚且完整的，其效力就会得到英国法的承认；荷兰海商法协会的回复是，荷兰法院承认提单仲裁条款的效力，但是该条款不能适用于不是由提单持有人和承运人协议签订的其他文件（如未并入提单的租船合同）；加拿大海商法协会和挪威海商法协会均认为，其国内法院会承认提单仲裁条款的效力；美国海商法协会也表示提单仲裁条款往往具有法律效力。

值得注意的是，美国对提单仲裁条款效力的承认经历了一个过程。美国法院过去倾向于保护货物所有人的利益，并且习惯于认为提单管辖权条款无效。这一态度在 Indussa 案中得到进一步强化。[5] 然而，Sky Reefer 案后，[6] 仲裁条款的效力得到了广泛承认。而且，在 1925 年《美国联邦仲裁法》颁布之前，[7] 海事法院甚至

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5 377 F. 2d 200 (2d Cir. 1967). Indussa Corp. v. S. S. Ranborg (1967) AMC 589. Indussa Corporation v. The Ranborg, Lloyd’s Law Report, Vol. 2, 1967, p. 101. 本案的承运人为挪威海运公司。一审法院拒绝审理该案件。然而，美国联邦第二巡回上诉法院接受了上诉请求并认定提单管辖条款无效。因为依照 1936 年美国《海上货物运输法》第 3 条第 8 款，旨在减轻责任和义务的运输合同条款是无效的。

6 Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 29 F. 3d 727, 1994 U.S. App. LEXIS 16784, 1994 A.M.C. 2513 (1st Cir. Mass. 1994).

7 The United States Arbitration Act on February 12, 1925; 9 U.S.C. § § 1-14 as amended on July 30, 1947.

拒绝协助仲裁条款的执行。但如今，《美国联邦仲裁法》使仲裁协议能够在所有受联邦控制的商事管辖领域中都有效，包括联邦海事管辖。[8]

三、提单是否符合法律规定的书面形式要求

1958 年《纽约公约》第 2 条第 2 款和 1985 年联合国国际贸易法委员会《国际商事仲裁示范法》第 7 条第 2 款均规定，由当事方签订的合同或仲裁协议，或当事人函电往来中须包含一项仲裁条款。然而，作为海上运输合同证明的提单，在实践中通常都由承运人签署，并没有其他当事人（即托运人）的签名。此外，由于提单的可转让性，收货人签名的机会很小。因此，提单仲裁条款似乎不能符合《纽约公约》和《国际商事仲裁示范法》的有效仲裁协议的形式要求。

1996 年《英国仲裁法》、1950 年《美国联邦仲裁法》、1998 年新《美国联邦仲裁法》和 1994 年《中华人民共和国仲裁法》都要求仲裁协议应当采用书面形式。然而，对于“书面形式”的解释并不清楚。例如，是否必须有双方的签名和盖章这一问题也还存在疑问。由于班轮提单往往只有承运人的签名，显然无法符合上述的要求。

1996 年《英国仲裁法》在这方面有更宽松的阐释，其承认能够被书面文件证明的口头协议。[9] 这一新版《英国仲裁法》确认了书面形式的要求，但同时对“书面形式”的定义却很灵活，尤其清晰地规定了“书面形式”不需要双方当事人都签名。[10]

根据拉尔夫里彻博士的观点，提单仲裁条款可以只有承运人单方签名，然后由提单持有人默示接受，这样即构成书面形式。事实上，提单持有人至少有 3 次机会决定是否接受提单条款。第一次是托运人交付货物给承运人后获得提单，第二次是船到目的港后，提单持有人凭提单提货，第三次是，如果货物有任何毁损，提单持有人依据清洁提单向承运人索赔。这种观点对书面形式做了更宽松的解释，不要求双方当事人签字。

从上述讨论可以看出，在许多国家，“书面形式”在实践中已得到很灵活的解释，并进一步表现为更宽松的趋势。因此，书面形式要求不应当构成承认提单仲裁条款效力的阻碍。从根本上讲，要求仲裁协议采用书面形式的立法目的与国际商事仲裁的发展有关。由于“书面形式”提醒当事人谨慎考虑的功能变弱，援引严格的书面形式要求以否认提单仲裁条款的效力显然与现今需求和国际贸易实践的进一步发展不符。在这种情形下，有必要跟随宽松解释的趋势，并承认当事人以

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8 H. R. Rep. 96, 68th Cong., 1st Sess., 1 (1924).

9 Clare Ambrose and Karen Maxwell, London Maritime Arbitration, London: LLP, 1996, p. 22.

10 有一种书面协议——（一）如果协议是书面形式的（不论是否由双方当事人签名）。

多种形式达成的仲裁协议，包括但不仅限于电子数据、传统习惯等。

四、仲裁条款或法院选择条款是否适用于承租人以外的提单持有人

租船合同提单条款很少且不包括仲裁条款或法院选择条款的现象并不罕见。目前广泛使用的金康合同与康金提单，也只列有少量条款，如首要条款。仲裁条款或法院选择条款往往根据提单的并入条款而从租船合同中援引。[11] 所以，援引条款的效力仍然是一个问题。

我国《仲裁法》对此并无规定。相反，1996 年《英国仲裁法》清楚地规定了由提单引发的纠纷可依照并入条款的规定提交仲裁解决。根据《美国联邦仲裁法》，仲裁协议应当采用书面形式 [12]，但是个人应当受租船合同中仲裁协议的约束，即使其没有签署租船合同或被列入其中。[13] 美国案例也认为，简单而一般的并入条款即将在提单中并入的仲裁条款或法院选择条款，其可对承租人以外的提单持有人产生约束力。在 Aluncentro Div Dell's Alusuiss Italia SPA and others v. M/V "Hafnia" and others 一案中，[14] 由于并入提单的租船合同仲裁条款，法院终止了诉讼程序。

虽然仲裁条款由承运人单方面起草和规定，但提单的所有条款包括仲裁条款都是公开的。此外，由于所有的条款均是印刷在提单背面，当提单持有人检验和取得提单时，已经清楚地知道或应当清楚地知道所有提单条款的内容。除非承运人和提单持有人另有约定，作为承运人和托运人之间运输合同证明的提单，应当对提单持有人有约束力。

在这方面，中国海事法院认为并入条款应当足够清楚，否则，援引自租船合同的仲裁条款将被视为无效。也就是说，在这类案例中，仲裁条款应当阐明一些受仲裁管辖的特定事项。如果租船合同中的仲裁条款只是简单地规定，由租船合同引起的所有纠纷应当提交仲裁，这并不足以约束提单持有人，即使提单中有并入条款。上述规则的唯一例外是涉及提单持有人和船舶所有人之间的租船合同纠纷。武汉海事法院在上海农工商集团国际贸易公司诉天津远洋运输公司案中即采

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11 并入条款通常规定，"背面所示日期的租约的所有条款、条件、特权、免责，包括法律适用和仲裁条款，均并入本提单"。

12 9 U.S.C. § § 2, 3, 4.

13 E. A. S. T., Inc. v. M/V Alaia, 673 F. Supp. 795, 1988 AmC 1396 (E. D. La. 1987).

14 Alucentro Div Dell's Alusuiss Italia SPA abd others. v. M/V "Hafnia" and others, 785 F. Supp. 155; 1991 U. S. Dist. LEXIS 20226; 1992 AMC 267.

纳了这一观点。[15] 而中国海事法院因为提单同时规定了仲裁条款和司法管辖权条款而认定管辖权选择条款无效的案例更多。例如，中国远洋运输集团的提单规定，由提单引起或与提单有关的所有纠纷应当根据中国法律在中国进行司法诉讼或仲裁。

五、仲裁条款的宽容原则

有许多海事领域的问题与传统理论不一致，尤其是关于提单的。因此，如提单转让后提单仲裁条款对受让人的效力；根据租船合同签发的提单转让后，租船合同中的仲裁条款对受让人的效力；门到门运输中火车和汽车段运输的提单仲裁条款效力等问题都存疑。笔者认为，在现代法治社会，应当充分尊重当事人的意愿，并优先选择他们偏好的仲裁。换言之，在解决管辖权纠纷时，我们应当对提单仲裁条款采取宽容原则并以有效的方式加以解释。

上述案例表明，虽然中国法院通常都承认提单仲裁条款的效力，但在实施过程和海事仲裁实践中依然存在着阻碍。特别是在中国的司法管辖权和外国的仲裁管辖权相冲突的案例中，中国法院的保守态度实际上不利于中国当事人。在中国部分地方，地方保护主义仍然普遍，对外国仲裁造成了消极影响。在西方国家，迟至 1938 年，主流的观点已是如果条款同时包括仲裁和诉讼，协议当事人可以通过法院的协助来规避此类条款。[16] 因此，中国法院的保守态度应当跟随当今经济全球化的形势而改变。国际贸易的相对自由必须保证更高程度的自由的贸易。国际司法应当与全球经济的真正兴起相适应。

六、加快海事立法的国际统一

海事纠纷解决程序普遍存在挑选法院的情况，这部分是由于各国缺乏统一规定而引起的。从原告或被告的角度来说，不同的司法管辖权下不同的程序法或实体法规定将造成某些法院比其他法院更具有吸引力。此外，缺乏统一的国内法和法律规范选择也会导致同案不同判，这取决于被选择的特定法院。鉴于大部分海

15 上海农工商集团国际贸易公司诉天津远洋运输公司案，下载于 http://www.ccmt.gov，2007 年 10 月 8 日。在本案中，法院认定仲裁事项并非仅是由租船合同引起的纠纷，而且包含海上货物运输合同引起的索赔纠纷；此外，租船合同下的仲裁条款并没有与提单客体有直接关系，所以不能由一般的并入条款并入提单。因此，法院拒绝了被告关于司法管辖权的请求。另一个案例是海口海事法院也在 1997 年的某个案例中采纳了相同的观点，拒绝了司法管辖权的请求。

16 The Soloy, 98 F. 2d 711, 1938 AMC 1123 (2d Cir. 1938).

事立法包括技术和专业知识，海事领域的立法要取得统一相比其他部门法更容易。即使国际公约有局限性，它们依旧可以在一定程度上减少管辖权冲突。在海事领域，首要目标应当是促进关于船舶扣押的国际立法，该方面立法的统一可以减少管辖权冲突。

七、结　论

由于提单的特殊性质，受到普遍接受和承认的租船合同下的仲裁条款遭遇了很大的挑战。海事法官应当对载于或并入提单的仲裁条款给予充分的宽容。海事领域的国际立法统一似乎是解决管辖权冲突问题的适当方式，但是考虑到各国间协调的难度，这绝非一个最有效的方式。

（中译：郑蔚茗　单位：厦门大学）

An Analysis of the Trial Mechanisms of Overlapping Maritime and Criminal Cases

HAN Bing*

Abstract: The co-existence of mechanisms of incidental civil action and the exclusive jurisdiction of maritime cases has caused disorder and confusion in the trial of overlapping maritime and criminal cases in judicial practice in China. Due to the highly specialized and technical character of maritime cases, the entertainment of overlapping maritime and criminal cases should not be confined by current legislation regarding incidental civil action. Rather, these two parts shall be adjudicated separately with maritime aspects of cases adjudicated by maritime courts and criminal aspects of cases adjudicated by local courts. Prior to the conclusion of the criminal aspects, maritime courts should promptly issue their judgment or ruling on civil aspects whose legal facts are basically clear.

Key Words: Overlapping maritime and criminal cases; Incidental civil action; Criminal first, civil next

I. Introduction

Overlapping civil and criminal cases are those in which the conduct of the actor constitutes a crime which simultaneously causes civil losses, including the victim's economic loss. Current Chinese legislation provides the mechanism of incidental civil action for such cases. Relevant provisions can be found in Chapter VII of the General Provisions of the Criminal Procedure Law of the People's Republic of China (hereinafter "Criminal Procedure Law") and Articles 36, 37 and 64 of the Criminal Law of the People's Republic of China (hereinafter "Criminal Law"). The Supreme People's Court has also issued a series of judicial interpretations, which include the Interpretation on Several Issues concerning the

* HAN Bing, Master of Laws and Assistant Judge at Wuhan Maritime Court.

Implementation of the Criminal Procedure Law and the Regulations on the Scope of Civil Suit Collateral to Criminal Proceedings. Among the relevant provisions, Article 77 of the Criminal Procedure Law provides that, if a victim has suffered material losses as a result of the defendant's criminal act, he shall have the right to file an incidental civil action during the course of the criminal proceeding. If losses have been caused to State or collective property, the People's Procuratorate may file an incidental civil action while initiating a public prosecution. Article 36(1) of the Criminal Law prescribes that, where the victim has suffered economic loss as a result of a criminal act, the criminal defendant, in addition to receiving criminal sanctions according to law, shall be ordered to compensate for the economic loss in accordance with the circumstances of the case. Based on the laws and judicial interpretations above, it can be seen that incidental civil action in China refers to the situation where during criminal proceedings, the judicial authority while settling the criminal responsibility of the defendant, resolves through the proceedings initiated by the victim or the People's Procuratorate for the compensation of material losses caused by the criminal act of the defendant. Together, these rules fully affirm the significance of the mechanism of incidental civil action, namely its positive function in punishing the guilty and protecting the interests of the State and its people. These rules also establish several principles of the mechanism, including the principle of "criminal first, civil next". Meanwhile, the system of exclusive jurisdiction of maritime cases is provided in the civil legislations of China. For example, the Special Maritime Procedure Law of the People's Republic of China (hereinafter "Special Maritime Procedure Law") explicitly regulates the scope of exclusive jurisdiction for maritime courts. Its Article 4 stipulates that maritime courts shall entertain the lawsuits filed in respect of a maritime tortious dispute, maritime contract dispute and other maritime disputes brought by the parties as provided for by law.

The co-existence of mechanisms of incidental civil action and exclusive jurisdiction of maritime cases would result in a theoretical dilemma. For example, different aspects of a civil maritime case which also has aspects of a criminal case would be dealt with by different courts. The civil aspects of this case would be exclusively dealt with by a maritime court, while the criminal aspects will be heard by a local court. Would this challenge the current system of incidental civil action in China? Under such circumstance, should we maintain the principle of "criminal first, civil next"? In other words, should the maritime aspects of these cases be heard only after the criminal proceedings? For the above questions,

current laws and regulations, including the Special Maritime Procedure Law, do not provide a clear answer. In practice, maritime courts across China handle this problem differently: some strictly follow the principle of "criminal first, civil next", hearing maritime aspects of cases after the delivery of the judgments by local courts regarding criminal aspects; others independently hear the two aspects of cases, issuing the judgments on maritime aspects with or without decisions on the criminal aspects. Simultaneously, as society develops, voices which question the system of incidental civil action began to emerge. This article aims to offer constructive suggestions in order to further perfect this legislation through the analysis of several issues concerning overlapping maritime and criminal cases within judicial practice.

II. The Necessity and Advantage of Separate Trials for Overlapping Maritime and Criminal Cases

Just as there is no legal definition of overlapping civil and criminal cases, there is neither connotation nor denotation of overlapping maritime and criminal cases. In practice, there are three common categories of maritime and criminal overlapping cases: first, torts of ship collision and crimes which cause traffic casualties; second, maritime torts and crimes of piracy;[1] and third, maritime torts and crimes of fraud.[2] These three categories of overlapping maritime and criminal cases are the very same legal facts or the different but interrelated legal facts that have respectively violated maritime and criminal legal relationships. The very same legal facts or the different but interrelated legal facts constitute the intersection of maritime and criminal cases. Consequently, we may define the overlapping maritime and criminal cases as the cases in which the very same legal facts or different but interrelated legal facts violate maritime and criminal legal relationships respectively.

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1 Piracy is considered an international crime. According to the definition provided by the International Maritime Bureau of the International Chamber of Commerce, piracy is an act of boarding any ship with the intent to commit theft or any other crime and with the capability to use force in furtherance of that act.

2 Normally such cases involve transnational crimes, i.e. transnational maritime fraud, including fraud of insurance, fraud of payment in advance, fraud of bill of lading and fraud of cargo container, etc.

A. The Necessity of Separate Trials for Overlapping Maritime and Criminal Cases

Current mechanism of incidental civil action within China causes general overlapping civil and criminal cases to be heard by the same bench. This is due to the following four reasons: first, hearing civil and criminal cases together improves judicial efficiency and saves judicial resources, which conforms to the principle of litigation economy; second, the mechanism of incidental civil action causes public security organs to actively determine the true material loss caused by the criminal act of the defendant in the criminal proceedings. Based on the strict standard of proof in criminal proceedings, facts concerning civil damages will be easier to be determined and laws applicable to such damages will be easier to be chosen, which helps with fact finding and liability distribution; third, ascertaining civil liability and criminal responsibility together makes civil compensation more realizable; fourth, this mechanism contributes to the consistency and seriousness of judicial judgments and avoids conflict and contradiction that may occur with varying judgments.

Although there are reasons to deal with these overlapping cases at the same bench, the author argues that overlapping maritime and criminal cases cannot be simply treated and tried in the same manner as other overlapping civil and criminal cases. The unique nature of overlapping maritime and criminal cases requires such cases to be determined separately by maritime and local courts. The unique nature of overlapping maritime and criminal cases is primarily reflected in the exclusive jurisdiction of maritime cases. Article 4 of the Special Maritime Procedure Law provides that maritime courts shall entertain lawsuits filed in respect of a maritime tortious dispute, maritime contract dispute and other maritime disputes brought by the parties as provided for by law. The Decision of the Sixth Standing Committee of the National People's Congress on the Establishment of Maritime Courts in Coastal Port Cities explicitly stipulates the principle of exclusive jurisdiction of maritime courts over maritime cases. Moreover, Some Provisions of the Supreme People's Court on the Scope of Cases to be Entertained by Maritime Courts further clarifies that disputes of maritime tort, maritime contract etc., are within the exclusive jurisdiction of maritime courts. In total this includes 5 large classifications and 64 subgroups, each of which are considered to be within the exclusive jurisdiction of maritime courts, meaning that other courts cannot exercise

jurisdiction over such cases.[3] All the above laws and judicial interpretations fully exclude the jurisdiction of non-maritime courts (including local courts) over maritime cases. This means overlapping maritime and criminal cases cannot simply follow the rules on incidental civil action established by the Criminal Procedure Law and other laws, which require that civil aspects of cases be heard along with their criminal aspects by the same bench. Rather, a specific law, which has equal legal effect with a general law, shall prevail over the general one based on the principle of *lex specialis derogat generalis*. Consequently, in accordance with the provisions regarding exclusive jurisdiction of maritime courts over maritime cases found within the Special Maritime Procedure Law, overlapping maritime and criminal cases shall be heard separately. That is to say, maritime aspects of these overlapping cases should be heard by maritime courts and their criminal aspects by local courts. To the author's knowledge, this is consistent with the judicial practice found in some areas of China.

Moreover, handling maritime and criminal aspects separately is also based on the consideration of the highly-technical and foreign-related character of maritime and admiralty disputes. Maritime litigation has special requirements which are different from those found within the Civil Procedure Law of the People's Republic of China (hereinafter "Civil Procedure Law"). If overlapping maritime and criminal cases are heard by local courts collaterally, it may result in an inconsistency of enforcement standards and prejudice to the protection of interests of those parties involved.

B. The Advantage of Separate Trials for Overlapping Maritime and Criminal Cases

Trial of overlapping maritime and criminal cases by maritime and local courts separately has four advantages.

First, separate trial fully represents the differences between the objectives pursued by civil litigation (or more specifically in this context, maritime litigation) and criminal litigation. On one hand, maritime litigation, as a form of civil litigation, belongs to the category of private proceedings, which can be disposed of based upon personal autonomy. This means that some rights can be waived or

3 The above rules are also reflected within the Notice on Reiterating the Exclusive Jurisdiction of Maritime Courts over Maritime Cases of Higher Peoples' Court of Guangdong.

compromised. On the other hand, criminal litigation belongs to the category of public proceedings, which emphasizes the significance of the power of punishment of the State. Such power originates from the public authority of the State, which typically cannot be waived or compromised in criminal proceedings. Consequently, separate trial leads the judges to a better understanding of their role in litigation with different nature.

Second, maritime litigation, as a form of civil litigation, applies the principle that the party who lodges claims bears the burden of proof, while criminal litigation applies a strict standard of proof, i.e. the evidence provided must be able to exclude any reasonable doubt; and the party that bears the burden to prove the origin and effectiveness of the evidence should be the People's Procuratorate while the defendant does not bear any burden of proof. As for the standard of proof, civil litigation requires verifying evidence comprehensively and objectively whereas criminal litigation demands hard and sufficient evidence. As a result, the distribution of the burden of proof and the standard of proof are different within maritime and criminal litigation. If overlapping maritime and criminal cases are heard by the same bench, it would be difficult for the bench to apply different rules to evaluate the evidence in different proceedings.[4] On the contrary, separate trial guarantees that judges apply different rules to the same evidence within different proceedings, which creates balance in the distribution of the burden of proof amongst the opposing parties and contributes to the achievement of substantial justice.

Third, the modern law of various departments is complicated. Judges in any State cannot become an expert in both civil and criminal proceedings, not to mention the maritime proceedings which have even higher requirements due to their specialized and technical character. Hence, the separation of maritime and criminal proceedings in these overlapping cases contributes to developing a highly qualified group of judges and conforms to the general trend of professional and expert judges in the modern structure of rule of law.

Finally, the separation of maritime and criminal proceedings in these overlapping cases can avoid the procedural defect of putting criminal aspects of such cases above their civil aspects in the proceedings of incidental civil actions,

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4 A typical example of such conflict is the well-known Simpson case. Although criminal judgment found Simpson not guilty for murder based on the principle of beyond any reasonable doubt, the civil judgment found there was a preponderance of evidence to hold Simpson liable for damage in the wrongful death of the victim.

as has been formed in judicial practice. This separation also avoids the negligence of the liability of civil compensation, which may disregard the issue of personal compensation in the process of pursuing and punishing the criminal by the State. Therefore, the separation of maritime and criminal proceedings in these overlapping cases serves the purpose of protecting the civil rights of the victim.

III. The Principle of "Criminal First, Civil Next" and the Trial of Overlapping Maritime and Criminal Cases

A. The Principle of "Criminal First, Civil Next"

The principle of "criminal first, civil next" established under the mechanism of incidental civil action has always been recognized as the golden rule by judicial authorities in dealing with general overlapping civil and criminal cases. The principle states that when dealing with overlapping civil and criminal cases, people's courts must reach a judgment on the criminal aspects of such cases before entering into civil proceedings. Alternatively, courts can hear both cases at the same time; however the civil judgment cannot be announced before the criminal judgment.[5] This principle has been enshrined within Chinese laws and regulations. For example, Article 77 of the Civil Procedure Law provides that if a victim has suffered material losses as a result of the defendant's criminal act, he shall have the right to file an incidental civil action during the course of the criminal proceeding. If losses have been caused to State or collective property, the People's Procuratorate may file an incidental civil action while initiating a public prosecution. Its Article 78 states that an incidental civil action shall be heard concurrently with the criminal case. An incidental civil action may be heard by the same judicial organization after the trial of the criminal case only to prevent excessive delay of the trial of the criminal case. Furthermore, Article 89 of the Interpretation on Several Issues Concerning the Implementation of the Criminal Procedure Law stipulates that incidental civil actions shall be initiated before the announcement of the judgment of first instance after the criminal case is accepted by the court. For those who have not initiated the incidental civil action before the announcement of the judgment of first instance, the plaintiff cannot initiate civil incidental action. Instead, he or she

5 Chen Jiangping, Research on the Principle of "Criminal First, Civil Next", at http://blog.chinacourt.org/wp-profilel.Php?p=67460, 15 October 2007. (in Chinese)

reserves the right to initiate another civil proceeding after the criminal judgment comes into effect. Article 99 of the Interpretation provides that if the material loss suffered by the victim or the defendant's ability to compensate cannot be temporarily determined, or the parties to the incidental civil action are unable to appear before the court for certain reasons, in order to prevent the undue delay of the entertainment of the criminal case, incidental civil action can be initiated after the announcement of the criminal judgment and will be heard by the same bench.[6]

B. Whether Overlapping Maritime and Criminal Cases Shall Follow the Principle of "Criminal First, Civil Next"

In practice, overlapping civil and criminal cases appear in various forms. Despite the legal provisions described above, it is unclear under what circumstances the principle of "criminal first, civil next" shall be strictly or flexibly applied to overlapping cases. In judicial practice, most civil and criminal cases strictly apply the principle while a minority of cases alter the principle for application. This creates further uncertainty as to whether the principle of "criminal first, civil next" applies to the overlapping maritime and criminal cases. More specifically, in the context of maritime law, the Special Maritime Procedure Law does not include relevant regulations on the trial of overlapping maritime and criminal cases. As for the practice of maritime courts in China, there is no consensus on whether or not to apply the principle of "criminal first, civil next", or whether or not to wait for the judgment of local courts on the criminal aspects of a maritime dispute.

The author suggests that, if maritime courts strictly apply the principle of "criminal first, civil next", then there would be apparent disadvantages. First, it is adverse to the protection of the victim's civil rights and the achievement of judicial justice. If a maritime court finds that a crime is indeed involved in a maritime dispute in the proceedings of a maritime case, the court would normally transfer the relevant material regarding the suspected crime to the investigative organs and simultaneously suspend the proceedings of the maritime case. However, statistics collected by the relevant authorities have shown that approximately 60%

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6 The Principle of "criminal first, civil next" is also reflected within the Several Provisions of the Supreme People's Court on the Trial of Cases Involving Disputes over Deposit Receipt which came into effect on 13 December 1997 and Articles 1, 10, 11, 12 of the Provisions on Several Issues Concerning Suspicions of Economic Crimes during the Trial of Economic Dispute Cases which came into effect on 9 April 1998.

of criminal offenses are detected annually in China, however a large portion of criminal suspects go uncaptured.[7] According to the principle of "criminal first, civil next", the maritime case can be indefinitely delayed so long as the suspect remains uncaptured. This means that the maritime case is subject to the criminal case, which interferes with regular maritime proceedings, deprives citizens and legal persons of prompt and effective protection and may trigger the deterioration of the conflict between the parties involved. It should be mentioned that civil and criminal cases have their own time limits in regards to trials. In civil cases, especially in instances of commercial cases, the length of the trial and how easily judgment is carried out are of vital importance. If the maritime case has to wait until the judgment of the criminal case, then the parties to commercial cases may not be able to realize their economic interests as soon as possible. This is precisely why the parties to commercial cases take their economic interests into consideration prior to imposing criminal penalties on the suspect.[8] Also, it should be restated that maritime cases, by their very nature, have a highly specialized character. For example, it is hardly possible for public security organs to be placed in charge of investigating and determining whether there has been a tort in the case of a ship collision, as a form of overlapping maritime and criminal cases, for technical reasons. Even if public security organs are able to identify that there has been a tort, the process of investigation and verification would be too economically costly and time consuming. Strictly applying the principle of "criminal first, civil next" would make the dispute subject to criminal proceedings even though it could have been resolved through civil proceedings. As a result, maritime aspects, with their highly specialized character, shall be generally determined by the expertise and experience of maritime judges, which also facilitates the trial of criminal aspects.

Based on the above analysis, the author concludes that overlapping maritime and criminal cases shall not be subject to the principle of "criminal first, civil next". First, for overlapping maritime and criminal cases in which their criminal aspects has not filed or is still in the process of investigation, maritime courts shall put the maritime aspects of the cases on the list and evaluate evidences based on the standard of proof in civil cases. Maritime courts shall also promptly announce

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7 Chen Jiangping, Research on the Principle of "Criminal First, Civil Next", at http://blog.chinacourt.org/wp-profilel.Php?p=67460, 15 October 2007. (in Chinese)

8 Song Yushui, The Flexible Application of the Doctrine of Criminal First, Civil Next and Its Significance, at http://politics.people.com.cn/GB/8198/42824/42830/3096960.html, 28 October 2007. (in Chinese)

their judgment for the cases with clear facts and unequivocal rights and obligations of the parties involved. Second, in instances of overlapping cases in which the criminal proceedings have already been initiated, under normal circumstances maritime courts shall promptly announce their judgments on the maritime aspects of the cases. In certain exceptional conditions maritime courts must wait until the delivery of the judgment by local courts concerning the criminal aspects of the cases.

IV. Proposals on Legislation

Due to the highly technical and foreign-related character of maritime disputes, the overlapping maritime and criminal cases which involve ship collision, piracy, maritime fraud, etc., are substantially different from other overlapping civil and criminal cases. Therefore, the author believes that we should not maintain the principle of "criminal first, civil next" as contained in the current rules on incidental civil action. Instead, these overlapping cases should be determined by maritime courts with respect to maritime aspects of the cases and by local courts with respect to their criminal aspects. Meanwhile, for cases with clear facts and unequivocal rights and obligations of the involved parties, the courts shall promptly announce their judgment.

First and foremost, in order to unify the different approaches adopted in practice and improve the efficiency of these trials, there must be relevant laws for people to follow. At present, only Criminal Procedure Law and some judicial interpretations of criminal law touch upon the issue of overlapping civil and criminal cases. The Special Maritime Procedure Law elaborates on the exclusive jurisdiction of maritime courts, which indicates that overlapping maritime and criminal cases shall be determined by maritime courts and local courts separately, but without mention of any specific provision on how this should be carried out. For example, during the period of filing and investigating a criminal case, should maritime courts accept a maritime case? When a criminal case is still pending, can maritime courts promptly announce their judgment in respect of the maritime aspects in accordance with the law? Such questions are not answered in the above legal regulations. Consequently, the particularity of overlapping maritime and criminal cases ought to be emphasized and the Special Maritime Procedure Law ought to have certain provisions with regards to these problems. Specifically, the author proposes that overlapping maritime and criminal cases shall be regulated in

the General Provisions of the Special Maritime Procedure Law. These provisions could consist of two articles: first, the overlapping maritime and criminal cases are those in which the very same legal facts or different but interrelated legal facts respectively violate maritime and criminal legal relationships. If an involved party files a lawsuit before a maritime court to claim its civil rights, the court shall accept the case. Second, before the conclusion of the criminal aspects of overlapping maritime and criminal cases, the maritime court shall announce its judgment for their maritime aspects whose legal facts are basically clear. If it is impossible to modify the law in the short term, the judicial interpretation of the Supreme Court may be one option for making these changes by providing for the trial of such overlapping cases.

That fact that the trial of overlapping maritime and criminal cases are regulated by the Special Maritime Procedure Law could give due consideration to the particularity and specialty of such cases. By doing so, maritime cases will not be subject to the mechanism of incidental civil action which is established on the basis of general overlapping civil and criminal cases, and the drawbacks of the current mechanism of incidental civil action may be avoided. Moreover, despite that the mechanism of incidental civil action is well established and plays an important role in protecting public interests of the State and society, improving judicial efficiency and saving judicial resources, its drawbacks emerged gradually in practice with the introduction of the modern conception of justice and the development of the rule of law in China. Some commenters advocated for the improvement or even abolishment of the mechanism of incidental civil action. Regulating overlapping maritime and criminal cases in the Special Maritime Procedure Law actually freezes the mechanism in the field of overlapping maritime and criminal cases and abandons the principle of "criminal first, civil next". In fact, the inclusion of relevant provisions in the Special Maritime Procedure Law can be regarded as an initial attempt to improve or even abandon the mechanism of incidental civil action and sheds light on future reform of the trial mechanism of general overlapping civil and criminal cases.

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Auction of Ships and Goods on Board by Chinese Maritime Courts: Current Practices, Existing Problems and Relevant Solutions

XU Zengcang*

Abstract: The current practices of various Chinese maritime courts regarding the auction of ships and goods on board are inconsistent with relevant laws and regulations, therefore causing a multitude of problems. Having researched the specific practices of 10 domestic maritime courts in auction of ships and goods on board, the author conducts an analysis of the existing problems and identifies corresponding solutions in this paper.

Key Words: Ship and goods on board; Auction; Maritime court

In the auction of ships and goods on board, the Chinese maritime courts have some of the following practices: a Price Appraisal Report is issued by the ship inspection institution; the Price Appraisal Report is not sent to the parties concerned and other interested parties; the starting price is not available to the bidders; the reserve price and starting price are set by the judicial committee; the times and range of adjustments regarding the reserve price are not determined; sale is made without setting a reserve price in case of unsuccessful auction; conditions for offsetting debt in kind are not clear; materials like the Price Appraisal Report are not filed with case records, etc. These customary practices have been developed by the maritime courts through a long-term process generated by a historical condition of incomplete auction legislation. To some extent however, this played a positive role in filling an existing gap in the auction legislation. As of January 1, 2005, the auction legislation has been significantly improved through the promulgation of the Provisions of the Supreme People's Court Regarding Auctioning or Selling off Pro-

* XU Zengcang, Ph.D candidate in International Economic Law of East China University of Political Science and Law.

perty by the People's Courts in Civil Execution (hereinafter "Provisions of the SPC Regarding Auctioning or Selling off Property").[1] This, in turn, gradually determined the emergence of various problems and deficiencies in the previous practices. If the maritime courts stick to former practices, potential risks may arise due to the inconformity with the judicial interpretation of the Supreme People's Court. In order to regulate and perfect the system of auction of ships and goods on board, and to protect the legitimate rights and interests of the parties concerned, the author, after surveying the current practices of various Chinese maritime courts, analyzes the existing problems and proposes corresponding solutions.

I. Current Practices of Chinese Maritime Courts in Auction of Ships and Goods on Board

Following this investigation, the author made a comparison of the current practices in auctions of ships and goods on board among various maritime courts as follows: [2]

1 In 1994, the Supreme People's Court promulgated Provisions on Auctions of Distrained Ships for Offsetting Debt by Maritime Courts to impose regulations on the ship distrain and ship auction process. After the implementation of the Special Maritime Procedure Law of the People's Republic of China (hereinafter "Maritime Procedure Law"), the judicial interpretation above has not been abolished explicitly, and its main contents are included in the Maritime Procedure Law. It is notable that many processes in the auction of properties such as ships and goods on board, for example, the determination and adjustments of reserve prices, are addressed or fully addressed by neither the judicial interpretation nor the existing Maritime Procedure Law. This is the main reason why the maritime courts in China are inconsistent and have no uniform standards in the auction practices of ships and goods on board.

2 The data are collected as of December 31, 2006.

Table 1 Comparison of Practices in Auctions of Ships and Goods on Board among Various Maritime Courts

	Whether the Provisions of the SPC Regarding Auctioning or Selling off Property apply to ship auctions	Who issues the Ship Price Appraisal Report	Whether the Price Appraisal Report is sent to the parties concerned or interested parties	Who determines the starting price and reserve price of the ship	Whether the starting price is available to the public	How to determine the times and range of adjustments regarding the ship reserve price	Whether the ship may be sold off in case of unsuccessful auction and there is any minimum reserve price	Under what conditions may the ship be used to offset debt	Whether the materials like Ship Price Appraisal Report are filed
Guangzhou	×	Ship inspection institution	×	Judicial committee	×	Undetermined	√, none	Undetermined	×
Dalian	√	Appraisal institution	√	Judicial committee	×	Immovable property	×, ⩾ 50%	Unsuccessful auction, not subject to authority	√
Tianjin	√	Ship inspection institution	√	Collegiate panel or sole judge	√	Immovable property	×, undefined	Non-unsuccessful auction, not subject to authority	√
Qingdao	×	Appraisal institution	√	Judicial committee	√	Movable property	√, ⩾ 60%	Non-unsuccessful auction, not subject to authority	√
Shanghai	√	Appraisal institution	√	Judicial committee	√	Undetermined	×, undefined	Unsuccessful auction, not subject to authority	√

Ningbo	√	Ship inspection institution	√	Judicial committee	×	Immovable property	×, ⩾ 60%	Non-unsuccessful auction, not subject to authority	√
Xiamen	√	Appraisal institution	√	Judicial committee	×	Immovable property	×, ⩾ 50%	Non-unsuccessful auction, not subject to authority	√
Beihai	×	Ship inspection institution	√	Auction committee	√	Movable property	×, ⩾ 60%	Non-unsuccessful auction, not subject to authority	√
Haikou	√	Ship inspection institution	√	Judicial committee	×	Movable property	×, ⩾ 50%	Non-unsuccessful auction, not subject to authority	√
Wuhan	√	Appraisal institution	√	Judicial committee	×	Immovable property	√, ⩾ 60%	Unsuccessful auction, not subject to authority	√

Notes: 1. "√" in the Table means "Yes" and "×" means "No".

2. Though Wuhan Maritime Court applies the Provisions of the SPC Regarding Auctioning or Selling off Property, it reserves a different opinion.

3. The percentage listed in the column under "Whether there is any minimum reserve price" is based on the appraised price.

As described in the table above, the author makes a comparison and analysis on the practices in the auction of ships and goods on board among various maritime courts, focusing on the following issues:

A. Whether the Provisions of the SPC Regarding Auctioning or Selling off Property Apply to Ship Auction

The Provisions of the SPC Regarding Auctioning or Selling off Property implemented as of January 1, 2005 further regulate the auction and sale of property in the civil execution, but do not expressly state whether it applies to the auction and sale of ships by the maritime courts. Analyzing the judicial practices regarding auction of ships by various maritime courts, it is found that the Provisions are applicable to all maritime courts except for Guangzhou Maritime Court and Qingdao Maritime Court. A special case is that of Wuhan Maritime Court where the Provisions are being applied but the court reserves different opinions.

B. Whether the Price Appraisal Report Is Issued by an Eligible Appraisal Institution

The Price Appraisal Report is an assessment of the market value of the to-be-auctioned ship and goods on board and it is made by an eligible asset (price) appraisal institution. For five out of the ten maritime courts observed in this study (Dalian, Qingdao, Shanghai, Xiamen and Wuhan) the Price Appraisal Report is issued by an eligible appraisal institution. For the other five courts (Guangzhou, Tianjin, Ningbo, Beihai and Haikou) the Price Appraisal Report is issued by an eligible ship inspection institution without a ship appraisal qualification. In the practices of Shanghai Maritime Court and Dalian Maritime Court, the Price Appraisal Report is jointly created by an asset appraisal institution and a ship inspection institution, with the Investigation Report of Ship Condition issued by the ship inspection institution attached thereto.

C. Whether the Price Appraisal Report Is Sent to the Parties Concerned or Other Interested Parties

One finding of this study is that, currently, nine out of the ten Chinese maritime courts, excluding Guangzhou Maritime Court, send the Price Appraisal Re-

port to the parties concerned and other interested parties. The current practice of Guangzhou Maritime Court is to submit the issued Price Appraisal Report to the judicial committee instead of the parties concerned and other interested parties by sealing it in an envelope to keep its contents confidential. Only when the judicial committee is to discuss the reserve price, it may open the sealed envelope and use the Price Appraisal Report as a reference to determine the reserve price.

D. Whether the Starting Price of Ship and Goods on Board Is Available to the Bidders

The starting price, usually less than or equal to the reserve price, is the price used at the beginning of the auction of ships and goods on board. Findings of this study reflect that six out of the ten maritime courts represented by Guangzhou, Dalian, Ningbo, Xiamen, Haikou and Wuhan do not disclose the starting price to the bidders. In contrast, the other four courts (Tianjin, Qingdao, Shanghai and Beihai) disclose such price. According to the current practice of Guangzhou Maritime Court, on one hand, since the auction announcement is published prior to the judicial committee's decision regarding the starting price of the bid, the starting price cannot be published in advance in the announcement. On the other hand, although the starting price will not be kept confidential after being determined, it is submitted directly to the auction committee director (generally the judge responsible for the case), and therefore it is difficult for the bidders to obtain the starting price before the auction date.

E. Who Determines the Reserve Price and Starting Price of the Ship and Goods on Board

The reserve price, also referred to as base price, is the minimum price for a successful auction, which is set to protect the legitimate rights and interests of the parties concerned. In the case of Tianjin Maritime Court, the task of determining both the reserve price and the starting price is appointed to a collegiate panel or a responsible judge. Beihai Maritime Court has it determined by the auction committee of ship and goods on board while Guangzhou Maritime Court and the other seven maritime courts under study have it determined by the judicial committee. According to the current practice of Guangzhou Maritime Court, when the ship and goods on board enter the auction process, the judicial committee will,

upon request, determine the reserve price and starting price for the auction by referring to the Price Appraisal Report. In case the first auction is not successful, an application should be made to the judicial committee in order to adjust the reserve price and starting price until the ship and goods on board are disposed of.

F. How to Determine the Times and Range of Adjustments of Reserve Price

For Dalian, Tianjin, Ningbo, Xiamen and Wuhan Maritime Courts, practice dictates that the minimum reserve price for the first auction will be at least 80% of the appraised price. If the initial auction is unsuccessful, the reserve price can be adjusted for up to two times, which means that the reserve price can be determined or adjusted for a total of three times. Qingdao, Beihai and Haikou Maritime Courts have the same practice of establishing a ship's reserve price not lower than 80% of the appraised price but are limited to a single adjustment in case the first auction fails, which means that the reserve price can be determined or adjusted for a total of two times. There are no explicit rules for determining reserve prices in the current practice of Guangzhou Maritime Court. In its practice, for the first auction the ship's reserve price may be as low as 70% of the appraised price, and when an auction is unsuccessful the price may be adjusted, with the number of times and the range of adjustment to be determined by the court.

G. May the Ship Be Sold off in Case of Unsuccessful Auction

In the practices of Guangzhou, Qingdao and Wuhan Maritime Courts, a ship may be sold off once the auction is unsuccessful, but the other seven maritime courts do not adopt this measure. Regarding the issue of the minimum reserve price set for the selloff, Guangzhou Maritime Court and Tianjin Maritime Court have no such setting; Dalian, Xiamen and Haikou Maritime Courts specify that the minimum selling price shall not be lower than 50% of the appraised price; and Qingdao, Ningbo and Wuhan Maritime Courts specify that the minimum selling price should not be lower than 60% of the appraised price. This study shows that according to the current practices of some of the maritime courts, where the bidding price is lower than the reserve price, thus resulting in an unsuccessful auction, the judicial committee must reconvene a meeting to adjust the reserve price. However, to avoid having to hold countless meetings, the judicial committee exercises its

liberty to adapt to each situation. In some cases a decision can be made to have a ship sold without setting a minimum selling price although a reserve price has been determined. For example, the judicial committee of one of the courts decided that if a ship identified as Yue Zhan Jiang 03043 was unsuccessfully auctioned as the bidding price is lower than the reserve price as fixed, the ship will be sold off to the highest bidder.

H. Under What Conditions May the Ship Be Sold to Offset Debt

Currently, nine of the Maritime Courts under study (excluding Guangzhou Maritime Court) hold a negative attitude towards the ruling of offsetting debt through the sale of a ship in accordance with their authorities. Three maritime courts including Dalian, Shanghai and Wuhan require that the measure of offsetting debt in kind be implemented only for unsuccessful auctions, while the other six maritime courts (Tianjin, Qingdao, Ningbo, Xiamen, Beihai and Haikou) have no such requirements. As far as the current practice of Guangzhou Maritime Court is concerned, there is no specific condition for the judicial committee to offset a debt through the sale of a ship in case of an unsuccessful auction or unfavourable auction during the process of discussing the ship's reserve price. Some hold the view that offsetting a debt through selling a ship may be carried out not under the condition of unsuccessful auction, as the court has the authority to do so in case of unsuccessful auctioning, without the prior application or even consent of the party concerned.

I. Whether Price Appraisal Report and Other Materials Are Filed

Contrary to Guangzhou Maritime Court, the other nine maritime courts keep the Price Appraisal Report and other materials on records. According to the current practice of Guangzhou Maritime Court, the Price Appraisal Report, starting price, reserve price of the ship and other materials are kept separately by the judicial committee's staff, rather than being filed with the case records.

II. Existing Problems in Auctions of Ships and Goods on Board by Chinese Maritime Courts

Some problems and deficiencies have emerged gradually in judicial practice

as evidenced by the above practices of auctions of ships and goods on board by the maritime courts, which are mainly reflected in the following aspects:

A. Failure to Apply Relevant Judicial Interpretations of the Supreme People's Court May Result in Illegal Auction

In the Provisions of the SPC Regarding Auctioning or Selling off Property, there is no specific mentioning that the Provisions should not be applied to the auction of ships and goods on board by maritime courts. However, if a maritime court does not abide by the Provisions in the auction, it may result in illegal auction or even State compensation. It is provided in Article 31 of the State Compensation Law of the People's Republic of China that:

> *If a people's court, in violation of the law, adopts in civil or administrative proceedings compulsory measures or preservative measures in impairment of the proceedings, or wrongly executes a judgment or a ruling or other effective legal documents, thereby resulting in damage being caused, the criminal compensation procedure of this Law shall be applicable to the procedure for making claims for compensation by the claimant.*

Therefore, the maritime court should auction the ship in accordance with the effective civil ruling, or it may result in an illegal auction or even State compensation if it fails to observe the Provisions of the SPC Regarding Auctioning or Selling off Property. Although the problems are only being revealed at this current stage, it is possible that the party concerned may request to verify the legality of the ship auction and claim for State compensation for the losses caused thereby.

B. Ineligibility of the Appraisal Institution Makes the Price Appraisal Report Illegal

The appropriate qualification of the appraisal institution is an essential condition for the Price Appraisal Report to be legitimate and reliable. Because the ship inspection institution only has the qualification to inspect the ship's condition rather than to assess its value, the Price Appraisal Report issued by it is illegitimate. There was an instance where a party concerned had raised an objection regarding

the qualification of a ship inspection institution for issuing the Price Appraisal Report. Although the Price Appraisal Report issued by the ship inspection institution was reasonably accurate, it is illegitimate. To better understand, imagine that a case was brought to the court for a solution but it was too complicated to be adjudicated by the judge. He would then ask for a law expert's opinion on the matter. Under no circumstances, despite his/her expertise and processing skill, an expert is permitted to adjudicate, for he or she has no power of judicial judgment like a judge does. Clearly, when entertaining a case, the judge may adopt the law expert's opinion but the case should be adjudicated by the judge, as only the judge has the qualification to adjudicate.

C. Lack of Right to Know and Right to Object against Price Appraisal Report for the Parties Concerned

Looking at the current practices of maritime courts in the auctions of ships and goods on board, it can be observed that the main criticism refers to the fact that the Price Appraisal Report is not sent to the parties concerned. Without the report, they are unable to know what the appraised price is and what the calculation basis of such price is, therefore cannot raise objections against the report or apply for re-appraisal. It is extremely unfair to the parties concerned as in some occasions the appraised price remains unknown after the ship has been auctioned. In one instance, a maritime court did not deliver the Price Appraisal Report to the ship owner during the auction, and the owner thought he had the right to such information and considered the court's practice as unfair and expressed his discontent thereto.

D. Bidders Cannot Decide Whether to Participate in Bidding Based on Starting Price

As the starting price is slightly lower than or equal to the reserve price, bidders may have estimated the reserve price and appraised price by referencing them to the starting price. This practice helps them decide whether or not to participate in the bidding. However, if the starting price is not available to them, they cannot make an informed decision in advance regarding their participation in the auction by predicting the reserve price based on the starting price. The issue is that they can only obtain the starting price at the auction site, which generates unnecessary expenditures.

E. Frequent Discussions on Ship Price Result in Functions of Judicial Committee out of Balance

It is reasonable for the judicial committee to discuss the ship price, but frequently the focus remains on discussing this price issue, therefore weakening the committee's other functions and duties. For example, in the 15 judicial committee meetings held by a maritime court in 2006, 10 meetings were designed to discuss the ship price, and only 5 meetings were specially focused on or touched on discussing the complicated cases and other matters. If the judicial committee members are too busy with discussing the reserve price and starting price of ships and goods on board, it would be reasonable to consider the committee a "ship pricing committee".

F. Highly Flexible Reserve Price May Generate Unfair Results

The modern judgment concept requires the judgment rules to be consistent, which means applying similar methods in dealing with the same objects to achieve alike results. The absence of specific and uniform rules for maritime courts to determine the reserve price and inconsistency of times and range of adjustments may cause the auction results to be unfair horizontally and vertically. From a horizontal perspective, if several ships of the same category are auctioned at the same time but with different ranges and times of adjustments of reserve prices, the results will certainly be different. And from a vertical perspective, if ships of the same category are auctioned at different times, the range and times of adjustments of reserve prices will be diverse and the results will vary.

G. Sale off upon Unsuccessful Auction Impedes the Maximization of Values of the Articles to Be Auctioned

The ship is realized purposefully to offset debt with the proceeds obtained therefrom. The higher the proceeds received from the realization is, the better for realizing the creditor's rights as well as protecting the legitimate rights and interests of the debtor. For this reason, it is essential to choose an appropriate method to realize the ship. As the auction is an open and fair competition, the first choice should be to organize a public auction of the seized ship with impartial

bidding, which may help prevent black case work and achieve a maximized price. Compared to the auction, sell off is a less preferred choice, for it is short of openness, transparency and competitiveness and its procedures are relatively random. Without setting the reserve price, the executive power of the court may be easily abused and the ship may be undersold, thus causing potential damage to the interests of the execution applicant, other interested parties and individuals against whom a judgment or order is being executed.

H. Unclear Rules for Offsetting Debt in Kind Is Detrimental to the Protection of Creditor's Rights

Compared to the auction and sell off, offsetting debt in kind is the last choice among various methods of disposal since the articles cannot be cashed to offset a debt. If there are several creditors, a ship could not be used to pay several debts. Even if the ship is forcefully given to one of the creditors to offset one debt, such a creditor may be confronted with difficulties in selling the ship or a series of problems arising from low use value. On that account, when offsetting debt with ships, the wills of the creditors should be fully respected, and in general, the court shall not use its authority to rule that a debt should be offset in kind.

I. Non-filing of Price Appraisal Report and Other Materials Makes Case Records Incomplete

The separate custody of the Price Appraisal Report and of other materials or not filing them with the case records leads to the following three deficiencies. Firstly, it makes the case records incomplete. The case volume is the carrier throughout the settlement of a case and it records the entire process. The case volume about the auction of a ship should be a physical record of the overall process of an auction and when the Price Appraisal Report of a ship or other materials are missing, it will render the case volume as incomplete. Secondly, it is inconvenient for the parties concerned to consult the case volume. In order to check the case details about the auctioned ship, apply for retrial and for any other needs, the parties concerned may apply for consulting the case volume. However, if the Price Appraisal Report of the ship and other materials are not filed, clearly the parties concerned are unable to access to relevant materials. Thirdly, it is unfavorable for the judge to be aware of relevant information. If the Price Appraisal

Report and other materials are not placed on file, the judge taking charge of the case may not know the appraised price, thus causing difficulties to the case execution. For instance, in the execution of the case involving ship Sui Gang Jun No. 1, the executor proposed to sell off the ship after the third auction failed, and the reserve price should be determined by reference to the appraised price before the sale. However, because the Price Appraisal Report was not kept on file, the reserve price could not be determined. As a result, the timely sale was impeded until finally the judicial committee members were asked to provide the Price Appraisal Report.

III. Solutions to Problems in Auction of Ships and Goods on Board by Chinese Maritime Courts

In response to the above-mentioned problems and deficiencies, the author believes that it is necessary to further regulate the auctions of ships and goods on board by maritime courts, and the specific suggestions and advice are listed as blow:

A. Supplementary Application of the Provisions of the SPC Regarding Auctioning or Selling off Property

The auctions of ships and goods on board can be classified by litigation stage. We then have two categories: auctions at the stage of maritime claim preservation and auctions at the stage of maritime execution. In the author's opinion, Provisions of the SPC Regarding Auctioning or Selling off Property should unquestionably apply to the auction at the stage of maritime execution, as the stipulations regarding execution in Civil Procedure Law of the People's Republic of China and Opinions of the Supreme People's Court on Several Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China and other judicial interpretation on civil execution promulgated by the Supreme People's Court, are applicable to the stage of maritime execution. The author gives reasons as follows:

Firstly, Provisions of the SPC Regarding Auctioning or Selling off Property do not exclude the auctions of ships and goods on board. Its preface states that:

> *For the purpose of regulating the measures for auctioning or selling off property in civil execution and protecting the legitimate rights and interests of the parties concerned, the present provisions are formulated in accordance*

> *with the Civil Procedure Law of the People's Republic of China as well as in combination with the practical experience of the people's courts in civil execution.*

And its Article 1 provides that:

> *During the execution process, after the property of the person against whom a judgment or order is being executed is sealed up, distrained or frozen, the people's court shall timely auction it, sell it off or take other execution measures.*

This demonstrates that the auctions of ships and goods on board are not excluded from the application scope of the Provisions of the SPC Regarding Auctioning or Selling off Property.

Secondly, the application scope of other judicial interpretations of the Supreme People's Court on execution does not exclude the maritime execution. During the maritime execution, other judicial interpretations of the Supreme People's Court on execution, such as Provisions of the Supreme People's Court on Several Issues Regarding Execution by the People's Court (for Trial) implemented as of July 18, 1998 and Provisions of the Supreme People's Court for the People's Courts to Seal up, Distrain and Freeze Properties in Civil Enforcement (FaShi [2004] No. 15) implemented as of January 1, 2005, are applicable. Therefore, it is unreasonable to claim that the Provisions of the SPC Regarding Auctioning or Selling off Property should not be applied to the auction of ships and goods on board.

Lastly, the auction institution entrusted by the court should abide by the Provisions of the SPC Regarding Auctioning or Selling off Property as well. After accepting the ship auction entrustment of the court, the auction institution, substantially acting as a civil agency, carries out the auction in the name of the court with the outcome vested in the court, which is a part of the civil execution, and without doubt it should be governed by the Provisions of the SPC regarding Auctioning or Selling off Property. Though the Auction Law has been formulated in China, it mainly applies to commercial auctions in order to regulate the auction activities performed by auction institutions independently entrusted by citizens, corporates and other organizations. However, an auction carried out by the auction institution entrusted by the court during execution is substantially a judicial auction, which is of specificity, and shall be subject to the Provisions of the SPC Regarding

the Auctioning or Selling off Property.

As for whether the Provisions of the SPC Regarding the Auctioning or Selling off Property should be applicable to auctions at the stage of maritime claim preservation, there is a view that the Provisions should not apply, and the main reasons are presented as follows: such a category of auction is not a part of civil execution; if the Provisions apply, bidders may only participate in the bidding when the ship price is as low as the minimum reserve price; and auction conducted by an auction institution entrusted by the court should be governed by the Auction Law rather than the Provisions of the SPC Regarding Auctioning or Selling off Property.

The author asserts that, for auctions of ships and goods on board at the stage of maritime claim preservation, the Special Maritime Procedure Law of the People's Republic of China (hereinafter "Maritime Procedure Law") and relevant judicial interpretations should be applicable first of all, and for the auction process not covered by the Maritime Procedure Law and the relevant judicial interpretations, Provisions of the SPC Regarding Auctioning or Selling off Property should be applicable by reference, with three reasons listed as follows:

1. There should not be any significant discrepancy between the auction at the stage of preservation and auction at the stage of execution. As we can see from legislative mode of the Maritime Procedure Law that the auction at the stage of maritime claim preservation is different to the auction at the stage of execution. Relevant provisions regarding the auctions of ships and goods on board are specified in Section 2 (Arrest and Auction of Ships) and Section 3 (Arrest and Auction of the Goods on Board) of Chapter III (Maritime Claims Preservation) of the Maritime Procedure Law. Article 42 of the Maritime Procedure Law provides that:

> *In addition to the provisions in this Section, auctions shall be governed by the relevant provisions of the Auction Law of the People's Republic of China.*

And its Article 49, Paragraph 2 provides that:

> *Auction of the goods on board, if not covered by the provisions of this Section, shall be referred to the relevant provisions of Section 2 of this Chapter on auction of a ship.*

And its Article 50 provides that:

Application by a maritime claimant for maritime claim preservation imposed upon fuel and materials used by a ship related to the maritime claim shall be governed by the provisions of this Section.

However, if one puts excessive emphasis on the specificity of auctions of ships and goods on board and arbitrarily deviates from the provisions of the Civil Procedure Law on execution under the excuse of the above provisions, notable discrepancies of processes and results between auction of ships and goods on board at different stages may appear, thus violating the principle of equality.

2. The formulation of the Provisions of the SPC Regarding Auctioning or Selling off Property fills in the gap left by the Maritime Procedure Law regarding the auction of ships and goods on board. The Maritime Procedure Law has made some regulations concerning the auction of ships and goods on board, but there are no relevant stipulations on the price appraisal and determination and adjustment of the reserve price. The Provisions of the SPC Regarding Auctioning or Selling off Property have detailed and specific regulations with regards to these auction processes, which are available for application by reference. This effectively fills a gap in the Maritime Procedure Law.

3. When a bidder does not participate in the bidding until the price is equal to the minimum reserve price, it is an exceptional circumstance falling under the category of collusive bidding. As legal regulations, judicial interpretations have directive and predictive functions. In accordance with rules for determining the starting price in the Provisions of the SPC Regarding Auctioning or Selling off Property, a bidder should be able to estimate the reserve price and appraised price of a ship, and therefore make an offer conducive to the conclusion of the auction. In this sense, the Provisions of the SPC Regarding Auctioning or Selling off Property facilitate the auctions of ships. If all the bidders conspire with each other in an auction, and do not participate in the bidding based on their predictions until the price reduces to an amount equivalent to the minimum reserve price, such practice may constitute a collusive bidding. However, it is an abnormal auction status rather than the deficiency of the rule for determining the reserve price itself, which should be adjusted and solved with the relevant prevention and remedy mechanisms.

B. Price Appraisal Report Should Be Issued by an Eligible Appraisal Institution

For the auction of ships and goods on board, the Price Appraisal Report should be issued by an eligible appraisal institution in accordance with Article 4 of Provisions of the SPC Regarding Auctioning or Selling off Property, which specifies that:

> *The people's court shall entrust an eligible appraisal institution to appraise the price of the to-be-auctioned property. If the value of the property is minor or is easy to be set through a common approach, no appraisal may be required.*

China's other maritime courts may refer to the practices of Dalian Maritime Court and Shanghai Maritime Court to assign tasks between the ship inspection institution and asset appraisal institution. As such, the Investigation Report of Ship Condition should be issued by the ship inspection institution while the Price Appraisal Report should be issued by the asset appraisal institution after assessing the value of the ship based on the condition it is at the time.

C. Price Appraisal Report Should Be Sent to the Parties Concerned and Other Interested Parties

Article 6, Paragraph 1 of the Provisions of the SPC Regarding Auctioning or Selling off Property specifies that:

> *After the people's court receives the appraisal report issued by the appraisal institution, it shall, within 5 days, send it to the parties concerned and other interested parties, who shall put forward their objections in writing to the people's court within 10 days after they receive the appraisal report.*

Also, Article 6, Paragraph 2 specifies that:

> *Where a party concerned or any other interested party applies for reappraisal because it has evidence to prove that the appraisal institution or its appraiser is ineligible or the appraisal process is in serious violation of the law, the people's court shall grant permission to conduct a reappraisal.*

These two articles clearly state that the Price Appraisal Report should be sent to the

parties concerned or other interested parties, and such parties should be permitted to raise objections and apply for reappraisal if necessary. Therefore, the maritime court should from now on regulate the process of serving the Price Appraisal Report from the following three aspects. Firstly, the contents of the Price Appraisal Report should be complete. If the Price Appraisal Report is not sent to the parties concerned and other interested parties for viewing, the problems that its contents may be oversimplified and the appraisal basis therein may be unclear are not easily identifiable. However, the problems will be easily indentified if the Price Appraisal Report is sent to the parties concerned, thus the institution responsible for creating it should provide a clearer and more detailed explanation for its appraisal basis and contents. Secondly, the serving scope of the report should be specified. Since other creditors might request to register their rights to part of the ship during the period that the auction is being announced and may have their shares in the proceeds from the ship auction, the Price Appraisal Report should be sent to both the parties concerned and the registered creditors. In the event that the number of parties concerned, interested parties and registered creditors is too large, a meeting can be convened in order to send such report. Thirdly, the reappraisal procedure should be made stricter. To allow the parties concerned to raise objections does not necessarily mean that the reappraisal procedure should be initiated arbitrarily. Since the result of the appraisal report is only used as a factor in determining the reserve price for an auction, the burden of the parties concerned will be aggravated and the execution efficiency will be adversely influenced if too much time, energy and money are invested in the appraisal. For this reason, in accordance with Article 6, Paragraph 2 of the Provisions of the SPC Regarding Auctioning or Selling off Property, only when a party concerned or any other interested party has evidence to prove the appraisal institution or its appraiser is ineligible or the appraisal process is in serious violation of the law, may it apply for reappraisal.

D. Starting Price of Ship Should Be Published to Bidders in Appropriate Manners

It is important for the bidders to have access to the starting price in a timely manner as this assists them in making a preliminary estimate of the reserve price and appraised price. Therefore, to save unnecessary trip expenses, the starting price should be published to the bidders in an appropriate manner. The main issue is that because the ship auction announcement is published prior to the determination of

a ship's reserve price and starting price, the starting price cannot be published in the auction announcement. However, the starting price can be published to bidders through the following methods. One is to provide in the auction announcement details of how one can make necessary enquiries. For instance, information and clues for enquiring the starting price are provided in the auction announcement, including contact person, contact method, enquiry website, etc. Another possible method is to timely publish the starting price on the internet. The starting price should be published on the China Auction and Seizure of Ship website (http://www.cnaas.com.cn) immediately after it is determined, so as to make it more convenient for bidders to access this information. The starting price may also be published through other appropriate methods.

E. The Body Responsible for Determining the Reserve Price Should Be Decided Based on the Appraised Price

The reserve price is the minimum price for a successful auction. If the highest price offered by bidders is lower than the reserve price, the auction should not be concluded. There is a right balance mechanism established for determining the reserve price, which can effectively avoid the over tilting of rights and interests and prevent damaging the legal rights and interests of the person against whom a judgment or order is being executed due to a low auction price. Article 8 of the Provisions of the SPC Regarding Auctioning or Selling off Property stipulates that a reserve price shall be set for an auction, and the reserve price of an auction shall be determined by the people's court by reference to the appraised price. According to this article, the maritime court should set a reserve price for any auction of ships and goods on board, but the department to determine the reserve price has not been specified. The current practice of some maritime courts is to have it determined by the judicial committee in a uniform manner. In the author's opinion, in accordance with relevant provisions of the Civil Procedure Law and the Organic Law of the People's Courts of the People's Republic of China, a collegiate panel or a sole judge on behalf of the people's court should exercise its judicial power to try and adjudicate specific cases. While the judicial committee should be mainly responsible for summing up the trial experience, discussing and making decisions in major complicated cases and studying other issues relating to trial. The reserve price can be determined by the collegiate panel, the sole judge or the judicial committee, provided that rules for determining the reserve price are

clearly specified. If the reserve prices of any ships, regardless of their prices and sizes, are all determined by the judicial committee, as affected by the committee's rules of procedure (the convening of meetings and decision-making of judicial committee should meet certain requirements in respect of quorum and procedure) and limited by its functions and duties, the auction efficiency and the balance of the committee's functions may be influenced. However, the reserve price of ship with significant impact is necessary to be determined by the committee. Therefore, it is essential to find a balance point between the aforesaid aspects. Not the reserve prices of all ships in auction, but those of ships with significant impact, shall be determined by the judicial committee.

As to circumstances where the reserve price shall be determined by the judicial committee, there are two standards that could be followed. The first standard is to refer to the tonnage of the ship. Article 3, Paragraph 1 of the Maritime Code of the People's Republic of China states that:

> *"Ship" as referred to in this Code means sea-going ships and other mobile units, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage.*

Based on this article, the to-be-auctioned ship with a gross tonnage of more than 20 tons should be submitted to the judicial committee to discuss its reserve price, while for ships with a gross tonnage of less than 20 tons, a collegiate panel may be constituted to determine its reserve price. The second standard is to refer to the appraised price of a ship. For example, for a ship with an appraised price over a certain amount, the reserve price should be determined by the judicial committee while for those ships with an appraised price under the limit, a collegiate panel can be constituted. In the author's view, although the standard of tonnage of ship is objective, there are situations in which a large-tonnage ship may have a small value, while a small-tonnage ship may have a greater value due to its age, usage, structure and other factors. The appraised price of a ship is closely related to the interests of the parties concerned and has significant impact on the realization of creditor's rights and repayment of debt, even though it sometimes reflects subjectivity. Consequently, it is more reasonable to submit the ship with a higher appraised price to the judicial committee for determining the reserve price. The author suggests an appraised price of RMB 5 million be taken as the cut-off point. For the to-be-auctioned ship, the reserve price and starting price shall be determined by the

judicial committee if its appraised price is over RMB 5 million (inclusive), or by the collegiate panel if its appraised price is below RMB 5 million. Some believe that the reserve price may be decided by the ship auction committee. The Maritime Procedure Law states that the ship auction committee should be composed of appointed execution officers as well as auctioneers and surveyors engaged by the maritime court. And the auction committee shall be responsible for the maritime court. Considering that the reserve price is determined by the maritime court, while the auctioneer and surveyor have no such authority, the author contends the execution officer is actually the only party who may determine the reserve price, and it acts for the maritime court rather than for the ship auction committee. What's more, even though the ship auction committee is responsible for the maritime court, it should not be interpreted as it may determine the reserve price on behalf of the maritime court.

F. Rules for Adjusting the Ship Reserve Price Based on the Appraised Price

Regardless of who decides the reserve price, specific rules for determining the reserve price should be followed. According to the Provisions of the SPC Regarding Auctioning or Selling off Property, the rules for determining the reserve prices of movable properties and immovable properties are different. Article 8, Paragraph 3 of the Provisions stipulates that:

> *At the first auction, the reserve price as determined by the people's court shall not be lower than 80% of the appraised price or the market price. If the auction fails, when a second auction is conducted, the reserve price may be lowered by taking into consideration certain circumstances, but the level of decrease at each stage should not exceed 20% of the former reserve price.*

Article 27 of the Provisions prescribes that:

> *As to the movable property unsuccessfully auctioned in the second auction, the people's court may, under Article 19 of the present Provisions, fix its price and give it to the execution applicant or other executing creditors for offsetting debt. If the execution applicant or other executing creditors refuse to accept it, or if, in accordance with the law, the property shall not be given*

> *to the execution applicant or other executing creditors for offsetting debt, the people's court shall lift the sealing up or distrainment and shall return the movable property to the person against whom a judgment or order is being executed.*

And Article 28, Paragraph 1 of the Provisions stipulates that:

> *As to the immovable property or any other property unsuccessfully auctioned in the second auction, the people's court may, under Article 19 of the present Provisions, fix its price and give it to the execution applicant or other executing creditors for offsetting debt. If the execution applicant or other executing creditors refuse to accept it, or if, in accordance with the law, the property shall not be given to the execution applicant or other executing creditors for offsetting debt, a third auction shall be held for the immovable property or any other property right within 60 days.*

In accordance with the above stipulations, the reserve price of the movable property may be determined and adjusted two times, with the first reserve price not lower than 80% of the appraised price, and the second reserve price (minimum reserve price) not lower than 64% (80%×80%) of the appraised price. According to the same articles, the reserve price of immovable property may be determined for up to three times, with the first reserve price not lower than 80% of the appraised price, the second reserve price not lower than 64% (80%×80%) of the appraised price, and the reserve price (minimum reserve price) determined in the third auction not lower than 51.2% (80%×80%×80%) of the appraised price.

A ship is in essence a movable property, but has some characteristics of the immovable property, which is manifested as the ownership registration system. Article 24 of the Property Law of the People's Republic of China provides that:

> *The creation, change, transfer or elimination of the real right of any vessel, aircraft or motor vehicle, etc, if it is not registered, may not challenge any bona fide third party.*

In the author's opinion, as a small ship with an appraised price lower than RMB 300,000 is of high liquidity, easier to be cashed and similar to the movable property in nature, its reserve price may be determined and adjusted two times by the rules

for movable property, with the minimum price as low as 64% of the appraised price; and as a ship with an appraised price of more than RMB 300,000 (inclusive) is relatively difficult to be cashed and similar to the immovable property in nature, in order to sell the ship at a maximized price as soon as possible, the reserve price may be determined and adjusted according to the rules for immovable property for up to three times, with the minimum price as low as 51.2% of the appraised price.

G. Conditions for Selling off a Ship Should Be Strictly Complied with

Certain stringent limiting conditions have been set for the sell off of an article. The Provisions of the SPC Regarding Auctioning or Selling off Property specify three circumstances for the sale of an article. One circumstance refers to the legal sale of immovable property after the third unsuccessful auction. Article 28, Paragraph 2 of the Provisions stipulates that:

> *Concerning the immovable property or any of other property right unsuccessfully auctioned in the third auction, if the execution applicant or other executing creditors refuse to accept it, or if, in accordance with the law, the property shall not be given to the execution applicant or other executing creditors for offsetting debt, the people's court shall, within 7 days from the close of the third auction, issue a public notice of sale. Within 60 days from the day when the public notice is issued, if no one is willing to buy the aforesaid property at the reserve price of the third auction and if neither the execution applicant nor other executing creditors accept the property to offset debt, the people's court shall lift the sealing up or distrainment and shall return the property to the person against whom a judgment or order is being executed, except when other execution measures may be taken concerning the property.*

The second circumstance is the sale as agreed by the parties concerned. Article 34, Paragraph 1 of the Provisions stipulates that:

> *If both parties and the relevant creditors agree to sell off the sealed up, restrained or frozen property, such property may be sold off.*

The third circumstance is the legal sale of special articles. Article 34, Paragraph 2 of the Provisions stipulates that:

The people's court may decide to sell off the gold, silver and products made thereof, movable properties with public dealing price in the local market, perishable articles, seasonal goods, and other articles which are difficult to be preserved or need extremely high preservation expenses.

In conclusion, the maritime court should pay attention to the following three aspects in the auction of ships and other properties. Firstly, the auction method should be subject to the aforementioned three circumstances, and the conditions for sale should be strictly followed to avoid immediate sale upon unsuccessful auction. Secondly, for a small ship with an appraised price of less than RMB 300,000 which is difficult to be preserved or needs extremely high preservation expenses, the maritime court may use its authority to decide to sell it off according to the third circumstance. Thirdly, for the sale in the first and third circumstance, a reserve price not lower than half the appraised price shall be set in accordance with Article 35, Paragraph 2 of the Provisions of the SPC Regarding Auctioning or Selling off Property, which stipulates that:

If it is unsuccessful to sell it off at the appraised price, it shall be sold off at a lower price, but this price shall not be lower than 50% of the appraised price.

H. Conditions for Offsetting Debt with Ship Should Be Strictly Complied with

Compared to sale, offsetting debt in kind shall be subject to stricter conditions and restrictions. Currently there are two circumstances under which offsetting debt in kind is permitted by the Chinese law. One circumstance is that the execution applicant or any other creditor requests or agrees to offset debt in kind in case of unsuccessful auction. Article 302 of the Opinions of the Supreme People's Court on Several Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China provides that:

If the property of the person against whom a judgment or order is being executed fails to be auctioned or sold off, the people's court may, with the consent of the execution applicant, fix a price for the property and give it to the execution applicant to offset debt, or give it to the execution applicant

for management; if the execution applicant refuses to accept or manage it, it should be returned to the person against whom a judgment or order is being executed.

Article 19, Paragraph 1 of the Provisions of the SPC Regarding Auctioning or Selling off Property provides that:

During the course of an auction, if no one makes a bidding or the highest bidding is lower than the reserve price, and the present execution applicant or any other executing creditor requests or agrees to accept the auctioned property at the reserve price determined for this auction, the said property shall be handed over to it to offset the debt.

Another circumstance is that the parties concerned agree to offset debt in kind. Article 301 of the Opinions of the Supreme People's Court on Several Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China provides that:

With the consent of the execution applicant and the person against whom a judgment or order is being executed, the property of the latter may, after being fixed with a price, be directly given to the execution applicant to offset debt, rather than being auctioned or sold off. As for the outstanding debt, the person against whom a judgment or order is being executed should continue to pay it off.

Accordingly, the maritime court should strictly comply with the above conditions specified for offsetting debt with ship, and should not use its authority to rule to offset debt in case of unsuccessful or difficult auction.

I. Price Appraisal Report and Other Materials Should Be Filed with Case Volume

Article 61 of the Civil Procedure Law of the People's Republic of China claims that:

Lawyers who serve as litigation representatives or other litigation representa-

tives have the right to investigate and collect evidence, and may consult materials relevant to the case. The scopes and measures of consulting relevant materials should be regulated by the Supreme People's Court.

The Provisions of the Supreme People's Court on Law Agents' Consulting of Civil Case Materials has come into effect as of December 7, 2002. Accordingly, the civil cases records of the people's court will be open to the public, and the lawyers and other law agents may, by presenting their valid certificates, consult at the court the materials relating to the cases they represent during the litigation. The parties concerned may also, as required by any retrial, consult materials relevant to cases already concluded. In order for the parties concerned to exercise the right to consult materials relating to the ship auction cases and for the judge to easily learn about the ship conditions, and to ensure the integrity of the case volume, the author suggests that the Price Appraisal Report, the reserve price and starting price of the ship and other materials be filed in the formal volume with the case records, while the draft of reserve price and starting price of the ship be filed in the sub-volume with the case records.

In consideration of all the issues listed above, the author draws up the Standard Measures for Auctioning Properties including Ships and Goods on Board by the Maritime Courts (Exemplary Draft) as follows:

Article I Purpose and Basis

For the purpose of regulating the disposal of ships and goods on board (including fuel and materials used by ships) including auction, sale or offsetting debt with the property (hereinafter "disposal"), safeguarding the legitimate rights and interests of the parties concerned and other interested parties, these Measures are hereby formulated based on the effective laws and regulations and taking into account the actual conditions of the maritime courts.

Article II Application of Law

The Special Maritime Procedure Law of the People's Republic of China (hereinafter "Maritime Procedure Law") shall apply to the disposal of ships and goods on board (including fuel and materials used by ships) in the maritime claim preservation procedures. For matters not covered by the Maritime Procedure Law or specifically regulated therein, the Provisions of the Supreme People's Court Regarding Auctioning or Selling off Property by the People's Courts in Civil Execution (hereinafter "Provisions of the SPC Regarding Auctioning or Selling off Property") shall be applicable by reference.

For the disposal of ships and goods on board (including fuel and materials used by ships) in the execution procedures, the Provision of the SPC Regarding Auctioning or Selling off Property shall be applicable and the Maritime Procedure Law shall be applicable by reference.

For the disposal of other properties, relevant regulations in the Civil Procedure Law of the People's Republic of China and the Provisions of the SPC Regarding Auctioning or Selling off Property shall be applicable.

Article III Issuance of Investigation Report of Ship Condition

In accordance with the provisions of the Maritime Procedure Law, where it is necessary to investigate a ship's condition, the Investigation Report of Ship Condition should be issued by an eligible ship inspection institution and an eligible inspector.

The Investigation Report of Ship Condition shall contain the following information:

(I) Name of the principal and contents entrusted for investigation;

(II) Materials entrusted for investigation;

(III) Investigation basis and scientific and technical means applied;

(IV) Description of the investigation process;

(V) Specific investigation conclusions;

(VI) Statement of eligibility of investigator;

(VII) Seals and signatures of investigator and investigation institution.

Article IV Issuance of Price Appraisal Report

The Price Appraisal Report of ships and goods on board (including fuel and materials used by ships) should be issued by an eligible asset (price) appraisal institution and eligible appraiser.

The asset (price) appraisal institution shall assess the ship price based on the Investigation Report of Ship Condition issued by the ship inspection institution.

The Price Appraisal Report shall include the following information:

(I) Object to be appraised;

(II) Specific appraisal basis;

(III) Description of appraisal method;

(IV) Description of appraisal process;

(V) Specific appraisal conclusions;

(VI) Qualification certificate of appraisal institution and appraiser;

(VII) Seals and signatures of appraisal institution and appraiser;

(VIII) Other contents relevant to the price appraisal.

Article V Delivery of Report

The Investigation Report of Ship Condition and the Price Appraisal Report should be delivered to the parties concerned or other interested parties.

If the number of the parties concerned and other interested parties is more than ten, and it is inconvenient to deliver the above documents to all parties, a hearing should be established in order to present the contents of the Investigation Report of Ship Condition and the Price Appraisal Report. A notice of the hearing should be sent to all the parties.

Article VI Body to Determine the Reserve Price

The reserve price shall be set for the auction and sale of ships and goods on board (including fuel and materials used by ships).

If the appraised price of a ship and goods on board (including fuel and materials used by the ship) is more than RMB 5 million (inclusive), the reserve price should be determined and adjusted by the judicial committee; if the appraised price is lower than RMB 5 million, the reserve price should be preliminarily determined and adjusted by the collegiate panel before reporting to the competent vice president of the court for approval. For major, difficult, complicated and sensitive cases that require submission to the judicial committee, the reserve price should be determined and adjusted by the judicial committee.

The reserve price shall be kept confidential.

Article VII Constitution of the Collegiate Panel

A collegiate panel shall be constituted for the auction of ships and goods on board (including fuel and materials used by ships), and shall consist of judges or assistant judges.

The collegiate panel shall perform the following duties:

(I) To determine and adjust the reserve price and starting price for the auction of a ship and goods on board (including fuel and materials used by a ship);

(II) To decide whether the ship and goods on board (including fuel and materials used by a ship) will be sold off and the reserve price for the selloff;

(III) To decide whether the ship and goods on board (including fuel and materials used by a ship) will be used to offset debt; and

(IV) Other matters for the collegiate panel to decide.

The trial service center should be responsible for specific matters regarding the auction of ships and goods on board (including fuel and materials used by ships), including finding the relevant entity or individuals to conduct investigation, appraisal, announcement, auction, custody and property transfer.

Article VIII Rules for Determining and Adjusting the Reserve Price

In the auction of ships and goods on board (including fuel and materials used by a ship), a reserve price should be set, determined and adjusted based on the appraised price.

For movable property, the reserve price may be determined and adjusted a total of two times. The first reserve price shall not be lower than 80% of the appraised price, while the second reserve price (the minimum reserve price) shall not be lower than 64% of the appraised price.

For immovable property, the reserve price may be determined and adjusted for up to three times. The first reserve price shall not be lower than 80% of the appraised price, the second reserve price not lower than 64%, and the third reserve price (the minimum reserve price) not lower than 51.2%.

Article IX Determination of Reserve Price of Ships and Other Properties

As for a ship with an appraised price lower than RMB 300,000, the reserve price should be determined and adjusted according to rules applicable to movable properties.

As for a ship with an appraised price exceeding RMB 300,000 (inclusive), the reserve price should be determined and adjusted according to rules applicable to immovable properties, unless prompt disposal is required in special situations, when the reserve price may be determined and adjusted according to rules applicable to movable properties.

Reserve prices of other properties excluding ships should be determined and adjusted according to rules for movable properties or immovable properties respectively based on the nature of a property.

Article X Publishing of Starting Price

The starting price should be published to the public in a timely manner.

The starting price may be published through the following methods:

(I) Enquiry clues provided in the auction announcement, including the enquiry time, enquiry channel, contact person, etc.;

(II) Publishing on the internet. The starting price should be published on the China Auction and Seizure of Ship website (http://www.cnaas.com.cn) immediately after it is determined.

(III) Other appropriate methods to publish.

Article XI Sale of Ships and Goods on Board (Including Fuel and Materials Used by Ships)

Ships and goods on board (including fuel and materials used by ships) may

only be sold off under any of the following circumstances:

(I) Sale based on agreements. According to Article 34, Paragraph 1 of the Provisions of the SPC regarding Auctioning or Selling off Property, sale may only be made with the consent of the parties concerned and relevant right holders;

(II) Sale of Special Articles. According to Article 34, Paragraph 2 of the Provisions of the SPC Regarding Auctioning or Selling off Property, gold, silver and products made thereof, movable properties with public dealing price in the local market, perishable articles, seasonal goods, and other articles which are difficult to be preserved or need extremely high preservation expenses may be sold off by the people's court in the light of its authority;

(III) Unsuccessful auction of ships and other immovable properties for the third time. As to the immovable properties or other properties unsuccessfully auctioned in the third auction, under Article 28, Paragraph 2 of the Provisions of the SPC Regarding Auctioning or Selling off Property, if the execution applicant or other executing creditors refuse to accept it, or if in accordance with the law, it shall not be given to offset debt, the people's court may arrange a sale.

According to Article 35, Paragraph 2 of the Provisions of the SPC Regarding Auctioning or Selling off Property, a reserve price not lower than 50% of the appraised price should be set for sale in circumstances as described in the above Paragraphs (I) and (II).

As for ship with an appraised price lower than RMB 300,000, if it is difficult to preserve or requires extremely high preservation expenses, the people's court may use its authority to decide to sell it off in the manner as described in Paragraph (II).

Article XII Offsetting Debt with Ships and Goods on Board (including Fuel and Materials Used by Ships)

Ships and goods on board (including fuel and materials used by ships) may be used to offset debt under any of the two following circumstances:

(I) The parties concerned agree to offset debt in kind. According to Article 301 of the Opinions of the Supreme People's Court on Several Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China, with the consent of the execution applicant and person against whom a judgment or order is being executed, the people's court may fix a price for the property of such person rather than auctioning or selling it off, and directly give it to the execution applicant to offset debt.

(II) The execution applicant or any other creditor requests or agrees to offset

debt in kind in case of unsuccessful auction. According to Article 19, Paragraph 1 of the Provisions of the SPC Regarding Auctioning or Selling off Property, the execution applicant or any other executing creditor may request or agree to offset debt in kind after the auction fails.

Article XIII Filing of Materials

The Price Appraisal Reports, reserve price and starting price of ships and goods on board (including fuel and materials used by ships) and other materials should be filed in the formal volume with the case records, while drafts of the reserve price and starting price should be filed in the sub-volume with the case records.

Article XIV Effective Date

The Measures (in trial) will come into effect as of the date of being adopted.

Translator: FANG Qiong
Editor (English): Vasile Gadinceanu

Obligations and Liabilities for Consigning Dangerous Goods

YANG Yi*

Abstract: In the event of an accident such as fire and explosion arising from transporting dangerous goods, the cargo-carrying vessel and seamen thereon potentially face damage to an immeasurable extent. As such, it is necessary to discuss the issue of obligations and liabilities of consigning dangerous goods so as to ensure, as much as possible, before-the-event preventions are in place rather than needing an after-the-event remedy.

Key Words: Dangerous goods; Marine transport; Hague-Visby Rules; United Nations Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]

I. Introduction of the Issue

Hanjin operates a shipping company, focusing on the ship route of the Far East and Europe, jointly with Yang Ming Marine Transport Corp., K Lines, COSCO and Senator. The vessel named MV Hanjin Pennsylvania was delivered, in April 2002, to Dr. Peters Group, an investment company based in Germany, who fund the ship building. The vessel was then rented to Hanjin on a long-term basis and left from Singapore to Hamburg in early November. In route to Hamburg, two explosive fires occurred in containers on the left side on the fourth hold's deck at approximately 6 a.m. in the Indian Ocean, to the south of Sri Lanka (88 nautical miles away from Colombo). Two mariners died in the fire, and the other mariners, who survived but could not control the fire, were later rescued by other passing vessels. Sustained combustion along with small explosions continued. Smit and Wijsmuller companies entered into salvage contracts with Hanjin but failed to put out the fire. In order to prevent the fire from endangering containers filled with fireworks loaded on the

* YANG Yi, Master Candidate of Maritime Law at Dalian Maritime University.

decks of the first, second and third holds, salvage personnel would have sprayed a large quantity of seawater on the containers, which would have resulted in seawater leakage into the cargo hold and potential submergence of the entire vessel. As the fire spread backwards, the containers on the decks of the fifth and sixth holds began to combust. On November 15, a violent explosion happened in the sixth hold, and the bridge, the living quarter and the engine room were also affected. The vessel was towed to Singapore on December 13, and the fire was completely extinguished on December 16. The vessel was insured for USD 60 million, and the insurance company agreed to assess the damage as a constructive total loss. After all goods had been unloaded, the vessel was sold to Zodiac Maritime Company for USD 2.3 million as scrap. On July 8, 2003, the vessel was towed to Shanghai Chengxi Shipyard for rebuilding. On March 11, 2004, the vessel left the shipyard with a new name MV NORASIA BELLATRIX. The estimated rebuilding cost was approximately USD 20 to 30 million. The cause of the fire so far has not been identified. The possible reasons include: (1) The vessel carried undeclared or falsely declared dangerous goods; (2) The oils in the diesel engines, loaded in the refrigerated containers on the deck, leaked out due to neglected maintenance or repair of the refrigerated containers when the vessel was sailing in the high-temperature equatorial sea area, and the damaged circuit and connector on the deck caught fire.[1]

It is assumed that the cause of fire is the first interpretation above, i.e., the vessel carried undeclared or falsely declared dangerous goods. It is clear that in the event of any accident such as fire and explosion during the transportation of dangerous goods, the cargo carrying vessel and seamen thereon will face potential immeasurable damage. As such, it is necessary to discuss the issue of obligations and liabilities of consigning dangerous goods.

II. The Concept of Dangerous Goods

A. Regulations of International Shipping Conventions

1. Regulations of the Hague Rules

According to Paragraph 6, Article 4 of the Hague Rules,

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1 MV Hanjin Pennsylvania: Explosions at Sea-Final Report, prepared by National Fireworks Association.

> *Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation…*

It is obvious that regulations on dangerous goods under the Hague Rules are very principled, i.e., dangerous goods are "goods of an inflammable, explosive or dangerous nature." We should not be overcritical with respect to such regulations under these rules, as after all, an understanding of dangerous goods when the rules were promulgated was generally concentrated on inflammable or explosive goods. On the other hand, the Hague Rules embody an open-ended regulation pattern by setting forth "goods of a dangerous nature." The flexibility of the common law system is thus fully revealed. In an effort to handle ever-changing specific circumstances of dangerous goods, common law countries in which the Hague Rules apply, generally complement and perfect their understanding of the definition of dangerous goods through abundant legal precedents. As such, the scope of goods of a dangerous nature has become increasingly extensive.

The case of *Chandris v. Isbrandtsen-Moller Co. Inc.*[2] involved the transport of rosin. It was regulated in the charter party that transportation of "acidic materials, explosive substances, arms, munitions or other dangerous goods" was forbidden. The shipper in this case claimed that a restricted meaning of "other dangerous goods" should be provided under the context. In the judgment, Judge Devlin stated the following: "I do not find any suggestion that any such restricted meaning shall be provided. I believe that the only reason why the ship owner objected to the shipment of acidic materials, explosive substances, arms and munitions is that they are dangerous, and hence it is assumable that the ship owner would also object to the shipment of any other dangerous goods."

In *Giannis NK*,[3] the peanut meal loaded in the fourth hold was contaminated by Khapra beetles. Because the wheat (not contaminated by the said beetles) loaded in the second and third holds was forbidden to be unloaded at the destination port, ultimately the carrier was left with no other choice but to discharge all the goods

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2 *Lloyd's Law Report*, Vol. 83, 1950, p. 385.
3 *Lloyd's Law Report*, No. 1, 1998, p. 337.

into the sea. The first-instance judgment, ruled by Judge Longmore, indicated that the peanut meal loaded in the fourth hold constituted dangerous goods in that it had resulted in losses by causing other goods loaded on the same vessel to be discharged into the sea. The shipper appealed against the first-instance judgment, but the court of appeal as well as the House of Lords both affirmed the first-instance judgment. Lord Lloyd of the House of Lords repeated Judge Devlin's opinions with respect to the case of *Chandris v. Isbrandtsen-Moller Co. Inc.* and later pointed out that "I can see no reason to confine the word 'dangerous' to goods which are liable to cause direct physical damage to other goods." It is true that goods which explode or catch fire would normally cause direct physical damage to other cargo in the vicinity. However, there is no reason for us to simply interpret the word "dangerous" as "directly dangerous", because it is explicitly stipulated under the Hague Rules as follows: "the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment." In his admirably clear and concise judgment[4], Judge Longmore pointed out that the peanut meal loaded on the vessel was of a dangerous nature, and because of such peanut meal other goods loaded on the same vessel had to be dumped into the sea, thereby resulting in losses. Judge Hirst of the court of appeal[5] also supported the above judgment by saying:

> *I find myself in complete agreement with their reasoning. Accordingly it is unnecessary to consider a further argument that goods may be of a dangerous nature even though they do not present any physical danger to ship or cargo, but are "legally" dangerous in the sense that they are liable to cause delay to ship and cargo through the operation of some local law.*

The Hague–Visby Rules have not revised the provision of Paragraph 6, Article 4 of the Hague Rules. It is clear that the understanding of "dangerous goods" under the Hague Rules is open-ended. New legal precedents concerning the affirmation of dangerous goods have been enriching the connotation and extension thereof. However, such expanded extension of dangerous goods is a sort of after-the-event remedy and cannot change the status quo of frequent occurrence of marine accidents. Many maritime countries have gradually recognized the importance

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4 *Lloyd's Law Report*, No. 2, 1994, p. 171.
5 *Lloyd's Law Report*, No. 1, 1996, p. 577.

and necessity of before-the-event prevention and are standardizing and improving marine transport of dangerous goods by developing international conventions and domestic legislations.

2. Regulations under the Hamburg Rules

There are no regulations that define dangerous goods under the Hamburg Rules.

3. Regulations under the United Nations Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]

It is provided in Paragraph 1, Article 33 ("Special rules on dangerous goods") under the Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] (hereinafter "the Draft Convention") (WP. 56) as follows:

> *"Dangerous goods" means goods which by their nature or character are, or reasonably appear likely to become, a danger to persons or property or an illegal or unacceptable danger to the environment.*

Article 15 ("Goods that may become a danger") of the up-to-date text (WP. 81) states that: … if the goods are, or appear likely to become during the carrier's period of responsibility an actual danger to persons, to property or to the environment. It is provided in its Article 32 ("Special rules on dangerous goods") that: when goods which by their nature or character are, or become, or reasonably appear likely to become, a danger to persons or property or to the environment… It can be seen from the provisions above that the regulations on dangerous goods under the Draft Convention have inherited and developed the regulations of Paragraph 6, Article 4 of the Hague Rules. On one hand, the Draft Convention still adopts the open-ended regulations pattern, i.e., goods can be defined as dangerous goods based on their nature or character or other evidence proving their potential of being dangerous. On the other hand, the Draft Convention defines dangerous goods as "goods which are, or become, or reasonably appear likely to become, a danger to persons or property or to the environment." Such dangerousness is based on the nature or character of goods.

4. Brief Summary

In summary, both the Hague Rules and the up-to-date Draft Convention have adopted the open-ended regulation pattern when they touch on the provisions concerning dangerous goods. Additionally, the connotation and extension of dangerous goods are continually enhanced, along with the development of

scientific technology. However, they are merely international shipping conventions aiming at safeguarding the orderly development of the international shipping industry by stipulating the rights, obligations and liabilities of the carrier and the shipper. It is unlikely for them to make more detailed stipulations on marine transport of dangerous goods. The improvement of regulations on marine transport of dangerous goods requires the preparation of international conventions on transport of dangerous goods as well as the development of domestic legislation. Notwithstanding, the open-ended regulations on dangerous goods under these two laws have undoubtedly provided a direction for international conventions and domestic legislation. It is mandatory to safeguard the legitimate rights and interests of the carrier as much as possible so as to maintain healthy and orderly development of the shipping industry.

B. Regulations under the International Maritime Dangerous Goods Code

For the purpose of strengthening international management of marine transport of dangerous goods, the Safety of Life at Sea (SOLAS) Conference adopted general regulations on the classification of dangerous goods and the shipping of dangerous goods in 1948. According to the Proposal No. 56, adopted in 1960, the International Maritime Organization (IMO) shall be responsible for researching and developing a uniform International Maritime Dangerous Goods Code (hereinafter "the IMDG Code"). In 1965, upon the approval of the Maritime Safety Committee, the IMDG Code was recommended by the IMO to the governments of various countries at an IMO conference. Since the promulgation of the IMDG Code, multiple countries have implemented the requirements imposed by the IMDG Code through domestic legislation. So far, more than 50 countries in the world have implemented the IMDG Code for the marine transport of dangerous goods, where the gross tonnage of vessels accounts for more than 84% of that of merchant vessels in the world. The IMDG Code have incorporated the relevant provisions under the International Convention for Safety of Life at Sea (SOLAS Convention) and the International Convention for the Prevention of Pollution from Ships (MARPOL), making the IMDG Code prescriptive rules on marine transport of dangerous goods and marine pollutions. From the marine transport perspective, dangerous goods are divided into four classes: (1) dangerous goods in packaged form, (2) dangerous goods in solid form in bulk, (3) dangerous goods in liquid form in bulk and (4) dangerous goods in liquefied gas form in bulk. The four classes of dangerous goods were

originally regulated by the IMO's IMDG Code, Code of Safe Practice for Solid Bulk Cargoes, International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk and International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk, respectively. In 1994, the IMO published the IMDG Code (consolidated edition, 5 volumes in total) by combining the first two codes.

Paragraph 1.1.1.5 of Section 1.1.1 ("Application and implementation of the Code") under the IMDG Code (consolidated edition) stipulates that the provisions contained in this Code are applicable to all ships to which the SOLAS Convention, 1974, as amended, applies and which are carrying dangerous goods as defined in Regulation 2, Part A of Chapter VII of that Convention. Additionally, Section 1.1.2 of the IMDG Code reproduces in full Part A ("Carriage of dangerous goods in packaged form or in solid form in bulk") of Chapter VII of the SOLAS Convention, 1974, as amended. It is clear that the meaning of dangerous goods in the IMDG Code is identical to that in the SOLAS Convention, 1974, as amended. Regulation 2 ("Classification"), Part A, Chapter VII of the SOLAS Convention, 1974[6] can be deemed as regulations on the meaning of dangerous goods. This regulation defines dangerous goods in a special way, because it adopts both the closed-type regulation pattern of listing the names of various dangerous goods and the open-ended regulation pattern by stating that miscellaneous dangerous substances are "any other substance which experience has shown, or may show, to be of such a dangerous character that the provisions of this Chapter should apply to it." In other words, even if a type of substance is not listed in the dangerous goods of Class 1 to Class 8, such type of substance shall be deemed as dangerous goods as long as there is evidence proving its dangerous character. The above regulation pattern is undoubtedly reasonable, since, after all, due to people's limited cognitive ability, it is impossible to list all dangerous goods in an exhausted manner. With

6 Regulation 2 ("Classification"), Part A, Chapter VII of the SOLAS Convention, 1974, as amended, stipulates that: Dangerous goods shall be divided into the following classes: Class 1, explosives; Class 2, gases compressed, liquefied or dissolved under pressure; Class 3, inflammable liquids; Class 4.1, inflammable solids; Class 4.2, substances liable to spontaneous combustion; Class 4.3, substances which, in contact with water, emit inflammable gases; Class 5.1, oxidizing substances; Class 5.2, organic peroxides; Class 6.1 poisonous (toxic) substances; Class 6.2, infectious substances; Class 7, radioactive substances; Class 8, corrosives; Class 9, miscellaneous dangerous substances, that is, any other substance which experience has shown, or may show, to be of such a dangerous character that the provisions of this Chapter should apply to it.

the progress of science and technology, new substances with dangerous character will continually appear. If we merely consider the dangerous articles as those which are specifically enumerated in the IMDG Code, the carrier will suffer inevitable unfairness, and the healthy development of the shipping industry will be impaired. It is based on such considerations that the regulation on Class 9 ("Miscellaneous dangerous substances") is prepared in an open-ended pattern, so that new substances with dangerous character can be regarded as dangerous goods. By doing so, shippers may be required to perform their obligations when consigning dangerous goods, so as to offer certain protection to carriers in the shipping industry who are engaged in industry with high risks and demanding big investment. After all, before-the-event prevention is more effective than the after-the-event compensation for loss or damage of property or human life.

C. Provisions of Domestic Laws and Regulations

There are no regulations defining dangerous goods in the Maritime Code of the People's Republic of China. However, it is provided in Paragraph 1, Article 68 thereunder, as follows: At the time of shipment of dangerous goods, the shipper shall, in compliance with the regulations governing marine transport of dangerous goods, have them properly packed, distinctly marked and labeled and notify the carrier in writing of their proper description and nature and the precautions to be taken. In the event that the shipper fails to notify the carrier or notifies it in an inaccurate manner, the carrier may have such goods unloaded, destroyed or rendered innocuous when and where circumstances so require, without making any compensation. It can be observed from the provisions above that the key to understanding the meaning of dangerous goods is the interpretation to relevant regulations on marine transport of dangerous goods observed by the shipper. Once the relevant regulations on marine transport of dangerous goods as observed are clarified, dangerous goods may be interpreted clearly. Article 68 of the Maritime Code of the People's Republic of China is the general requirement imposed on the shipper when they are shipping dangerous goods. During the practice, regulations, which are clearer and more detailed, are needed to facilitate the implementation of the general requirement.

Since January 1, 2004, China has enforced the 31st Amendment to the IMDG Code 2002. At the same time, all the packaging, labeling, stacking and loading of dangerous goods and other matters related thereto shall be handled in strict

accordance with relevant requirements imposed by the incoming and departing port States and the IMDG Code. In other words, with respect to marine transport of dangerous goods involving foreign interest, the effect of the IMDG Code is higher than that of domestic laws and regulations, which means that the relevant regulations under the IMDG Code shall prevail. As such, the above discussion on the meaning of dangerous goods also applies to China. That is to say, when identifying dangerous goods in China, we should check whether the concerned substance is specifically listed in the classes under the IMDG Code and whether such substance can be proved to be of dangerous character. Only with analysis from the above-mentioned two aspects can we reach a correct conclusion on the dangerousness of a substance.

In addition to the IMDG Code mentioned above, which should prevail in application, the provisions under relevant Chinese administrative regulations must also be analyzed. Paragraph 3, Article 23 of the Provisions of the People's Republic of China on Safety Supervision and Administration of Carriage of Dangerous Goods by Vessels (2003 Order No. 10 of the Ministry of Communications of the People's Republic of China) provides that:

> *Where a vessel carries goods which are not listed in the List of Dangerous Goods (State Standard GB12268) or the International Maritime Dangerous Goods Code formulated by the International Maritime Organization but which have the nature of dangerous substance, it shall make declaration for entering or exiting the port in accordance with the administrative provisions on carriage of dangerous goods.*

Article 3 of the Rules on Dangerous Goods Declaration for the Ships Carrying Foreign Trade Cargo of the People's Republic of China (1993 Order No. 298 of the Harbor Supervision Bureau of China) stipulates that:

> "*Dangerous goods" mentioned hereunder refer to dangerous and hazardous substances and articles under Chapter VII of the International Convention for the Safety of Life at Sea, 1974, Annexes I, II and III to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978, and other international conventions and rules which China has acceded to.*

Article 5 of the Rules states that:

> *Vessels carrying the following dangerous goods to enter a port or cross the border… (I) Radioactive substances; (II) Infectious substances; (III) New organic peroxides; (IV) Articles "not set out separately" in the IMDG Code; (V) Liquid chemicals in bulk.*

From the provisions above, one can note that the domestic legislation in China embodies exactly the same spirit as the IMDG Code. Those substances listed in the List of Dangerous Goods (State Standard GB12268) or the IMDG Code apparently fall within the scope of dangerous goods. However, those which are not listed in the List of Dangerous Goods (State Standard GB12268) or the IMDG Code but have the nature of dangerous substance as proved by evidence will also be deemed as dangerous goods.

The Rules for Carriage of Dangerous Goods by Waterway implemented by the Ministry of Communications of the People's Republic of China since December 1, 1996 rather than the IMDG Code should be applicable to marine transport of dangerous goods not involving foreign interest. Paragraph 1, Article 3 of the Rules states:

> *All goods characterized by explosiveness, inflammability, toxicity, corrosion or radioactivity which are likely to cause personal injury and property damage and hence require special protection in the transport, handling and storage process are dangerous goods.*

It is clear that the above definition emphasizes the dangerous character of the goods themselves. Those goods which are likely to cause personal injury and property damage and hence require special protection in the transport, handling and storage process will be considered dangerous goods without any exception. Additionally, in accordance with the Classification and Code of Dangerous Goods of the People's Republic of China (State Standard GB6944), the List of Dangerous Goods of the People's Republic of China (State Standard GB12268) and other relevant State standards, the Rules divide dangerous goods into nine classes. Article 21 of the Rules stipulates that:

> *When consigning dangerous goods unlisted in the Rules, the shipper shall,*

before the consignment, submit the Dangerous Goods Appraisal Sheet issued by the department recognized by the Ministry of Communications to the Harbor Administration Authority and the Harbor (Navigation) Supervision Authority at the port of loading for the Harbor Administration Authority and the Harbor (Navigation) Supervision Authority to determine the handling and transport conditions. Upon the approval of the Ministry of Communications, the consignment shall be implemented as per the item of "not set out separately" in the corresponding category of the Rules.

The above stipulation shows from another perspective that the goods, as long as they are of dangerous character, shall be treated as dangerous goods even though they are not set out in the classes of dangerous goods.

D. Brief Summary

We can see from the analysis above that international shipping conventions, the IMDG Code and the domestic legislation of China interpret dangerous goods in a similarly open-ended way. Various countries have reached a common understanding with respect to providing carriers carrying dangerous goods with more and fuller protection, and China is not an exception. First of all, Article 68 of the Maritime Code of the People's Republic of China, as general provisions on the obligations of the shipper when consigning dangerous goods, is an overriding rule in this area. Second, as the prescriptive rules for marine transport of dangerous goods, the IMDG Code lists over 6,000 dangerous goods in nine classes in a detailed manner and specifically provides for each obligation to be performed when consigning these dangerous goods. The Code also functions as a specific regulation, standardizing marine transport of dangerous goods within the Chinese territory involving foreign interest. Meanwhile, the Provisions of the People's Republic of China on Safety Supervision and Administration of Carriage of Dangerous Goods by Vessels promulgated by the Ministry of Communications as well as the Rules on Dangerous Goods Declaration for the Ships Carrying Foreign Trade Cargo promulgated by the Harbor Supervision Bureau both provide legal support for the administration of marine transport of dangerous goods in China. Third, the Rules for Carriage of Dangerous Goods by Waterway implemented by the Ministry of Communications since December 1, 1996, is applicable to marine transport of dangerous goods not involving foreign interest.

III. Obligations and Liabilities for Consigning Dangerous Goods

A. Regulations under International Shipping Conventions

1. The Hague Rules and the Hamburg Rules

The Hamburg Rules regulate the obligations and liabilities for consigning dangerous goods for the first time. Article 13 ("Special rules on dangerous goods") thereof states that:

> *(1) The shipper must mark or label in a suitable manner dangerous goods as dangerous. (2) Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character: (a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation. (3) The provisions of Paragraph (2) of this Article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character. (4) If, in cases where the provisions of Subparagraph (b), Paragraph (2) of this Article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation….*

One can note that under the Hamburg Rules, the shipper shall perform two obligations: the obligation to inform and the obligation to give clear indication. It is noteworthy that "any person" provided in Paragraph (3) apparently includes the carrier. In other words, even if the shipper fails to inform or wrongly informs, as long as the carrier has knowledge of the goods' dangerous character, he shall not be entitled to invoke the provisions of Paragraph (2) of this Article to require compensation for any loss resulting from the shipment of such goods, but he may at any time unload, destroy or render innocuous the goods, as the circumstances may

require, without payment of compensation.

Even though the Hague Rules do not explicitly stipulate the obligations of the shipper when consigning dangerous goods, they specify the liability for compensation on the part of the shipper. Paragraph 6, Article 4 thereof states:

> *The shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.*

Comparing the regulations under the Hague Rules and the Hamburg Rules, the author believes that the following two points are worth mentioning:

First is the consequence if the carrier knows the dangerous character of the goods. Under the Hague Rules as well as the Hamburg Rules, even if the carrier has knowledge of the dangerous character of the goods, he may still unload such goods at any place, or have them destroyed or rendered innocuous, without payment of compensation.

Second is the accountability principle of the compensation liability of the shipper. Under the Hague Rules, the principle of strict liability is applied to the compensation liability of the shipper, which is demonstrated by the Judgment made by Lord Lloyd in *Giannis NK*. In this case, in accordance with the provisions of Paragraph 3, Article 4 of the Hague Rules,[7] the shipper claimed that he had no knowledge of the fact that the goods had been contaminated by pests and hence had no fault. As such, he should not assume the compensation liability. However, Lord Lloyd from the House of Lords opined that

> *For one thing, the provisions of Paragraph 3, Article 4 did not have over-riding effect as the explicit wording of 'notwithstanding the provisions of the preceding Articles' did not appear therein just as did in Article 6. What was more important, according to the first half of Paragraph 6, Article 4,*

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7 Paragraph 3, Article 4 of the Hague Rules states: The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

the carrier is entitled to unload and destroy dangerous goods whose nature is unknown by the carrier. Apparently, the entitlement to such right is not affected whether or not the shipper has knowledge of the dangerous character of the goods. The provisions continued without a pause that the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. Naturally, we can understand the two parts of the provisions as the two sides of a coin. As such, the liability of the shipper when consigning dangerous goods does not depend on his knowledge of the dangerous character of the goods, and his compensation liability does not depend on the existence of fault.

The Hamburg Rules, first, provide for general rules with respect to the shipper's liability in Article 12:

The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

It can be seen that the shipper's compensation liability follows the fault liability principle. However, such general rule cannot override the special rules provided in Article 13. In other words, the principle of strict liability is implemented with respect to the shipper's compensation liability.

2. United Nations Draft Convention

Article 32 of the latest Draft Convention (WP. 81) of the United Nations provides:

When goods by their nature or character are, [or become,] or reasonably appear likely to become, a danger to persons or property or to the environment: (a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before the consignor delivers them to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier or any performing party for all losses, damages, delay in delivery and expenses

directly or indirectly arising out of or resulting from such shipment; (b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier or any performing party for all losses, damages, delay in delivery and expenses directly or indirectly arising out of or resulting from such failure.

It can be observed from the provision above that under the Draft Convention, first, the obligations of the shipper when consigning dangerous goods include the obligation to inform and the obligation to give clear indication. Second, the shipper's compensation liability shall be based on the strict liability, meaning that the shipper shall assume the compensation liability "as long as he fails to do so." Finally, matters that may cause the shipper to pay compensation include "all losses, damages, delays in delivery and expenses directly or indirectly arising out of or resulting from such failure."

B. Domestic Legislation in China

Article 68 of the Maritime Code of the People's Republic of China provides:

At the time of shipment of dangerous goods, the shipper shall, in compliance with the regulations governing marine transport of dangerous goods, have them properly packed, distinctly marked and labeled and notify the carrier in writing of their proper description and nature and the precautions to be taken. In the event that the shipper fails to notify the carrier or notifies him in an inaccurate manner, the carrier may have such goods unloaded, destroyed or rendered innocuous when and where circumstances so require, without payment of any compensation. The shipper shall make compensation to the carrier for any damage resulting from transporting such goods. Notwithstanding the carrier's knowledge of the nature of the dangerous goods and his consent to carry, he may still have such goods unloaded, destroyed or rendered innocuous, without making any compensation, when they become an actual danger to the ship, the crew and other persons on board, or to other goods. However, the provisions of this paragraph shall not prejudice the contribution to general average, if any.

Article 70 of the Maritime Code further states:

> *The shipper shall not be liable for the loss sustained by the carrier or the actual carrier, or for the damage sustained by the ship, unless such loss or damage was caused by the fault of the shipper or the servant or agent thereof. The servant or agent of the shipper shall not be liable for the loss sustained by the carrier or the actual carrier, or for the damage sustained by the ship, unless the loss or damage was caused by the fault of the servant or agent of the shipper.*

It can be seen that the above regulations under the Maritime Code of the People's Republic of China have incorporated and developed the reasonable provisions under the Hague Rules and the Hamburg Rules. On one hand, China sets out the obligations to be performed by the shipper when consigning dangerous goods in accordance with the Hamburg Rules and also develops the later to some extent. First, the shipper is obliged to provide the carrier with information of the dangerous goods in a truthful manner (the obligation to inform); second, the shipper is obliged to have the dangerous goods properly packed (the obligation to pack); and third, the shipper is obliged to mark and label the dangerous goods as dangerous (the obligation to give clear indication). On the other hand, China stipulates the compensation liability to be performed by the shipper when consigning dangerous goods as well as the accountability principle in accordance with the Hague Rules

The obligations of the shipper will be analyzed specifically as follows:

1. The Obligation to Inform

Performance of this obligation shall be based on and with the help of various documents. The documents submitted by the shipper recording items required shall serve the purpose of informing the carrier of the dangerous character of the consigned goods.

Section 1.1.2 of the IMDG Code reproduces in full Part A ("Carriage of dangerous goods in packaged form or in solid form in bulk") of Chapter VII of the SOLAS Convention, 1974, as amended. Paragraph 1, Regulation 5 of this Part provides:

> *In all documents relating to the carriage of dangerous goods by sea where*

the goods are named the correct technical name of the goods shall be used (trade names shall not be used alone) and the correct description given in accordance with the classification set out in Regulation 2 of this Chapter.

Article 24 of the Provisions of the People's Republic of China on Safety Supervision and Administration of Carriage of Dangerous Goods by Vessels promulgated by the Ministry of Communications of the People's Republic of China stipulates:

Where a vessel carrying dangerous goods goes through the declaration procedures for entering or exiting a port, the declared contents shall at least include the name of the vessel, the estimated time of entering or exiting the port, and the correct name, serial number, category, quantity, character, packing, position of loading, etc. of the dangerous goods carried, and the vessel shall provide the information on its holding of the certificates or documents on safe navigability, fitness for carriage, fitness for transport, and prevention of pollution ... With respect to the inflammable, explosive, erosive, virulent, radioactive, infectious, pollutant or harmful articles or other dangerous articles, the vessel shall, at the time of declaration, attach such information as the technical instructions on the safety of corresponding dangerous goods, notes on safe operation, the protection of personnel, emergency rescue and leakage treatment measures.

Article 7 of the Rules on Dangerous Goods Declaration for the Ships Carrying Foreign Trade Cargo promulgated by the Harbor Supervision Bureau prescribes:

In the event of any vessel carrying dangerous goods for export, the Declaration Form for Dangerous Goods Carried by Ships shall be completed and submitted to the harbor supervisor directly or through the agent three days before loading, so as to report the description, UN No., type or nature, quantity, packaging form and specification or shipping form of the preloaded dangerous goods. Shipment may be proceeded only with the approval of the harbor supervisor.

Paragraph 1, Article 11 of the said Rules further states:

> *When completing relevant documents concerning dangerous goods, the correct technical name shall be used.*

And its Article 12 provides:

> *When going through the dangerous goods declaration procedure, the shipper shall explicitly indicate in the declaration documents emergency measures and medical first aid methods or applicable emergency measures and medical first aid guidance table numbers, as well as the constantly available phone number and other communication methods.*

It may be concluded from the above-mentioned provisions that under the Chinese legal system, when consigning dangerous goods involving foreign interest, the shipper shall inform the carrier of the following items: the correct technical name of dangerous goods (trade name of the goods shall not be used alone), UN No., type or nature, quantity, packaging form and specification or shipping form, loading position, technical instructions on safety, notes on safe operation, protection of personnel, and emergency rescue and leakage treatment measures. The above items constitute an organic whole. Regardless of whether the shipper has failed to inform or has informed wrongly, or whether his breach of his obligations is caused by his fault, the shipper shall assume liability to compensate the carrier for any loss caused by the above items in whole or in part, if any. The following two cases embody the above obligations and liabilities of the shipper.

Case I: The dispute case of *Hanjin Shipping Co., Ltd. vs. Lianyungang Chemical, Medicine and Health Products Import and Export Corporation et al* concerning dangerous goods transport damages and general average heard by Qingdao Maritime Court in 2002.[8]

Basic case information: In May 2000, Lianyungang Chemical, Medicine and Health Products Import and Export Company (hereinafter "Lianyungang CMHP") issued the Power of Attorney for Export Shipment to Fuxing Shipping Company Lianyungang Office for the export of lime chlorinated, indicating that the shipper was Lianyungang CMHP. And the goods are described as follows: 800 bags of lime chlorinated, 1 × 20′, Semi Hazardous. Through a series of entrustment and

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8 JIN Zhengjia ed., *Annual of China Maritime Trial*, Beijing: China Communications Press, 2003, p. 430. (in Chinese)

re-entrustment afterwards, Shandong COFCO International Warehousing and Transportation Company (hereinafter "Shandong COFCO") was held responsible for booking cargo space with Hanjin Shipping Co., Ltd. (hereinafter "Hanjin Shipping"). Shandong COFCO told Hanjin Shipping that it was booking cargo space as an agent of the actual owner of cargo. Hanjin Shipping issued the on board bill of lading dated May 10, 2000, indicating as follows: Cargo Name: lime chlorinated; Container No.: HJCU8701653; Shipper: ASTG CONTAINER LINE LIMITED; as encased and counted by the shipper, 800 bags of lime chlorinated were loaded within 1 × 20′ container; Loading Port: Qingdao; Discharging Port: Hamburg; Place of Delivery: Budapest. During the transportation, spontaneous combustion occurred to the above lime chlorinated and caused losses to the ship and other cargos.

Hanjin Shipping claimed that Shandong COFCO, ASTG CONTAINER LINE LIMITED, and the actual shipper Lianyungang CMHP, upon consigning the goods to the Plaintiff, failed to expressly indicate the dangerous character of the goods or request for strict transportation, and that Lianyungang CMHP, the actual shipper with knowledge of the dangerous character of the goods, failed to package the dangerous goods in a safe and reliable manner according to the requirements of the IMDG Code and relevant Chinese laws, and hence it resulted in spontaneous combustion of the goods. As a result of the combustion a serious fire accident occurred and the cargo was damaged both during the fire and the fire extinguishment by means of water. Claiming that reasonable expenses arising from damage of cargo, tugboat hiring, salvaging the vessel, taking refuge in the harbor, surveyor and lawyer hiring, as well as settlement of general average, Hanjin Shipping filed a lawsuit with Qingdao Maritime Court on May 24, 2001. The claim made was that the Defendants shall jointly and severally compensate Hanjin Shipping for its losses. Eventually, the Court was of the opinion that Lianyungang CMHP, as the actual shipper of the goods, was required to perform the obligations of the shipper. Its failure to declare the dangerous character of the goods to Hanjin Shipping and mark the dangerous goods as dangerous had resulted in the insufficient attention paid to the goods on the part of Hanjin Shipping, and that the shipper, instead of Hanjin Shipping, shall be held liable. As such, according to the regulations of the Maritime Code of the People's Republic of China, Lianyungang CMHP was solely responsible to assume all liabilities.

Case II: The case concerning the contract dispute over maritime transport of dangerous goods by M/V YEON AM heard by Guangzhou Maritime Court in

1999.[9]

Basic case information: On July 2, 1998, Samsung Shipping Co., Ltd. (hereinafter "Samsung Company") entered into a voyage charter party with the Defendant, China Non-ferrous Metal Import and Export Guangdong Company (hereinafter "Non-ferrous Company"). As agreed in the charter party, Samsung Company was the shipowner, Non-ferrous Company was the charterer, the transported goods were 4000~5000t pyrites in bulk with the maximum moisture content of 12%, the carrying ship was M/V YEON AM, the loading port was Huangpu Port, China and the discharging port was Ulsan Port, South Korea. On the same day (July 2), Samsung Company entered into another voyage charter party with Shinsung Shipping Co., Ltd. (hereinafter "Shinsung Company"), agreeing that the above goods shall be carried by the M/V YEON AM owned by Shinsung Company. On July 11, M/V YEON AM loading 4498t pyrites in bulk departed from Huangpu Port. On July 12, the vessel was wrecked when it was navigating in the sea area off Shantou Port. Shinsung Company filed a lawsuit with Guangzhou Maritime Court on July 9, 1999, claiming that the Defendant Non-ferrous Company shall compensate for its losses and assume the litigation fee of the case.

The Court finally opined that the Chinese government had officially implemented the IMDG Code for goods transported via ocean going vessels on October 2, 1982, and hence the Chinese laws and the IMDG Code shall be applicable in this case for determining both parties' liabilities. The IMDG Code shall include its supplementary copy, the International Maritime Solid Bulk Cargoes Code (IMSBC Code). As the shipper, the Non-ferrous Company had failed to provide the goods' flow moisture point, stowage factor, moisture content, repose angle, water discharge method, etc. before cargo loading or submit relevant testing certificates to the ship's master at the time of cargo loading, and hence had breached Article 67 of the Maritime Code of the People's Republic of China and the IMSBC Code. As such, it shall assume corresponding liabilities for the legal consequences arising therefrom.

From the above two cases, it is clear that if the shipper fails to perform the obligation to inform, it shall assume the compensation liability to the carrier. However, because of the different features of a container loaded cargo and bulk cargo, the shipper shall assume the compensation liability in different proportions.

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9 At http://www.chinalawedu.com/news/2005%5C2%5Cli508835564132500216720.html, 24 May 2006. (in Chinese)

In Case I, the consigned goods were container loaded cargo, and the cargo name recorded in the bill of lading was lime chlorinated. There was no way for the carrier to learn about the actual conditions of the cargo loaded within the container, and the shipper had failed to truthfully inform the carrier of the dangerous character of the lime chlorinated which was not listed in the IMDG Code. As such, the carrier had no knowledge of the dangerous character of the cargo. Therefore, the Court asserted that the shipper should assume all the liabilities. On the other hand, the consigned cargo in Case II was bulk. The carrier could have learned that the pyritic was being shipped and could have made preparations for the carriage of dangerous goods so as to ensure safe transportation. The shipper had breached its obligation to inform by failing to truthfully inform the carrier of the goods' flow moisture point, stowage factor, moisture content, repose angle, water discharge method, etc. In the meantime, in spite of its knowledge of the dangerous goods, the carrier had not required the shipper to perform the obligation to inform and had not transported the goods appropriately and prudently. Hence, the carrier shall also assume inescapable liabilities as well. In this connection, the Court held that the two parties shall assume liabilities in proportion.

It can be noted that the carrier carrying containers loaded with dangerous goods are confronted with greater risks than that carrying dangerous goods in bulk. Hence, the stricter legal obligation to inform shall be imposed on the shipper of container cargo. Paragraph 3, Regulation 5, Part A ("Carriage of dangerous goods in packaged form or in solid form in bulk") of Chapter VII of the SOLAS Convention, 1974, as amended, which is reproduced in full in Section 1.1.2 under the IMDG Code, states:

> *The person(s) responsible for the packing/loading of dangerous goods in a cargo transport unit (container or road vehicle) shall provide a signed container/vehicle packing certificate stating that the cargo in the unit has been properly packed and secured and that all applicable transport requirements have been met.*

Paragraph 2, Article 24 of the Provisions of the People's Republic of China on Safety Supervision and Administration of Carriage of Dangerous Goods by Vessels promulgated by the Ministry of Communications stipulates: With respect to a container containing dangerous goods, the vessel needs to provide the container packing certificate confirmed by a container encasement inspector with his

signature. Paragraph 3, Article 8 of the Rules on Dangerous Goods Declaration for the Ships Carrying Foreign Trade Cargo promulgated by the Harbor Supervision Bureau provides: Where a container is used for the carriage of dangerous goods, the container packing certificate issued upon inspection by the container packing inspector subject to the assessment of the harbor supervisor shall be submitted. Meanwhile, Article 4 of the Provisions on Supervision and Administration of Carriage of Packaged Dangerous Goods by Containers promulgated by the Harbor Supervision Bureau in 1986 prescribes: Before packing the dangerous goods in containers, the packing unit shall carefully inspect the container and the dangerous goods to be transported in advance so as to ensure compliance thereby with the requirements of Paragraphs 12.3.2 and 12.3.6, Section 12 of the IMDG Code of the IMO. Article 7 of the Provisions states: After the container packing is completed and inspected as qualified, the packing unit shall prepare the container packing certificate in conformity with the requirements of Paragraph 12.3.7, Section 12 of the IMDG Code, and the field packing inspector shall sign on the certificate. The container packing certificate shall be submitted to the harbor supervisor for examination. Where necessary, the harbor supervisor will require the shipper to submit other relevant documents for examination.

From the above regulations it is clear that, with respect to the dangerous goods loaded in a container, on one hand, the encasing unit shall perform its inspection obligation in a prudent and reasonable manner, and on the other hand, the Maritime Safety Administration shall examine the container packing certificate in a prudent and reasonable manner. These two aspects are complementary and must both be met. However, the most crucial link lies in strict enforcement by the Maritime Safety Administration, which performs the duty of ensuring safe transport in a sense. If it issues the container packing certificate to the shipper who consigns containers containing dangerous goods incompliance with the relevant requirement, it is unlikely that the carrier can be aware and precautious of such dangerous goods, and the consequential losses will be immeasurable. Therefore, the encasing unit is expected to appropriately guard the first pass against shippers attempting to operate illegally, while the Maritime Safety Administration is expected to guard the second pass to ensure that the goods in the container are completely consistent with those recorded on the container packing certificate. This all depends on the improvement of the quality of the inspection and examination personnel, and on the provision of sufficient legal regulations on the relevant accountability.

With respect to carriage of dangerous goods not involving foreign interest,

the shipper shall also perform the obligation to inform the carrier. Article 19 of the Rules for Carriage of Dangerous Goods by Waterway implemented in 1996 by the Ministry of Communications of the People's Republic of China provides:

> *When going through the procedure for transport and handling of dangerous goods, the shipper and the operation consignor shall provide the carrier and the harbor operator with the following relevant documents and data: (I) The Dangerous Goods Transport Declaration or the Radioactive Substances Transport Declaration ... (III) The effective container packing certificate shall be submitted in the event of shipment of dangerous goods by containers ... (V) Besides relevant documents indicated in Paragraphs (I) to (IV) above, relevant data shall also be submitted with respect to goods which may endanger transport and handling safety or need special instructions.*

The spirit embodied by the Rules is identical to that implemented during the consignment of dangerous goods with foreign interest.

2. The Obligation to Pack

Paragraph 1, Regulation 3, Part A ("Carriage of dangerous goods in packaged form or in solid form in bulk") of Chapter VII of the SOLAS Convention, 1974, as amended, which is reproduced in full in Section 1.1.2 under the IMDG Code, states:

> *The packing of dangerous goods shall be (1) well made and in good condition; (2) of such a character that any interior surface with which the contents may come in contact is not dangerously affected by the substance being conveyed; and (3) capable of withstanding the ordinary risks of handling and carriage by sea.*

Paragraph 2, Regulation 5 in this Part provides:

> *The shipping documents prepared by the shipper shall include, or be accompanied by, a signed certificate or declaration that the shipment offered for carriage is properly packed, marked and labeled and in proper condition for carriage.*

Its Paragraph 3 further states:

The person(s) responsible for the packing/loading of dangerous goods in a cargo transport unit (container or road vehicle) shall provide a signed container/vehicle packing certificate stating that the cargo in the unit has been properly packed and secured and that all applicable transport requirements have been met.

The following case demonstrated the above-mentioned obligation and liability of the shipper:

The case over carriage of dangerous goods involving Orient Overseas Container Line Inc. (hereinafter "Orient Company") vs. Sinochem Import and Export Company in Yantai, Shandong (hereinafter "Sinochem Company") and Yantai Native Products and Animal By-products Import and Export Group Co., Ltd. (hereinafter "NPAB Company") heard by Shanghai Maritime Court in 2002.[10]

Basic case information: The Orient Company accepted the NPAB Company's cargo space booking and issued an on board original bill of lading, indicating that: description of the goods: thiourea dioxide; vessel name: Alligator Strength; loading port: Qingdao; discharging port: Los Angeles; and shipper: NPAB Company. On the night of August 19, 1997, when the vessel Alligator Strength was berthing at Shanghai Port, the second hold was found smoking. Upon joint detection by the fire fighting department and the harbor administrative company, 166 cases were restowed, and container No. OOLU3360121, which spontaneously combusted and smoked, was unloaded off the vessel and stacked in the dangerous articles wharf of the harbor. In addition, container No. OOLU3429526 was also unloaded, as it had emitted strong smell and six workers were slightly poisoned during the open-case inspection.

After the cargo arrived at the destination port, multiple claims were made by the consignees due to cargo damage. The Orient Company engaged FREEHILL HOGAN & MAHAR LLP, an American company, to handle the claims-related matters, with great expense. Immediately after the accident occurred, on August 26, 1997 and in August 1998, the Orient Company entrusted Shanghai Zhongheng Consultation Co., Ltd. to inspect the involved container. The Orient Company also entrusted Hong Kong expert Edmondson and Singaporean expert Mullen to jointly participate in the second inspection. According to the unanimous opinions of

10 At http://www.ccrnt.org.cn/hs/news/show.php?c1d=5693, 24 May 2006. (in Chinese)

several inspection reports, it was found that spontaneous combustion of the goods was caused by improper loading. Afterwards, the Orient Company filed a lawsuit with Shanghai Maritime Court, claiming that the Sinochem Company and the NPAB Company shall compensate for its losses. Upon hearing, Shanghai Maritime Court was of the opinion that, as the shipper of the contract of carriage of goods by sea, the NPAB Company had breached the regulations under the Maritime Code on the shipper's obligation of appropriately packaging and encasing the goods and thus shall assume compensation liabilities for any loss suffered by the carrier arising from the shipper's fault.

3. The Obligation to Give Clear Indication

Regulation 4, Part A ("Carriage of dangerous goods in packaged form or in solid form in bulk") of Chapter VII of the SOLAS Convention, 1974, as amended, which is reproduced in full in Section 1.1.2 under the IMDG Code, states:

> *Each receptacle containing dangerous goods shall be marked with the correct technical name (trade names thereof shall not be used alone) and identified with a distinctive label or stencil of the label so as to make clear the dangerous character ...*

Article 6 of the Provisions on Supervision and Administration of Carriage of Packaged Dangerous Goods by Containers promulgated by the Harbor Supervision Bureau of China in 1986 provides:

> *The dangerous goods packed in containers and the surface of containers shall be marked or labeled according to the requirements of Sections 7 and 8 of the IMDG Code. Other irrelevant mark of dangerous goods should not be pasted on the surface of containers.*

With respect to carriage of dangerous goods not involving foreign interest, Article 13 of the Rules for Carriage of Dangerous Goods by Waterway implemented by the Ministry of Communications of the People's Republic of China in 1996 stipulates:

> *Correct name of the loaded goods shall be clearly marked on all the packages of dangerous goods, and the application of names shall be in conformity with the regulations of Annex I, Introduction and List of Dangerous Goods.*

Regulations conforming to Annex II, Mark of Dangerous Goods, shall be pasted or printed in a conspicuous place on the package, at the four sides of containers, and at the four sides and on the top of portable tanks. With respect to goods with two or more dangerous characters, apart from the main mark based on the major dangerous character, additional marks (without category number) specified in the List of Dangerous Goods under the Rules shall also be pasted. The marks shall be well pasted or printed to make them clear and prevent them from falling off during the transportation.

Compensation liability and the accountability principle concerning the shipment of dangerous goods by the shipper are regulated under Article 68 of the Maritime Code of the People's Republic of China: The shipper shall be liable to the carrier for any damage resulting from such shipment … It is clear that the shipper consigning dangerous goods shall assume strict liability, which implies that whether or not it has any fault, the shipper shall assume the compensation liability as long as the carrier sustains any damage resulting from such shipment. The legislative spirit of this Article is identical to that of the Hague Rules. The provision of Paragraph 3, Article 4 of the Hague Rules does not have any overriding effect, neither does that of Article 70 of the Maritime Code of the People's Republic of China. The latter cannot alter the strict liability of the shipper provided in Articles 66 to 68 of the Maritime Code of the People's Republic of China. Its exclusive purpose lies in providing that except for the obligations specified in the above three Articles, what the shipper assumes is the liability of fault, i.e. if the shipper has no fault, it shall not be held liable.

IV. Conclusion

From the shipwreck accident elaborated in the first section we can see that the shipper's nonperformance of obligations when consigning dangerous goods may potentially result in immeasurable losses. Hence, we should focus on before-the-event prevention rather than an after-the-event remedy as much as possible. Firstly, the domestic legislation in China embodies the open-ended regulations on dangerous goods under the Hague Rules and the IMDG Code by including all goods with dangerous character into the scope of dangerous goods as much as possible and bringing the declaration of goods with dangerous character to the attention of the shipper. Secondly, the shipper's obligations to inform, pack

and give clear indication are explicitly stipulated so as to specifically ensure the realization of safe transportation. Thirdly, with reference to the regulations under the Hague Rules, strict liability is imposed on the shipper of dangerous goods so that the shipper will perform its obligation more prudently and appropriately. Legislation provides a solution; however, it is not the optimal solution. The ultimate solution then, lies in improvement of safety awareness of relevant parties and the consistent and full enforcement of laws.

Translator: HUANG Weizhen
Editor (English): Katie Annette Roth

Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras, 1999-2007)

ZHAO Wei*

On 8 December 1999, the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the International Court of Justice (ICJ) an application, instituting proceedings against the Republic of Honduras (hereinafter "Honduras") in respect of a dispute relating to the delimitation of the maritime areas appertaining to each of those States in the Caribbean Sea.[1] On 8 October 2007, the ICJ made a judgment that Honduras had sovereignty over the four islands in the Caribbean Sea, as well as a determination on the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras.

I. Historical and Geographical Background

A. Historical Background

Nicaragua and Honduras, which had been under the rule of Spain, became independent States in 1821, and then formed the short-lived Federal Republic of Central America (also known as the United Provinces of Central America, 1823-1840) in 1823. However, both States seceded from the Federation in 1838 and

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* ZHAO Wei, Ph.D. Candidate of International Law, matriculated in 2006 at School of Law, Xiamen University. His main research area is the Law of the Sea.

1 Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras, 1997–2007). This paper is written and translated according to the judgment of 8 October 2007 of the ICJ, at http://www.icj-cij.org/docket/files/120/14075.pdf?PHPSESSID=744e470fd41b57b37871957c7dbf17d3, 12 October 2007.

maintained the territory they had before. The Queen of Spain signed a treaty with Nicaragua in 1850 and Honduras in 1866, recognizing their independence from Spain and their sovereignty over land territory and adjacent islands that lie along their coasts. However, the names of specific islands were not included in either treaty.

A general boundary treaty which was known as the Gámez-Bonilla Treaty was concluded in 1894 by and between Nicaragua and Honduras and entered into force in 1896. Article 2 of the Treaty, according to the principle of *uti possidetis juris*,[2] provided that "each Republic is owned of the territory which at the date of independence constituted respectively, the provinces of Honduras and Nicaragua". Article 1 of the Treaty further provided for the establishment of a Mixed Boundary Commission to demarcate the boundary line. The Commission thereby delimited a boundary line from the Pacific Ocean at the Gulf of Fonseca to the Portillo de Teotecacinte, which accounted for approximately 1/3 of the way across the land territory; however, the efforts toward delimiting a boundary line from Portillo de Teotecacinte to the Atlantic coast failed.

Pursuant to the terms of Article 3 of the Gámez-Bonilla Treaty, Nicaragua and Honduras subsequently submitted their dispute over the remaining part of the boundary to King Alfonso XIII of Spain for as sole arbitrator. The King handed down an arbitral award in 1906, which drew a boundary from the mouth of the River Coco at Cape Gracias a Dios to Portillo de Teotecacinte. However its validity and binding force were challenged by Nicaragua in a note. After several failed

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2 *Uti possidetis juris* is a principle of international law that newly formed States should have the same borders that they had before their independence, at http://encarta.msn.com/encnet/refpages/search.aspx?q=uti+possidetis+juris, 12 October 2007. As a key principle for settling territory and boundary disputes arising during the process of decolonization, it aims at guaranteeing States should legally have the same borders as those before their independence. It shall be applicable provided that the territory involved shall not be *terra nullius*, and the border shall be already determined prior to independence. Upon gaining their independence from Spanish colonial rule in the 19th century, a majority of American States have applied this principle for resolving border disputes. The International Court of Justice has also determined the legal significance of such principle in dealing with territorial and boundary disputes among African States. In both the Case Concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands) and the Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), it was emphasized by the Court that *uti possidetis juris* shall be a guiding principle for all newly formed States in the world to deal border issues. It is also believed that the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) has already proved the applicability of such principle beyond Africa and America. Shao Shaping ed., *Study on Recent Cases Heard by the International Court of Justice (1990-2003)*, Beijing: The Commercial Press, 2006, pp. 40~43. (in Chinese)

attempts to settle this dispute and a number of boundary incidents in 1957, both Nicaragua and Honduras agreed to submit such a dispute to the ICJ.

On 18 November 1960, the Court found in its judgment that the award made by King Alfonso XIII of Spain in 1906 was valid and binding, and that Nicaragua was under an obligation to give effect to it.[3]

As the two States thereafter failed to reach an agreement on how to implement the 1906 award, Nicaragua requested the intervention of the Inter-American Peace Committee. The Committee subsequently established a Mixed Committee which delimited the boundary line with the placement of boundary markers in 1962. The Mixed Committee determined that the land boundary would begin at the mouth of the River Coco, at 14°59.8'N and 83°08.9'W.

Thus, the dispute concerning the land border between the two States was finally settled. However, no practical efforts had been made toward the resolution of maritime delimitation in the Caribbean Sea.

In 1977, Nicaragua proposed to Honduras in a diplomatic note that bilateral negotiations relating to the maritime boundary in the Caribbean should be initiated. However, the negotiations proved to be in vain. Since then, the two States have been increasingly involved in border disputes. Based on the evidence submitted by both sides to the ICJ, the disputes were focused on the following:

(1) Numerous incidents involving the capture and/or attack by each State of fishing vessels belonging to the other State in the vicinity of the 15°N parallel (the exact latitude line was determined by the Mixed Committee at 14°59.8'N in 1962 and for convenience, hereinafter referred to as 15°N) were recorded in a series of diplomatic exchanges. In 1982, it was confirmed in the bilateral diplomatic notes that the mutual maritime boundary had not been formally delimited. However, Honduras believed that the latitude line 15°N had been traditionally recognized as the maritime boundary line between the two States, whereas Nicaragua claimed the nonexistence of such a recognized maritime boundary.

(2) The disputed areas were provided for in the legislation of both parties. According to Article 2 of the 1979 Continental Shelf and Adjacent Sea Act of Nicaragua, the sovereignty and jurisdiction of Nicaragua extended over the sea adjacent to its seacoasts for 200 nautical miles, whereas Honduras claimed its sovereignty over the islands adjacent to its coast in the Caribbean Sea and

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3 Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, *I. C. J. Reports 1960*, pp. 215~217.

announced an exclusive economic zone of 200 nautical miles under the new Constitution of 1982.

(3) A delimitation agreement was reached with a third State in the disputed areas. In 1986, Honduras concluded a maritime boundary treaty with Colombia, providing the latitude line 15°N should be the mutual boundary in waters east of 82°W, and made clear its intentions for ratification. However, Nicaragua lodged a firm objection and resorted to the Central American Court of Justice for resolution.

(4) Throughout the 1990s several diplomatic notes in opposition to each other were also exchanged with regard to the parties' circulation of official maps concerning the area in dispute, which were published based on their domestic laws.

B. Geographical Background

Nicaragua and Honduras are adjacent coastal States, and their coastlines along the Caribbean Sea roughly form a right angle that juts out to sea, with the separation point at the mouth of the River Coco, which meets the sea at the easternmost tip of Cape Gracias a Dios.

The disputed waters were located in the Caribbean Sea east of the coastlines, covering a continental margin that is generally termed the "Nicaraguan Rise". It takes a form of a relatively flat triangular shaped platform, with depth around 20 meters. Approximately midway between the coast of those countries and the coast of Jamaica, the Nicaraguan Rise ends by deepening abruptly to depths of over 1500 meters. Before descending to these greater depths the Rise is broken into several large banks that are separated by deeper channels of over 200 meters. In the shallow regions close to the mainland of Nicaragua and Honduras, there are a large number of reefs, including cays that reach above the water surface, and larger cays can accumulate enough sediment to allow for colonization and fixation by vegetation. In the waters north of 15°N that are 30 ~ 40 nautical miles east of the mouth of the River Coco, such relatively larger cays higher than the sea level include Bobel Cay, South Cay, Savanna Cay, and Port Royal Cay.[4]

In this case, the mouth of the River Coco is an important geographical feature that not only terminates the land frontier of the two States in the coast of the

4 Although referred to as cays, these insular features are completely consistent with the definition provided for in Article 121 of the United Nations Convention on the Law of the Sea.

Caribbean Sea, but also deposits much of its sediment that formed deltas, islands and shoals. Because it is extremely unstable in nature, the mouth drifts from time to time, leading to frequent changes in shoreline morphology and instabilities in the sediment deltas, islands and shoals.

II. Court Jurisdiction

In Nicaragua's application, it held the Court should have jurisdiction over the present case on the following basis:

Firstly, as acknowledged in Article 31 of the American Treaty on Pacific Settlement (officially designated as the Pact of Bogotá), the Court shall have compulsory jurisdiction over such legal disputes as stipulated in Article 36, Paragraph 2 of the Statute of the International Court of Justice, provided that the declaration accepting the jurisdiction of the Court made by the parties. In case of any dispute arising between the contracting parties that cannot be settled through mediation or fail to reach an arbitration agreement, any party might refer it to the Court; and if refused by the Court, it might initiate compulsory arbitration procedures.[5]

Both Nicaragua and Honduras have been parties to the Treaty since 1950. The former has accepted the provisions in Article 31 thereof concerning the settlement of disputes without reservation, while the latter has completely agreed with all the provisions under the Treaty.

Secondly, both parties have declared to accept such compulsory jurisdiction of the Court over legal disputes as provided in Article 36, Paragraph 2 of the Statute.[6]

On 24 September 1929, Nicaragua declared its acceptance of the jurisdiction

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5 As the authentic text of the Pact of Bogotá is written in Spanish, the description of provisions in Article 31 thereof in the present paper is based on an editorial comment published in the *American Journal of International Law* in July, 1948, which is available on its official website. Edgar Turlington, Editorial comment: The Pact of Bogota, *American Journal of International Law*, Vol. 42, 1948, p. 608, at http://links.jstor.org/sici?sici=0002-9300%28194807%2942003A3%C608%3ATPOB%3E2.0.CO%3B2-K, 14 May 2007.

6 Article 36, Paragraph 2 of the Statute of the International Court of Justice: 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 concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.

of the Permanent Court of International Justice, and according to the provisions in Article 36, Paragraph 5 of the Statute, Nicaragua might be deemed to still accept the compulsory jurisdiction of the ICJ.[7] On 6 June 1986, Honduras also declared its acceptance of the compulsory jurisdiction of the ICJ.

III. Claims of Each Party

The claims made by both parties in a series of written (application, counter-memorial, and rejoinder) and oral procedures include the following:

A. Nicaragua's Claims

(1) The bisector[8] of the lines representing the coastal fronts of the two parties, drawn from a fixed point approximately 3 miles from the mouth of the River Coco in the position 15°02′00″ N and 83°05′26″ W, constituted the single maritime boundary for the purposes of the delimitation of the disputed areas of the territorial sea, exclusive economic zone and continental shelf.

(2) The starting-point of the single maritime boundary was the thalweg of the main mouth of the River Coco as determined in the award of 1906 handed down by the King of Spain; and

(3) Without prejudice to the foregoing, the Court should decide the question of sovereignty over the islands and cays within the area in dispute.

It should be noted that Nicaragua's claims of sovereignty over the islands in the disputed waters was firstly filed on 21 March 2001.

B. Honduras' Claims

(1) The islands Bobel Cay, South Cay, Savanna Cay, Port Royal Cay, together

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7 Article 36, Paragraph 5 of the Statute of the International Court of Justice: Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

8 The bisector of the angle is calculated from the general direction of the Nicaraguan coast and the general direction of the Honduran coast and is produced by constructing lines based upon the respective coastal frontages and producing extensions of these lines. This bisector is also referred to in the ensuing paragraphs.

with all other islands, cays, rocks, reefs, and banks claimed by Nicaragua which lie north of 15°N were under the sovereignty of Honduras;

(2) The starting-point of the maritime boundary to be delimited by the Court shall be a point located at 14°59.8′ N, 83°05.8′ W. The boundary from the point determined by the Mixed Commission in 1962 at 14°59.8′ N, 83°08.9′ W to the starting-point of the maritime boundary to be delimited by the Court shall be agreed between the parties to this case on the basis of the award of the King of Spain of 1906, and taking into account the changing geographical characteristics of the mouth of the River Coco; and

(3) East of the point at 14°59.8′ N, 83°05.8′ W, the single maritime boundary which divided the respective territorial seas, exclusive economic zones and continental shelves of Honduras and Nicaragua followed 14°59.8′ N, or an adjusted equidistance line, until the jurisdiction of a third.

The nature of the two parties' disputes was the starting-point as well as the course of the single maritime boundary. Nicaragua insisted that the maritime boundary had not been delimitated, while Honduras was of the opinion that the latitude 15°N constituted the traditional maritime boundary, which was derived from the *uti possidetis juris* that had been practiced by Nicaragua and Honduras and confirmed by third States. The disputes concerning sovereignty over the islands in the disputed area stemmed from the maritime boundary dispute between them.

IV. Each Party's Position concerning Relevant Issues

A. Sovereignty over the Islands in the Disputed Area

Nicaragua claimed its sovereignty over the islands north of 15ºN, including Bobel Cay, South Cay, Savanna Cay, and Port Royal Cay; whereas Honduras extended its sovereignty claims to cover not only these four cays, but also some other smaller islands and cays in the same area.

Both parties agreed that these disputed islands were not *terra nullius* in 1821, when they gained independence from the Kingdom of Spain. However, divergence emerged ever since: on one hand, Nicaragua alleged that as upon independence in 1821, these features were not assigned to either of the Republics, the *uti possidetis juris* principle should not be applicable, and it should enjoy original title over such islands under the principle of adjacency. On the other hand, Honduras's argument was that it has an original title over the disputed islands derived from the doctrine

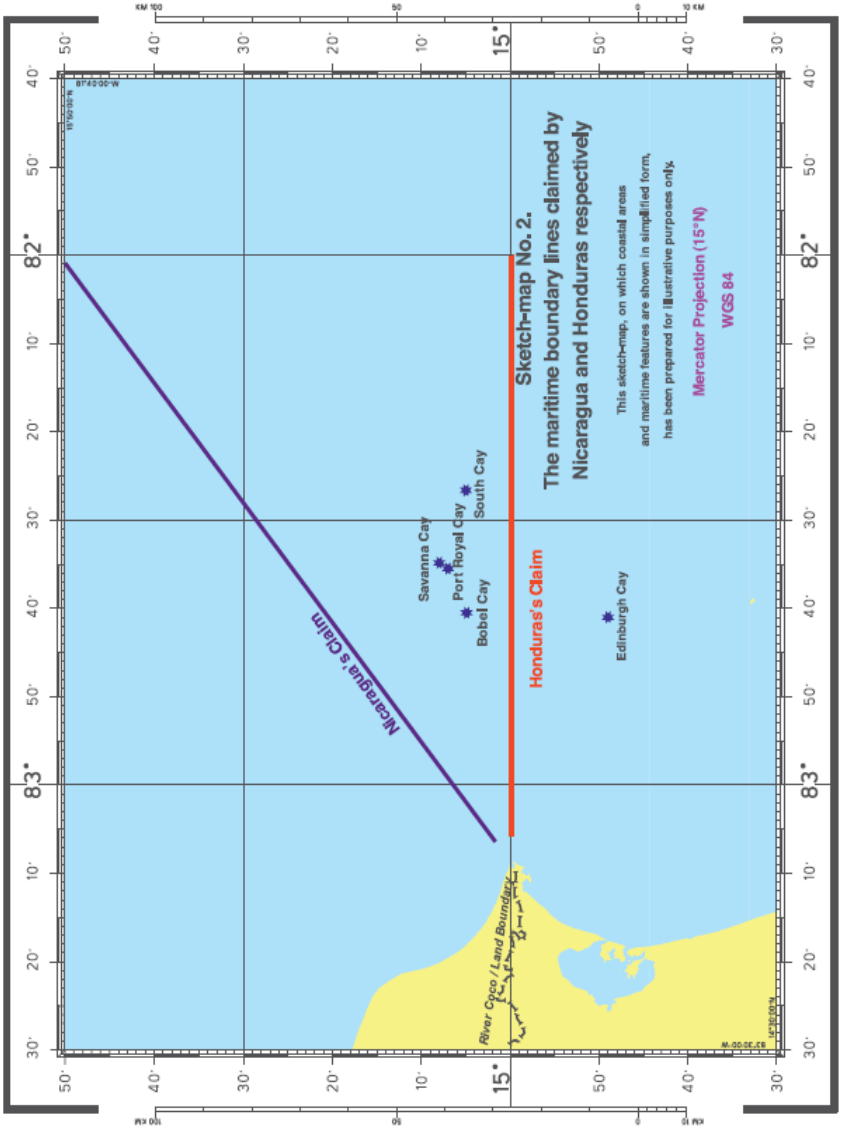

Fig. 1 Maritime Boundaries Claimed Respectively by Nicaragua and Honduras

Source: *I.C.J. Judgment*, p. 25.

of *uti possidetis juris*, which was confirmed by many *effectivités*.

B. Maritime Boundary beyond the Territorial Sea

Nicaragua proposed a method of delimitation consisting of "the bisector of the angle produced by constructing lines based upon the respective coastal frontages and producing extensions of these lines". Such a bisector is calculated from the general direction of the Nicaraguan coast and the general direction of the Honduran coast. These coastal fronts generate a bisector which runs from the mouth of the River Coco as a line of constant bearing until intersecting with the boundary of a third State in the vicinity of Rosalind Bank.

On the other hand, Honduras asked the Court to confirm what it claimed was a traditional maritime boundary, which had its historical basis in the principle of *uti possidetis juris*, running along 15°N between Honduras and Nicaragua in the Caribbean Sea and to continue that existing line until the jurisdiction of a third State is reached. Were its contentions as to 15°N not to be accepted by the Court, Honduras asked alternatively that the Court traced an adjusted equidistance line, until the jurisdiction of a third State was reached.

C. Starting-Point of the Maritime Boundary

Both parties agreed that the terminus of the land boundary between Nicaragua and Honduras was located at the mouth of the principal arm of the River Coco as per the award of 1906. In 1962 the Mixed Boundary Commission determined that the starting-point of the land boundary at the mouth of the River Coco was situated at 14°59.8′ N, 83°08.9′ W. Both parties also acknowledged that since 1962 the mouth of River Coco has moved due to the accretion of sediments.

Nicaragua suggested that the starting-point of the maritime boundary be set "at a prudent distance", namely 3 nautical miles out at sea from the actual mouth of the River Covo on the bisector line. This was largely acceptable to Honduras, except that the seaward fixed point should be located on the latitude 15°N, rather than on the suggested bisector line.

D. Delimitation of the Territorial Sea

Nicaragua stated that the delimitation of the territorial seas between States

with adjacent coasts must be effected on the basis of the principles established in Article 15 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),[9] namely the "median line + special circumstances" principle. In the view of Nicaragua, it was technically impossible to draw an equidistance line in the present case because it would have to be entirely drawn on the basis of the two outermost points of the mouth of the river, which are extremely unstable and continuously change position. Thus, according to Nicaragua, the bisector line should also be used for the delimitation of the territorial sea.

Honduras agreed with Nicaragua that there are "special circumstances" which, under Article 15 of the UNCLOS "require a delimitation by a line other than a strict median line". However, according to Honduras, the configuration of the mouth of the River Coco might be one such "special circumstance", of far greater significance "is the established practice of the parties in treating the 15th parallel as their boundary from the mouth of the River Coco". On this ground it suggested that the maritime boundary in the territorial sea should follow in an eastward direction the 15° N.

V. Court Investigation and Recognition of Relevant Legal Issues

Based on both parties' positions, the ICJ investigated and recognized the following problems of procedure and substance during the process of judgment:

A. Admissibility of the New Claim relating to Sovereignty over the Islands in the Area in Dispute

Nicaragua did not claim sovereignty over the islands in the disputed area in its application until 21 March 2001. The Court investigated prior relevant cases in order to determine whether new claims introduced during the course of the

9 Article 15 of the United Nations Convention on the Law of the Sea: 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 seas 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.

proceedings were admissible. In its judgment on the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court held that although formally a new claim, the claim in question which can be considered as included in the original claim in substance might be admissible.[10] For this purpose, to find that the new claim, as a matter of substance, has been included in the original claim, it was not sufficient that there should be links between them of a general nature. Moreover, the additional claim must have been implicit in the application[11] or must arise directly out of the question which is the subject-matter of that Application.[12]

As it has repeatedly stressed the principle that the land dominates the sea, the ICJ held that the potential influence of maritime features on the course of maritime boundary should be considered to draw a single maritime boundary line in the disputed area in the Caribbean Sea. To this end, the Court was required to first determine which State shall have sovereignty over the islands and rocks in the disputed area no matter whether a claim had been formally filed. Thus the new claim concerning sovereignty was implied in and arose directly out of the question which is the subject-matter of Nicaragua's application, namely the delimitation of the disputed areas of the territorial sea, continental shelf and exclusive economic zone.

Therefore, the Court adjudged Nicaragua's new claims was admissible.

B. The Critical Date

The ICJ observed that in any dispute concerning maritime delimitation or land sovereignty, the critical date's significance lay in distinguishing between those acts which are in principle relevant for the purpose of assessing and validating *effectivités*. A State could take those actions occurring before the critical date to buttress its claims of *effectivités*. Thus a critical date will be the dividing line after which the parties' acts become irrelevant for the purposes of assessing the value of *effectivités*.

Honduras contended that there are two disputes, albeit related: one as to

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10 Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, *I. C. J. Reports 1992*, pp. 265~266.

11 Temple of Preah Vihear, Merits, Judgment, *I. C. J. Reports 1962*, p. 36.

12 Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, *I. C. J. Reports 1974*, p. 203; Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, *I. C. J. Reports 1992*, p. 266.

whether Nicaragua or Honduras had title to the disputed islands; and the other as to whether 15° N represented the current maritime frontier between the parties. Nicaragua perceived them as a single dispute.

Honduras considered there might be more than one critical date regarding the dispute concerning sovereignty over the maritime features. In Honduras's opinion, the critical date for the application of *uti possidetis* should be 1821 – the date of independence of Honduras and Nicaragua from Spain. For the purposes of post-colonial *effectivités*, Honduras argued that the date cannot be earlier than 21 March 2001, since this was the first time that Nicaragua asserted that it had title to the islands. With regard to disputes over the maritime boundary, Honduras maintained that the year 1979, when the Sandinista Government came to power, constituted the critical date, as up to that date Nicaragua had not shown any interest in the sovereignty over the islands and cays north of 15°N.

However, for Nicaragua, the critical date was 1977 when the parties initiated mutual negotiations on maritime delimitation, following an exchange of letters by the two governments. Nicaragua asserted that the dispute over the maritime boundary, by implication, encompassed the dispute over the islands within the relevant area and therefore the critical date for both disputes coincided.

Based on an investigation of both parties' claims, the Court held that there existed two interrelated disputes in the present case. Therefore, the Court found it necessary to distinguish two different critical dates which were to be applied to two different circumstances: one critical date concerned the attribution of sovereignty, and the other critical date was related to the issue of delimitation of the disputed maritime area.

With regard to the dispute over the islands, the Court considered 2001 as the critical date, since it was only in its Memorial filed in 2001 that Nicaragua expressly reserved the sovereign rights appurtenant to all the islets and rocks claimed by Nicaragua in the disputed area. It further held that the critical date concerning the dispute on the maritime boundary should be 1982, because it was from the time (March 1982) of two fishing vessel capture incidents and exchange of official letters thereafter that a dispute as to the maritime delimitation could be said to exist.

C. Sovereignty over the Islands

1. Legal Nature of the Maritime Features in the Disputed Area

As noted by the Court in assessing the legal status of the maritime features in the disputed area, both parties did not dispute the fact that Bobel Cay, South Cay, Savanna Cay, and Port Royal Cay remained above water at high tide. They thus fell within the definition and regime of islands provided for in Article 121 of the UNCLOS to which both States are parties.[13]

The legal status of other maritime features in the disputed area might be difficult to identify due to the paucity of information. Although both parties requested the Court to adjudge the sovereignty over such features in both oral and written procedures, little assistance was provided to define with the necessary precision the other features.

Given all these considerations, the Court regarded it as appropriate to pronounce only upon the question of sovereignty over the four cays with clear legal status.

In oral proceedings, both parties also made a claim to an island in an entirely different location, namely, the island in the mouth of the River Coco. Because of the unstable nature of the river mouth, together with the changing conditions of the adjacent islands, the Court made no finding as to sovereignty over such islands.

2. The *Uti Possidetis Juris* and Sovereignty over the Islands in Dispute

The Court observed that Honduras's sovereignty claims over the islands in dispute were based on the *uti possidetis juris* principle, while Nicaragua contested that sovereignty over the islands cannot be attributed to one or the other party on the basis of this principle.

In the judgment on the case concerning the *Frontier Dispute (Burkina Faso v. Republic of Mali)*, the Court has acknowledged that "the principle of *uti possidetis* has kept its place among the most important legal principles" regarding territorial title and boundary delimitation at the moment of decolonization.[14] Therefore, this principle is undoubtedly applicable to the delimitation between Nicaragua and Honduras, both former Spanish colonial provinces. In addition, Article 2, Paragraph 3 of the Gámez-Bonilla Treaty of 1894 provided that such principle shall be the basis of both parties' territorial sovereignty, and the award of 1906 handed down by the King of Spain also defined the territorial boundary that was undetermined in the Treaty of 1894 on the basis of the principle of *uti possidetis juris*. The validity and binding force of such award had been confirmed by the ICJ in its 1960 judgment.

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13 Article 121, Paragraph 1, of the United Nations Convention on the Law of the Sea: An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

14 Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, *I. C. J. Reports 1986*, p. 567.

The Court held that *uti possidetis juris* might, in principle, apply to offshore possessions and maritime spaces, however, the mere invocation of the principle of *uti possidetis juris* did not of itself provide a clear answer as to sovereignty over the disputed islands. If these islands were not *terra nullius*, as both parties acknowledged and as was generally recognized, it must be assumed that they had been under Spanish colonial rule. However, it did not necessarily follow that the successor to the disputed islands could only be Honduras, being the only State formally to have claimed such status. The Court recalled that *uti possidetis juris* presupposed the existence of a delimitation of territory between the colonial provinces concerned having been effected by the central colonial authorities. Thus, in order to apply the principle of *uti possidetis juris* to the islands in dispute, it must be shown that the Spanish Crown had allocated them to one or the other of its colonial provinces. The Court accordingly turned to the issue of whether there was convincing evidence which would allow it to determine whether and to which of the colonial provinces of the former Spanish America the islands in question had been attributed.

The parties have not produced documentary or other evidence from the pre-independence era which explicitly referred to the islands. The information provided by the parties on the colonial administration of Central America by Spain did not allow for certainty as to whether one entity or two subordinate entities exercised administration over the insular territories of Honduras and Nicaragua at that time. It was apparent that there was no clear-cut demarcation with regard to islands in general.

Notwithstanding the historical and continuing importance of the *uti possidetis juris* principle, so closely associated with Latin American decolonization, it cannot in this case be said that the principle should be applicable to determine the sovereignty over the islands that were located considerably offshore and not obviously adjacent to the mainland coast of Nicaragua or Honduras.

Regarding the adjacency principle proposed by Nicaragua, the Court found both the independence treaties concluded between Spain and Nicaragua in 1850 and between Spain and Honduras in 1866 only referred to adjacency with respect to mainland coasts rather than to offshore islands. Nicaragua's argument that the disputed islands were closer to Edinburgh Cay, which belonged to Nicaragua, cannot therefore be accepted. Although no judgment was made by virtue of the adjacency principle, the Court observed that, in any event, the disputed islands appeared to be in fact closer to the coast of Honduras.

Having concluded that the question of sovereignty over the islands in dispute cannot be resolved on the above basis, the Court then investigated whether there had been relevant *effectivités* during the colonial period. In the judgment on the case concerning the *Frontier Dispute (Burkina Faso v. Republic of Mali)* and case concerning the *Frontier Dispute (Benin v. Niger)*, the Court had defined colonial *effectivités* as the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period.[15]

However, the Court found the available information about such conduct by the colonial administrative authorities was lacking, and there were no colonial *effectivités* in relation to them due to the location of the disputed island and the lack of any particular economic or strategic significance of these islands at that time. Thus, it should not serve as the basis for adjudging and determining the sovereignty over the disputed islands either.

Based on the above considerations, the Court concluded that the *uti possidetis juris* principle afforded inadequate assistance in determining sovereignty over these islands because nothing clearly indicated whether the colonial provinces of Nicaragua or of Honduras prior to or upon independence had sovereignty over the disputed islands and neither did the award of 1906 handed down by the King of Spain that was aimed at delimiting the land boundary between the two States. Equally, no evidence of colonial *effectivités* in respect of the said islands was collected by the Court.

3. Post-colonial *Effectivités* and Sovereignty over the Disputed Islands

According to prior judgments of the ICJ as well as the Permanent International Court of Justice, especially the one on the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, sovereignty over minor maritime features may be established based on a relatively modest display of State powers in terms of quality and quantity. Therefore, the Court examined all the behaviors of both parties to this end:

(i) Legislative and administrative control: The Court, noting that there was no reference to the islands in dispute in the various Honduran Constitution and other laws, further noted that there was no evidence that Honduras had applied such legal instruments in any specific manner. The Court therefore found that the Honduran claim that it had legislative and administrative control over the islands

15 Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, *I. C. J. Reports 1986*, p. 586; Frontier Dispute (Benin/Niger), Judgment, *I. C. J. Reports 2005*, p. 120.

was unconvincing.

(ii) Application and enforcement of criminal and civil law: The Court held that the evidence presented by Honduras was indeed of great legal significance. Many criminal acts occurring in the 1990s (including charges on the theft and physical assault committed on Bobel Cay and Savanna Cay, and the 1993 drug enforcement operation by Honduras and the United States Drug Enforcement Administration) were related to *effectivités*, because the Court have determined that the critical date in relation to the islands was 2001. The 1993 drug enforcement operation, while not necessarily an example of the application and enforcement of Honduran criminal law, can well be considered as an authorization by Honduras to the United States Drug Enforcement Administration to fly over the island. The authorization document also mentioned the names of the four islands and cays, which could be understood as a sovereignty act constituting *effectivités* in this area.

(iii) Regulation of immigration: Honduras carried out a series of substantial activities with regard to immigration and work-permit regulation on these islands in 1999 and 2000. In 1999, Honduran authorities visited the four cays and recorded the details of the foreigners living in South Cay, Savanna Cay, and Port Royal Cay. The Court found that legal significance is to be attached to the evidence provided by Honduras on the regulation of immigration as proof of *effectivités*, notwithstanding that it began only in the late 1990s. The issuance of work permits and visa to Jamaicans and Nicaraguans on these cays was a demonstration of Honduras's power. The visits to the islands by Honduran officials embodied the jurisdiction over such islands, even if its purpose was to monitor rather than to regulate the immigrants on the islands. Despite time span for these acts is rather short, it is only Honduras which had undertaken measures in the area that can be regarded as acts performed *effectivités*. Furthermore, it was found that Nicaragua did not contest the immigrant regulation by Honduras either before or after the 1990s.

(iv) Regulation of fisheries activities: The Honduran government issued fishing licenses on the strength of the claimed rights over the waters surrounding the said islands. The Court considered the evidence of Honduran-regulated fishing boats and construction on the islands was relevant under the category of administrative and legislative control. In addition, the permits issued by the Honduran Government allowing the construction of houses in Savanna Cay and the permit for the storage of fishing equipment in the same cay might also be regarded as a display, albeit modest, of the exercise of authority, and as evidence of *effectivités* with respect

to the disputed islands. Nicaragua for its part contended that it had exercised jurisdiction over the islands in question in connection with its turtle fishing dispute with the United Kingdom which started in the nineteenth century, however it was rejected by the Court.

(v) Naval patrols: The evidence of naval patrols presented by both parties was neither adequate nor directly related to the disputed islands. Therefore, the Court did not find the evidence persuasive as to the existence of *effectivités* with respect to the islands.

(vi) Oil concessions: The Court found that the evidence of offshore oil exploitation presented by both parties has no bearing on disputed islands. Therefore, oil exploitation-related activities on the islands were included in the public works, as described in the following paragraph.

(vii) Public works: Honduras claimed that the placing on Bobel Cay in 1975 of a 10 metre long antenna for the Union Oil Company was an integral part of the oil exploration activity authorized by Honduras. Reports on these activities were periodically submitted by the oil company to the Honduran authorities, in which the amount of the corresponding taxes paid was also indicated. Nicaragua claimed that the placement of the antenna on Bobel Cay was a private act for which no specific governmental authorization was granted. The Court thus considered that the public works referred to by Honduras constituted *effectivités* which supported Honduran sovereignty over the islands in dispute.

Having considered the arguments and evidence put forward by the Parties, the Court found that the *effectivités* invoked by Honduras evidenced an "intention and will to act as sovereign" and constituted a modest but real display of authority over the four islands. Although it had not been established that the four islands are of economic or strategic importance and in spite of the scarcity of acts of State authority, Honduras had shown a sufficient overall pattern of conduct to demonstrate its intention to act as sovereign in respect of the said four islands. The Court further noted that those Honduran activities qualifying as *effectivités* which could be assumed to have come to the knowledge of Nicaragua did not elicit any protest. With regard to Nicaragua, the Court found no proof of intention or will to act as sovereign, and no proof of any actual exercise or display of authority over the islands.

4. Evidentiary Value of Maps in Confirming Sovereignty over the Disputed Islands

Both parties presented a large number of maps to illustrate their respective

claims, however, nothing in these maps clearly indicated which State had exercised sovereignty over the said islands. Besides, none of the maps submitted by the parties was part of a legal instrument in force nor more specifically part of a boundary treaty concluded between Nicaragua and Honduras. The Court then concluded that these cartographic materials cannot of themselves support their respective claims to sovereignty over islands to the north of 15ºN.

5. Recognition by Third States via Bilateral and Multilateral Treaties

The Court found there was no evidence to support any of contentions made by the parties with respect to recognition by third States that sovereignty over the disputed islands was vested in Honduras or in Nicaragua. Some of the evidence only included inconsistent and inconsecutive episodic incidents. It was obvious that they neither explicitly acknowledged the sovereignty over the disputed islands, nor had the intention to do so.

Honduras invoked the Colombia-Honduras and Colombia-Jamaica bilateral treaties as the proof of recognition of its sovereignty over the disputed islands by third States. However, as observed by the Court, in relation to these treaties Nicaragua never acquiesced in any understanding that Honduras had sovereignty over the disputed islands. Therefore, the Court adjudged that these bilateral treaties should not constitute recognition of the sovereignty over the disputed islands by third parties.

In addition, both parties invoked the Central America-Dominican Republic Free Trade Agreement that was signed by Nicaragua, Honduras, Costa Rica, Guatemala, El Salvador and the Dominican Republic in Santo Domingo on 16 April 1998. According to Honduras, an annex to Paragraph 1, Article 2 of the original text thereof defined Honduran territory to include Palo de Campeche and Media Luna Cays. Honduras claimed that the term Media Luna was frequently used to refer to the entire group of islands and cays in the area in dispute. On the other hand, Nicaragua pointed out that in the revised version as approved by the National Assembly, such annex was deleted. Having examined the above-mentioned annex, the Court observed that the four islands in dispute were not mentioned by name in the Annex. Moreover, the Court noted that it had not been presented with any convincing evidence that the term "Media Luna" had the meaning advanced by Honduras. Therefore, the Court decided not to further investigate the claims associated with this trade agreement as well as their status in oral proceedings.

6. Decision as to Sovereignty over the Islands

Following a review of all the evidence and legal issues associated with the

disputed islands, the Court concluded that Honduras had sovereignty over these islands based on its post-colonial *effectivités*.

D. Maritime Delimitation

1. Traditional Maritime Boundary Line Claimed by Honduras

Honduras claimed a traditional maritime boundary line between the two States based on the *uti possidetis juris* principle. The Court held that this principle might play a role in a maritime delimitation under certain circumstances, such as in connection with the delimitation of historic bays and territorial seas. However, Honduras did not present effective evidence in support of its argument that the line along 15°N starting from Cape Gracias a Dios constituted a boundary dividing the two States' maritime jurisdiction. It merely asserted that the Spanish Crown tended to use parallels and meridians to draw jurisdictional divisions, without presenting any evidence that the colonial Power did so in this particular case.

The Court further observed that Nicaragua and Honduras as new independent States were entitled by virtue of the *uti possidetis juris* principle to such mainland territories and territorial seas which constituted their provinces at independence. However, as decided by the Court, such principle should not be applicable to determining the sovereignty over the disputed islands. The King of Spain had not divided its maritime jurisdiction between the colonial provinces of Nicaragua and Honduras even within the limits of the territorial sea. Although it might be considered that these States gained their independence with an entitlement to a territorial sea, that legal fact did not determine where the maritime boundary between adjacent seas of neighbouring States will run. In the present case, the *uti possidetis juris* principle cannot be said to have provided a basis for a maritime division along the latitude 15°N.

The Court also observed that the 1906 arbitral award based on the *uti possidetis juris* principle included neither delimitation on the maritime boundary between the two States nor confirmation on the alleged maritime boundary along the latitude 15°N.

Therefore, the Court determined that the traditional maritime boundary along the latitude 15°N contended by Honduras based on the *uti possidetis juris* principle should be invalid.

Since there was no boundary established with reference to *uti possidetis juris*, the Court needed to further determine whether the tacit agreements on this

issue alleged by Honduras were valid. Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary was of great significance and agreement was not easily to be presumed. For this reason, Honduras presented a series of evidence, including offshore oil concessions, the Honduras-Colombia Agreement, fishery activities, exchange of diplomatic notes, etc. The Court observed that these pieces of evidence were either consistently contested by Nicaragua or considered recent contingency that could not adequately imply a maritime boundary between the two States. Based on a review of the evidence, the Court determined that there had not been any legally binding tacit agreement on the maritime boundary in 1982 or afterward.

2. Determination of the Maritime Boundary

The Court, having found that there is no traditional boundary line along the latitude 15ºN, proceeds now to the maritime delimitation:

(i) Applicable law: As parties to the UNCLOS of 1982,[16] both States agreed to settle the disputes in accordance with relevant provisions thereunder.

(ii) Regions to be delimited and methodology: In this case, the single maritime boundary would be the result of the delimitation of the various areas of jurisdiction spanning the maritime zone from the Nicaragua-Honduras mainland out to at least the 82°W, where third-State interests may become relevant. According to Article 3 of the UNCLOS, a State's territorial sea shall not exceed 12 nautical miles. These islands (including the four cays that had been adjudged to Honduras and Nicaragua's Edinburgh Cay) were all indisputably located within 24 nautical miles of each other but more than 24 miles from the mainland, which meant each island could has its own territorial sea, but would result in overlapping areas. Thus the single maritime boundary might also include segments delimiting the overlapping areas of the islands' opposite-facing territorial seas as well as segments delimiting the continental shelf and exclusive economic zones of the two States.

Delimitation methods and principles for the territorial sea are provided for in Article 15 of the UNCLOS. Regarding how to perform such provisions, the Court determined in the case concerning *Maritime Delimitation and Territorial Questions*

16 On 5 October 1993, Honduras became the 57th party to ratify the UNCLOS. Nicaragua was not a party to the UNCLOS when the application was filed. However, on 3 May 2000, Nicaragua also ratified the UNCLOS and became the 132th party to do so. See the UNCLOS and AIPUNCLOS (Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea) Ratification Chronology, at http://china-isa.jm.chineseembassy.org/chn/xwdt/P020070214235463597991.pdf, 14 May 2007. (in Chinese)

between Qatar and Bahrain that the most logical and widely practised method was first to draw an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.[17]

The jurisprudence of the Court set out the reasons why the equidistance method was widely applied in practice: it has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied. However, the equidistance method did not automatically have priority over other methods of delimitation and, in particular circumstances, there might be factors which made the application of the equidistance method inappropriate.

For the purpose of identifying base points, the Court considered the coastal geomorphology of both States as well as the circumstances of the mouth of River Coco which served as the endpoint of the land boundary between the two States. Considering the unstable geomorphology at the mouth, any base point determined in its vicinity as the starting point for delimitation could be considered unreasonable in the future. For all of the above reasons, the Court found itself within the exception provided for in Article 15 of the UNCLOS, namely facing special circumstances in which it cannot apply the equidistance principle.

The Court then considered the bisector delimitation method proposed by Nicaragua. It decided that such method, should an equidistance line be inapplicable, might be a reasonable alternative approach to fair results based on the special coastal geomorphology of the two States.

(iii) Delimitation of territorial seas around the islands: By virtue of Article 3 of the UNCLOS[18] the breadth of the territorial sea of the islands in the vicinity of 15°N shall not exceed 12 nautical miles. Considering the potential overlapping claims to the territorial sea in case that the distance between each island is smaller than 24 nautical miles, the territorial sea around the islands should be delimited. Following an investigation of the geographical features of the islands, the Court considered that the equidistance method should be used to delimit the territorial sea

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17 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, *I. C. J. Reports 2001*, p. 94.

18 Article 3 of the United Nations Convention on the Law of the Sea: Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention. Article 121, Paragraph 2 of the United Nations Convention on the Law of the Sea: 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.

around the islands because there was no legally relevant "special circumstance" in this area that would entail its inapplicability.

(iv) Starting-point and endpoint of the maritime boundary: Based on a review of both parties' proposition, the Court started the maritime boundary at a point on the bisector line three nautical miles seaward of the 1962 Point. The dividing line between the starting point and the 1906 land boundary point must be determined through mutual negotiation. However, the Court did not determine the endpoint of the maritime boundary, except with the vague description that it should run until the jurisdiction of a third State.

The Court also considered certain interests of third States which resulted from some bilateral treaties between countries in the region and which may be of possible relevance to the limits to the maritime boundary drawn between Nicaragua and Honduras. The Court added that its consideration of these interests was without prejudice to any other legitimate third party interests which might also exist in the area.

Therefore, despite the fact the endpoint was not determined, the Court may delimit the maritime boundary which, according to its explanation, may extend beyond 82ºW, provided that the rights of third States should not be affected, but should never continue beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in any circumstance. All rights to the continental shelf beyond 200 nautical miles should conform to the definition provided for in Article 76 of the UNCLOS and subject to review by the UN Commission on the Limits of the Continental Shelf.

(v) Course of the maritime boundary: With its decision on the starting-point as well as on the principle for the determination of endpoint, the Court ruled on the course of the maritime boundary between the two States. (See the Judgment)

VI. Court Decision

For these reasons, The ICJ,

(1) found unanimously that Honduras had sovereignty over Bobel Cay, Savanna Cay, Port Royal Cay and South Cay;

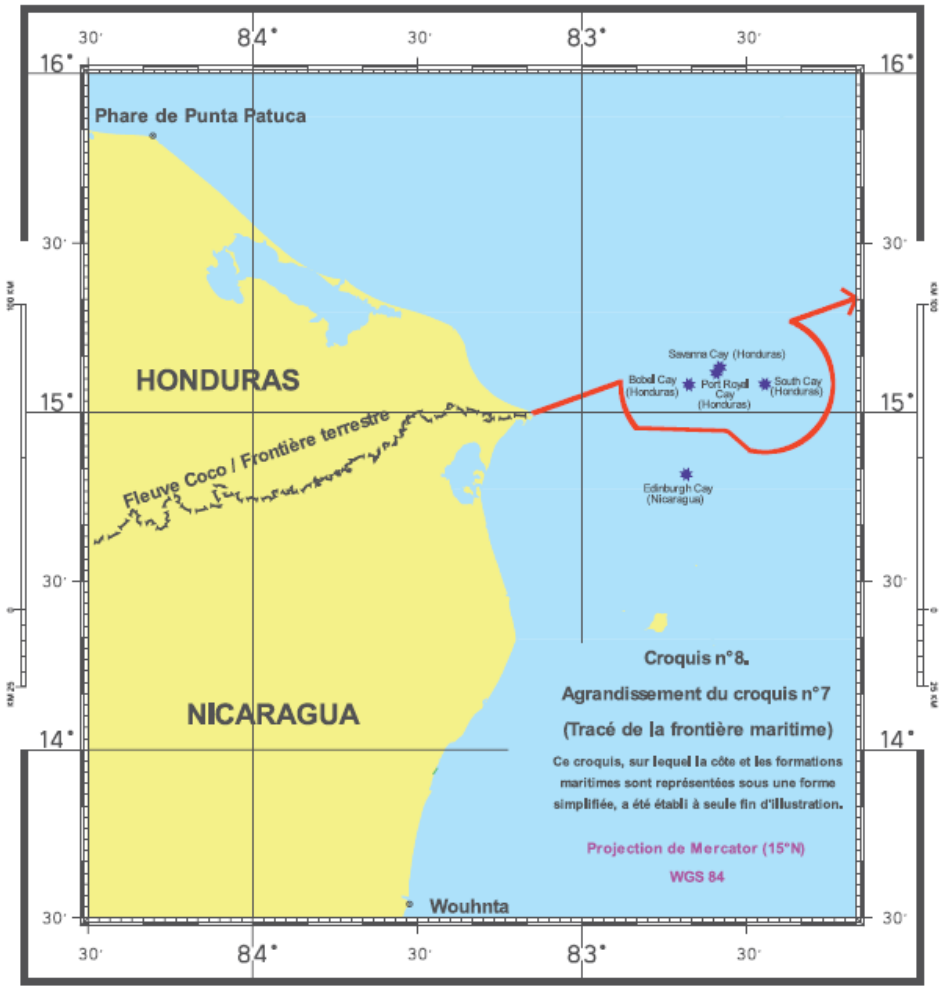
(2) By fifteen votes to two, decided that the single maritime boundary between the two States shall start from 15°00′52″N, 83°05′58″W. (Against: Judge Parra-Aranguren; Judge *ad hoc* Torres Bernárdez);

(3) By fourteen votes to three, decided that starting from the point with the co-

ordinates 15°00′52″ N and 83°05′58″ W the line of the single maritime boundary shall follow the azimuth 70°14′41.25″ until its intersection with the 12-nautical-mile arc of the territorial sea of Bobel Cay at point A (with co-ordinates 15°05′25″ N and 82°52′54″ W). From point A the boundary line shall follow the 12-nautical-mile arc of the territorial sea of Bobel Cay in a southerly direction until its intersection with the 12-nautical-mile arc of the territorial sea of Edinburgh Cay at point B (with co-ordinates 14°57′13″ N and 82°50′03″ W). From point B the boundary line shall continue along the median line which was formed by the points of equidistance between Bobel Cay, Port Royal Cay and South Cay (Honduras) and Edinburgh Cay (Nicaragua), through point C (with co-ordinates 14°56′45″ N and 82°33′56″ W) and D (with co-ordinates 14°56′35″ N and 82°33′20″ W), until it met the point of intersection of the 12-nautical-mile arcs of the territorial seas of South Cay (Honduras) and Edinburgh Cay (Nicaragua) at point E (with co-ordinates 14°53′15″ N and 82°29′24″ W). From point E the boundary line shall follow the 12-nautical-mile arc of the territorial sea of South Cay in a northerly direction until it met the line of the azimuth at point F (with co-ordinates 15°16′08″ N and 82°21′56″ W). From point F, it shall continue along the line having the azimuth of 70°14′41.25″ until it reached the area where the rights of third States may be affected; (Against: Judges Ranjeva, Parra-Aranguren, Judge *ad hoc* Torres Bernárdez) and

(4) By sixteen votes to one, found that the parties must negotiate in good faith with a view to agreeing on the course of the delimitation line of that portion located between the endpoint of the land boundary as established by the 1906 Arbitral Award and the starting-point of the single maritime boundary determined by the Court. (Against: Judge Parra-Aranguren).

Judges Ranjeva and Koroma appended separate opinions to the Judgment of the Court; Judge Parra-Aranguren and Judge *ad hoc* Gaja appended declarations to the Judgment of the Court; Judge adhoc Torres Bernardez appended a dissenting opinion to the Judgment of the Court.



Source: *I. C. J. Judgment*, p. 92.

Translator: TAN Shuangpeng
Editor (English): Mary Frances Cappiello

A Review of China's Research on Oceans Law in 2007

Research Team of the Journal*

In 2007, China's legal scholarship on oceans law has made a number of breakthroughs and achievements. This issue makes a summary of the writings published in 2007 on ocean-related law and policies from various aspects, with a view to enabling relevant researchers to better understand the current situation and dynamic state of oceans law research in China.

I. Maritime Sovereignty Disputes and Boundary Delimitation

In 2007, Chinese research on maritime sovereignty disputes and boundary delimitation further extends and studies of many new problems are noteworthy. These studies mainly involve cases of International Court of Justice (ICJ) concerning maritime disputes, general theories of maritime boundary delimitation, and disputes between China and relevant States in the East and South China Seas.

A. ICJ Cases on Maritime Disputes

On October 8, 2007, the ICJ entered its judgment in the case *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*. In this case, subject-matters under dispute are the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining to the two States in the Caribbean Sea and the sovereignty over islands relating to this delimitation.

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* The research team, led by Prof. Kuen-chen FU of Xiamen University, consists of Zhao Wei, Wang Zelin, Dong Lin, Lu Bing, Gao Xiaorui, Ji Ye, Yang Fan, Wu Chunqing, Zhu Yan and Chen Sisi.

In terms of the sovereignty of disputed islands, Nicaragua claims sovereignty over the islands under the principle of adjacency, whereas Honduras asserts title over the islands under the doctrine of *uti possidetis juris*. Regarding the course of a single maritime boundary, Nicaragua contends its maritime boundary with Honduras has not been officially delimited and requests the Court to determine the boundary by a method of "bisector line"; however, Honduras asks the Court to confirm that the boundary which is a traditional maritime boundary runs along the 15th parallel, or alternatively, an adjusted equidistance line.

The Court, after examining the evidence and arguments offered by the two parties, makes the following rulings: with regard to the sovereignty of the islands in dispute, the legal bases for the sovereignty proposed by both parties are insufficient; however, Honduras should have titles to the islands on the basis of its post-colonial effectivités; regarding the starting point and direction of the single maritime boundary, the Court holds that there is no proof that a traditional maritime boundary along north of the 15th parallel exists between the States. Further, "special circumstances" provided for in the United Nations Convention on the Law of the Sea (UNCLOS) exist in this case, and the Court cannot apply the equidistance principle. In this connection, the Court notes that the bisector method put forward by Nicaragua is an appropriate alternative and uses it to identify the general direction of the maritime boundary. As there are no "special circumstances" with respect to areas adjacent to the relevant islands, equidistance method should be employed to delimit the sea areas around such islands. The starting point of the maritime boundary is set at 3 miles out to sea from the terminus of the land boundary on the bisector line and this boundary continues until the jurisdiction of a third State is reached.

Another pending case on maritime disputes at the ICJ is *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In this case, Romania requests the Court to draw a single maritime boundary dividing the continental shelves and exclusive economic zones of Romania and Ukraine in the Black Sea. The case is in process and on June 28, 2007, the Court issued an order, extending the time limit for the filing of rejoinders by the two parties.

In an article of this issue, Zhao Wei, a PhD candidate, elaborates on the

judgment and proceedings of these two cases.[1]

B. General Theories of Maritime Boundary Delimitation

This year witnesses a wealth of writings on the general theories of maritime delimitation, but no new ideas are presented. In this regard, articles revolve around the status of equidistance principle, consideration of "special circumstances", application of "proportionality", application of "a single maritime boundary" and equitable principle in maritime delimitation. Among them, Zhao Ling argues that according to the UNCLOS and international practice, "equidistance line + special circumstances" and "equitable principle" should be the major rules for the delimitation of the continental shelf; Qu Bo, a PhD candidate, after an analysis of Art. 56(3) and Art.83 of the UNCLOS, contends that equitable principle is the fundamental principle in continental shelf delimitation, and other principles and methods can apply only when they are in line with equitable principle. Mr. Ren Zhiqiang studies application of equidistance principle in maritime delimitation in the context of the UNCLOS and relevant international practice. He observes that equidistance principle is not of a nature of general international law or customary international law and its application in maritime delimitation depends on specific situations; Researchers Li Linghua and Tan Shudong mention the "single maritime boundary" and the concept of "proportionality" in delimitation in their article; in another article, Li Linghua by reference to international cases analyzes the application of the "proportionality" concept in maritime delimitation and notes that this principle is of enlightening value in the maritime delimitation between China and its neighboring States; Mr. Li Xingya holds that consultation and equitable principle are the general principles of maritime delimitation after exploring relevant

1 Zhao Wei, New Developments of International Court of Justice Settling Maritime Disputes, *China Oceans Law Review*, No. 2, 2006 (in Chinese); Zhao Wei, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea Case, *China Oceans Law Review*, No. 2, 2007. (in Chinese)

provisions of the UNCLOS and international practice in this regard.[2]

C. China's Disputes with Relevant States in the East and South China Seas

Professor Kuen-chen Fu sketches various methods for delimiting continental shelves around China. He states, as regards the continental shelf in Huang Sea, due to the shallowness of superjacent water and lack of natural boundary lines, we may lay out a list of equitable considerations, examine each consideration based on scientific evidence and finally achieve an equitable delimitation arrangement; in the East China Sea, the Okinawa Trough is deep, long and constantly growing, which divides the continental shelf into two sectors. To resolve the delimitation dispute in this area, the sovereignty of the Diaoyu Islands and the location of the foot of the East China Sea continental slope should be clarified first. As for the continental shelf in the South China Sea, Professor Kuen-chen Fu contends that islands in the South China Sea are not small features as in a regular delimitation case where they may be ignored, and non-encroachment or no cutting-off principle could not be applied entirely in this region. China has never intended to claim the legal status of "historic bay" for the northern area of the South China Sea; China has historic rights in the waters within the U-shape line, while other States also have historic waters. Professor Fu reiterates the concept of "three layers of the South China Sea", namely the entire semi-enclosed South China Sea, historic waters in the South China Sea, and islands and the 12-nautical-mile territorial sea in the South China Sea, which should be the basis of the solution of the South China Sea continental shelf delimitation disputes.[3]

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2 Zhao Ling, Comparison of Continental Shelf Delimitation Rules, *Journal of Shaanxi Administration School*, No. 1, 2007 (in Chinese); Qu Bo, Reflection on Issues of Delimitation of Continental Shelf, *Contemporary Law Review*, No. 4, 2006 (in Chinese); Ren Zhiqiang, A Discussion of the Status of Equidistance in Continental Shelf Delimitation, *Ocean Development and Management*, No. 2, 2007 (in Chinese); Li Linghua and Tan Shudong, New Developments of Theories and Methods in International Maritime Boundary Delimitation, *Ocean Development and Management*, No. 4, 2006 (in Chinese); Li Linghua, The Concept of Proportionality in Maritime Boundary Delimitation and Relevant Cases, *Journal of Ocean University of China (Social Sciences Edition)*, No. 2, 2006 (in Chinese); Li Xingya, Consultation and Equity, *Ocean World*, No. 5, 2006. (in Chinese)

3 Kuen-chen Fu, Delimitation of the Continental Shelf Surrounding China: Methods and Problems, in Kuen-chen Fu and Shui Binghe eds., *China and the South China Sea Issue*, Taipei: Askfor Bookstore, 2007, pp. 365~385. (in Chinese)

1. The Issue of Delimitation in the East China Sea between China and Japan

a. Discussions on Relevant Jurisprudence

Many scholars discuss the East China Sea disputes between China and Japan from the perspective of international law. These writings mainly focus on the origins and history of the disputes, stances of both sides, delimitation principles established by relevant international law and practices, special considerations for China-Japan maritime boundary delimitation, etc.[4]

Doctor Gao Jianjun believes, in light of international law and delimitation practices, the boundary line of the continental shelf between China and Japan should be an equidistant line between the axis of the Okinawa Trough and the 200-nautical-mile limit line off Japan's coast; the line dividing the exclusive economic zones should be an adjusted equidistant line between the coasts of the two States with base points determined through their negotiations and should be modified in favor to China so as to reflect the major difference between the lengths of coastlines of the two States; the "median line" delineated unilaterally by Japan in the East China Sea has no grounds under international law; as the delimitation may result in two different lines for seabed and superjacent waters respectively, the two countries should make an arrangement on the overlapping areas arising therefrom.[5]

Associate Professor Lu Xiumin argues that, in the East China Sea disputes, the Diaoyu Islands issue relates to territorial sovereignty dispute. On the contrary, the East China Sea continental shelf and exclusive economic zones are subject to maritime jurisdiction, a form of incomplete sovereignty, which are of a distinct nature from the Diaoyu Islands issue and requires a separate approach to deal with. As far as delimitation of the East China Sea is concerned, both China and Japan have grounds in international law and Japan's median line claim does not

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4 Articles in this regard mainly include: Liu Zhongmin, The Deadlock in the East China Sea: A Legal Analysis of the East China Sea Disputes between China and Japan, *Ocean World*, No. 5, 2006 (in Chinese); Gao Junguo and Ju Guangyu, An Analysis of Sino-Japanese East China Sea Delimitation from the Perspective of International Law, *Ocean Development and Management*, No. 2, 2006 (in Chinese); Zhang Wanbin and Zhang Min, Principles in Delimitation of the Continental Shelf in East China Sea, *Journal of China University of Mining & Technology (Social Sciences Edition)*, No. 2, 2007 (in Chinese); Shi Xin, An Analysis of Delimitation Disputes in the East China Sea between China and Japan, *Ocean Development and Management*, No. 6, 2006. (in Chinese)

5 Gao Jianjun, Sino-Japanese Delimitation Disputes in the East China Sea from the Perspective of International Law: Groundlessness of Japan's Claims, *Global Law Review*, No. 6, 2006. (in Chinese)

violate international practices or the equitable principle. Notwithstanding lack of contemplation of application conflict in delimiting continental shelf and exclusive economic zones between States with adjacent or opposite coasts, the continental shelf regime should prevail by virtue of the natures of the continental shelf and exclusive economic zones and existing provisions of the UNCLOS. The rationale is that although both the continental shelf and exclusive economic zone, in nature, are subject to maritime jurisdiction over a certain area (incomplete sovereignty), given that territorial sovereignty takes precedence over maritime jurisdiction and the continental shelf is the natural prolongation of land territory, the status of the continental shelf should rank between territory and exclusive economic zone. Supporting evidence for this argument, to a certain extent, can be found in Article 77 of the UNCLOS and a number of judgments of the ICJ. Therefore, China can assert its claims on this basis so as to maintain our legitimate rights and interests and contribute to the development and improvement of the law of the sea.[6]

Wang Deshui and other scholars view that, in terms of the definition of the continental shelf, "natural prolongation" is the fundamental principle to make the definition of the continental shelf, whereas the 200-nautical-mile standard is applicable only if it conforms to the principle "natural prolongation". "Equidistance principle" *per se* is not a general international law principle for delimiting the continental shelf, but a sub-principle of equitable principle. It follows that Sino-Japanese continental shelf delimitation in the East China Sea should observe equitable principle and natural prolongation principle and take into all relevant circumstances, and achieve delimitation through negotiation.[7] Concerning the effect of Diaoyu Islands on the East China Sea continental shelf delimitation, Zhang Wanbin, Zhang Min, et al., consider that Diaoyu Islands are small in size and lacking natural resources, thus they cannot sustain human habitation or economic life of their own without outside resources. Pursuant to

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6 Lu Xiumin, An Analysis of Sino-Japanese Dispute over the East China Sea Issue, *Journal of Guangdong Radio & TV University*, No. 1, 2007. (in Chinese)

7 Wang Deshui, Sino-Japanese Disputes over the Sovereignty of Diaoyu Islands from the Perspective of International Law, *Ocean Development and Management*, No. 3, 2007 (in Chinese); Xing Xiaoling, Sino-Japanese Disputes over the Continental Shelf Delimitation in the East China Sea from the Perspective of International Law, *Legal System and Society*, No. 7, 2007 (in Chinese); Cui Xidong, *An Analysis of Sino-Japanese Dispute over Diaoyu Islands from the View of International Law* (Master's Thesis), Dalian: Dalian Maritime University, 2007 (in Chinese); Zhang Weibin, *A Study of Equitable Principle in International Maritime Boundary Delimitation* (Master's Thesis), Hefei: Anhui University of Finance & Economics, 2007. (in Chinese)

Article 121(3) of the UNCLOS, they shall not have their own continental shelves. Additionally, taking into account the two factors to determine the effect of islands on boundary delimitation, that is distortion to boundary lines by islands and status of islands, Diaoyu Islands shall have zero effect on Sino-Japanese East China Sea continental shelf delimitation.[8] Zhang Tianfei summarizes theoretical elements the ICJ considered when adjudging maritime disputes cases, including equitable principle, natural prolongation, equidistance, special circumstances, "all relevant circumstances", proportionality and adjacency. Based on this, he comments on the effects of the claims by the parties to any dispute under international law.[9]

In response to Japanese assertion to rely on and apply the 1958 Continental Shelf Convention as customary international law, Lu Wei and Zhou Dejiang contend that given the special circumstances in the East China Sea, the equidistant line (median line) should not serve as the boundary line. This is because where an oceanic trough or trench divides two different geological structures, an oceanic trough or trench can be considered a special circumstance and treated as boundary of the continental shelf. Furthermore, China and Japan are not contracting parties to the Continental Shelf Convention and thus, are not legally bound by this Convention. Additionally, treating Article 6 of the Continental Shelf Convention as customary international law is questionable, as there is controversy over the equidistant line and thus, the element of *opinio juris* of States, the subjective element of customary international law is missing.[10] Jin Yongming argues that we should adhere to the claim of natural prolongation which constitutes the basis of continental shelf and delimit the continental shelf and the exclusive economic zone separately. Moreover, we should prove and explain the differences in geographical features and geologic structures between Okinawa Trough and the adjacent continental shelf, and that Japan and China do not share the same continental shelf in the East China Sea, with a view to establishing the Okinawa Trough's role in

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8 Zhang Wanbin and Zhang Min, Principles in Delimitation of the Continental Shelf in the East China Sea, *Journal of China University of Mining & Technology (Social Sciences Edition)*, No. 2, 2007 (in Chinese); Zhang Wanbing and Zhang Min, Diaoyu Islands and Sino-Japanese Delimitation of East China Sea Continental Shelf, *New West*, No. 8, 2007. (in Chinese)

9 Zhang Tianfei, *Insights into Maritime Boundary Delimitation between China and States with Adjacent or Opposite Coasts Gained from Maritime Boundary Delimitation Cases of International Court of Justice* (Master's Thesis), Jilin: Jilin University, 2007. (in Chinese)

10 Lu Wei and Zhou Dejiang, Sino-Japanese East China Sea Disputes from the Perspective of International Law, *Journal of Ocean University of China (Social Sciences Edition)*, No. 5, 2007. (in Chinese)

delimitation and endorsing our assertion that our continental shelf extends to the Okinawa Trough.[11]

b. Negotiation is the Solely Correct Approach towards the Resolution of Sino-Japanese Dispute over the East China Sea

From the perspective of law, Chinese scholars believe that the dispute can be resolved by legal methods; however, this apparently is not the actual way chosen by the Chinese government. Since the beginning of this year, the Chinese government's stance that the dispute should be settled by political negotiations is becoming clearer. On December 1, Yang Jiechi, the foreign minister of China stated, friendly consultation was the solely correct approach to the East China Sea issue; "shelving differences and seeking joint development" is a practical way to resolve the East China Sea disputes; "moving towards each other" is the key to making progress in consultation.[12]

On August 25, 2006, pursuant to Article 298 of the UNCLOS, China submitted a written declaration to the Secretary-General of the United Nations stating that the Chinese government does not accept any international judicial or arbitral procedure provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention, namely disputes relating to sea boundary delimitations, territory disputes, military activities, etc. This declaration indicates China's fundamental position that its maritime disputes with its neighboring States should be resolved through political negotiations and excludes the possibility of China accepting international adjudication or arbitration. In the current Issue, Doctor Gu Junfeng's article will specifically analyze this topic.

c. Joint Development is a Crucial Step during the Resolution of Sino-Japanese East China Sea Disputes

Responding to the issue discussed above, joint development is recognized by the government and academics as a crucial step to resolve the East China Sea delimitation dispute between China and Japan. Judging from the Chinese government's position, one can see that the ultimate resolution of the East China Sea Dispute rests on political wills and diplomatic skills of the two States. Given

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11 Jin Yongming, Dynamics of Japan on Ocean Issues and Insights for China, *China Ocean Law Review*, No. 1, 2007. (in Chinese)

12 Yang Jiechi, Friendly Consultation Is the Only Right Way to Resolve East China Sea Issue, at http://news.xinhuanet.com/newscenter/2007-12/01/content-7179623.htm, 28 October 2007. (in Chinese)

the importance of the East China Sea, obviously, it will take a long time. Joint development serves as a crucial step in this process and is very likely to be the crack to break the impasse on this issue. In April 2007, Premier Wen Jiabao visited Japan and reached consensus with Japan to jointly develop the East China Sea on the basis of the principle of mutual benefit. The consensus includes: to make the East China Sea a sea of peace, cooperation and friendship; as a provisional arrangement pending the final delimitation, to conduct joint development under the principle of mutual benefit without prejudice to the positions of each side relating to ocean matters; to conduct higher level consultation as required; to carry out joint development in a large area agreed by both sides; to expedite the process of consultation in an attempt to report specific plans on joint development to the leaders of each side in 2007 fall.[13] As far as the area for joint development is concerned, the Chinese government has always been asserting that development should be carried out in disputed sea areas.[14]

Wan Xia and Song Dong contend that joint development refers to a consensual, practical and provisional development agreement between two or more countries whose purpose is to jointly exploit natural resources in disputed areas, and share costs and interest arising therefrom. Although joint development more frequently applies to maritime disputes, it also applies to land territory disputes between States. In legal terms, the joint development regime is one of the provisional arrangements advocated by the UNCLOS; its practical effects have been demonstrated by proper implementation of bilateral or multilateral treaties among States; successful operation of the joint development regime lies in identifying a State's national interest and stances precisely, while at the same time being flexible and pragmatic and taking initiatives to embark on States' common interest and goals.[15]

Researcher Jin Yongming makes a detailed analysis on the value of joint development. He holds that joint development will not only maintain peace

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13 China and Japan Reached Consensus on East China Sea Issue and Will Conduct Joint Development as per the Principle of Mutual Benefit, at http://news.sina.com.cn/c/2007-04-11/211312754839.shtm1, 28 October 2007. (in Chinese)

14 Foreign Ministry: Joint Development of the East China Sea Should Be Conducted in Disputed Sea Areas, at http://news.sina.com.cn/c/2007-04-12/213911626885s.shtml, 28 October 2007. (in Chinese)

15 Wan Xia and Song Dong, The Regime of Joint Development in Disputed Sea Areas: Starting from Deng Xiaoping's Diplomatic Thoughts on Peaceful Resolution of International Disputes, *Pacific Journal*, No. 6, 2007. (in Chinese)

and stability in the region, but also gain actual resource interest and strengthen cooperation and exchange between the two States in various aspects.[16]

As for the legal features of joint development, Ren Huaifeng contends that joint development is practical, transitional, encouraging and prohibitive.[17] He Hairong describes its legal features as sharing of objectives, being pragmatic (functional), provisional, and non-intervening.[18]

With regard to the legal nature of joint development proposed by China, Ren Huaifeng believes that the proposal conforms to the spirit of the UNCLOS and emerges with the development of the law of the sea. He claims that the context for the emergence of joint development is that the expansion of State jurisdiction over oceans gives rise to disputed sea areas with overlapping claims for maritime interest of States with adjacent or opposite coasts; on the premise of not prejudicing each party's autonomy or maritime jurisdiction, States in a spirit of seeking common grounds and shelving differences achieve joint development of natural resources in disputed sea areas through consultation.[19] He Hairong considers that joint development is not a means to acquire territory and does not qualify evidence to claim sovereignty; it does not need transfer of sovereignty as political grounds; it is merely a manner of utilizing resources in special sea areas; it is economic cooperation between States. Joint development is in line with the principles of cooperation, consultation and friendly relations with neighboring countries in international law as confirmed and reflected in international legal instruments such as the United Nations Charter, the Vienna Convention on the Law of Treaties, and is a provisional measure whose legal basis derives from Articles 72 and 83 of the UNCLOS. A comparison of joint development and non-actions from the three perspectives of economy, politics and problems resolution effects indicates that joint development is a better approach for utilizing resources in disputed sea areas.

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16 Jin Yongmin, On the East Sea Issue & Joint Development, *Journal of Social Sciences*, No. 6, 2007. (in Chinese)

17 Ren Huaifeng, A Study of Joint Development in the South China Sea, in Kuen-chen Fu and Shui Binghe eds., *China and the South China Sea Issue*, Taipei: Askfor Bookstore, 2007, pp. 316~324. (in Chinese)

18 He Hairong, Legal Understandings of Joint Development, in Kuen-chen Fu and Shui Binghe eds., *China and the South China Sea Issue*, Taipei: Askfor Bookstore, 2007, pp. 325~335. (in Chinese)

19 Ren Huaifeng, A Study of Joint Development in the South China Sea, in Kuen-chen Fu and Shui Binghe eds., *China and the South China Sea Issue*, Taipei: Askfor Bookstore, 2007, pp. 316~324. (in Chinese)

This is also has been proved by international practice.[20]

d. Implications of Japan's Basic Act on Ocean Policy for East China Sea Disputes

On April 20, 2007, Japan's Diet adopted the Basic Act on Ocean Policy and Act on the Establishment of Safety Zones around Marine Structures. The two Acts mark a strategic shift of Japan from an island State to an oceanic State and establish the direction of Japan's future ocean strategies. The former Act involves promoting the exploration and exploitation of marine resources, driving the development of exclusive economic zones and preventing infringement upon exclusive economic zones by foreign States. The latter Act is aimed at ensuring the safety of exploiting resources by Japan in its exclusive economic zones and continental shelf and empowers the Minister of Land, Infrastructure, Transport and Tourism to set up safety zones within a radius of 500 meters around an excavating structure and ships can be excluded from traveling through this area.

Researchers Zhou Yipu and Li Yiliang hold that a series of important systems on the ocean established by the Basic Act reflect the trend of Japanese future ocean strategies; the enactment and implementation of the Basic Act will bring revolutionary changes to Japan's ocean strategies and policies; as Japan's constitution for oceans, the Basic Act presents a grand blueprint of Japan's prospective ocean policies rather than a swift reaction to oil disputes in the East China Sea. However, Japan unilaterally legalizes (under internal law) its claims to the East China Sea continental shelf and exclusive economic zones by these acts and many provisions therein target the development of oil and gas resources in the East China Sea.[21]

Japan's Basic Act demonstrates Japan's positions on the East China Sea issue, adds to the difficulty in resolving East China Sea disputes and further evidences that Sino-Japanese East China Sea disputes are unlikely to be settled in a short time.

2. South China Sea Disputes

China's stance on the South China Sea issue is that China has sovereignty

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20 He Hairong, Legal Understandings of Joint Development, in Kuen-chen Fu and Shui Binghe eds., *China and the South China Sea Issue*, Taipei: Askfor Bookstore, 2007, pp. 325~335. (in Chinese)

21 Zhou Yipu and Li Yiliang, A Series of Studies on Japan's Basic Act on Ocean Policy: An Analysis of Legal Content, *Ocean Development and Management*, No. 4, 2007. (in Chinese)

over Xisha, Nansha and the sea areas adjacent to them. With regard to Vietnam's infringement on China's sovereignty, China's Ministry of Foreign Affairs lodges solemn protest and reiterates this stance.[22] On the basis of this, China asserts to "shelve disputes and seek joint development" with States bordering the South China Sea and settle disputes through consultations.

After researching on relevant theories, Wang Ao discusses on the UNCLOS and resolution of South China Sea disputes; Yang Qing argues that we should keep in mind a general picture of overall national interest and regional cooperation, and understand and deal with South China Sea disputes properly.[23]

II. Marine Pollution and Environmental Protection

In the field of marine environmental protection, establishing State jurisdiction over marine environmental pollution and State responsibility for marine pollution caused by the State is of great significance to the protection of marine environment. Cui Feng and Xu Weili contend that with gradual recognition of the urgency of preventing marine environmental pollution, the conventional single jurisdiction by the flag State has been altered with regards to the issue of jurisdiction over marine environmental pollution; the adoption of the 1982 UNCLOS expands coastal States' jurisdiction while narrows the jurisdiction of the flag States, and lays out a comprehensive system of jurisdiction involving coastal State, flag State and port State. Such a jurisdiction system will enable all countries to play their respective roles under the highest legislative authority of International Maritime Organization (IMO) in dealing with marine safety and preventing pollution. Xu Weili also make proposals such as improving Chinese current legislation on the prevention of vessel-sourced pollution, for instance, by being in line with international standards, incorporating international treaties into Chinese internal laws and making their

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22 China Reiterates Its Sovereignty over Xisha Islands, Nansha Islands and Adjacent Sea Areas, at http://news.sina.com.cn/c/2007-01-04/174811953759.shtml, 2 November 2007 (in Chinese); China Lodged Solemn Protest against Vietnam's New Activities in Nansha, at http://news.sina.com.cn/c/2007-04-10/174112744688.shtml, 2 November 2007 (in Chinese); China Lodged a Strong Protest against Vietnam's "Congressional Elections" in Nansha, at http://news.sohu.com/20070614/n250579278_1.shtml, 2 November 2007. (in Chinese)

23 Wang Ao, The UNCLOS and Resolution of Disputes in the South China Sea, *Journal of Heilongjiang College of Education*, No. 6, 2007 (in Chinese); Yang Qing, A Correct Understanding and Dealing with South China Sea Disputes, *Outlook Weekly*, 16 January 2006. (in Chinese)

provisions specific; improving domestic regulations on the prevention of vessel-sourced pollution to inland waters as well as regional comprehensive laws and regulations; setting out comprehensive and all-around regulations on the prevention of vessel-sourced pollution and considering accession to relevant international treaties, etc. He also put forward plans to enhance China's administrative regime for maritime law enforcement: including marine environmental protection into comprehensive marine administration; strengthening administration and control over vessel-sourced pollution to marine environment; constructing environmental protection port facilities; increasing and enhancing equipment for the administration of vessel-sourced pollution; boosting law enforcement by local administrations; and strengthening cooperation with relevant entities and States, etc.[24]

China's port container throughout has ranked first in the world for five consecutive years,[25] thus, how to control vessel-sourced pollution is considerably significant for the protection of marine environment and healthy development of navigational economy. After analyzing the ballast water management plans and logs, Wei Jingtian suggests that China should promote research on the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments and the Guidelines on the Control and Management of Ships' Ballast Water and Sediments so that maritime administrative departments and shipping companies are able to better understand conventions and regulations regarding ballast water management. Further, this will help them take actions to reduce and eliminate risks to ecology and human health from harmful aquatic creatures as well as pathogens.[26] As the relevant domestic administrative regulations on the prevention of vessel-sourced pollution to marine environment have yet to be set out in China, Liu Gongcheng notes deficiencies of Chinese current regulatory system on the prevention of vessel-sourced pollution. In this connection, he emphasizes that it is necessary and urgent to establish and enhance this regulatory system and

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24 Cui Feng and Xu Weili, A Preliminary Analysis of the UNCLOS and Comprehensive Jurisdiction over Vessel-sourced Pollution, *Journal of Ocean University of China (Social Science Edition)*, No. 1, 2007 (in Chinese); Xu Weili, A Preliminary Analysis of Coastal States' Jurisdiction over Vessel-sourced Pollution, *China Oceans Law Review*, No. 1, 2007 (in Chinese); Xu Weili, *A Study of Coastal States' Jurisdiction over Vessel-sourced Pollution* (Master's Thesis), Qingdao: Ocean University of China, 2007. (in Chinese)

25 China Traffic Net, Chinese Port Container Throughput Ranked First in the World for Five Consecutive Years, at http://news.c-cc.cn/news_detail.asp?Newsid=26220, 27 October 2007. (in Chinese)

26 Wei Jingtian, Control and Management of Ships' Ballast Water and Sediment, *Maritime China*, No. 6, 2007. (in Chinese)

then he offers some feasible suggestions from aspects of level, content, method and regime.[27]

China has become the second largest oil consumer in the world, however, China's ship technology, crew quality and communication and navigation abilities demand further development. Currently, large-scale oil pollution at sea is at a high-risk stage. As regards civil liabilities for oil pollution damage, Li Jinsheng and Zhang Yunke analyze the history and content of the 1992 International Convention on Civil Liability for Oil Pollution Damage and argue that the principle that the liability for oil pollution damage is on the owner of the ship from which the polluting oil escaped or was discharged effectively ensures timely compensation, but adequate compensation requires the establishment of funds for compensation for oil pollution damage and a system of mandatory insurance. Thus, China should not only adopt the aforementioned principle in relevant legislation, but also build up funds for compensation for oil pollution damage to guarantee adequate compensation. Only in this way can the effective management of polluted marine environment be accomplished.[28]

Environmental protection and economic development have been an inherent conflict in the traditional pattern of social development. How to tackle this conflict is one focus of scholars' discussions. Referring to the Beibu Bay Economic Zone as an example, Nong Zuolie suggests the adoption of the principle of protecting environment alongside with economic development and coordinating marine development with land development, urges to make a plan for the protection of marine environment and sets proper targets to control land-sourced pollution after taking into account the effects pollutant discharge imposes on the functional areas of oceans, for the purpose of full, reasonable, efficient and sustainable use of marine resources as well as development of marine economy.[29] Strengthening environmental management is one major method to resolve this conflict. Starting from real problems in marine environment, Wang Qi and Chen Huiling make a spot analysis of the current demand-supply situation of and conflicts in the management system on marine environment and propose to transform perceptions

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27 Liu Gongcheng, Establishing and Perfecting China's Legislation on Prevention of Pollution from Ships, *China Maritime Safety*, No. 6, 2007. (in Chinese)

28 Li Jinsheng and Zhang Yunke, Comment on the Principle "He Who Leaks Oil Takes the Responsibility" on the Sea, *Law Science Magazine*, No. 4, 2007. (in Chinese)

29 Nong Zuolie, Enhancing Marine Environmental Protection: Harmonious Development of Beibu Bay Economic Zone, *Nanfang Guotu Ziyuan*, No. 9, 2007. (in Chinese)

and approaches to marine environment management, so as to drive the sustainable development of Chinese marine environment and economy.[30] Conflicts and controversies emerge when various sectors and industries utilize the sea areas in a period of fast development of marine economy in China. However, since the current practice in relation to marine industry layout lacks theoretical support, Han Limin and Du Xiaoyan analyze the real demand for a proper marine industry layout and based on this analysis, they explore a number of theoretical issues such as the connotation, layers and ways of implementation of the marine industry layout. They finally propose a dynamic model of a proper marine industry layout so as to meet the urgent need to sustainably develop the marine economy.[31]

Yu Youlong and Jiao Guiying explore the origins of contemporary marine environmental problems, analyze the principles that should be adhered to for the protection of marine environment and suggest to draft a marine environmental protection plan, enhance and improve public service work related to oceans, and promote the construction and management of coastal and marine protected areas with a view to enhancing marine environmental protection and restoring ecological environment.[32] Timely information regarding marine environment is of great value for the government, industry and relevant individuals to engage in ocean-related activities. Nevertheless, information asymmetry is a prominent issue in Chinese marine environment management. Wang Qi and Li Yang attribute this issue to factors including "dislocated conceptions", profit-driven behaviors and drawbacks in the system of management. They study the four forms of information asymmetry currently existing in China and then, propose to resolve this issue through changing conceptions, establishing a coordination mechanism and implementing a "sea-land integrated" managerial regime.[33]

As regards treatment and restoration of Bo Sea, Wang Qi and Gao Wenzhong

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30 Wang Qi and Chen Huiling, An Analysis of the Imbalance between Supply and Demand in Marine Environment Control and Management, *Ecological Economics*, No. 3, 2007. (in Chinese)

31 Han Limin and Du Xiaoyan, A Study of Theoretical Questions Related to Marine Industry Layout, *Journal of Ocean University of China (Social Sciences Edition)*, No. 3, 2007. (in Chinese)

32 Yu Youlong and Jiao Guiying, Focus on Marine Environmental Protection and Promote Coordinated Development of Human and Sea, *Ocean Development and Management*, No. 1, 2007. (in Chinese)

33 Wang Qi and Li Yang, Information Asymmetry in Marine Environment Management and Counter-measures, *Journal of Ocean University of China (Social Sciences Edition)*, No. 5, 2007. (in Chinese)

analyze a number of problems existing in current comprehensive treatment actions on the environment of Bo Sea, for instance, the legacy of out of date guidance, lack of a centralized and effective leading organ, absence of supporting policies and regulations. They also note the issues needed to focus in the next phrase such as promoting a comprehensive coordination mechanism and public participation.[34] Sun Shuxian introduces the basic status quo of polluted Bo Sea, points out inadequacy in regulations, policies, and mechanisms in current treatment actions on Bo Sea and advises to make a series of regulations that would facilitate the protection of Bo Sea's environment so as to manage Bo Sea in accordance with law.[35]

As to land-sourced pollution, "excessive discharge from outfalls into the sea remains unabated, and the quality of waters near the outfall continues to worsen".[36] To strengthen management of coastal engineering construction projects, the State Council of China made the Decision on Amending the Administrative Regulation on the Prevention and Control of Pollution Damage to the Marine Environment by Coastal Engineering Construction Projects of the People's Republic of China on September 25, 2007 which will take effect on January 1, 2008.[37]

III. Port Administration and Shipping

In this year, in terms of port administration, with the rising status of ports, security management over ports draws increasingly wide attention and many writings discuss this issue from various perspectives.[38] As to management of

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34 Wang Qi and Gao Zhongwen, Reflections on the Integrative Governance Actions of the Bo Sea Environment, *Marine Environmental Science*, No. 3, 2007. (in Chinese)

35 Sun Shuxian, Apply New Technology and New Ideas in Treatment of Bo Sea, *Ocean Development and Management*, No. 1, 2007. (in Chinese)

36 State Oceanic Administration, Report on the Quality of China's Marine Environment in First Half of 2007, at http://www.soa.gov.cn/news/200708/16241a.htm, 29 October 2007. (in Chinese)

37 At http://www.gov.cn/zwgk/2007-09/30/content_765616.htm, 28 October 2007. (in Chinese)

38 Yu Deqi, Discussions on Internal Safety Management of Port Enterprises, *Transportation Enterprise Management*, No. 1, 2007 (in Chinese); Wang Chenyang, A Brief Discussion on Safe Production Management in Port Enterprises, *China Ports*, No. 2, 2007 (in Chinese); Zeng Shijuan, Discussions on Supervision and Management of Port Security, *China Ports*, No. 7, 2007 (in Chinese); Luo Fangjin and An Shuiyuan, Application of Port Safety Culture, *China Water Transport*, No. 7, 2007 (in Chinese); Wei Ming, China's Port Facilities' Security Goes Deep with Full Performance of Treaties, *China Ports*, No. 8, 2007 (in Chinese); Shen Yue and Hu Tiejun, Ports Should Set up a Security System, *China Ports*, No. 9, 2007. (in Chinese)

port construction, some scholars consider adopting a new managerial system for port construction based on specific situations of different places and propose to set up specialized port construction management companies.[39] Some argue that performance management should be adopted in port enterprises to avoid waste of resources and improve their core competitiveness.[40] Some elaborate on the importance of fostering sustainable strategic culture when conducting port construction in a sustainable way, in light of the situation and features of current port construction.[41] Since port logistics is still a focus of port management, academics study it from various aspects, including investigating its status quo, drawing on foreign experiences and attempting to create a modern port logistics mode that suits China's current situation.[42] Up to 2007, China's port cargo and container throughput reach 6.4 billion tons and 117 million TEUs respectively. China's container throughput has ranked first in the world for five years consecutively.[43] In light of this situation, some scholars specifically study the implications of ships' growing sizes for liner companies, shipping trade and ports;[44] one academic makes an analysis of container ships' increasing sizes in terms of economies of scale and on the basis of it, offers some strategies for liner companies to adopt.[45] With regard to new regulations, the Provisions on the Administration of Port Construction was adopted at the second executive meeting

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39 Shao Zuobin, Probing into Management System of Port Construction, *Port & Waterway Engineering*, No. 9, 2007. (in Chinese)

40 Zhou Haiyun and An Tong, Use All-directional Performance Board to Improve Port Enterprises' Management, *Transportation Enterprise Management*, No. 9, 2007. (in Chinese)

41 Zhang Fengjiang, On Strategic Culture Related to the Sustainable Development of Port Construction, *China Habour Engineering*, No. 4, 2007. (in Chinese)

42 Li Xuegong and Ren Wei, Trend, Characteristic and Apocalypse of the Foreign Port Logistics Development, *Science & Technology of Ports*, No. 2, 2007 (in Chinese); Shi Lirong, Construction and Management of Port Supply Chain, *Logistics Sci-Tech*, No. 3, 2007 (in Chinese); Zhao Xia, Discussions on Operational Modes of Developing Modern Logistics in Ports, *Enterprise Economy*, No. 7, 2007 (in Chinese); Gu Yazhu, A Discussion of Strategic Positioning of Port Logistics Parks under the Idea of Sustainable Development, *Market Modernization*, August 2007 (in Chinese); Li Xiangwen, An Investigation on the Current Situation of China's Port Logistics Informatization, *China Logistics & Purchasing*, No. 16, 2007. (in Chinese)

43 China's Port Container Throughput Will Exceed 100 Million, at http://www.zj.xinhuanet.com/news-center/2007-10/21/content_11455458.htm, 24 October 2007. (in Chinese)

44 Xu Jianhua and Zhang Jin, Impact of Larger Vessels on Shipping and Ports, *Navigation of China*, No. 2, 2007. (in Chinese)

45 Xu Minjie, A Discussion of Large Container Vessels from the Perspective of Economies of Scale, *Containerization*, No. 5, 2007. (in Chinese)

of the Ministry of Communications on January 25, 2007 and took effect on June 1, 2007. The Provisions consider the Law of the People's Republic of China on Ports, the Regulation on the Quality Management of Construction Projects and the Regulations on Administration of Surveying and Designing of Construction Projects for reference and reflect the principles of "unification", "hierarchical management" and "fair competition". In terms of project management of port construction, the Provisions stresses the four phases of a strict management system, consisting of a preliminary design review system, a management system of recording bids, a system for filing projects commenced and a system for checking projects completed. The biggest feature of such a management system is that it highlights the transformation of governmental functions and enhances industrial management.[46] As for local legislation, Zhejiang Province adopted the Regulations on Port Administration of Zhejiang Province on May 25, 2007 which entered into force on October 1, 2007.[47]

On October 29, 2007, the ASEAN-China Port Development and Cooperation Forum was closed in Nanning, Guangxi. The Ministers of Communications/ Transport from the ASEAN Member Countries and China reached consensus on many issues related to port development and cooperation in the future. In recent years, with the establishment of ASEAN-China Free Trade Area, import and export trade between the ASEAN Member Countries and China has progressed swiftly. Statistics show that more than 80% of the ASEAN-China trade is conducted through maritime shipping and ports. Against this background, "port cooperation" has been the theme of this Expo and the first ASEAN-China Port Development and Cooperation Forum was held in Nanning. Officials from Ministry of Communications/Transport from China and the ten ASEAN Member Countries, distinguished company managers in port and shipping industries as well as experts and scholars, a total of approximately 450 people, discussed on how to succeed in port development. The Ministers of Communications/Transport from the ASEAN Member Countries and China issued the Joint Statement on ASEAN-China Port Development (also known as Nanning Consensus), which marks a full start of substantial cooperation between China and ASEAN in the field of port

46 Lyu Hang, Strengthening Management: Interpretation of Regulations on the Administration of Port Construction from Projects to Industrial Market, *China Ship Survey*, No. 6, 2007. (in Chinese)

47 Regulations on Port Administration of Zhejiang Province, *Provincial People's Congress of Zhejiang Province (Communiqué)*, No. 4, 2007. (in Chinese)

and indicates a promising future for cooperative port development. The Statement makes it clear that the Strategic Plan for ASEAN-China Transport Cooperation should be considered and adopted as soon as possible and the ASEAN-China Maritime Transport Agreement should be signed at the 6th ASEAN-China Transport Ministers' Meeting so as to develop ASEAN-China port cooperation plan and identify the top priority cooperation projects. In the Statement, the Ministers also decided to improve investment environment, develop the related facilitative policies, and encourage and support enterprises in their own countries to actively participate in the port infrastructure development of other countries, in accordance with the respective national laws, rules and regulations.[48]

As far as shipping is concerned, scholars contend to draw on foreign advanced experience and increase shipping competitiveness of China.[49] As to specific arrangements, some discuss the harbor pilotage system;[50] some refer to the legal status and responsibilities of port operators;[51] some conduct research from various aspects on the carrier's liability, the core system for international carriage of goods

48 ASEAN-China Port Development and Cooperation Forum Blossomed Flowers of Hope, at http://www.gx.xinhuanet.com/newscenter/2007-11/02/content11564954.htm, 2 November 2007. (in Chinese)

49 Zhang Jinyuan, A Coordinated Management System of Water Transport: Insight into the American Management System on Ports and Shipping, *China Ports*, No. 2, 2007 (in Chinese); Xiao Zhongxi, A Retrospective Review of the Changes of Korean Maritime Transport Policies, *China Ports*, No. 2, 2007 (in Chinese); Ge Chunfeng, Go with the Trend in Global Maritime Shipping and Promote China's International Competitiveness, *Transportation Enterprise Management*, No. 8, 2007 (in Chinese); Jing Yan, Dynamics of European Union's Maritime Transport Policies and Their Enlightenment, *China Ports*, No. 7, 2007. (in Chinese)

50 Wang Jie and Yu Hai, Exploration in Choosing Pilots' Organizational Mode for Chinese Ports, *Journal of Dalian Maritime University (Social Sciences Edition)*, No. 3, 2007 (in Chinese); Shen Zhongping and Huang Yan, Some Views Relating to the Enhancement of Piloting Management and Piloting Safety Control, *China Maritime Safety*, No. 7, 2007. (in Chinese)

51 Liu Bing, Gen Xinying and Liu Qiang, A Preliminary Discussion on the Legal Status of Port Operators in Carriage of Goods by Sea, *China Water Transport*, No. 1, 2007 (in Chinese); Zhang Jianjun, Strategies for Limiting Liability of Port Operators in Contracts, *Shipping Management*, No. 3, 2007 (in Chinese); Ding Bing, A Discussion on the Civil Liabilities of Port Operators, *Pearl River Water Transport*, No. 5, 2007 (in Chinese); Wang Yuanyuan, Port Operators: Subjects Who Have Limited Maritime Liability?, *Containerization*, No. 7, 2007. (in Chinese)

by sea.[52] In terms of new regulations, the speedy development of ship transport gives rise to the Regulations on Ship Crew of the People's Republic of China. On March 28, 2007, the Regulations on Ship Crew was adopted at the 172nd Executive Meeting of the State Council and came into force upon September 1, 2007. The enactment of these Regulations will contribute to strengthening the administration of ship crew, improving their quality and safeguarding their legal rights and interests so as to ensure traffic safety in waterways.

IV. International Protection of Underwater Cultural Heritage

On November 2, 2001, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Protection of the Underwater Cultural Heritage at its 31st session of the General Conference. The Convention shall enter into force on the first day of the month following a period of 3 months after the date of the deposit of the twentieth instrument of ratification or accession. Until October 8, 2007, UNESCO has received such instruments from sixteen countries[53] and thus, the effective date of the Convention is anticipated to be not far away.

Since the adoption of this Convention, China's experts and scholars have actively engaged in studies on it and made some achievements.[54] However, when compared with other areas of international law, research on international protection of underwater cultural heritage is relatively not much. After searching the stock of books of the National Library of China, only two monographs are found at present. One is *Protection of Underwater Cultural Heritage under International Law: A Commentary on the 2001 Convention on the Protection of Underwater Cultural*

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52 Zhang Xianglan and Zhang Jie, Price Control and Exemption for Controlled Carriers under American Law, *Law Review*, No. 2, 2007 (in Chinese); Fu Tingzhong, Dynamics of International Ocean Shipping Law between Divergence and Reconciliation in a Hundred Years: The System of Carriers' Liability in Carriage of Goods by Sea, *Science of Law*, No. 5, 2007 (in Chinese); Hu Xuyu, Criticizing Laws on Liabilities of Carriers Centering on Special Purposes, *Modern Law Science*, No. 5, 2007. (in Chinese)

53 The sixteen countries are Bulgaria, Croatia, Ecuador, Lebanon, Libya, Lithuania, Mexico, Nigeria, Panama, Paraguay, Portugal, Romania, Saint Lucia, Spain, Ukraine, and Cambodia.

54 See the details in A Summary of the Symposium on the Protection of Underwater Cultural Heritage, *China Oceans Law Review*, No. 1, 2005 (in Chinese); A Review of China's Research on Oceans Law in 2006 – Protection of Underwater Cultural Heritage, *China Oceans Law Review*, No. 2, 2006. (in Chinese)

Heritage of the UNESCO,[55] co-authored by Professor Fu Kuen-chen at Xiamen University Law School (PhD Supervisor, Director of Xiamen University Center for Ocean Policy and Law) and graduate student Song Yuxiang. The book introduces the background for drafting and process of negotiating for the Convention; it expounds on the content of the Convention and comments on the general principles and important systems laid out by the Convention; it discusses China's relation with this Convention and whether China should accede to it; it notes that the Convention avoids the issue of ownership over underwater cultural heritage which bears risks of causing international conflicts in the future and therefore, the authors advise to make substantive and procedural amendment to the Convention. The other is *A Study of the UNESCO Convention on the Protection of Underwater Cultural Heritage* written by Lecturer Zhao Yajuan of South China University of Technology Law School (PhD in Law at Xiamen University).[56] This book gives a detailed introduction and analysis of international law relevant to the protection of underwater cultural heritage, the context against which the Convention was drafted and the Convention's content. It also devotes separate chapters to China's practice in the protection of underwater cultural heritage and its related legislation, in which the author reflects on such practice and gives some suggestions.

Underwater cultural heritage worldwide is faced with various threats. Zhang Yihong makes a brief introduction to this challenge in his article.[57] Wang Junling, in her article Jurisdiction and Title over Underwater Cultural Heritage, analyzes the jurisdiction and ownership over underwater cultural heritage in different sea areas in view of international treaties and practice, and argues that coastal States' jurisdiction should gradually decrease from the territorial sea. She contends that the ownership of national ships and other public property among the underwater cultural heritage is explicit and therefore, States should maintain State sovereignty and claim jurisdiction and title over such underwater cultural heritage while protecting them.[58]

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55 Kuen-chen Fu and Song Yuxiang, *Protection of Underwater Cultural Heritage under International Law: A Commentary on the 2001 Convention on the Protection of Underwater Cultural Heritage of the UNESCO*, Beijing: Law Press China, 2006. (in Chinese)

56 Zhao Yajuan, *A Study of the UNESCO Convention on the Protection of Underwater Cultural Heritage*, Xiamen: Xiamen University Press, 2007. (in Chinese)

57 Zhang Yihong, The Threats to and Protection of Underwater Cultural Heritage, *World Culture*, No. 7, 2007. (in Chinese)

58 Wang Junling, Jurisdiction and Title over Underwater Cultural Heritage, *Ocean Development and Management*, No. 1, 2007. (in Chinese)

Doctor Zhao Yajuan reviews the "South China Sea No. 1" event after considering China's relevant legislation. She contends that this event exposes the deficiencies in China's discovery and report system concerning underwater cultural heritage as well as relevant reward and punishment system. She states that on-site protection method is rational and scientific in certain extent; China should include this method in legislation on the protection of cultural heritage; private entities should be allowed to participate in the excavation of underwater cultural heritage under certain conditions in order to concentrate (governmental) efforts on the protection of the most important sites.[59] She analyzes the new developments of international law related to the protection of underwater cultural heritage and puts forward suggestions on improving China's relevant legislation.[60] Opinions are greatly divided among scholars on whether the salvage system should be applied to underwater cultural heritage. The focus of the division is whether salvage at sea will affect the protection of underwater cultural heritage. The Convention provides that in principle the salvage law and the law on acquisition of property by discovery should not apply to underwater cultural heritage, except that three conditions are satisfied. Zhao Yajuan holds that the resolution of the conflict between the archaeologic value and economic value of underwater cultural heritage is to strike a balance between them and the provisions of the Convention is a reflection of such efforts.[61] With regard to the relations among the 1982 United Nations Convention on the Law of the Sea, 1989 International Convention on Salvage, and 2001 Convention on the Protection of Underwater Cultural Heritage, through an in-depth comparison and analysis, she believes that the adoption of the three convention shows that the international community has finally completed its three chapters on underwater cultural heritage protection.[62]

V. Marine Energy

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59 Zhao Yajuan and Zhang Liang, Perfection of the System for Protecting Underwater Cultural Heritage: The South China Sea No. 1 Event, *Legal Science*, No. 1, 2007. (in Chinese)

60 Zhao Yajuan, Improvement of Legislation on the Protection of Underwater Cultural Heritage in China, *South China Normal University (Social Sciences Edition)*, No. 2, 2007. (in Chinese)

61 Zhao Yajuan, A Discussion of the Salvage System and the Protection of Underwater Cultural Heritage: A Commentary on Relevant Provisions of the Convention, *China Oceans Law Review*, No. 1, 2007. (in Chinese)

62 Zhao Yajuan, International Legislation on the Protection of Underwater Cultural Heritage: A Discussion of the Relations among Three Relevant Multilateral Treaties, *International Law Review of Wuhan University*, Vol. 6, 2007. (in Chinese)

Ocean is an immense treasury of energy. It not only abounds in traditional non-renewable resources such as oil and gas, but also boasts abundant new renewable energy that is infinitely available for use, including tide and current energy, marine biological energy and geothermal energy. With the development of technology, States begin to value reasonable development and protection of marine energy.

Professor Kuen-chen Fu contends that to ease the pressure from the shortage of energy currently faced by China, development of marine oil and gas resources is a desirable option. China's success in the exploitation of marine oil resource has a close connection with the influence of the 1982 Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises. Apart from enhancing the development of ocean oil and gas resources on our own, these Regulations also allow the participation of foreign enterprises in certain manners, for the purpose of "walking with two legs" (a combined use of international cooperation and self-independent operations). Nonetheless, at the same time, Professor Fu believes that the prospect of China's exploitation of marine petroleum is not very positive and many problems relate to how to equitably settle the political and legal disputes behind resources development on the basis of the law of the sea. Among them, one urgent issue is maritime boundary delimitation and joint development. Though the Chinese government has yet to submit its outer limits of the extended continental shelf to the United Nations Commission on the Limits of the Continental Shelf (UNCLCS), its policy of "shelving differences, seeking joint development", in practice, has not worked well. Many neighboring States have a much greater interest in the exploration of resources than negotiations for boundary delimitation or joint development. It is still unclear whether China will resolve disputes of this sort according to the procedures envisaged in the UNCLOS. Despite this, China has to make preparations and provide sufficient grounds for its claims – not only geographical and geologic, but also legal grounds such as vested rights and historical rights.[63]

As far as the development of marine energy is concerned, the development of non-renewable resources draws wide attention this year. With aggravating

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63 Kuen-chen Fu, China's Energy Policies and the Law of the Sea, in Kuen-chen Fu and Shui Binghe eds., *China and the South China Sea Issue*, Taipei: Askfor Bookstore, 2007, pp. 77~107. (in Chinese)

global greenhouse effect, a performance mechanism that States implement part of their emission reduction commitment abroad, namely the Clean Development Mechanism (CDM), becomes the focus of attention. Its purpose is to reduce the emission of global greenhouse gases and to slow down the greenhouse effect by selling the emission reduction quota saved by developing countries to developed countries. Sun Liying, in light of the CDM, explores the potential for developing new energy in the fields of energy industry, chemical industry, forestry and reforestation, and agriculture and notes that the CDM offers a precious opportunity to introduce foreign capital and technology. The government, business as well as research and consulting institutions should make advantage of this opportunity so as to contribute to the harmony among economy, society and environment, and their sustainable development. And tide, current and thermal energy, among other new and renewable energy should be used reasonably.[64] In June 2007, the State Council adopted A Medium- and Long-term Development Plan of Renewable Energy, which notes that the development and utilization of renewable energy including marine energy is of great significance to guarantee energy security, protect environment and achieve sustainable development. However, according to experts, China's current technology to utilize marine energy is not mature enough and several technological bottlenecks need to be resolved. In addition, in respect of the exploitation and utilization of conventional non-renewable energy, State Oceanic Administration's reports show that the first half of 2007 witnesses improvement in independent innovative research on the technology to explore marine oil and gas resources in China and a shallow water oil field with geological reserves of 1 billion tons was found in Jidong Nanbao, Hebei Province. Meanwhile, cooperation with foreign entities on ocean oil and gas was initiated to expedite the development and utilization of marine gas hydrate and boost the potential for development of marine oil and gas. In the first half of 2007, marine petroleum and gas industry maintained rapid growth with added value of 57.361 billion yuan, an increase of 33.2% over the same period of the last year.[65]

Since the "9/11" event, sea routes have gradually become the target of terrorist activities, which arouses concern about the security of China's energy transport.

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64 Sun Liying, The Development of New Energy in the Context of CDM, *Renewable Energy Industry*, No. 3, 2007. (in Chinese)

65 State Oceanic Administration, Reports of China's Marine Economy in the First Half of 2007 Released by State Oceanic Administration, at http://www.china5e.com/news/newpower/200709/200709140252.html, 5 December 2007. (in Chinese)

Yang Zewei contends that as far as fight against terrorist activities is concerned, the current international legal systems in relation to energy routes by sea bear quite a few drawbacks: there is no specific convention on the safety of maritime energy routes; existing provisions are optional and a supervising mechanism over their implementation is not in place; it is likely to lead to jurisdictional conflict over territorial sea. In this connection, he suggests to make a uniform international convention on suppression of terrorism, to set a supervising mechanism over implementation of the convention, to bring into play the role of international organizations such as the United Nations and to improve the cooperative mechanism for international maritime affairs. Also, China needs to strengthen collaboration with ASEAN Member Countries, in particular coastal States along the Strait of Malacca. China should enhance law enforcement cooperation with relevant international organizations and countries in the fields of exchange of information on counter-terrorism at sea, anti-terrorism clues investigation, apprehension of suspects, capture of hijacked ships and extradition of criminals. China should promote the establishment of the China-Japan-South Korea "Northeast Asian Energy Community" so as to maintain maritime energy routes' security.[66] Zhang Guihong argues that when dealing with energy safety issues, China is confronted with dual pressures: one is the issue concerning the exploitation of the South China Sea oil and gas resources caused by the sovereignty disputes in the South China Sea; the other is that the peculiarity and complexity of the Malacca Strait affect the security of China's energy sea routes. By virtue of this, China should, on the basis of the UNCLOS, boost international cooperation on energy safety at sea, by paying attention to both community and treaties, both domestic legislation and international law, both long-term supply contracts and franchise agreements, and adopting the cooperative mode of giving priority to cooperation in certain sea areas and regions, so as to ensure the development and supply of energy.

VI. Marine Fisheries

The first is concerning fisheries subsidies. To protect the interest of fishermen, in 2006, the government began to distribute fuel subsidies for fisheries. Scholars Chen Meng and Wang Quan review the studies on reform of international

66 Yang Zewei, Counterterrorism and Protection of the Safety of Energy's Sea Routes, *Journal of the East China University of Politics & Law*, No. 1, 2007. (in Chinese)

disciplines for fisheries subsidies and draw on the experience and lessons gained by people in other places, and discuss a number of problems emerging from the implementation of the policy on granting fuel subsidies for fisheries. They propose to improve relevant supporting management measures as soon as possible and claim that such subsidies are merely a short-term policy in the sense of sustainable development of fisheries, and a provisional policy in response to current demand. In the context of the normalization of international fisheries subsidies, we have to be concerned about how long such subsidies could survive. Thus, as a WTO member State, China should make preparations with regard to the implementation approach of these subsidies.[67] Chen Jingna, Mu Yongtong and Yin Wenwei contend that since fisheries subsidy was listed as a negotiation issue in the WTO Doha Ministerial Declaration, notwithstanding that various parties have proposed "omission method", "signal method" or "special and differentiated treatment method" in their submissions and no consensus has not been reached yet, the prospect of negotiation is turning promising. As such, they offer some policy suggestions: China should establish an experts team spanning diverse disciplines to make a detailed and thorough analysis on the trend of the decision-making on each fishery issue; China should take active part in the seminars related to international fisheries subsidies; China should conduct normative and empirical studies, theoretical prediction and case analysis of issues related to fisheries subsidies, so as to provide sufficient information for Chinese negotiators' reference and avoid regrets resulted from information asymmetry.[68] Additionally, starting from the existing WTO provisions on fisheries subsidies, Yin Jinhui dwells on the deficiencies of the existing system and the necessity of creating a new fisheries subsidies system, which serves as theoretical reference for China's involvement in a new round of negotiations on international fisheries subsidies rules. He argues that the original purpose of the WTO anti-subsidy agreement is to normalize the subsidies in trade without taking into account environment's effect on trade and does not relate to environment. On the other hand, the issue of fisheries subsidies is one where environment and trade are twined. Furthermore, the anti-subsidy agreement usually targets to deal with the issue of export subsidies; however, most of the fisheries subsidies are not directly

67 Chen Meng and Wang Quan, A Discussion of Fuel Subsidies for Fisheries, *Fisheries Economy Research*, No. 4, 2007. (in Chinese)

68 Chen Jingna, Mu Yongtong and Yin Wenwei, On Negotiation of Fishery Subsidy under WTO, *Journal of Zhejiang Ocean University (Humanities Science Edition)*, No. 2, 2007. (in Chinese)

related to export trade. Consequently, the anti-subsidy agreement is not able to satisfy the need to deal with fisheries subsidies, and stricter and specific system and disciplines aimed at fisheries subsidies should be established.[69]

The second is about China's legal system on marine fisheries. The European Union's fisheries law and common fisheries policy is of considerable reference value for China to build a complete legal system of fisheries. Scholars Liu Xinshan and Yu Yang make a review of the status quo of the EU's fishery industry and resources, and the history and basics of the EU fisheries law and common fisheries policy. They state that the EU fisheries law comprises basic law, subsidiary law and case law. Subsidiary law includes regulations, decisions and ordinances. The EU common fisheries policy comprises all rules and mechanisms related to resources use and conservation, structural policies and fishing boats management, a common market for aquatic products, fisheries relations with a third State, fishery law enforcement, aquaculture, etc. Though the common fisheries policy plays a positive role in establishing a closer Europe, developing fishing areas' economy, improving living standards of people in fishing areas, promoting standard trade of aquatic products, protecting consumers' health and environment and boosting the competitiveness of fishing industry, among others, it fails to protect fishery resources. This is because fishery resources cannot be conserved only through fisheries management; designers and decision-makers of the common fisheries policy need to take note of economic value of fishing industry, supply of aquatic products, employment in this industry and States' relations, etc.[70] Scholars Wang Jianting and Dou Heitie examine the achievements made in China's development of rule of law on oceans and fisheries since the enactment of the Fisheries Law twenty years ago, and also note that this regulatory system has many problems. This article puts forward proposals to further enhance China's regulations and rules on oceans and fisheries from the following five aspects: the protection of marine environment and conservation of fishery resources, marine and fishery protected areas, fishery insurance, fishing boats management, supporting regulations for Administrative Regulations on the Prevention and Treatment of the Pollution and Damage to the Marine Environment by Marine Engineering Construction

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69 Yin Jinhui, The Fisheries Subsidies and WTO Rules, *Chinese Fisheries Economics*, No. 1, 2007. (in Chinese)

70 Liu Xinshan and Yu Yang, Review of Fisheries Law and Common Fisheries Policy of the European Union, *Journal of Shanghai Fisheries University*, No. 5, 2007. (in Chinese)

Projects.[71] Security management has evolved from past accidents management to modern risk management. Liu Zengzhen and Xie Qingjian make a specific study of the status quo of safety management of fishing vessels as well as laws and regulations relevant to safety management in Fujian province. After analyzing the problems and their causes in safety management of fishing vessels, Liu and Xie suggest setting up a fishery production safety system in market economy with a view of promoting the development of fishery production. They also propose to strengthen the supervision over ports, ships and people, establish and improve the safety management system of fishing vessels, regulate organizations or entities that manage the safety of fishing vessels, control risks and eliminate hazards, and lay a solid foundation for safe production.[72]

Marine fishery is a major component of environment. Tao Yanli examines the relationship between cultural elements and depletion of fishery resources by questionnaire survey from the perspectives of consumption concept and values, and makes an observation of the linkage between social mechanisms and depletion of fishery resources. She notes that, in China, the exhaustion of fishery resources and environment is directly connected with population, economy and social mechanisms, that we should improve the social mechanisms to restore fishery resources, raise people's awareness of protecting resources and advocate conservation.[73] Besides, as regards pelagic fishing, Lyu Xiang and other scholars contend that China's pelagic fishing has made significant progress since the foundation of People's Republic of China, but it is faced with serious problems; notably after entry into force of the UNCLOS, the environment for the development of China's pelagic fishing is growing worse. In this connection, the Chinese government should increase investment, develop fisheries diplomacy, seek new friends for cooperation, etc., in order to proactively boost the growth of pelagic fishing.[74] Regarding the exploitation and utilization of fishery resources in the central and north Pacific high seas, Sun Ming points out that since the UNCLOS'

71 Wang Jianting and Dou Heitie, Improvement of China's Regulations on the Ocean and Fisheries, *Ocean Development and Management*, No. 5, 2007. (in Chinese)

72 Liu Zengzhen and Xie Qingjian, A Preliminary Analysis of the Establishment of a Security Management System of Fishing Boats in Fujian Province, *Fujian Fisheries*, No. 1, 2007. (in Chinese)

73 Tao Yanli, Analysis on the Humane Factors of the Fishery Resource Exhaustion, *Fisheries Economy Research*, No. 4, 2007. (in Chinese)

74 Lyu Xiang, Li Lu and Luo Le, Analysis on Development of Pelagic Fishery of China, *Fisheries Economy Research*, No. 3, 2007. (in Chinese)

entry into force in 1994, a new system on the law of the sea has gradually been established and the regulatory regime of 200 nautical miles exclusive economic zones of coastal States has grown mature, which bring remarkable changes to the outer environment of pelagic fishing: the competition for developing marine resources becomes increasingly fierce and operational space is being narrowed. The development of pelagic fishing, particularly ocean fishing on the high seas which subject to few restrictions, serves as a major measure to adjust Chinese marine fisheries' structure; and it is of significant and positive value to drive the development of processing, trade, transport, fishing materials and other related industries. Sun also comments on the development situations of the Haishan fishing ground located in the central and north Pacific and make a preliminary discussion on the feasibility of the development of fishery resources in the central and north Pacific high seas.[75]

Leisure fishery has evolved into an important part of modern fisheries and legal issues arising therefrom are also under heated discussions during recent years. In terms of leisure fishery modes, scholar Yang Zijiang proposes new thoughts to understand leisure fishery from the perspective of the experience economy: leisure fishery refers to a category or form of fishery economy which employs aquatic products, aquatic creatures and fishing gears as tools, fishery service and fishing (fish) culture as the performance stage, and provides "three fisheries" experience as economic products. On the basis of discussions on the status quo and problems of China's leisure fishery development, he gives advice to further the development of China's leisure fishery: to shape an overall image and make a reasonable plan for the leisure fishery based on the scientific concept of development; to integrate recreational fishery resources with fishing culture; to combine such resources with the structural adjustment of fisheries; to make experience designs in line with various operational modes of recreational fishery; and to choose promotional and advertising strategies that meet the requirements of the experience economy.[76] As to the status quo and strategies of Chinese leisure fishery's development, scholars Wang Lin and Han Zenglin examine the current situations of China's recreational fishery, elaborate on the necessity, advantages and value of developing leisure fishery, draw people's attention to the difficulties facing it, and discuss

75 Sun Ming, A Preliminary Analysis of Development and Utilization of Fishery Recourses in the Central and North Pacific High Seas, *Shandong Fisheries*, No. 1, 2007. (in Chinese)

76 Yang Zijiang, Study on the Development Pattern of China's Recreational Fishery Based on Experience Economy, *Journal of Shanghai Fisheries University*, No. 5, 2007. (in Chinese)

the strategies and suggestions for developing leisure fishery. They argue that to develop China's recreational fishery meets the needs to develop the society and economy of China. Although recreational fishery is a new emerging industry and many problems related to it need to be addressed, due to the current pace of development, coupled with favorable policies, China's leisure fishery market will divide into more segments, recreational projects will become more diverse to satisfy demands of different groups of consumers, legislation in this regard will be more mature, investment will be more diversified and reasonable. After five to ten years of development, recreational fishery is expected to take an important position in fisheries economy.[77] We should draw on foreign experience to solve the problems we are facing. Scholars Cai Shousheng and Zhang Jiajia dwell on the US and Japanese leisure fishery development patterns and state what we can learn from them. They contend that leisure fishery plays a considerable role in the adjustment of fisheries' industry structure and sustainable development. American and Japanese recreational fishery began to develop relatively earlier and achieve a wealth of successful experience in terms of management regimes, management methods, legal system, organizational construction, scientific research, resources conservation and the like. During the development of China's leisure fishery, many prominent issues exist such as lack of planning, disorderly competition, resources degradation, financial shortage, disorganized management and outdated legal regulations. We should draw on American and Japanese experience, make reasonable plans, establish a scientific administration regime, enhance the legal system, broaden financing channels, strengthen scientific research and boost the management of information system.[78]

As of the enactment of the Property Law of China, studies of rights to marine fisheries have become a spotlight in China. Professor Sun Xianzhong contend that the newly adopted Property Law sets out fisheries rights in the Usufructuary Rights Chapter, which demonstrates that the Property Law cares about people's livelihood and maintains civil rights, which is the result of the progress of Chinese politics, legal system and social civilization. This will serve as strong guarantee

77 Wang Lin and Han Zenglin, An Analysis of the Status Quo of and Strategies for China's Recreational Fishery's Development, *Ocean Development and Management*, No. 1, 2007. (in Chinese)

78 Chai Shousheng and Zhang Jiajia, The Implication of the Development Model of American and Japanese Recreational Fishery for the Development of Chinese Recreational Fishery, *Journal of Ocean University of China (Social Sciences Edition)*, No. 1, 2007 (in Chinese)

for a harmonious socialist society. He makes a review of the background of China's research on the fisheries rights system, and elaborates on the value and connotation of establishing a fisheries rights system. He argues that the connotation of the fisheries system provided in the Property Law should be understood from the following aspects: firstly, the fisheries rights are a type of property rights that bear both the features of usufructuary rights and chartered rights; secondly, the fisheries rights connects to the existing fisheries management system; thirdly, regarding the relation between the fisheries rights and the right to use sea areas, the fisheries rights are fundamental rights to survival, a primary right. Where the right to use sea areas impairs the fisheries rights, the holder of fisheries rights shall be duly compensated; fourthly, we should popularize the Property Law to enable fishermen to know the Law, raise their awareness of self-protection, and protect their legitimate rights and interests.[79] The Agriculture and Rural Affairs Committee of the National People's Congress of China and the Department of Agriculture jointly convened a meeting on the implementation of the Property Law and fisheries policy, calling for granting fishermen long-term and guaranteed rights to use waters and beaches, a basic and stable operational system for fisheries, earnest protection of the legitimate rights and interests of fishermen, and advancing institution building on fisheries rights, and a sustained, healthy development of fisheries.[80] Quan Yongbo gives special attention to fishermen who have "lost sea", a new vulnerable group. He holds that there is a loophole in the legal system on the fisheries rights, a basic right, and a conflict between the fisheries rights and the right to use sea areas in the sense of rights structure, which give rise to difficulty in remedy. Hence, China should improve the fisheries rights system in legislation, enact a specific act to protect the rights of fishermen, and enhance legal remedy to protect the interests of "lost sea" fishermen in procedures. He makes an observation of the status quo, causes and legal theories concerning "lost sea" fishermen whose fisheries rights are missing; he further comments on the existing remedies and argues that the key to address the issue is to confirm and ensure the fisheries rights,

79 Sun Xianzhong, The Property Law: A New Starting Point of the Protection of Fisheries Rights – A Discussion of the Value and Content of Establishing a Fisheries Rights System, *China Aquaculture*, No. 5, 2007. (in Chinese)

80 Zhang Jiaqiu, The Agriculture and Rural Affairs Committee of the National People's Congress of China and the Ministry of Agriculture Jointly Convened a Meeting on the Implementation of the Property Law and Fisheries Policy, *China Aquaculture*, No. 7, 2007. (in Chinese)

along with a mature legal procedure.[81] As far as the guarantee for fisheries rights is concerned, Shen Tian'en believes that the fisheries rights are an objective reality and their nature should be defined as a usufructuray right. We should clarify the status of fisheries rights, make the ownership of fisheries rights clear, and improve protection methods under fisheries law in terms of both public power and private rights.[82] A number of scholars also make a study of the legal conflict concerning the right to use sea areas and fisheries rights. Jin Keke considers that notwithstanding provisions of the Property Law on fisheries rights, they are not sufficient. By virtue of different titles over waters, there are two sorts of fisheries rights which possess distinct nature and status in the system of the property law. The fisheries rights system envisaged by the Property Law can be coordinated with the Constitution Law, General Principle of the Civil Law, Land Administration Law, Agriculture Law, Fisheries Law, Law on the Use of Sea Areas, and Water Law.[83] Wan Yaqin contends that a structural conflict exist between the right to use sea areas and fisheries rights which is difficult to solve. Traditional fisheries rights include two kinds of rights with distinct nature: the right of aquaculture and that of fishing. If the right of aquaculture is separated from fisheries rights and incorporated to the right to use sea areas, this problem will be resolved.[84]

The last is regarding marine fisheries law enforcement. In the context of an immature legal system, inadequate law enforcement and increasing violations in fisheries, marine fisheries law enforcement departments are difficult to carry out their work effectively. Lin Qishan makes an in-depth analysis of the origins of such phenomenon and suggests expediting the legislation on marine fisheries, straightening out the management system of fisheries, and broadening the channels for supervising law enforcement.[85] Yang Bo specifically studies the control and prevention of security incidents caused by maritime fishery disputes. He notes that security incidents caused by maritime fishery disputes are often done by

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81 Quan Yongbo, Missing Rights of "Lost Sea" Fishermen and Legal Remedies, *Ocean Development and Management*, No. 5, 2007. (in Chinese)

82 Shen Tian'en, A Discussion of the Guarantee for the Fisheries Rights, *Economic and Social Development*, No. 9, 2007. (in Chinese)

83 Jin Keke, The Fisheries System from the Perspective of Property Law: Based on the Protection of Fishermen's Rights and Interests, *China Market*, No. 31, 2007. (in Chinese)

84 Wan Yaqin, Conflict and Reconciliation between the Right to Use Sea Areas and Fisheries Rights, *Journal of Yunyang Teachers College*, No. 4, 2007. (in Chinese)

85 Lin Qishan, A Preliminary Analysis of the Problems in Marine Fisheries Law Enforcement and Strategies, *Journal of Fujian Fisheries*, No. 3, 2007. (in Chinese)

atrocious means, which will lead to serious consequences. Lawbreakers in such incidents often commit crimes in groups in particular seasons and regions. With regard to the severe security circumstances at sea, the police and border protection departments should enhance the administration system on maritime security and order, strengthen prevention and treatment of security incidents by citizens, enhance law enforcement, establish a cross-regions collaboration mechanism for security and order, set up a coordination mechanism and take other measures, in order to effectively prevent and control security incidents caused by fishery disputes.[86] Shi Tongchi casts doubt on the legitimacy of a "order to reflect" in administrative punishment in fisheries. He believes that the additional "order to reflect" imposed by an administrative organ during its performance of functions upon a party who resists law enforcement or does not assist in law enforcement in any other ways, is a reprimand penalty in legal theories of administrative law and should be conducted pursuant to the provisions and requirements of the Law on Administrative Penalty. However, the Law does not empower an administrative organ to issue a penalty order of reflection and thus, the administrative act of ordering the party to reflect on his actions is illegal.[87] Zhang Jinrong contemplates how to improve fisheries administrative law enforcement in China. His suggestions involve properly arranging the system of fisheries administrative law enforcement, establishing a scientific and comprehensive regime for fisheries law enforcement, regulating fisheries law enforcement actions, laying stress on the performance of international treaties, conducting administrative reconsiderations related to fisheries in accordance with law, actively handling fisheries administrative suits, and strengthening supervision over fisheries law enforcement.[88]

VII. The Arctic and Antarctica

In this year, research on the Arctic and Antarctic mainly revolves around topics determined by the International Polar Year. International Polar Year refers to large-scale scientific expeditions in polar areas planned and run by worldwide scientists

86 Yang Bo, Prevention and Control of Security Incidents Caused by Maritime Fishery Disputes, *Ocean Development and Management*, No. 2, 2007. (in Chinese)

87 Shi Tongchi, A Study of the Legitimacy of the "Order to Reflect" in Fisheries Administrative Penalty, *Hebei Fisheries*, No. 3, 2007. (in Chinese)

88 Zhang Jinrong, Thoughts on Improvement of Fisheries Law Enforcement, *Journal of Dalian Official*, No. 5, 2007. (in Chinese)

together. The Fourth International Polar Year (2007 – 2008) is jointly initiated by the International Council for Science and World Meteorological Organization which receives positive support from governments, scientific organizations and scientists. On March 1, 2007, the Chinese initiative in the International Polar Year was launched in Beijing. The Chinese initiative involves five parts, namely Pridz Bay – Amery Ice Shelf – Dome A Observation Program (PANDA), Arctic Ocean scientific expeditions, international cooperation, information and data sharing, and education and advocacy. From 2007 to 2010, China is expected to enforce the Chinese Initiative after completing annual south and north polar scientific expedition tasks: to conduct comprehensive scientific expeditions across disciplines of glaciology, oceanography, geophysics, geology, mapping and astronomy in PANDA section, the southeast highest point as well as Arctic Ocean critical regions; cooperate with more than ten States on polar scientific expeditions and relevant logistics; actively engage in International Polar Year data sharing and publicizing polar science. Among the aforementioned five plans, the PANDA plan is listed as a core International Polar Year science plan and draws interest of scientists from the US, UK, France, Germany, and Australia who offer to collaborate with China. The implementation of this plan will not only explore new territories and build up the advantages of China in Antarctic research, but also greatly increase the international competitiveness and influence of China in polar expeditions and research.[89]

With regard to research on the Antarctic, construction of inland Antarctic research stations, Dome A deep ice core research and astronomical observations, among other issues, are heated topics. On November 12, 2007, China's Antarctic expedition team sailed the upgraded polar icebreaker *Snow Dragon* to embark on its 24th Antarctic expedition. This expedition will focus on the renovation of Antarctic Great Wall Station and Zhongshan Station, the implementation of the International Polar Year Chinese Initiative and selection of a construction site for an inland station. The expedition team will reach the summit of Dome A for the second time to carry out glaciology, astronomy, geology, atmospheric and space physics studies, and site selection and environmental assessment for the construction of an inland scientific research station. The expedition team will draw a high-precision three-dimensional topographic map of the Dome A region under the ice, providing the most detailed survey data to determine the inland research station site; meanwhile,

89 Su Tao, Scientific Development and Leading the Future: Achievements of China Polar Research Center's Second Start-up, *China Ocean Newspaper*, 3 August 2007. (in Chinese)

the team will clarify whether Dome A has ice more than 1.5 million years old and find the best location for deep ice core drilling. In addition, in light of the special geographical location of Dome A, a natural seismic observation system will be set up to make use of natural seismic observation data and have access to information on deep earth's structure of this site and its surrounding area.[90] If we can acquire a complete ice cover about 3200 meters deep at the ice core of Dome A, we can rebuild high-resolution records of climate change of the earth for the past 1.2 to 1.5 million years, revealing the earth's climate change and its impacts on biological evolution and biosphere. To ensure research on Dome A's deep ice core to achieve internationally influential outcomes, Dome A study will be carried out through extensive and in-depth international cooperation. Antarctic inland has been recognized by the international astronomical community as the best observatory position on earth, and Dome A region may be the best observation point in Antarctic inland. Chinese astronomers will take full advantage of Dome A region's excellent conditions for astronomical observations, start observatory sites selection and trial observations, promote the construction of a series of telescopes, make efforts to enhance Chinese ability to make astronomical observations, actively seek solutions to the prominent questions in modern astronomy such as the origin of the earth, the stellar system and the universe, the nature of the early universe and dark energy in the universe, the origin of the terrestrial planets and other issues related to the origin of life.[91]

Recently, sovereignty disputes over the Antarctic have been gaining momentum. On October 16, the UK announced its intention to submit territorial claims to partial seabed of the Antarctic to the United Nations which would enable the UK to own the seabed of the waters which extend 350 miles (approximately 560 kilometers) along the Antarctic Southern Ocean coast, and to enjoy the rights to exploit oil, gas and other natural resources in this area. As the Antarctic Treaty system outlined a relatively mature legal system in Antarctica, freezing claims to Antarctic territory and sovereignty, the UK was actually asserting future rights upon the expiration of the Treaty. The international community reacted strongly to the assertion of the UK, but judging from current circumstances, one can see that a

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90 Yu Jianbin, *Snow Dragon* Visits the Antarctic Again, a New Research Station Is Planned to Be Constructed in the Antarctic, *People's Daily (Overseas Edition)*, 12 November 2007. (in Chinese)

91 Zeng Honghui, Highlights of 2007 International Polar Year, *China Ocean Newspaper*, 4 September 2007. (in Chinese)

new round "Enclosure Movement" seems not to be formed yet.

As to research on the Arctic, Russia's planting its flag on the Arctic Ocean seabed draws great attention. The US, Canada, Denmark and Norway also take actions in an effort to take initiatives in the Arctic fight.[92] In China, extensive discussions are made on this issue. Views of Professor Liu Nanlai of the Chinese Academy of Social Sciences and Professor Yu Mincai of Renmin University of China on this issue are noteworthy. Professor Liu Nanlai contend that relevant waters in the Arctic have been under the regulation of international rules (including the UNCLOS as a leading law); Russia's act does not have the effect of declaring sovereignty, but is for the purpose of finding scientific evidence for its claims to the extended continental shelf; given that coastal States of the Arctic Ocean have overlapping claims to the continental shelf in the Arctic Ocean, this act is likely to cause disputes; the Arctic Ocean seabed beyond the outer limits of the extended continental shelf determined by coastal States of the Arctic Ocean falls within international seabed area in which China has an interest. Professor Yu Mincai believes that Russia's act complicates a legal issue, because this move reflects a hidden view that the Arctic belongs to the Arctic littoral States, which does not conform to international law and is an infringement upon other States' marine interests. They also hold that the Arctic legal system should be further improved.[93]

Concerning this issue, scientists in China state that there is only one north pole on earth which should be the common wealth of mankind. China should enhance its ability to protect Arctic scientific expeditions, organize scientific expeditions regularly to the Arctic, and conduct in-depth research on arctic climate and environmental change and their implications for China's climate and national economy, so as to effectively protect Chinese arctic interests.[94] The 2007 China's Arctic expedition has started. From June 9, 2007 to May 30, 2008, the Yellow River Station research projects will revolve around observation and study of 12 projects, including modern glaciers and climate & environment change in the Svalbard region, maintenance of the Arctic GPS tracking station and the station's digital panoramic construction, the level and trend of persistent organic pollutants

92 Wan Yan, Concerns about the Arctic Forecast, *China Ocean Newspaper*, 25 September 2007. (in Chinese)

93 Fights over the Artic Are Essentially Legal Questions, and China Has Legitimate Interests in It, at http://www.jcrb.com/200708/ca628594.htm, 19 October 2007. (in Chinese)

94 Zeng Honghui, Highlights of 2007 International Polar Year, *China Ocean Newspaper*, 4 September 2007. (in Chinese)

of the Svalbard region, environmental sample collection in the area surrounding the Yellow River Station and initial separation of actinomycetes, monitoring and research of ecological environment in the Yellow River Station area, biodiversity research in the Yellow River Station area, polar upper atmospheric physics observations, and glacier outwash and climate records of coastal areas in the vicinity of the Yellow River Station.[95]

Meanwhile, China's research on polar expedition auxiliary equipment has made new progress. One national "863 project" hosted by China's polar scientist Qin Weijia – Surface Movement on the Glaciers in Polar Scientific Expeditions and Critical Technologies & System Research of Low-flying Robot, and another "863 project" hosted by Sun Bo – Critical Technologies & Systems Research for Sea Ice Thickness Monitoring Based on Electromagnetic Induction, both of which were reviewed and approved by the Ministry of Science and Technology. The completion of the two projects will provide China with ice surface mobile robots and low-flying robots that can adapt to the harsh polar environment and have certain self-controlling ability and observational capabilities. The prototype will participate in Chinese 2008-2009 polar expeditions. Such field test will demonstrate the functions of a polar research robot.[96]

Moreover, application and review for 2007 projects funded by "Polar Science Strategic Research Foundation of China" have been completed. Thirty-six projects including "Strategy and Policy Studies of China's Polar Expeditions in the First-half of the 21st Century", "International Laws and Rules Related to Polar Areas & China's Polar Expeditions and Interests: Impact Analysis and Strategies", will be sponsored by this foundation with a total of 1.98 million yuan. Most of such projects are hosted by young scientists.[97]

VIII. Marine Scientific Research

In 2007, legal and policy issues related to marine scientific research are centered on marine genetic resources. In China, the main article in this regard is

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95 Zhang Yiling, China's 2007 Arctic Expeditions Are Launched, *China Ocean Newspaper,* 12 June 2007. (in Chinese)

96 Liu Kefeng, Two "863" Projects Related to China Polar Research Center Were Approved, *China Ocean Newspaper*, 16 February 2007. (in Chinese)

97 Zhang Yiling, Release of Polar Strategic Research Fund Projects 2007, *China Ocean Newspaper*, 3 July 2007. (in Chinese)

Jiang Jiadong's master's thesis *Legal Issues Related to the Management of Genetic Resources in International Seabed Area;*[98] internationally, on March 12, 2007, the UN Secretary-General Ban Ki-moon made an annual comprehensive report titled "Oceans and the Law of the Sea" (A/62/66) at the 62nd session of the UN General Assembly, in which one chapter is devoted to issues relevant to marine genetic resources. From June 25 to 29, 2007, the eighth meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (hereinafter "Consultative Process") was held at the UN Headquarters, New York. Pursuant to the provisions of General Assembly resolution 61/222, the focus of discussions at this meeting is marine genetic resources. This section will make a summary of the law of the sea issues related to marine genetic resources, on the basis of the Secretary-General's report, the report on the work of the eighth meeting of the Consultative Process and the thesis *Legal Issues Related to the Management of Genetic Resources in International Seabed Area*.

A. Overview

The Convention on Biological Diversity defines genetic resources as "genetic material of actual or potential value" and genetic material as "any material of plant, animal, microbial or other origin containing functional units of heredity" (Article 2). Oceans boast an enormous amount of genetic resources that have yet to be discovered but have great value in terms of sustaining and adjusting environment and climate, health care and nutrition. At present, human activities related to marine genetic resources can be divided into three categories: scientific investigation and research and development of the oceans and their biological processes, bioprospecting and exploitation of resources. The so-called "bioprospecting" refers to research and development related to marine genetic resources. The term is generally understood, among researchers, as the search for biological compounds of actual or potential value to various applications, in particular commercial applications.[99] However, the border between marine scientific investigations and marine research and development is turning blurred. This is because within the

98 Jiang Jiadong, *Legal Issues Related to the Management of Genetic Resources in International Seabed Area* (Master's Thesis), Xiamen: Xiamen University, 2007. (in Chinese)

99 Report of the Secretary-General on Oceans and the Law of the Sea at the 62nd Session of the General Assembly, para. 150, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368556.htm, 29 October 2007. (in Chinese)

partnership between public research institutions and biotechnology companies, genetic resources are collected and analyzed as part of a research plan; knowledge, information and available materials obtained from such resources enter into commercial applications often in later phases.

B. Legal Issues Related to Marine Genetic Resources Research and Exploitation

1. Definition

While the term "marine genetic resources" was not used in the UNCLOS, its general principles applied to such resources. In the view of some States, the definition of marine genetic resources becomes increasingly important when considering benefit-sharing arrangements.[100] The definition of "bioprospecting" was not clarified either. Some States view that "bioprospecting" is a scientific research activity and there is no essential difference between pure and applied marine scientific research in the method. Therefore, the provisions governing marine scientific research in the UNCLOS should be applied to "bioprospecting" and special regulations on "bioprospecting" should be avoided.[101]

2. The Legal Regime for Marine Genetic Resources within Area of National Jurisdiction

According to the UNCLOS, coastal States have sovereignty or sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources of the internal waters, territorial sea, exclusive economic zone and continental shelf. These rights also should extend to genetic resources within the area of national jurisdiction.[102]

Several States emphasized the importance of establishing practical legal and

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100 Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eighth Meeting, para. 53, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm, 29 October 2007. (in Chinese)

101 Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eighth Meeting, paras. 54~55, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm, October 29, 2007. (in Chinese)

102 Report of the Secretary-General on Oceans and the Law of the Sea at the 62nd Session of the General Assembly, paras. 191~195, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368556.htm, 29 October 2007. (in Chinese)

regulatory frameworks at the national level.[103] The importance of legal certainty in the collection process (owing to downstream commercial risk) was highlighted, especially concerning ownership, protection of investment and well-defined benefit-sharing arrangements. There was a need to develop clear national regulations for the collection of samples by foreign actors. The regulations should provide for the issuance of permits.[104]

Some States expressed concern over "biopiracy", which they considered to include the illegal extraction of marine genetic resources and the associated traditional knowledge from areas within national jurisdiction and even from areas beyond national jurisdiction. "Biopiracy" was considered a particular problem for developing countries, as a result of lack of knowledge regarding marine genetic resources, ambiguous national and international legal provisions regarding "bioprospecting" and the difficulty of enforcing existing laws and regulations. Such difficulty particularly affected small island developing States, because it was quite challenging for them to monitor their exclusive economic zones. Other States pointed out that there was no widely accepted definition of "biopiracy". Accordingly, they argued that there could be no "biopiracy" in areas beyond national jurisdiction. Other States noted that "biopiracy" could also be addressed through the development of a clear legal and regulatory framework which took into account the interest of all stakeholders.[105]

3. The Legal Regime for Marine Genetic Resources in Areas beyond National Jurisdiction

Areas beyond national jurisdiction cover the high seas and the international seabed area (the "Area"). According to the UNCLOS, the high seas are open to all States, but freedom on the high seas needs to be enjoyed under the conditions provided for in the UNCLOS and relevant international law. The Area and its resources (for the purpose of Chapter XI defined as all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including

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103 Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eighth Meeting, para. 58, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm, 29 October 2007. (in Chinese)

104 Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eighth Meeting, paras. 58~60, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm, 29 October 2007. (in Chinese)

105 Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eighth Meeting, paras. 63~65, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm, 29 October 2007. (in Chinese)

polymetallic nodules, Article 133 of the UNCLOS) are the common heritage of mankind (Article 136 of the UNCLOS).

In the work of the UN General Assembly, States expressed their different views on the legal status of genetic resources discovered in the Area.[106]

Several States reiterated their view that all resources of the Area, including marine genetic resources, were part of the "common heritage of mankind". Activities related to biological resources, including marine genetic resources, of the deep seabed beyond areas of national jurisdiction should be carried out for the benefit of mankind as a whole. The regime applicable to marine scientific resources should not be equated to that governing marine living resources in the high seas. Access to genetic resources and benefit-sharing could not be based on contract in respect of areas beyond national jurisdiction, but rather on principles of the common heritage of mankind. Marine genetic resources should be utilized equitably and efficiently in accordance with paragraph 4 of the Preamble of the UNCLOS. A view was further expressed that the principle of the common heritage of mankind predated the UNCLOS and that its codification in the UNCLOS did not reduce its significance and impact. Consequently, Article 133 of the UNCLOS could not be interpreted as excluding marine genetic resources in the deep seabed beyond areas of national jurisdiction from the umbrella of the common heritage of mankind. Under the UNCLOS, marine genetic resources were part of the common heritage of mankind; any future implementing agreement to the UNCLOS should clarify that point.[107]

Other States expressed their disagreement. They stated that living marine resources were not covered by the provisions of UNCLOS Part XI pertaining to the Area, and fell outside of the mandate of the International Seabed Authority. For these States, the relevant provisions in the UNCLOS applicable to marine genetic resources were contained in Part VII on the high seas, in particular section 2, Articles 117 and 118, and in Parts XII, XIII and XIV. Although sharing the view that marine genetic resources in areas beyond national jurisdiction did not fall within the definition of the resources of the Area, several States considered

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106 Report of the Secretary-General on Oceans and the Law of the Sea at the 62nd Session of the General Assembly, para. 200, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368556.htm, 30 October 2007. (in Chinese)

107 Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eighth Meeting, paras. 71~72, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm, 30 October 2007. (in Chinese)

the UNCLOS did not provide a clear and comprehensive framework for the management of marine genetic resources in areas beyond national jurisdiction. A comprehensive and practical framework for exploring and exploiting all marine genetic resources in areas beyond national jurisdiction should be developed by the international community within the framework of the UNCLOS, so as to protect and preserve those resources and facilitate the access to those resources and sharing of benefit arising therefrom.[108]

C. Conclusion

In light of the two UN reports, legal and policy issues related to marine genetic resources have drawn increasing attention worldwide. States have made good faith discussions and cooperation on this issue, however, States are divided on a number of crucial topics, in particular the legal status and regime of marine genetic resources in areas beyond national jurisdiction, which need further consultation and discussion. As to the future development, Jiang Jiadong makes a few suggestions: first, we should lay down an international treaty to identify and protect all vulnerable ecosystems beyond the areas of national jurisdiction, including in the Area; second, we should coordinate efforts from relevant international organizations as well as from States involved in research, and take into consideration of the applicability of relevant coordinative mechanisms, existing treaties, and other international instruments; third, we should encourage the international scientific community to formulate codes of conduct regulating the activities of competent agencies and individuals in the Area. In terms of China, he believes that China should pay attention to both deep seabed mineral and living resources, expedite capacity building as it conducts research activities at deep sea hydrothermal vents, and improve industrialized operation of deep-sea resources development.

IX. Maritime Law Enforcement and Military Uses of Ocean

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108 Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eighth Meeting, paras. 73~81, at http://china-isa.jm.china-embassy.org/chn/xwdt/t368770.htm, 30 October 2007. (in Chinese)

In 2007, research on maritime law enforcement and military uses of ocean is relatively fruitful. The topics under discussion involve the right to self-defense, right of hot pursuit, management of foreign military ships, maritime security, etc.

A. Right of Hot Pursuit

As far as the right of hot pursuit is concerned, Gong Yingchun contends that when coastal States exercise the right of hot pursuit in the exclusive economic zone, continental shelf or on the high seas, it may conflict with relevant States' exercise of jurisdiction or other rights. The reasons why conflict may arise between law enforcement of coastal States and jurisdiction of other States are complicated. For instance, the uncertainty and loopholes of the UNCLOS cause disputes between contracting States when they interpret and apply the Convention; where interpreting and applying the Convention, some countries purposely expand the meaning of the provisions, in an attempt to enlarge their jurisdictional scope and space. Notably, in establishing the East Asia maritime security cooperative mechanism, Japan expands the elements of the exercise of hot pursuit and the scope of subjects who can exercise hot pursuit, which presents challenges to current international rules.[109] The factors and acts above aggravate the "fragmentation of international law" in the field of the law of the sea, lead to the confrontation among neighboring States, affect regional security, and impair the consistency and authority of the legal order in the law of the sea. Therefore, the construction of an East Asia maritime security cooperative mechanism should be undertaken within the international law framework widely accepted by States. Relevant States should abstain from arbitrarily expanding the meaning of international treaties for national interests, so as to avoid worsening the division of international law.[110]

Guo Hongyan compares the differences and similarities between China's current legislation and relevant provisions of the UNCLOS. He believes that China should enhance its laws and regulations concerning internal waters and the territorial sea and make full use of the provisions of the UNCLOS regarding the

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109 Gong Yingchun, International Law Issues in East Asian Maritime Security Cooperation – Changes of Hot Pursuit Requirements in State Practice, *Foreign Affairs Review*, No. 5, 2007. (in Chinese)

110 Gong Yingchun, International Law Issues in East Asian Maritime Security Cooperation – Changes of Hot Pursuit Requirements in State Practice, *Foreign Affairs Review*, No. 5, 2007. (in Chinese)

right of hot pursuit which must be commenced when the ship pursued is in the internal waters or the territorial sea of the pursuing State. Based on the different legal statuses of different sea areas, China should add specific provisions to the Law on the Exclusive Economic Zone and Continental Shelf with regard to the right of hot pursuit and specify that aircraft can solely exercise the right of hot pursuit. In addition, China should build up a maritime law enforcement system which is mainly centered on a unitary organ and supported by other relevant departments and lay down the conditions for the exercise of hot pursuit. Also, China should stipulate that use of force is the last resort in the exercise of hot pursuit and abuse of force should be forbidden. Lastly, China should add a liability provision that renders compensation to victims when the right of hot pursuit is exercised inappropriately, in order to protect China's maritime interests.[111]

B. Right to Self-defense at Sea

In terms of self-defense at sea, Doctor Xing Guangmei argues that exercise of this power shall comply with the requirements provided in Article 51 of the UN Charter as well as international judicial cases and the UN resolutions. These requirements include: subjects to exercise this right shall be military forces, the majority of which is navy; the right can only be exercised upon specific objects under the jurisdiction of the attacking State; the right to self-defense should be exercised only when there is armed attack against or from the sea; such right shall be exercised prior to the necessary measures taken by the UN Security Council; self-defense shall be conducted to the extent determined based on two fundamental principles of customary international law – necessity and proportionality.

Regarding whether foreign military vessels' innocent passage of the territorial sea may trigger the right to self-defense, Doctor Xing Guangmei holds that given that legislation and practice in the world are divided as to whether military vessels can enjoy innocent passage, Chinese navy should be cautious on this issue. She believes that there are clear differences between the rights to self-defense at sea and auxiliary maritime law enforcement powers, but they may be mutually transformable, particularly in the case that foreign military vessels illegally enter China's territorial sea and refuse to leave.

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111 Guo Hongyan, A Preliminary Analysis of China's Legislation on the Right of Hot Pursuit, *Journal of University of International Relations*, No. 2, 2007. (in Chinese)

Lastly, Doctor Xing Guangmei contends that China's legislation on the right of self-defense at sea, entry of foreign military vessels into the territorial sea and the like should be specified, rather than being excessively general and abstract.[112]

C. Piracy

After examining the deficiencies of the provisions on piracy under the UNCLOS, Qian Fei argues that the two conditions of "for private purpose" and "on the high seas" would exclude many terrorist activities (for example, piracy with political purposes or supported by States) as well as violent behaviors such as robbery and plunder within the territorial sea of a State from the scope of piracy in the sense of international law. Base on this argument, Qian suggests to adopt the definition of piracy made by the International Maritime Bureau (IMB) in 1996, that is piracy refers to "the act of boarding any vessel with an intent to commit theft or any other crime, and with an intent or capacity to use force in furtherance of that act" so as to strengthen combat against this international crime.[113]

Sun Xiaojing argues that under the guidance of international treaties, China's legislation should boost its efforts in the resolution of piracy and maritime terrorism problems. China needs a specific and systematic act on counterterrorism at sea, which should regulate maritime counterterrorism actions, mobilize various parties, and clarify the responsibilities for counterterrorism at sea, so as to effectively fight against piracy and maritime terrorist crimes. China is a member State of the UN, International Maritime Organization, and a contracting State to relevant international conventions. As such, when China lays down its act on counterterrorism at sea, it should conform to relevant international treaties and resolutions, perform its obligations and commitments on counterterrorism and keep its legislation consistent with international standards.[114]

D. Management of Foreign Military Vessels within the Territorial Sea

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112 Xing Guangmei, A Preliminary Discussion on the Right to Self-defense at Sea and the Relevant Legal Issues, *China Oceans Law Review*, No. 2, 2006. (in Chinese)

113 Qian Fei, A Review of Piracy under the UNCLOS, *Modern Business*, No. 17, 2007. (in Chinese)

114 Sun Xiaojing, *A Study of Legal Issues Related to Piracy and Terrorism at Sea* (Master's Thesis), Dalian: Dalian Maritime University, 2007. (in Chinese)

In March, 2007, Iran seized 15 British navy soldiers in the waters near the boundary between Iraq and it. In respect of this incident, Tian Shicheng views that it involves a variety of legal issues including jurisdiction, innocent passage of military vessels, State immunity, responsibilities of a State to a UN resolution, espionage, the obligation of notification to consular officers, diplomatic protection, and dispute settlement procedures which need to be analyzed respectively. However, State legislation and practice since the adoption of the UNCLOS indicate that coastal States may allow foreign military vessels to pass their territorial seas without imposing special restrictions, and they may also require advance notice or approval or performance of other duties for such a passage. Foreign military vessels which intend to pass the territorial sea of other coastal States have the obligation of complying with laws and regulations of such coastal States related to passage through the territorial sea by foreign military vessels. This incident makes us to reflect on China's management system of foreign vessels within Chinese territorial sea, and the serious problems exist in China's legislation and law enforcement in this regard. China should rectify this situation and at present, first, we need to enhance legislation and make detailed provisions for implementation; second, we should centralize law enforcement forces.[115]

E. Military Survey

During the past three or four years, the US military survey vessels have entered into the exclusive economic zones of China and India for multiple times to conduct so-called "military survey". The US claims that "military survey" is not marine scientific research regulated by the UNCLOS and coastal States have no rights to protest against it.

Professor Kuen-chen Fu contends that the UNCLOS explicitly requires that freedom of navigation and overflight shall be exercised for peaceful purposes. Furthermore, this Convention also provides that any scientific survey, whether civil or military, in the exclusive economic zone shall acquire the costal State's consent. As to the "peaceful purpose", it should be left to the coastal State to judge. Thus, the US has no right to conduct military survey in the exclusive economic zone of

115 Tian Shicheng, China's Management of Foreign Military Vessels in the Territorial Sea in Light of Iran's Seizure of British Maritime Soldiers Event, *China Oceans Law Review*, No. 1, 2007. (in Chinese)

the coastal State without its consent.[116]

Regarding this issue, researcher Zhang Haiwen notes that the development of science and technology renders it difficult to strictly distinguish between pure and applied marine scientific research, or between marine scientific research and hydrographic survey (military survey). The results of these activities can be applied to scientific research, economy, military affairs, etc. The legal system with regard to marine scientific research under the UNCLOS is very explicit, which stipulates that marine scientific research in the exclusive economic zone of the coastal State shall be conducted with the prior consent of such State. Nevertheless, there are some problems with certain definitions. States should strengthen communications, and try to reach consensus and understanding on disputed issues such as scientific research and military survey.[117]

Wan Binhua contends that military survey in the exclusive economic zone falls within the scope of marine scientific research provided in the UNCLOS, but at the same time is a military activity. Hence, when conducting any form of marine scientific research and military survey in the exclusive economic zone of the coastal State, non-coastal States shall acquire the coastal State's consent and subject to its jurisdiction. Also, such activities should be conducted for peaceful purposes by giving due regard to the legitimate interest of the coastal State and sharing the information and intelligence obtained with the coastal State. All illegal activities should be forbidden.[118]

F. Building of Maritime Law Enforcement Forces and Armed Forces

China's maritime law enforcement forces are fragmented and lack of uniformity, which brings a number of problems and difficulties in practice. The establishment of a centralized coast guard may resolve such problems and such a coast guard can become a mighty backup force. *A Feasibility Analysis of the Establishment of a Coast Guard in China* argues that China has the required material basis, law enforcement environment, and marine legal and social

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116 Kuen-chen Fu, Military Survey and Liquid Cargo Transfer in the EEZ: Some Undefined Rights of the Coastal States. *China Oceans Law Review*, No. 2, 2006.

117 Zhang Haiwen, Conflicts between Coastal States' Jurisdiction over Marine Scientific Research and Military Survey, *China Oceans Law Review*, No. 2, 2006. (in Chinese)

118 Wan Binhua, Legal Issues Regarding "Marine Scientific Research" and "Military Surveys" in the Exclusive Economic Zone, *Journal of Xi'an Politics Institute*, No. 5, 2007. (in Chinese)

environment to establish a coast guard. Of course, the factors restricting the establishment of a coast guard also exist, for instance, the establishment of such a guard involves many organs and such a reform would be difficult; it is hard to determine which organ the coast guard will belong to; there are doubts about the effectiveness of the coast guard's law enforcement. However, a majority of these factors are subjective. The decision to establish a coast guard is feasible, provided that the government makes up its mind.[119]

After a comparison of the ocean administrative regime of China with that of major great powers in the world, Wan Yueyue contends that China's ocean administrative regime is highly-fragmented. Due to the basic problems of the regime, functions and power configuration is not scientific and law enforcement methods are outdated. It follows that Chinese administrative law enforcement forces should be unified. From the perspective of necessity, unification of such forces has a solid ground under administrative law – unification is necessary to meet the demand to maintain China's maritime rights and interests, to guarantee the exploitation of marine resources and sustainable development of national economy, and to advance law enforcement efficiency and build up law enforcement reliability. From the perspective of feasibility, material basis, social conditions, legal environment and external driving forces are mature for the unification of such forces. In light of this, Wan Yueyue puts forward proposals for the reform of China's ocean administrative law enforcement regime. Firstly, the reform should be made in two main directions. Administrative law enforcement power should be separated from administrative management power. A comprehensive national administrative organ for marine policies should be set up based on the State Oceanic Administration; additionally, a coast guard of China should be established based on the Maritime Safety Administration, aiming to unify maritime law enforcement forces. Secondly, the reform should take two steps: to enact legislation concerning the law on the structure of administrative organs and the coast guard law, then establish administrative organs.[120]

G. Protection of Maritime Rights and Interests

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119 He Zhonglong, Ren Xingping, Luo Xianfen and Feng Yongli, A Feasibility Analysis of the Establishment of a Coast Guard in China, *Ocean Development and Management*, No. 3, 2007. (in Chinese)

120 Wan Yueyue, *Research on Subjects of China's Marine Administrative Law Enforcement* (Master's Thesis), Dalian: Dalian Maritime University, 2007. (in Chinese)

In 2007, a number of articles focus on the protection of China's maritime rights and interests. As to the definition of maritime rights and interests, scholars generally consider it consists of maritime rights and maritime interests. National maritime rights refer to various rights enjoyed by the State in legal sense, including the right to defend national sovereignty and territorial integrity of the coastal State in sea areas under its jurisdiction (the territorial sea, contiguous zone, exclusive economic zone and continental shelf); the right to exercise sovereignty, jurisdiction, management and control over its islands; the right to exploit and utilize marine living and non-living resources; and freedoms and rights in the area beyond national jurisdiction (high seas, international seabed area). The system of the law of the sea established by the UNCLOS sets out systematic, complete and explicit provisions on States' marine rights, which provide jurisprudential grounds for coastal States to exploit and utilize oceans, and to effectively manage oceans.[121] National marine interests refer to benefits and gains enjoyed by the State in the development and utilization of the ocean, which are an embodiment and actual status of the State's marine rights.[122] National marine interests are an important component of national interests. The most crucial parts of national marine interests comprise political, economic and security interests.[123]

Zhang Rui and Zhang Lin contend that the factors restricting the protection of China's marine rights and interests mainly include the immaturity of laws on safeguarding marine rights. Strategic legislation thoughts and specific organs to supervise and coordinate legislation are absent; the understanding on the law of the sea represented by the UNCLOS is inadequate and the relevant legislation is shortsighted; the special regulations are relatively independent and the development of these regulations are imbalanced; the protection of the overall maritime rights interests is not systematic, coordinated or specific; there are overlapping parts or gaps in the administrative system for marine rights and interests protection; and provisions concerning effective and unified distribution of powers and law

121 Zhang Rui and Zhang Lin, Improvement on the Regulatory System for the Protection of Marine Rights, *Ocean Development and Management*, No. 5, 2007. (in Chinese)

122 Ding Libai, A Discussion on Military Protection of Marine Rights and Interests, *Seeker*, No. 11, 2006. (in Chinese)

123 Zhu Jianzhen, Zhang Qinglin, Qiao Junguo and Shi Yinyan, Fostering Chinese Marine Competitiveness and Protecting Its Rights and Interests in the South China Sea, *Review of Economic Research*, No. 46, 2007. (in Chinese)

enforcement management are missing.[124]

In terms of approaches to protect China's marine rights and interests, it is widely recognized by scholars that first, we should improve laws and regulations as well as the managerial system, for instance, by establishing a specific organ to supervise and coordinate marine legislation, setting up a unified organ to lead marine management, making special laws for specific sea areas,[125] enacting and enforcing implementation measures for the Territorial Sea Law and the Law on the Exclusive Economic Zone and Continental Shelf,[126] etc. Second, we need to build up a strong people's navy so as to support the protection of marine rights and interests by armed forces.[127]

H. Proliferation Security Initiative

After the "9/11" event, the US proposed the Proliferation Security Initiative (PSI) to meet its practical demands for counterterrorism and further, to serve its overall strategic framework for seeking global hegemony. Li Xiaojun notes that the PSI is aimed at intercepting cargo ships that are suspected to transport weapons of mass destruction (WMD) and their components at sea. Its use of force in maritime interception operations has an influential deterrent effect on proliferators, directly boosts the "tooth" function of the non-proliferation regime and overcomes the weakness of the "missile technology control regime" for being non-mandatory. The PSI's efficacy in controlling WMD and its rapid development indicate that its existence has certain legitimate grounds. Nonetheless, pursuant to the UNCLOS, if a ship merely transports WMD and ballistic missile delivery systems and does not engage in the twelve illegal activities that impair coastal States' peace, good order or security, it still enjoys innocent passage in the territorial sea. The inclusion of the transport of WMD and ballistic missiles into the twelve illegal activities seems

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124 Zhang Rui and Zhang Lin, Improvement on the Regulatory System for the Protection of Marine Rights, *Ocean Development and Management*, No. 5, 2007. (in Chinese)

125 Zhang Rui and Zhang Lin, Improvement on the Regulatory System for the Protection of Marine Rights, *Ocean Development and Management*, No. 5, 2007. (in Chinese)

126 Zhu Jianzhen, Zhang Qinglin, Qiao Junguo and Shi Yinyan, Fostering Chinese Marine Competitiveness and Protecting Its Rights and Interests in the South China Sea, *Review of Economic Research*, No. 46, 2007. (in Chinese)

127 Ding Libai, A Discussion on Military Protection of Marine Rights and Interests, *Seeker*, No. 11, 2006 (in Chinese); Zhu Jianzhen, Zhang Qinglin, Qiao Junguo and Shi Yinyan, Fostering Chinese Marine Competitiveness and Protecting Its Rights and Interests in the South China Sea, *Review of Economic Research*, No. 46, 2007. (in Chinese)

to be farfetched and difficult. Therefore, as a non-treaty mechanism led by the US, the PSI receives limited international support. Its provisions' intense conflict with international law gives rise to its legitimacy crisis.[128] Furthermore, Liu Yan argues that the implementation measures of the PSI have the features of being offensive, mandatory and unilateral, which would present a great shock to the current law of the sea. The PSI's provisions on the right of the US and its allies' navies to intercept all vessels that are suspected to transport WMD and their materials to the so-called "rogue States" on the high seas make the principle of freedom of navigation on the high seas neglected. Such interception violates the exclusive jurisdiction of the flag State over their ships on the high seas, and constitutes a serious infringement on the complete immunity of warships or ships in government non-commercial service on the high seas. The right of visit claimed by the PSI for boarding and inspecting ships in international waters used for commercial or private purposes that are reasonably suspected of WMD proliferation activities at sea by the security forces is contrary to the current law of the sea. The PSI sets the right of hot pursuit as the international law basis for its maritime interception operations, which is not exact. In addition, the PSI requires all participating States to employ domestic measures to take intercepting measures in their territorial seas. If a relevant State adopts such measures under the US pressures, it would pose direct harm to relevant obligations under the law of the sea assumed by this State (for instance, the territorial sea, ports and airspace systems of coastal States which shall be applied indiscriminately to all States), cause confusion to the existing territorial sea system, and affect China's domestic legislation and law enforcement in the air and at the sea.[129]

I. Maritime Security

In the new round of international activities centered on oceans, research and practice related to maritime security take an important place. Chen Haibo believes that at present, the South China Sea maritime security problems mainly refer to non-traditional security issues (including piracy, armed robbery against ships and terrorism at sea), maritime navigation and transport safety, and marine environmental protection. Notwithstanding that the UN, International Maritime

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128 Li Xiaojun, The Legitimacy and Crisis of the US "Proliferation Security Initiative", *Academic Exploration*, No. 1, 2007. (in Chinese)

129 Liu Yan, *Analysis of the PSI under International Law* (Master's Thesis), Lanzhou: Lanzhou University, 2007. (in Chinese)

Organization (IMO) have separately or jointly laid down the UNCLOS, the 1974 International Convention for the Safety of Life at Sea and other conventions, these instruments fail to clearly define "piracy", "terrorist activities" and the like; some of the IMO maritime safety treaties have yet to take effect; and some effective treaties have not included all countries. However, by virtue of the features of the ocean and the complexity of maritime safety problems, the three issues aforementioned need to be addressed by relevant States through regional cooperation. Specifically, the following approaches can be taken: (1) to accede to and enforce relevant international treaties; (2) to make efforts in facilities construction, personnel training and technology assistance; (3) to communicate and cooperate on law enforcement personnel training; (4) to exchange information and data; (5) to conduct marine scientific research; (6) to establish an efficient cooperative mechanism for report, search and rescue, response, and investigation of shipwrecks and emergencies at sea; and (7) to strengthen control by port States and construct ports of refuge.[130]

X. The Right to Use Sea Areas

A. Problems in the Enforcement of the Law on the Management and Use of Sea Areas

Du Huazhong, from Taizhou Branch of the China Marine Surveillance, takes note of and collects cases of illegal occupation of sea areas (including illegal occupation of sea areas for reclamation) discovered by all-levels of the China Marine Surveillance during the past five years, which reveals that legal liability provided by this law for illegal occupation of sea areas is inadequate. He analyzes issues in this regard and proposes solutions. Specifically, these issues involve: "consistent use of specific sea areas for over three months"; problems arising from the fact that fines are calculated on the basis of "the payment for the use of sea areas"; the inability to calculate the sum of the illegal income to be confiscated; return of illegally occupied sea areas and restoration of the sea area; lack of legal

130 Chen Haibo, Maritime Safety of the China Sea and ASEAN-China Regional Cooperation, in Kuen-chen Fu and Shui Binghe eds., *China and the South China Sea Issue*, Taipei: Askfor Bookstore, 2007, pp. 108~202. (in Chinese)

liability for failure to pay damages.[131]

B. Conflict and Reconciliation of the Right to Use Sea Areas and Other Rights

Quan Yongbo contends that "lost sea" fishermen are a new vulnerable group; there is a loophole in the legal system on the fisheries rights, a basic right, and a conflict between the fisheries rights and the right to use sea areas in the sense of rights structure, which give rise to difficulty in remedy. Hence, China should improve the fisheries rights system in legislation, enact a specific act to protect the rights and interests of fishermen, and enhance legal remedy to protect the rights and interests of "lost sea" fishermen in procedures.[132] In addition, he believes to balance the right to use sea areas with the fisheries right, we should employ "the balance of interests", a legal theory, and strike a balance among individual, social and institutional interests in relation to the two sorts of rights through an evaluation of rights and values: (1) we should coordinate such interests from the perspective of basic social value. The general legal value is to protect vulnerable groups. However, holders of the right to use sea areas typically possess certain operating strength, and thus, when distributing rights, we should give priority to the relatively vulnerable group (namely fisheries producers), which is in compliance with basic social value; (2) we should consider the established legal order. Fisheries catch, as one primary necessary item for human beings, meets people's basic needs in life in the society. Indirectly speaking, the fisheries rights exist for human survival which should be a primary right, generally superior to the right to use sea area; (3) we should make public policies, which is of strategic value to national sovereignty and future development and great social interests. Comparatively, public policy apparently takes precedence over the value of fishermen's group interests and therefore, should be taken into overall account in restructuring institutions. He also contends that both the right to use sea areas and the fisheries rights are indispensable rights for the State and society. Recognizing the right to use sea areas to deny the fisheries rights argued by a few scholars is undesirable. To avoid rights conflict in this way would only do harm to the interests of holders of the fisheries

131 Du Huazhong, Drawbacks and Improvement of Legal Liability for Illegal Occupation of Sea Areas, *Ocean Development and Management*, No. 5, 2007. (in Chinese)

132 Quan Yongbo, Missing Rights of "Lost Sea" Fishermen and Legal Remedies, *Ocean Development and Management*, No. 5, 2007. (in Chinese)

rights, and further deny basic social value and deviate from institutional values. When relating to national maritime rights, the right to use sea areas mainly refers to national sovereign interests, the highest rights and interests, so any other right should be subject to them; however, when relating to individual interests and some group interests, specifically economic rights, if the right to use sea areas conflicts with the fisheries rights, fisheries rights should prevail. In legislation planning, the above views should be reconsidered and tested by judges in adjudication through the method of "the balance of interests".[133]

Wan Yaqin believes that the conflict between the right to use sea areas and the fisheries rights are structural and hard to settle. Traditional fisheries rights comprise two rights of distinct nature: the aquaculture right and fishing right. If the aquaculture right is separated from the fisheries rights and incorporated into the right to use sea areas, problems will be resolved. She argues that after the separation, the fisheries rights which now only comprise fishing right would still conflict with the right to use sea areas in effect. However, this conflict is essentially different from the conflict between traditional fisheries rights and the right to use sea areas. The conflict between unchanged traditional fisheries rights and the right to use sea areas is structural, which derives from the unreasonable and unharmonious rights system, a drawback in legislation. Such a conflict is impossible to resolve within the original rights system or institutional framework. To resolve the conflict, it is necessary to break original rights system and institutional framework. By contrast, the conflict between the changed fisheries rights and the right to use sea areas is entirely different, which is not a drawback in legislation but a normal and evitable conflict of effect between rights, in other words, a conflict of the exercise of rights that are able and easy to resolve. The way to resolve this conflict lies in making explicit provisions on the order of precedence between the fisheries rights and the right to use sea areas. Specifically, we should determine their order pursuant to the principles that "the fisheries rights have priority" and "rights established first take precedence over rights established later".[134]

Liu Shunbin notes that three conclusions can be drawn from the relation between the title over sea areas and the fisheries rights or fishermen's rights and

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133 Quan Yongbo, Balance of Interests in the Conflict between the Right to Use Sea Areas and Fisheries Rights, *Exploration and Free Views*, No. 5, 2007. (in Chinese)

134 Wan Yaqin, Conflict and Reconciliation between the Right to Use Sea Areas and Fisheries Rights, *Journal of Yunyang Teachers College*, No. 4, 2007. (in Chinese)

interests: the fisheries rights do not derive from State ownership of sea areas; the fisheries rights take precedence over the right to use sea areas; the fisheries rights cannot be incorporated into or become one type of the right to use sea areas. In addition, regarding how to establish a mechanism to maintain fishermen's rights and interests, Liu Shunbin holds that we can address this issue from two aspects: first, to improve the procedures for the transfer of the right to use beach and sea areas; second, to establish a compensation system for fishermen's rights and interests.[135]

Professor Wang Miao contends that holders of the marine mining right need to exclusively occupy certain sea areas during the process of prospecting and mining. For instance, construction of drilling platforms or establishment of prospecting operations zones would inevitably come into conflict with other users in the sea area. The conflict between the marine mining right and right to use sea areas is most prominent, and there is no ideal solution to this conflict yet. Such conflict directly affects the trade volume and transaction effects in the mining rights market and reduces effective investment. Hence, she argues that we should actively coordinate the relationship between the marine mining right and right to use sea areas. Since sea areas have multiple-functional uses, the sea areas whose marine mineral resources need to be exploited may encounter two situations – the sea area has been authorized for other uses or has yet to be transferred – which should be discussed respectively. (1) Where the sea area has been authorized for other uses, it should be withdrawn or used jointly, depending on the degree of its importance. First, as for important marine mineral resources such as oil and gas, the State should recover the original sea use right and compensate the original users. According to the Law on the Use and Management of Sea Areas, the State has the right of redemption. Oil and gas resources influence national security with significant strategic value. The State may withdraw the original right to use sea areas and grant it to the mining right holder. However, as to how to compensate the original sea user and protect his legitimate rights and interests, the State has no legislation in this regard. The State may compensate by money or consider giving priority to the user when he applies for other sea areas. Second, concerning non-strategic marine mineral resources, the State may coordinate the applicant and the original user, allowing them to jointly use the sea area, if possible. The exploitation of marine mineral resources, on one

135 Liu Shunbin, A Preliminary Analysis of Sea Areas Ownership and Fishermen's Interests, *China Aquaculture*, No. 10, 2007. (in Chinese)

hand, will pollute the environment and impact aquaculture, fishing, etc.; on the other hand, the exploitation may interact with the utilization of other resources. For example, relying on the oil rig as a platform, fishing and aquaculture can be developed; construction work made during the development of seabed oil and gas resources also prepares necessary conditions for China's marine tourism industry. As such, joint use of sea areas is feasible. Of course, if users generate pollution during the mining which affect the normal operations of other users, the former should pay damages to the latter. (2) Where the sea area has not been transferred yet, it should be managed by the Oceanic Administration and Mineral Resources Bureau together. Some scholars like Lu Shouben and Luan Weixin hold that during the phases of feasibility study on mineral development and license issuance, a review by marine administrative organs is necessary; in the phase of the exploitation of mineral resources, the marine administrative organs also have the supervisory responsibility. Professor Wang Miao agrees with this view. Nevertheless, applicants for marine mining have to go through a complex process consisting of feasibility study, application to the marine administrative organs for sea use, acquisition of the permit to use sea areas and application for the mining right. Whether the Oceanic Administration may directly combine two permits (the permit to prospect or mine and permit to use sea areas) into one and issue it to the applicant after the Administration approves his application for mining, so as to achieve a joint management by the Oceanic Administration and Mineral Resources Bureau. This model of joint management enables coordinated management over the full course comprising application, transfer, distribution of interests and supervision. First, during the applications review stage, the prior mining right arising from the prospecting right can be applied to the right to use sea areas, namely that the prospecting right holder may also be given priority in the right to use sea areas when conducting mining operations; second, when gaining benefits from the transfer of use right by bidding, auction, listing for sale, especially by sale at a premium, the two governmental organs share the benefits arising therefrom; third, with regard to supervising transferred resources, it is suggested the Oceanic Administration should be granted power to impose penalties. Besides imposing penalties on the party contaminating waters, it may have the authority to punish vessels for violations according to law, which forms a joint supervision mechanism

with the Mineral Resources Bureau.[136]

Professor Yang Lixin from Renmin University of China Law School contends that the civil law should provide a unified concept of surface right and examine the nature of the right to use sea areas: the right to construct structures at sea belongs to maritime surface right; salt producing and mining fall with the mining right, a concession property right or quasi-property right; general uses of sea surface or waters without constructing structures such as aquaculture, tourism, entertainment are general usufructuary rights. Professor Yang Lixin notes that the right to use sea areas is not a single and pure usufructuary right, but instead a collective system of usufructuary rights aggregating various uses of sea areas, part of which are maritime surface rights. That is to say, the sea use right to construct structures in waters should be covered by the unified surface rights system, and be interpreted, understood and applied in light of the concept of surface right.[137]

C. Recovery of the Right to Use Sea Areas

Wu Jilu and Zhang Zhihua propose explicitly that the essence of withdrawing the right to use sea areas is a compulsory purchase of the right rather than taking over the right for use. Further, they argue that like compulsory purchase of land, compulsory purchase of the right to use sea areas needs to address the following core issues – definition of public interests, standard for compensation and procedures for recovery (compulsory purchase). They elaborate on these three issues respectively, stating that sea use projects without paying charges for such use mostly are consistent with "public interests"; part of sea projects with a reduction in charges payment are of public nature; when determining the compensation standard and amount for recovery of the right to use sea areas, we should calculate the amount based on the market value to make compensation fairly. Also, we may adjust sea areas and give original sea users compensations in kind by giving them sea areas that are equal to or slightly larger than the original ones in order to compensate against their losses. The procedures to recover the right to use sea areas involve identification of "public interest", public notice, participation of sea

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136 Wang Miao and Yuan Dong, Analysis on the Reasons Causing Problems in the Property Rights Market of Marine Mineral Resources and the Measures for Dealing with the Problems, *Natural Resource Economics of China*, No. 8, 2007. (in Chinese)

137 Yang Lixin, On Setting up General Concept Conoepe and Sesterm, *Journal of Henan Administrative Institute of Politics and Law*, No. 1, 2007. (in Chinese)

area users, and disputes resolution. They believe that it is difficult to define "public interest" by legislation or prescribe its scope in detail. However, the authorities (all levels of the People's Congress) may determine whether it is of "public interest" on a case by case basis to prevent abuse of expropriation. Meanwhile, the judiciary may fill in the legal gap by using judicial interpretations when hearing and adjudicating compensation cases, and may determine whether the identification of public interest or compensation amount is reasonable, whether procedural violations exist, etc. In this connection, compulsory purchase of the right to use sea areas cannot suspend due to lack of legal basis during the time when the relevant regulations are not in place. On the contrary, we should make efforts to properly recover sea areas, avoid various problems that arise from compulsory purchase of land, accumulate experience, and promote the establishment of a system on reclaiming the right to use sea areas.[138]

Wu Zhuo analyzes the right to use sea areas and recovery of the right prior to its expiration for public interest. On the basis of this, he discusses the nature of pre-mature recovery of the right to use sea areas and criticizes the view of characterizing pre-mature recovery of the right for public interest as withdrawal of administrative approval. After studying the expropriation and taking systems at home and abroad, he identifies pre-mature recovery of the right for public interest as compulsory purchase for public interest, which therefore, offers legal theories for studies of pre-mature recovery of the right to use sea areas as well as compensation mechanisms. Then, he expounds on restrictions on pre-mature recovery of the right to use sea areas for public interest and the compensation payment. After a presentation of the production and living conditions of fishermen who lost sea, he points out the inadequacy in China's current compensation mechanism for expropriation of sea and attempts to establish a multi-layer and multi-channel compensation mechanism with financial payment as the main compensation, supplemented by relocation, social security placement and other resettlement policies.[139]

D. The Market of the Right to Use Sea Areas

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138 Wu Jilu and Zhang Zhihua, A Few Legal Questions Related to Recovery of the Right to Use Sea Areas, *Ocean Development and Management*, No. 1, 2007. (in Chinese)

139 Wu Zhuo, *A Study of Premature Recovery of the Right to Use Sea Areas for Public Interest and Its Compensation* (Master's Thesis), Dalian: Dalian Maritime University, 2007. (in Chinese)

Using Ningde City, Fujian Province as an example, Zhang Huiling and Zhang Wenqiang analyze the current problems in loans by mortgaging the right to use sea areas and offer some suggestions and measures for expanding this business in the future. Problems existing in the loan business by mortgaging the right to use sea areas mainly are: the ownership of the right to use sea areas is unclear and only limited licenses of this right are available for mortgages; there are legal obstacles in mortgaging the right to use sea areas for loans and difficulty in assessing the value of the mortgaged right and in materializing the mortgage; market circulation system has not been established and it is hard to realize the mortgaged property; loans by mortgaging the right to use sea areas are risky and the risks are not easy to prevent or control. Suggestions and measures for expanding such a business mainly include: establishing qualified and professional assessment agencies and setting out clear evaluation criteria; fostering a developed secondary market and building a loan business platform; simplifying application procedures and lowering service fees and loan interest rates; standardizing operating procedures and preventing credit risks.[140]

Yao Jufen argues that legal obstacles in market-oriented operations of the right to use sea areas mainly refer to: (1) a civil law on market-oriented operations of the right to use sea areas is absent; (2) there are serious conflicts among existing law related to use and management of sea areas; (3) the owner of the sea area and the entity to administrate the area are mixed, and operating entities in the primary market of the right to use sea areas are not qualified; (4) the objective of the provisions on the three methods of acquiring the right to use sea areas in the primary market is not clear or scientific; (5) specific provisions on investing, transfer, inheriting, mortgaging and leasing of the right to use sea areas are missing; and (6) it is difficult to enforce liability provisions related to the right to use sea areas. Correspondingly, she proposes suggestions on market-oriented operations of the right to use sea areas: (1) to develop mature civil law on market-oriented operations of the right to use sea areas; (2) to adjust the relations among different laws and clarify their respective application scope; (3) to establish a sea asset management agency with independent legal status to ensure the eligibility of the operating entities in the primary market; (4) to clarify the relationship

140 Zhang Huiling and Zhang Wenqiang, Discussions on Loans by Mortgaging the Right to Use Sea Areas, *Fujian Finance*, No. 5, 2007. (in Chinese)

between the way to transfer the right to use sea areas in the primary market and the administrative review and approval; (5) to sort out the circulation channels in the secondary market, and develop a mature legal system on investing, transfer, inheriting, mortgaging and leasing of the right to use sea areas; and (6) to gradually establish and improve liability system related to the right to use sea areas, with a view of safeguarding market-oriented operations of the right to use sea areas.[141]

Given that China's legislation on the right of mortgaging the right to use sea areas is still blank, Lan Lan and other scholars, in light of the Guarantee Law and relevant provisions on mortgaging the right to use land, dwell on the creation and enforcement of mortgages on the right to use sea areas.[142]

E. The Right to Use Sea Areas and the Property Law

Zhang Hongsheng, deputy director general of the State Oceanic Administration, notes that the Property Law specifically sets out the right to use sea areas in the Chapter of Usufructuary Rights, clarifying the legal status and nature of the right to use sea areas. In terms of legal nature, similar to the right to use land, the right to use sea areas is a basic usufructuary right. As a usufructuary right, the principles and provisions of the Property Law should apply to the right to use sea areas. One fundamental principle of the Property Law is providing equal protection to the property rights enjoyed by various holders. Hence, the specific provisions of the Property Law concerning the right to use sea areas offer a legal basis for the protection of the legitimate rights and interests of sea users, which would contribute to defining the rights and obligations among different sea users, boosting the confidence in investment of sea users including fishermen, and developing marine economy.[143] Wang Liming, the dean of the Renmin University of China Law School, holds that the right to use sea areas is an important usufructuary right, to which an independent section should be devoted, and we should timely amend the Law on

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141 Yao Jufen, Discussions of Legal Issues Related to Market-oriented Operation of the Right to Use Sea Areas, *Special Zone Economy*, No. 6, 2007. (in Chinese)

142 Lan Lan, Zhu Nan, Zhang Huaming and Yuan Ding, A Discussion of Establishment and Enforcement of Mortgages on the Right to Use Sea Areas, *Ocean Development and Management*, No. 1, 2007. (in Chinese)

143 Zhang Hongsheng, Another Milestone of Marine Legislation: Implementation of the Property Law of the PRC, *Ocean Development and Management*, No. 2, 2007. (in Chinese)

the Use and Management of Sea Areas after the enactment of the Property Law. Specifically, we should add the provisions on contracts on transfer of the right to use sea areas, set out the details on the transfer and mortgaging of the right to use sea areas, and further the development of the registration system of the right to use sea areas.[144]

Li Xiazhen from the North China Institute of Science and Technology believes that considering the usufructuary rights system established by the Property Law (draft) of China, apparently, sea areas were not under consideration. Therefore, sea areas easements are excluded from land easement. The rectification of "land easement" made under the Property Law (draft) of China is not thorough. Like other countries, Chinese rectification is not sufficient, which is reflected in its lack of provisions on sea areas easement. Moreover, he argues that China should establish a real estate easement system in its Property Law to cover sea areas easement, overcome the deficiencies of land easement system, and create new types of real estate easement.[145]

XI. Other Issues

A. Regime of Islands

The regime of islands under the UNCLOS also is under the spotlight of the academia in this year. Liu Xinhua contends that national maritime power reflects systematic marine capacities of the State, namely the capacity to make use of oceans to acquire wealth, to control oceans and to forward from sea to land. To develop, obtain and maintain maritime power needs the effective combination of an array of strategic resources. With the shift of international oceanic strategic environment as well as the evolution of islands' international legal status, islands play a strategic role in the State's maritime power development strategy that cannot be replaced by any other strategic resource.[146] Wang Yi argues that the

144 Wang Liming, Further Development of the Maritime Property System by Making Use of the Property Law Legislation, *Ocean Development and Management*, No. 1, 2007. (in Chinese)

145 Li Xiazhen, Some Thoughts of China's Easement System, *Journal of Heilongjiang Administrative Cadre Institute of Politics and Law*, No. 1, 2007. (in Chinese)

146 Liu Xinhua, A Discussion of the Strategic Value of Islands to the Development of Maritime Power, *Journal of Ocean University of China (Social Sciences Edition)*, No. 4, 2007. (in Chinese)

UNCLOS fails to clarify what kind of land area that is above waters at high tides is an island. The geographical definition is not clear; the language of "cannot sustain human habitation or economic life of their own" leaves the States great room for interpretation; it is not easy to distinguish between natural and artificially-constructed islands in practice; the boundary between islands and other land area is blurred. He thus suggests that China should strengthen actual control over disputed islands, enhance ocean awareness education for its citizens and reinforce defense forces at sea.[147]

With regard to maritime boundary delimitation relating to islands, Ma Chao asserts to rely on some islands, mainly offshore islands, middle-ocean islands, and pelagic islands that are 24 nautical miles away from the mainland, to decide the breadth of waters under jurisdiction. At the same time, Ma proposes that we should take advantage of the effects of islands on delimitation under different circumstances. Islands that are close to Chinese coasts can be used as a base point to draw the baselines of the territorial sea; islands that are located beyond Chinese territorial sea but inside the median line of two States can claim full effect, that is to claim its own territorial sea, contiguous zone, etc.; islands that are situated on the median line of the waters of two States can claim partial effect, which can be used to exchange for the same or similar compromise of the other State; islands closer to the other State's sea areas can be given zero effect, but such islands may claim a safety zone of certain breadth. In addition, existing historical rights to the islands can be asserted continuously, or based on the principle of reciprocity, two sides' claims have to be either recognized, or restricted in a uniform way.[148]

At present, maritime boundary delimitation related to China's waters is in progress. Correctly determining the positions of the base points and baselines of the territorial sea is pivotal. Li Linghua notes that the types of baselines are not chosen by the will of the government. Rather, it depends on the natural geographical conditions of coasts. The criteria for determining the baselines of the territorial sea should be consistent worldwide; the maximum length of straight baselines shall be strictly limited, and no States are allowed to change it freely. The principles and technical standards to determine the baselines of the territorial sea should be uniform among States; the effect of small islands in oceans in maritime delimitation

147 Wang Yi, Views on the Regime of Islands under the UNCLOS, *The Science Education Article Collects*, No. 5, 2007. (in Chinese)

148 Ma Chao, *Discussions of the Regime of Islands and International Maritime Boundary Delimitation* (Master'sThesis), Guizhou: Guizhou University, 2007. (in Chinese)

is decreasing, while isolated islands in oceans are even harder to be qualified for title over large sea areas; internationally, the standards for determining base points and baselines of the territorial sea tend to be uniform.[149]

B. International Tribunal for the Law of the Sea and Other International Organizations

The International Tribunal for the Law of the Sea (ITLOS) was founded under the UNCLOS, a permanent international judicial institution. Since its establishment in 1996, it has dealt with quite a few disputes related to the law of the sea. Xu Zengcang and Lu Jianxiang make an empirical analysis and comparison of the maritime disputes addressed by the ITLOS and that by the Permanent Court of International Justice/International Court of Justice for the past ten years. They argue that as the ITLOS has compulsory jurisdiction over two categories of cases, procedural disputes in connection with "provisional measures" and "prompt release of vessels and crews", it has achieved striking success in this regard. The arbitration under the Annex VII to the UNCLOS can be applied when necessary, and has bridged the UNCLOS with the Permanent Court of Arbitration. There are statutory and consensual exceptions to ITLOS' mandatory jurisdiction over maritime disputes, and the ITLOS is not adept at handling substantive issues of the disputes. Due to the fact that the development of the seabed resources of the Area is still at the stage of exploration, the Seabed Disputes Chamber of the ITLOS has not heard any case. However, since that the Chamber has advantages in the aspects of "compulsory jurisdiction", "parties" and "applicable law" when dealing with seabed disputes, it has great potential in addressing seabed disputes as the seabed resources in the Area are being developed in a large scale.[150] Guan Jin focuses on the special residual compulsory jurisdiction of the ITLOS, and contends that while the provisions on the jurisdiction over provisional measures, to a certain degree, are ambiguous, the Tribunal has gradually clarified on the issues such as the binding effect, purpose, and summary procedures of the provisional measures. Thus, she

149 Li Linghua, The Determination of Base Points and Baselines of the Territorial Sea, *Journal of Ocean University of China (Social Sciences Edition)*, No. 3, 2007. (in Chinese)

150 Xu Zengcang and Lu Jianxiang, Disputes Resolution Mechanisms of the UNCLOS during a Decade: Achievements, Deficiencies and Developments – An Empirical Comparison between the PCA and ICJ, *China Oceans Law Review*, No. 1, 2007. (in Chinese)

suggests China to refer to the Tribunal the maritime disputes between China and neighboring States, where appropriate.[151]

The Commission on the Limits of the Continental Shelf (CLCS) was established according to the provisions of Article 76 of the UNCLOS and Annex II to the UNCLOS, responsible for the work on the extended continental shelf. Fan Yunpeng summarizes the work of the CLCS since its foundation and states that the Commission is a professional organ to supervise the implementation of the Convention. Recommendations of the CLCS are not binding upon the State parties; however such binding effects actually exist when one views from the Convention's text and the practice related to it. The work of the CLCS concerns the balance of interests among the international community, coastal States that make submissions and interested States. It follows that the Commission should improve its working methods, and increase transparency and other entities' participation in its work.[152]

C. The Law of the Sea from the Perspective of International Relations

Introducing international relations theories into international law has become a new path in China's international law studies. Li Xingya, from the perspective of international relations, first embarks on "Truman's Declaration", "Prado Proposal" and other critical historical events, and then makes a detailed analysis of the history of conflicts and compromises regarding the exclusive economic zone system. After exploring the changing attitudes of States blocs and political alliances as well as their implications for the formation of the exclusive economic zone system, he expounds on the political process involved in the formation of this new system for the law of the sea amid the changes of international relations, and the impact that the new system imposes on international relations, so as to discuss the new system's enlightenment for China.[153] Coincidentally, the US government is reconsidering accession to the UNCLOS. During the last 25 years from entry into force of the Convention in 1982, the US has not been eager to join it. Nevertheless, in 2007 summer, after the Russian expedition team planted a Russian flag at the

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151 Guan Jing, A Discussion of Jurisdiction of the ITLOS over the Provisional Measures, *China Oceans Law Review*, No. 1, 2007. (in Chinese)

152 Fan Yunpeng, A Discussion of the Legal Status of the CLCS, *China Oceans Law Review*, No. 1, 2007. (in Chinese)

153 Li Xingya, *A Study of the Dynamic Relation between the UNCLOS and Contemporary International Relations: A Case Study of the Exclusive Economic Zone System* (Master's Thesis), Qingdao: Ocean University of China, 2007. (in Chinese)

ocean floor of the Arctic Ocean when they first dived to the north pole, the attitude of the US changed dramatically. On October 31, 2007, the U.S. Senate Committee on Foreign Relations agreed by a vote of 17 to 4 to the ratification of the UNCLOS. The bill was submitted to the Senate for the final vote. This was the second time that the Committee voted in favor of ratification of the convention. In 2004, the Committee voted in favor for the first time, but failed to send it to the full-house for vote. If the Senate agreed to ratify the UNCLOS this time, the US would gain new legal rights in the fight for territories and resources of the continental shelves of the Arctic, especially sovereign rights over the area from the coast of Alaska to the north pole. The Bush administration has repeatedly urged the Senate to ratify the Convention, saying this action will make clear the US navy's authority to operate and provide legal basis for the "reconstruction of international maritime order" by the US navy.

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主编：傅崐成

主办：厦门大学法学院

厦门大学海洋政策与法律中心

地　址：中国福建省厦门市思明南路 422 号　邮编：361005

Xiamen University Law School, Xiamen, Fujian 361005, CHINA

电　话：（86-592）-2187383　（86-592）-2187781

传　真：（86-592）-2187781

E-mail: colr@xmu.edu.cn; copl@xmu.edu.cn

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CHINA REVIEW CULTURE LIMITED

地　址：香港北角英皇道 250 号北角城中心 2205-2207 室

Rm. 2205-2207, Fortress Tower, 250 King's Road

North Point, Hong Kong

电　话：(852)-28816381

传　真：(852)-25042131

E-mail: cnreview@cnreview.com

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