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卷首语

2001 年 5 月举行的《联合国海洋法公约》缔约国大会第十一次会议决定对于在 1999 年 5 月 13 日之前开始对《公约》生效的缔约国，应在 2009 年 5 月 13 日之前，向大陆架界限委员会提交 200 海里以外大陆架界限的申请。截至今年 10 月份已经有 12 个国家提出申请，并且随着这一截止时间的逼近，可以预料会有更多的国家提出申请。这样的“蓝色圈地运动”不仅关系到沿海国的主权权利问题，也与各国的经济利益直接相连。高健军博士的文章《200 海里以外大陆架外部界限的划定:目前为止的实践综述》，针对各国提出 200 海里以外大陆架外部界限的申请以及委员会的审议情况进行总结和评价，对我国准备向委员会的申请工作无疑具有重要的参考价值。

“历史性权利”是国家在主张领土主权或特定水域主权权利时经常提出的依据，郭渊博士从海洋法的角度对“历史性权利”的内涵进行解析，并结合国际社会在海洋法中的实践，对“历史性权利”的本质进行深入分析，以对我国在南海诸岛的“历史性权利”进行论证。中国南海的“U”形线或“断续线”的法律性质一直是国内学者探讨的问题，罗婷婷的文章以国内学者对该线的几种观点为基础进行分析，提出“U”形线内的海域是我国的历史性水域，同时这也成为我国主张南海“历史性权利”的重要理由。

2008 年 5 月 23 日国际法院对新加坡与马来西亚白礁岛、中岩岛和南礁岛主权争议案作出裁决，将其中的白礁岛主权裁定给新加坡，熊良敏的文章《白礁岛主权争议案评论》对国际法院裁决的理由进行分析，得出国际法院在领土主权纠纷裁决过程中所重视的依据，对我国如何保护钓鱼岛的主权具有重要的参考意义。

本期关于海洋环境保护刊发了 2 篇文章。曹英志和范晓婷的《再论海洋倾废概念》，对“海洋倾废”的内涵和外延进行分析，并对我国的海洋倾废管理提出建议。《控制和管理船舶压载水和沉积物国际公约》虽未生效，但是它所规定的具体明确、循序渐进的管理措施对各国的实践具有重要的指导意义。管松的文章在详细分析该公约的基础上对中国相应的立法提出了建议。

此外，在海商法领域，黄西武法官结合海事法院的实践，针对我国目前海事诉讼程序中“海事强制令”制度存在的问题，提出意见。特别对制度不完善情形下如何加强保护被申请人的合法权益，作者提出了详尽的建议。《物权法》的相关规定对船舶登记制度提出了新的课题。刘本荣法官通过对 43 个案例的分析，总结了当前我国司法实践中船舶登记对抗主义的实际运行及特点，对于如何理解船舶登记对抗主义提出独道见解，具有重要的学术参考价值。

最后，本期刊登了很多与海洋法律相关的国内外法规与动态。金永明博士介绍了日本《海洋基本计划草案》的内容，并对该草案的预期影响进行了评价，应引起我国的关注。作为前文的背景资料，2007 年 7 月 20 日生效的日本《海洋基本法》经庄玉友翻译，金永明博士校对已经形成中文本，对中国了解日本的海洋立法非常重要。

《中国海洋法学评论》创办 4 年来，得到了海内外海洋法学界各位同仁的厚爱，其学术影响力也日益扩大。在此，编辑部对广大读者长期以来的关心与鼓励，对各位作者对《评论》的信任和支持，表示诚挚的感谢！我们也期待各位对本刊继续予以关注、支持和鞭策，为中国海洋法的发展尽绵薄之力！

编辑部　谨识

EDITOR'S NOTE

The 11th Meeting of States Parties to the United Nations Convention on the Law of the Sea held in May 2001, determined that for a State for which the Convention entered into force before 13 May 1999, the date of commencement of the 10-year time period for making submissions on the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental shelf (CLCS) was 13 May 1999. Up to October 2008, 12 States has made their submissions, and this number is predicable to increase with the deadline looming. Such a "blue enclosure movement" is not only related to costal States' sovereign rights, but also connected with economic interests of various countries. Dr. GAO Jianjun, in his article titled "Delimitation of the Outer Limit of Continental Shelf beyond 200 Nautical Miles: Submissions to Date", summarizes and analyses the submissions on the extended continental shelf made by States and the CLCS's consideration thereof, providing reference for the preparation of the submission to the CLCS by the Chinese government.

"Historic rights" are usually referred to by States as the foundation to claim sovereignty over a territory or sovereign right over specific waters. In consideration of the results from previous juridical studies, the international law of the sea and international law cases, Dr. GUO Yuan analyzes the connotation and substance of "historic rights" so as to demonstrate China's historic rights over the South China Sea islands. Chinese academia has always been discussing the legal status of the U-shaped line or nine-dotted line in the South China Sea. LUO Tingting proposes that the waters within the U-shaped line are China's historic waters after analyzing several doctrines widely accepted in the Chinese academia. This view is also an important ground for China to claim its "historic rights" in the South China Sea.

On 23 May 2008, the International Court of Justice (ICJ) awarded the sovereignty over Pedra Branca to Singapore in the Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh Middle Rocks and South Ledge (Malaysia/ Singapore). After analyzing the reasons why the ICJ made such an award, XIONG Liangmin, in his article "A Review on the Pedra Branca Dispute", summarizes

the bases that mainly support the ICJ in rendering an award concerning a territorial sovereignty dispute, which sheds some light on China's protection of its sovereignty over Diaoyu Islands.

The current Issue publishes two articles on environmental protection. One entitled "The Concept of Ocean Dumping" by CAO Zhiying and FAN Xiaoting offers some suggestions with regards to China's management of ocean dumping after exploring the connotations and the denotations of the concept of "ocean dumping". Even though the International Convention for the Control and Management of Ships' Ballast Water and Sediments has not yet taken effect, its specific and step-by-step management measures serve as an important practical guide for every country. GUAN Song proposes recommendations for the current relevant Chinese legislation based on a detailed analysis on the aforementioned Convention.

In addition, two articles on maritime law are included in this Issue. Based on the judicial practice of maritime courts, Judge HUANG Xiwu offers perspectives on how to resolve the problems existing in the system of maritime injunctions in a judicial proceeding, especially on how to strengthen the protection of the respondents' rights and interests under such an imperfect system. Judge LIU Benrong, through the empirical analysis of 43 cases, gives a summary of the operation and features of the doctrine of registration of property rights to ships against third parties in Chinese judicial practice, which gives a unique insight of the doctrine and has a significant academic reference value.

Finally, many regulations at home and abroad and their recent developments are incorporated into the current Issue. Dr. JIN Yongming reviews the relevant contents of the Draft of Basic Plan on Ocean Policy and evaluates its expected effects, which China should pay attention to. As the background information of the article above, the Chinese version of the Japanese Basic Act on Ocean Policy (translated by ZHUANG Yuyou and proofread by Dr. JIN Yongming), which took effect on 20 July 2007, is also presented here and will facilitate China's understanding of Japanese legislation governing the oceans.

Since its founding in 2005, China Oceans Law Review, with an increasing academic influence, has received generous assistance and supports from experts and scholars in the field of oceans law at home and abroad. The editorial board would like to take this opportunity to extend our sincere gratitude to each reader's continuous concerns and encouragement as well as each author's trust in and support to our Journal. With your concerns, supports and encouragement, we hope

to make our own contribution to the development of law of the sea in China.

COLR Editorial

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200 海里以外大陆架外部界限的划定：目前为止的实践综述

高健军 *

一、引　论

从测算领海宽度的基线量起200海里以外的大陆架，有人称为“扩展大陆架”或“外大陆架”。然而，正如2006年“巴巴多斯 / 特立尼达和多巴哥案”的仲裁法庭所言，一方面，大陆架并非正在被扩展中；[1] 另一方面，“法律上只有一个单一的‘大陆架’”，“而不是一个内大陆架和一个分离的扩展或外大陆架”。[2] 更为重要的是，1982年《联合国海洋法公约》[3]（以下简称“《公约》”）中并没有出现“扩展大陆架”或“外大陆架”这样的概念，而只有“200海里以外大陆架”的概念。[4] 为此，本文将使用“200海里以外大陆架”这一概念。依据自然延伸原则，沿海国可以享有200海里以外的大陆架。[5] 据估计，大约有60多个沿海国拥有200海里以外的大陆架，[6] 而其中很可能包括中国及其邻国日本、菲律宾、印度尼西亚、越

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1 Barbados/Trinidad and Tobago, Award of the Arbitral Tribunal, 11 April 2006, para. 65, note 4, at http://www.pca-cpa.org, 8 December 2008.

2 Barbados/Trinidad and Tobago, Award of the Arbitral Tribunal, 11 April 2006, para. 213, at http://www.pca-cpa.org, 8 December 2008. 然而，虽然当事国都使用了“扩展大陆架”一词，但法庭认为“外大陆架”一词更贴切。Barbados/Trinidad and Tobago, Award of the Arbitral Tribunal, 11 April 2006, para. 65, note 4, at http://www.pca-cpa.org, 8 December 2008.

3 公约于1982年12月10日开放签字，1994年11月16日生效，下载于 http://www.un.org/depts/los，2008年12月8日。

4 例如，第76条第7款和第8款、第82条、附件二第3条和第4条。

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

6 参见大陆架界限委员会第十七届会议（2006年3月20日至4月21日）：《大陆架界限委员会主席关于委员会工作进展情况的说明》附件——《决定草案：供第十六次缔约国会议审议》，下载于 http://www.un.org/Depts/1os/clcs_new/commission-documents.htm#Statements%20by%20the%20Chairman%20of%20the%20Commission，2008年12月8日。

南、韩国和马来西亚。[7]《公约》第 76 条第 8 款规定："从测算领海宽度的基线量起 200 海里以外大陆架界限的情报应由沿海国提交于根据附件二在公平地区代表制基础上成立的大陆架界限委员会。委员会应就有关划定大陆架外部界限的事项向沿海国提出建议，沿海国在这些建议的基础上划定的大陆架界限应有确定性和拘束力。"截至 2008 年 10 月，大陆架界限委员会（以下简称"委员会"）总共收到 12 份关于划定 200 海里以外大陆架外部界限的申请，涉及 12 个国家。除爱尔兰、法国、英国和西班牙曾联合提出过一个申请外，其他的申请都是由沿海国单独提出来的。委员会已经对俄罗斯、巴西、爱尔兰、澳大利亚和新西兰的申请提出了建议。[8] 目前，4 个小组委员会正在分别审议四国的联合申请，以及挪威、法国和墨西哥的申请。其中，对法国申请的审议是"作为例外情况处理"的，[9] 因为按照委员会的决定，同一时间只能有 3 个小组委员会同时工作，划界申请应按收到的时间先后排队，只有在 3 个运作的小组委员会之一向委员会提出建议后，才由 1 个小组委员会对轮到的下一个划界申请进行审议。[10] 这样，巴巴多斯、英国和印度尼西亚的申请只有等上一个小组委员会结束工作后方可得到审议。

本文的目的是对截至目前的各划定 200 海里以外大陆架外部界限的申请以及委员会的审议情况进行分析，找出申请国是如何划定其大陆架外部界限的，存在哪些法律和技术问题，并从整体上对划定 200 海里以外大陆架外部界限的实践加

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7 日本表示 2009 年 1 月提交申请，菲律宾表示 2009 年 5 月提交，印度尼西亚和越南表示 2009 年 5 月 13 日前提交，韩国表示 2009 年 5 月 12 日提交，马来西亚表示 2009 年 5 月 13 日提交申请。参见《联合国海洋法公约》缔约国会议文件《有关大陆架界限委员会工作量的问题——提交划界案的初定日期》（SPLOS/1NF/20），下载于 http://daccessdds.un.org/doc/UNDOC/GEN/N08/209/60/PDF/N0820960.pdf?OpenElement，2008 年 12 月 8 日。

8 委员会对俄罗斯和巴西建议的内容未公布，但却公布了对爱尔兰、澳大利亚和新西兰的建议摘要。按照委员会《议事规则》附件三第 12 段的规定，委员会的建议包括 3 种情况：(1) 划界申请附有的数据和其他材料充分，足以作为大陆架外部界限的根据；(2) 划界申请附有的数据和其他材料充分，但据之划定的大陆架外部界限不同于申请所拟议的大陆架外部界限；(3) 划界申请附有的数据和其他材料不充分，不足以作为大陆架外部界限的根据。另外，委员会《议事规则》第 54 条规定："秘书长在妥为公布沿海国依照《公约》第 76 条第 9 款规定交存的，其中永久标明大陆架外部界限的海图和相关资料，包括大地测量数据后，也应妥为公布委员会认为与上述界限有关的委员会建议。"参见 2008 年 4 月 17 日通过的委员会《议事规则》（CLCS/40/Rev.1），下载于 http://daccessdds.un.org/doc/UNDOC/GEN/N08/309/22/PDF/N0830922.pdf?OpenElement，2008 年 12 月 8 日。

9 大陆架界限委员会第二十届会议（2007 年 8 月 27 日至 9 月 14 日）：《大陆架界限委员会主席关于委员会工作进展情况的说明》，第 47 段，下载于 http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements%20by%20the%20Chairman%20of%20the%20Commission，2008 年 12 月 8 日。

10 大陆架界限委员会第十八届会议（2006 年 8 月 21 日至 9 月 15 日）：《大陆架界限委员会主席关于委员会工作进展情况的说明》，第 38 段，下载于 http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements%20by%20the%20Chairman%20of%20the%20Commission，2008 年 12 月 8 日。

以总结，试图找出其中的一些主要特点，从而为我国的申请工作提供参考。为了便于理解，现将《公约》第 76 条有关划定 200 海里以外大陆架外部界限的主要规定介绍如下:第 76 条第 4 款（a）规定："在大陆边从测算领海宽度的基线量起超过 200 海里的任何情形下，沿海国应以下列 2 种方式之一，划定大陆边的外缘:(1) 按照第 7 款，以最外各定点为准划定界线，每一定点上沉积岩厚度至少为从该点至大陆坡脚最短距离的百分之一;或 (2) 按照第 7 款，以离大陆坡脚的距离不超过 60 海里的各定点为准划定界线。"这被称为两个公式:"沉积厚度公式"和"大陆坡脚外 60 海里公式"（海登堡公式）。第 5 款规定:"组成按照第 4 款（a）项第 1 目和第 2 目划定的大陆架在海床上的外部界线的各定点，不应超过从测算领海宽度的基线量起 350 海里，或不应超过连接 2500 公尺深度各点的 2500 公尺等深线外 100 海里。"这被称为两条制约线:"350 海里制约线"和"2500 公尺等深线外 100 海里制约线"。最后，第 7 款规定:"沿海国的大陆架如从测算领海宽度的基线量起超过 200 海里，应连接以经纬度坐标标出的各定点划出长度各不超过 60 海里的若干直线，划定其大陆架的外部界限。"

二、划定 200 海里以外大陆架外部界限的申请

（一）俄罗斯的申请

俄罗斯是第一个按照第 76 条第 8 款的要求向委员会提交划定 200 海里以外大陆架外部界限申请的国家。[11] 俄罗斯 2001 年 12 月 21 日的申请包括 4 个海域:巴伦支海、中北冰洋、白令海、鄂霍次克海。其中，前 3 个区域是由俄罗斯同其邻国——挪威、美国、日本的大陆或岛屿所围绕的飞地，涉及与这些国家的领土或海洋划界争端。而俄罗斯在中北冰洋还可能需要与加拿大和丹麦划分大陆架边界。因此，这 5 个国家分别作出反应，表达了各自的保留或关切。[12] 其中特别值得注意的是，2002 年 2 月 28 日美国的照会不仅涉及与俄罗斯的双边海洋划界问题，而且还对《公约》所规定的提交申请的时限、委员会的建议对申请国基线的影响等一般性的法律问题，以及北冰洋的海底位置数据、阿尔法—门捷列夫海脊、罗蒙诺索

11 俄罗斯申请的执行摘要的英译版，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm，2008 年 12 月 8 日。

12 这 5 个国家的照会和信件，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm，2008 年 12 月 8 日。值得注意的是，加拿大和丹麦当时尚未加入《公约》:前者于 2003 年 11 月 7 日，后者于 2004 年 11 月 16 日成为公约缔约国。而美国则至今也未加入《公约》。另外，加拿大表示不迟于 2013 年 12 月提交申请，而丹麦表示不迟于 2009 年提交部分申请，并且不迟于 2014 年提交另一份申请。参见《有关大陆架界限委员会工作量的问题——提交划界案的初定日期》。

夫海脊等对俄罗斯申请具有决定意义的重要海底特征的认识，提出了自己的看法和建议。[13]

在巴伦支海，俄罗斯将“斯瓦尔巴德盒子”的东侧和南侧[14]作为与挪威的海洋边界，以及其在该地区大陆架的外部界限。[15]在法兰士•约瑟夫地群岛以北，大约北纬 85 度的地方，俄罗斯拟议的外部界限转向东。该段界限在一些地方与俄罗斯 200 海里界限线十分接近，直到大约东经 120 度。然后界限转向北，直到北极点。之后，界限向南沿着西经 168 度 58 分 37 秒直到白令海峡——这其实就是俄罗斯所主张的扇形原则。[16]俄罗斯在巴伦支海和中北冰洋的大陆架外部界限由 32 个定点组成。其中，9 个（定点 1—6 和 30—32）有待与其他国家进一步协商确定；3 个（定点 11、14、15）位于 200 海里界限线上；3 个（定点 7、21、29）基于大陆坡脚外 60 海里公式确定；剩余 17 个则基于沉积厚度公式确定[17]——它们主要利用了罗蒙诺索夫海脊等海底上的高地。在白令海，前苏联和美国 1990 年划分了两国在该地区的海洋边界。[18]位于俄罗斯 200 海里线和俄美边界线之间的白令海大陆架面积约为 21400 平方公里。根据俄罗斯的申请，该地区的沉积岩厚度与至大陆坡脚的最短距离之比都超过 1%，而大陆架外部界限则是按照 1990 年界线划定的。[19]鄂霍次克海 200 海里以外大陆架的面积为 56400 平方公里。在俄罗斯看来，由于该地区周围都是俄罗斯的领土，因此该区域无疑是俄罗斯法律上的大陆架。[20]

在小组委员会审议的基础上，委员会于 2002 年 6 月 27 日经协商一致提出建议。建议载有对俄罗斯所提数据和资料的审查结果，其中特别提到俄罗斯对 200 海里以外大陆架的权利，以及是否按《公约》第 76 条规定适用了公式线和制约线的问题。关于巴伦支海和白令海，委员会的建议是：俟与挪威和美国的海洋划界协定生效后，向委员会提交界线的海图和坐标，这些界线将分别是俄罗斯在巴伦支海和白令海的 200 海里以外大陆架外部界限。关于鄂霍次克海，委员会建议俄罗

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13 美国认为俄罗斯在北冰洋部分的申请有“重大缺陷”。

14 参见 1920 年 2 月 9 日签署，并于 1925 年 8 月 14 日生效的《有关斯匹次卑尔根（斯瓦尔巴德）群岛条约》第 1 条中有关斯瓦尔巴德群岛的定义，下载于 http://www.austlii.edu.au/au/other/dfat/treaties/1925/10.html，2008 年 12 月 8 日。

15 David A. Colson, The Delimitation of the Outer Continental Shelf between Neighboring States, *American Journal of International Law*, 2003, Vol. 97, No. 1, p. 91.

16 David A. Colson, The Delimitation of the Outer Continental Shelf between Neighboring States, *American Journal of International Law*, 2003, Vol. 97, No. 1, p. 91. 同时参见 1990 年 6 月 1 日苏联与美国《海洋边界协定》第 2 条第 1 款，俄罗斯还未批准，因此尚未生效。关于该条约，参见 Jonathan I. Charney and Lewis M. Alexander eds., *International Maritime Boundaries*, Vol. I, Leiden/Boston: Martinus Nijhoff Publishers, 1993, pp. 447~461。

17 俄罗斯申请的执行摘要，第 2 页，表 1：确定俄罗斯联邦在北冰洋大陆架外部界限各点的地理坐标。

18 参见苏联与美国《海洋边界协定》第 2 条第 2 款。

19 俄罗斯申请的执行摘要，第 4 页。

20 俄罗斯申请的执行摘要，第 4 页。

斯就其在该海北部的 200 海里以外大陆架提交一份资料完备的部分申请，该部分申请不应影响与日本的海洋划界问题。虽然《公约》附件二第 4 条规定了 10 年的时限，但南部申请可以在其后提出。同时，委员会建议俄罗斯尽最大努力与日本就南部地区的申请达成协议。至于中北冰洋，委员会建议俄罗斯根据建议所载的审查结果修订其有关该地区的申请。[21] 在委员会做出建议后，俄罗斯于 2003 年 6 月 3 日致信委员会，就委员会的建议提出一些问题和评论。负责审议俄罗斯申请的小组委员会的 5 委员编写了一份答复草稿，委员会在第十三届会议上审查同意后送交俄罗斯。[22] 俄罗斯目前正在准备提出订正的申请。[23]

作为第一个向委员会提交划定 200 海里以外大陆架外部界限的申请，俄罗斯的申请未获得委员会认可的原因至少有以下两方面。第一，当然是俄罗斯未能提供充足的科学证据。虽然具体情况不得而知——因为既未公布俄罗斯的申请，也未公布委员会的建议，甚至连俄罗斯申请的完整的执行摘要也未公布；[24] 但是，从公布的部分执行摘要可以看出，俄罗斯申请的一些地方明显不符合《公约》和委员会《科学和技术指南》的要求。例如，俄罗斯所提交的北冰洋外部界限中的一些直线段超过了《公约》第 76 条所规定的 60 海里的限度：定点 23 和 24 之间的距离是 63.59 海里，定点 24 和 25 之间的距离是 60.82 海里，而定点 27 和 28 之间的距离更长达 132.3 海里。[25] 有鉴于此，委员会在总结处理俄罗斯申请的经验时，强调各国必须遵从其《科学和技术指南》以便利审议其划界申请。[26] 第二，俄罗斯与邻国之间的陆地和海洋争端阻止了委员会审议其在一些海域的申请。本案中，

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21 参见联合国大会第五十七届会议《海洋和海洋法：秘书长的报告（增编）》，A/57/57/Add.1（2002 年 10 月 8 日），第 38~41 段。关于委员会建议的进一步讨论，参见 Ron Macnab, Russia's Submission for Continental Shelf Extensions: the First Test of UNCLOS Article 76, *EEZ International*, July 2003。

22 大陆架界限委员会第十三届会议（2004 年 4 月 26 日至 30 日）：《大陆架界限委员会主席关于委员会工作进展情况的说明》，第 20 段，下载于 http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements%20by%20the%20Chairman%20of%20the%20Commission，2008 年 12 月 8 日。

23 公约附件二第 8 条规定："在沿海国不同意委员会建议的情形下，沿海国应于合理期间内向委员会提出订正的或新的划界案。"

24 联合国秘书长所公布的执行摘要主要是俄罗斯申请的执行摘要中所含的海图和坐标，而没有公布完整的执行摘要。这是因为在委员会 1998 年版的《议事规则》（CLCS/3/Rev.2，1998 年 9 月 4 日通过）中只要求公布与提出的划界申请有关的拟议大陆架外部界限（第 48 条）。而 2004 年版的委员会《议事规则》（CLCS/40，2004 年 7 月 2 日通过）就明确要求"公布执行摘要，包括……载于摘要内的所用海图和坐标"（第 50 条）。

25 俄罗斯申请的执行摘要，第 2 页，表 1：确定俄罗斯联邦在北冰洋大陆架外部界限各点的地理坐标。

26 《大陆架界限委员会第十三届会议》，第 8 段。《大陆架界限委员会科学和技术指南》，CLCS/11，1999 年 5 月 13 日制订，下载于 http://daccessdds.un.org/doc/UNDOC/GEN/N99/171/08/IMG/N9917108.pdf?OpenElement，2008 年 12 月 8 日。2000 年 2 月 24 日修正，CLCS/11/Corr.1，下载于 http://daccessdds.un.org/doc/UNDOC/GEN/N00/355/59/PDF/N0035559.pdf?OpenElement，2008 年 12 月 8 日。

俄罗斯与日本在鄂霍次克海，与挪威在巴伦支海都存在陆地或 / 和海上争端。在鄂霍次克海，由于日本政府强烈请求委员会在其审议俄罗斯申请时不要采取任何妨碍日本和俄罗斯之间有关北方四岛的领土问题或是海洋划界问题的行动，委员会最终只建议俄罗斯为其鄂霍次克海北部的 200 海里以外大陆架提出一个部分申请，同时不得影响俄日两国在鄂霍次克海南部的划界问题。在巴伦支海，尽管挪威在其照会中明确同意委员会在不影响其与俄罗斯之间划界问题的前提下对俄罗斯涉及该“争端区域”的申请进行审查；但委员会最终仍建议俄罗斯通过与挪威的协定来确定其 200 海里以外大陆架的外部界限。

（二）巴西的申请

2004 年 5 月 17 日，巴西通过联合国秘书长向委员会提交划界申请。[27] 申请分为 2 个区域：北区 323658 平方公里，南区 588189 平方公里。这样，巴西申请的 200 海里以外大陆架区域的总面积为 911847 平方公里。[28] 2005 年 3 月巴西向审议其申请的小组委员会提供了大量补充信息。应委员会的要求，2006 年 3 月 1 日巴西提交了一份其申请执行摘要的补遗。[29] 委员会在 2007 年第十九届会议上以 15 票赞成、2 票反对和 0 票弃权的表决结果通过建议。委员会的建议大致针对以下 4 个地理区域：(a) 北部和亚马孙扇形区；(b) 巴西北部和费尔南多德诺罗尼亚海脊；(c) 维多利亚—特林达德海脊；(d) 圣保罗海台和南部区域。[30]

就巴西执行摘要的补遗而言，其大陆架外部界限由 11 段多边形线组成，包括 538 个定点。在这 11 段多边形线中，4 段基于大陆坡脚外 60 海里公式和沉积厚度公式：OL1—OL2（定点 1—20）、OL3—OL4（定点 116—151）、OL5—OL6（定点 152—165）、OL7—OL8（定点 166—201）；3 段根据 350 海里制约线：OL2—OL3（定点 20—116）、OL8—OL9（定点 201—504）、OL10—OL11（定点 506—535）；2 段只基于沉积厚度公式：OL9—OL10（定点 504—506）和 OL11—OL12（定点 535—538）；另有 2 段与巴西的 200 海里界限线重合：OL4—OL5 和

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27 《巴西按照《联合国海洋法公约》第 76 条向大陆架界限委员会的申请执行摘要》，下载于 http://www.un.org/Depts/1os/clcs_new/submissions_files/submission_bra.htm，2008 年 12 月 8 日。

28 巴西在其执行摘要的补遗中将该面积调整为 953525 平方公里。Addendum to the Executive Summary, at http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_add_executive_summary.pdf，2008 年 12 月 8 日。

29 Addendum to the Executive Summary, at http://www.un.org/Depts/los/clcs_ new/submissions_files/bra04/bra_add_executive_summary.pdf，2008 年 12 月 8 日。

30 大陆架界限委员会第十九届会议（2007 年 3 月 5 日至 4 月 13 日）：《大陆架界限委员会主席关于委员会工作进展情况的说明》，第 14 段和第 22 段，下载于 http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements%20by%20the%20Chairman%20of% 20the%20Comrnission，2008 年 12 月 8 日。

OL6—OL7。在总共 538 个定点中，2 个（起点和终点）是与邻国海洋边界的交点；4 个是与 200 海里界限线的交点；27 个基于沉积厚度公式；74 个基于大陆坡脚外 60 海里公式；其余 431 个基于 350 海里制约线。定点之间的最大距离为 59.8 海里（定点 196—197），这 2 个点都是基于沉积厚度公式。绝大部分定点之间的距离为“2 海里或小于 2 海里”，且主要出现在以下 2 种情况：一是相邻定点都位于 350 海里制约线上；二是相邻定点都位于围绕着同一个大陆坡脚点所划的 60 海里的圆弧上。之所以出现这种情况，是因为《公约》第 76 条第 7 款要求沿海国“应连接以经纬度坐标标出的各定点划出长度各不超过 60 海里的若干直线”，划定其 200 海里以外大陆架的外部界限。也就是说，200 海里以外大陆架的外部界限必须是由若干连接不同定点的直线段所组成的一条折线，而不能是一条弧线——不论 200 海里以外大陆架的外部界限是根据公式线还是制约线划定的。换言之，沿海国不得直接将 2500 米等深线外 100 海里、350 海里、或大陆坡脚外 60 海里的弧线用作大陆架外部界限，而必须在这些弧线上选取彼此距离不超过 60 海里的定点，然后用直线连接起来。[31] 在这种情况下，位于有关弧线上的相邻定点之间的距离越短，其所形成的折线就越接近弧线，两者之间的面积就越小，而有关沿海国所获得的 200 海里以外大陆架的面积也就越大。这就是为何巴西将在 60 海里弧线上和 350 海里弧线上的各定点之间的距离确定为“2 海里或小于 2 海里”的原因。其实，与后来遇到类似情况的其他申请国将定点之间的距离定为 1 海里或小于 1 海里相比，巴西所定的定点之间的距离还是过大了。

第一，与俄罗斯的申请相比，海底上的高地同样是巴西申请中的关键问题，它包括：费尔南多德诺罗尼亚海脊、圣保罗海台、以及争议最大的维多利亚—特林达德海脊—它涉及 OL5—OL6 和 OL7—OL8 段外部界限的划定。2004 年 8 月 25 日，美国专门给委员会去信讨论了维多利亚—特林迪达特征和沉积厚度问题。[32] 关于沉积厚度，美国认为巴西执行摘要中所提供的沉积厚度与从可以公开获得的来源中得出的沉积厚度之间有差异，因此建议委员会仔细审查巴西的沉积厚度数据。关于维多利亚—特林迪达特征，美国怀疑该特征是否为巴西大陆边的一部分，因此建议委员会采取谨慎态度。美国的这一做法实际涉及其他国家在委员会审议划界申请中的作用问题。这一问题在委员会审议俄罗斯申请的过程中就已经出现了，[33] 但委员会当时并未做出公开反应。针对美国的这次来信，委员会指出：“对于沿海国就 200 海里以外大陆架外部界限提出的数据和其他资料的审议，《公约》附件二和委员会《议事规则》规定其他国家只能发挥一项作用。只有在海岸相向或相邻国家之间的争端，或在其他未决的陆地或海洋争端的情况下，委员会才须

31 参见《科学和技术指南》，第 2.3.10 段。

32 美国的来信，下载于 http://www.un.org/Depts/1os/clcs_new/submissions_files/submission_bra.htm，2008 年 12 月 8 日。

33 参见美国关于俄罗斯申请的照会。

考虑申请国以外的其他国家的来函。因此，委员会的结论是，不应考虑美国来信的内容。”[34] 在收到委员会的上述声明后，美国于 2004 年 10 月 25 日再次给委员会去信，请求委员会重新考虑其结论。美国首先表示不同意委员会关于其《议事规则》的解读。该规则附件三第 2 段（a）分段（v）规定，沿海国代表应对“其他国家就反映在执行摘要中的数据，包括所有海图和坐标——它们是秘书长依照第 50 条规定公布的，所发的普通照会”做出评论。在美国看来，这样《议事规则》就特别预计到其他国家应有机会就“反映在执行摘要中的数据”发表评论，而委员会将考虑这些评论以及沿海国的反应。美国认为，这些评论显然不限于有关争端的信息，因为附件三第 2 段（b）分段单独规定了“考虑任何与申请有关的任何争端的信息”。因此，美国相信《议事规则》实际上要求委员会考虑“其他国家就反映在执行摘要中的数据”所做的评论，而不仅仅是与海岸相向或相邻国家之间的争端或其他争端相关的评论。再者，美国认为，即使委员会的《议事规则》不要求委员会考虑与申请国有未决争端的相关国家以外国家的来函，《议事规则》也并不禁止委员会这样做。而且，既然委员会将利用其专业技术彻底审查与每个申请所涵盖区域有关的科学文献，那么它为何不能稍微考虑一下其他国家的意见呢？美国强调，倘若申请国在扩张其大陆架过程中有明显的利益，那么其他国家以及国际社会整体在该问题上也有合法利益，而且或许能对申请中一些可能不被考虑的方面提供帮助。[35] 但是，委员会在进一步讨论了这个问题后认为没有必要改变其以前的决定。[36]

第二，巴西的申请又与俄罗斯的申请有许多不同之处。首先，巴西与其他国家不存在陆地或海洋争端。[37] 其次，委员会对巴西申请的审议用了近 3 年时间，而委员会只花了半年时间就完成了对俄罗斯申请的审议。这其中的一个重要原因是巴西在小组委员会审议过程中又提交了大量新的材料，而且重大偏离了其先前提交的外部界限。尽管巴西强调“提供的进一步材料和资料并不构成新的或订正的

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34 大陆架界限委员会第十四届会议（2004 年 8 月 30 日至 9 月 3 日）：《大陆架界限委员会主席关于委员会工作进展情况的说明》，第 17 段，下载于 http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements%20by%20the%20Chairman%20of%20the%20Commission，2008 年 12 月 8 日。

35 美国的复信，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bra.htm，2008 年 12 月 8 日。

36 大陆架界限委员会第十五届会议（2005 年 4 月 4 日至 22 日）：《大陆架界限委员会主席关于委员会工作进展情况的说明》，第 17 段，下载于 http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements%20by%20the%20Chairman%20of%20the%20Commission，2008 年 12 月 8 日。

37 巴西已经和其邻国划分了海洋边界。1972 年 7 月 21 日《巴西和乌拉圭关于订立最终确定朱伊河河岸和侧向海洋边界的协定的换文》，1975 年 6 月 12 日生效。1981 年 1 月 30 日《法兰西共和国政府和巴西联邦共和国政府关于巴西和法属圭亚那之间海洋划界协定》，1981 年 1 月 30 日生效。

划界案”，[38] 但 2005 年 5 月 27 日委员会决定专门就以下问题征求联合国法律顾问的法律意见：“根据《公约》和委员会《议事规则》的规定，已依照《公约》第 76 条规定向委员会提交划界案的沿海国，是否可以在委员会审议该国划界案期间，就该国大陆架或其重大部分的界限，向委员会提供有关的进一步材料和资料;这些材料和资料构成对联合国秘书长根据委员会《议事规则》第 50 条妥为公布的原有界限和公式线的重大偏离?”联合国法律顾问的答复是：《公约》并没有禁止沿海国在委员会审查该国申请期间通知委员会，在对原来为支持本国大陆架或其重大部分的界限的细节而提交委员会的科学和技术数据作进一步分析后，该国断定，申请细节有不正确之处，因此必须调整其大陆架外部界限。同样，如果有关沿海国认为，根据该国所得到的进一步科学和技术数据，应当就该国大陆架或其重大部分的界限提交新的细节，《公约》也没有规定沿海国不得在委员会审查其原来提交的资料期间向委员会提交新的细节。不能将《公约》没有明示规定沿海国可以在委员会审查原申请期间提交新的细节解释为默示沿海国不可以这样做。然而，在上述 2 种情况下，有关沿海国都应向委员会解释，该国认为原来提交委员会的部分大陆架界限必须予以调整或修改的理由，并为支持这项结论提供必要的科学和技术数据。如果新的细节导致重大偏离联合国秘书长妥为公布的执行摘要内的原界限，新提议的大陆架外部界限细节显然应同样妥为公布。至于原来提交的细节和新提出的细节之间是否有重大差异的问题，只能由委员会审议。如果委员会断定差异重大，可以考虑为妥为公布这些新资料，请有关沿海国向联合国秘书长提供执行摘要的增编。沿海国当然可以自行作出上述决定，直接向秘书长提供增编以供妥为公布。但是，秘书长在这方面应当依照委员会的指导行事。然而，沿海国应当善意、谨慎行事，避免不当拖延或推迟委员会的工作。[39] 根据法律顾问的上述意见，委员会要求巴西为其申请的执行摘要补遗，而这一过程大大推迟了委员会编写建议的工作。

第三，按照委员会的要求，巴西对其先前的执行摘要提交了补遗。与最初的执行摘要相比，该补遗更加详细，更符合委员会关于执行摘要的要求。[40] 在最初的摘要中，巴西大陆架的外部界限只分为 5 个部分，包括 75 个定点;而补遗增加为 11 个部分，538 个定点。另外，原先的执行摘要没有依照委员会的要求阐明曾为

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38 《就 CLCS/44 号文件内关于大陆架界限委员会的协商给法律顾问作出的澄清》(2005 年 6 月 20 日)，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bra.htm，2008 年 12 月 8 日。

39 《2005 年 8 月 25 日联合国主管法律事务副秘书长、法律顾问给大陆架界限委员会主席的信》，载于 CLCS/46 号文件。

40 委员会《科学和技术指南》第 9.1.4 段规定：“执行摘要应含有以下资料：(a) 以适当比例尺和坐标显示大陆架外部界限和有关领海基线的海图；(b) 划界案中引用的是《公约》第 76 条的哪几款规定；(c) 在拟订划界案时提供咨询意见的委员会成员姓名;和 (d)《委员会议事规则》第 44 条和附件一所述任何争端。”

巴西的申请提供过科学和技术咨询意见的委员会成员姓名。[41] 而且，该补遗通过修改最初的外部界限，使巴西 200 海里以外大陆架的面积增加了 5.5%。[42] 可以说，虽然称为执行摘要的“补遗”，但该补遗才是巴西申请的真正的执行摘要。

第四，委员会对巴西申请所提的建议是以 15 票赞成、2 票反对和 0 票弃权的表决结果通过的，并非像对俄罗斯的申请那样以协商一致的方式通过。[43]

第五，委员会从审查巴西的申请开始使用新的规则，增加了委员会与沿海国之间的互动频率。具体包括：(1) 在审查申请的后期阶段，小组委员会应邀请沿海国代表团参加一次或数次会议，其间，小组委员会应全面陈述其在审查申请部分或全部内容后得出的看法和一般性结论。(2) 沿海国应有机会在同一会议期间和（或）在稍后阶段，按照代表团与小组委员会商定的形式与时间安排，对小组委员会的陈述做出答复。[44] (3) 在小组委员会向委员会提出建议之后，委员会审议并通过建议之前，沿海国如果愿意，可有半天时间在委员会全体会议上介绍与划界案有关的任何事项。[45] 这些新规则的应用当然影响到委员会对巴西以及其后申请的审议效率。

（三）澳大利亚的申请

2004 年 11 月 15 日，澳大利亚向委员会提交了划定 200 海里以外大陆架外部界限的申请。[46] 值得注意的是，该申请日期恰恰是《公约》对澳大利亚生效满 10 年之日。澳大利亚的申请共包括 10 个区域，[47] 其中 2 号区是“澳大利亚的南极领土”。预料到该部分申请将引发其他国家的强烈反对，在提交申请的同时，澳大利亚给联合国秘书长发了一封照会。其中，澳大利亚考虑到南纬 60 度以南地区的情况，《南极条约》所规定的南极特殊的法律和政治地位，特别是其第 4 条指出，附属南极的大陆架区域的范围尚未确定。有鉴于此，澳大利亚请求委员会目前不

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41 参见《议事规则》附件三第 2 段（a）分段。
42 《大陆架界限委员会第十九届会议》，第 18 段。
43 《大陆架界限委员会第十九届会议》，第 22 段。
44 《大陆架界限委员会第十七届会议》，第 36 段。参见《议事规则》附件三第 10 段。
45 《大陆架界限委员会第十七届会议》，第 43 段。参见《议事规则》附件三第 15 段。
46 《〈联合国海洋法公约〉：向大陆架界限委员会提交澳大利亚从领海基线量起 200 海里以外的大陆架外部界限执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm，2008 年 12 月 8 日。
47 它们是：1. 阿尔戈；2. 澳大利亚的南极领土；3. 澳大利亚大海湾；4. 凯尔盖朗海台；5. 豪勋爵海隆；6. 麦夸里海岭；7. 博物学家海台；8. 南塔斯曼海隆；9. 三王海脊；10. 沃勒比和埃克斯茅斯海台。

要对其划界申请中涉及附属南极的大陆架部分的信息采取任何行动。[48] 共有 8 个国家就澳大利亚的申请提出照会。其中，美国、俄罗斯、日本、荷兰、德国和印度在照会中主要重申各自关于不承认任何国家对南极的领土主张，因此也不承认任何国家对南极大陆以外并邻接南极大陆的水下区域的海床和底土的权利。而法国和东帝汶的照会则主要涉及与澳大利亚的海洋划界问题。[49] 委员会在 2008 年 4 月第二十一届会议上以 14 票赞成、3 票反对和 1 票弃权的表决结果通过了建议。

澳大利亚的申请是迄今最为复杂的申请之一，所涉及的 200 海里以外大陆架的面积高达 3371990 平方公里。申请中的定点不仅有按照《公约》第 76 条规定划定的，而且还有许多是按照与邻国的海洋划界条约确定的。[50] 就按照第 76 条划定的定点而言，2 种公式线和 2 种制约线都使用了。其中，沉积厚度公式在澳大利亚南极领土区域的外部界限划定中发挥了主导作用，但在其他区域的作用则十分有限。绝大部分外部界限是按照大陆坡脚外 60 海里公式划定的。澳大利申请的一个突出特点是外部界限的划定大量涉及海底上的高地，这从申请中各个区域的名称就一目了然:凯尔盖朗海台、豪勋爵海隆、麦夸里海岭、博物学家海台、南塔斯曼海隆、三王海脊、沃勒比和埃克斯茅斯海台。由于海底上的高地问题是第 76 条中的一个难题，因此在小组委员会审议澳大利亚申请的过程中，如何认定这些海底上的高地的性质必然是一个棘手的核心问题。而委员会两度推迟提出建议，并最终被迫以 14 票赞成、3 票反对和 1 票弃权的表决结果通过建议的事实也反映出，委员会内部对这些问题的认识也存在很大的分歧。

澳大利亚的申请还涉及南极这一重要地区。作为南极制度基础的 1959 年《南极条约》第 4 条冻结了有关南极的领土主权问题。[51] 按照“陆地统治海洋”原则，自然也就冻结了附属于南极的大陆架区域。其实，即使澳大利亚不主动请求委员会不审议涉及附属南极的大陆架部分的信息，其他国家的反对也足以构成阻止委

48 Note from the Permanent Mission of Australia to the Secretary General of the United Nations accompanying the lodgment of Australia's submission Attachment, at http://www.tin.org/Depts/los/clcs_new/submissions_files/submission_aus.htm, 8 December 2008.《南极条约》1959 年 12 月 1 日签订，1961 年 6 月 23 日生效。

49 下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm，2008 年 12 月 8 日。值得注意的是，虽然法国也对南极提出领土主张，但并未在照会中就此发表评论。另外，印度表示不迟于 2009 年 5 月 13 日提交申请。参见《有关大陆架界限委员会工作量的问题——提交划界案的初定日期》。

50 澳大利亚的申请主要涉及与法国和新西兰的划界条约。1982 年 1 月 4 日《法兰西共和国政府和澳大利亚政府海洋划界协定》，1983 年 1 月 9 日生效；2004 年 7 月 25 日《新西兰政府和澳大利亚政府之间关于确立某些专属经济区和大陆架边界的条约》。

51 特别是，该条第 2 款规定：“在本条约有效期间所发生的一切行为或活动，不得构成主张、支持或否定对南极的领土主权的要求的基础，也不得创立在南极的任何主权权利。在本条约有效期间，对在南极的领土主权不得提出新的要求或扩大现有的要求。”7 个国家对南极提出领土主权要求，包括:澳大利亚、阿根廷、新西兰、英国、智利、挪威、法国。同时，有超过 35 个其他《南极条约》的缔约国不主张或不承认对南极的领土主权。

员会进行审议的“未解决的陆地或海洋争端”。[52] 委员会在澳大利亚以及其他国家就南极问题所提照会的基础上，[53] 决定不审议与执行摘要中提到、2 号区有关的澳大利亚申请的部分。[54] 然而，除澳大利亚南极领土这一地区外，澳大利亚在凯尔盖朗海台和麦夸里海岭地区的 200 海里以外大陆架的界限也侵入南纬 60 度以南地区，即侵入《南极条约》的适用范围。[55] 其中，凯尔盖朗海台地区的大陆架直到南极大陆 200 海里的界限。而且，澳大利亚在其照会中明确请求委员会目前不要对申请中涉及附属南极的大陆架部分的信息采取任何行动。但是，委员会似乎仅仅决定不审议申请中的 2 号地区，即澳大利亚的南极领土部分。这充分暴露出委员会的组成中缺乏法律人士所产生的问题。[56]

（四）爱尔兰的申请

2005 年 5 月 25 日爱尔兰向委员会提交划定邻接波丘派恩深海平原 200 海里以外大陆架外部界限的信息。[57] 据估计，所涉及的大陆架区域的面积约为 39000 平方公里。[58] 与之前 3 个申请的最大不同是，爱尔兰此次提交的是一个部分申请。爱尔兰 200 海里以外的大陆架区域包括 3 个部分：哈顿—罗科尔地区（A 区）、波丘派恩深海平原（B 区）和凯尔特海（C 区）。爱尔兰此次仅将波丘派恩深海平原 200 海里以外大陆架界限的情报提交委员会，同时表示关于其他 2 个部分的申请将于以后提出。促使爱尔兰做出这一选择的主要原因是“为了不影响在爱尔兰所主张的扩展大陆架其他部分的爱尔兰和其邻国间的尚未解决的划界问题”，而提出申请的“这部分大陆架不存在任何争议”。[59] 在哈顿—罗科尔地区，爱尔兰需要与英国、冰岛和丹麦（法罗群岛）划分大陆架边界，为此，冰岛和丹麦政府分别发表照会，强调爱尔兰提交申请和委员会的建议不能对两国将来的申请有任何影

52 参见委员会《议事规则》第 46 条。

53 特别是，荷兰在其照会中明确指出，澳大利亚对南极的领土要求还有未解决的陆地争端，并对澳大利亚根据委员会《议事规则》附件一第 2 段告知委员会上述争端表示理解。

54 《大陆架界限委员会第十五届会议》，第 23 段。

55 参见《南极条约》第 6 条，该条规定“本条约的规定应适用于南纬 60 度以南的地区，包括一切冰架；但本条约的规定不应损害或在任何方面影响任何一个国家在该地区内根据国际法所享有的对公海的权利或行使这些权利。”

56 《公约》附件二第 2 条第 1 款规定：“委员会应是地质学、地球物理学或水文学方面的专家”。

57 《爱尔兰根据 1982 年〈联合国海洋法公约〉第 76 条第 8 款就毗邻波丘派恩深海平原地区向大陆架界限委员会的申请执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_irl. htm，2008 年 12 月 8 日。

58 Ireland can extend territorial waters, at http://www.ireland.com/newspaper/breaking/2007/0407/breakingl.htm, 8 December 2008.

59 《爱尔兰根据 1982 年〈联合国海洋法公约〉第 76 条第 8 款就毗邻波丘派恩深海平原地区向大陆架界限委员会的申请执行摘要》，第 5 节。

响，也不能影响两国和爱尔兰之间在该地区的大陆架划界。[60] 在凯尔特海地区，爱尔兰需要与英国、法国和西班牙划分边界。后来这 4 个国家联合将该地区的大陆架外部界限提交给委员会。[61] 另外，1988 年，爱尔兰和英国划分了双方在上述 2 个地区的大陆架。[62] 经过审议，委员会在其 2007 年第十九届会议上以 14 票赞成、2 票反对和 2 票弃权的表决结果通过了建议。[63]

与委员会之前收到的申请相比，爱尔兰的此次部分申请比较简单。确定外部界限的定点只有 39 个。其中，除 2 个基于沉积厚度公式外，其余全部基于大陆坡脚外 60 海里公式，而且没有使用制约线。构成外部界限的直线段最长 59.75 海里（定点 10—11），最短 0.67 海里（定点 38—39），绝大部分为 1 海里（定点 3—10、11—32、33—38）。[64] 因此，虽然申请的执行摘要中说选择了 15 个大陆坡脚点，但实际上可能只用了 6 个。这就是为什么委员会能够在做出澳大利亚申请的建议之前通过对爱尔兰申请的建议的原因。然而，委员会的建议也并非协商一致的结果，而这很可能是因为爱尔兰的大陆坡脚点都是沿一个海底上的高地即波丘派恩海脊—戈班坡尖选择的缘故。

（五）新西兰的申请

2006 年 4 月 19 日，新西兰向委员会提交了划定 200 海里以外大陆架外部界限的申请。[65] 与爱尔兰的申请一样，新西兰的申请也是一个部分申请，“不包括属于南极的大陆架区域”。另外，和澳大利亚的做法一致，新西兰在提交申请的同时也就南极地区的大陆架问题提交了一份内容与澳大利亚照会十分类似的照会。不同的是，澳大利亚在照会中请求委员会不对其申请中涉及附属南极的大陆架部分的信息采取行动，而新西兰在照会中则表示有关南极地区的大陆架申请将在以后

60 冰岛和丹麦的照会，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_irl.htm，2008 年 12 月 8 日。

61 参见法国、爱尔兰、西班牙、英国的联合申请。

62 1988 年 11 月 7 日《大不列颠及北爱尔兰联合王国政府和爱尔兰共和国政府关于两国间大陆架区域的划界协定》，1990 年 1 月 11 日生效。

63 《大陆架界限委员会第十九届会议》，第 37 段。据报道，委员会似乎认可了爱尔兰拟议的大陆架外部界限。Ireland can extend territorial waters, at http://www.ireland.com/newspaper/breaking/2007/0407/breakingl.htm, 8 December 2008.

64 参见爱尔兰执行摘要的附件 1.1：确定爱尔兰在邻接波丘派恩深海平原地区扩展大陆架外部界限的坐标。

65 《新西兰根据〈联合国海洋法公约〉第 76 条第 8 款向大陆架界限委员会的申请执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htrn, 2008 年 12 月 8 日。

提出。[66] 新西兰的申请包括 4 个区域：北区（包括三王海脊、科尔维尔海岭、北克马德克海脊和克马德克海沟）、东区（包括南克马德克海脊和克马德克海沟，希库郎伊海台、查塔姆海隆、邦蒂海沟、以及北坎贝尔海台）、南区（包括坎贝尔海台南陆边）和西区（包括南诺福克海脊体系、新喀里多尼亚海盆、挑战者号海台、豪勋爵海隆，以及麦夸里海脊构造）。值得注意的是，在秘书长公布了新西兰申请的执行摘要以及摘要中的海图和坐标后不久，2006 年 5 月 31 日，新西兰就提交了误表，对北区的定点进行了大范围的修正。[67]

共有 5 个国家对新西兰的申请提出照会。其中，日本和荷兰在照会中重申不承认任何国家在南极的领土权利或主张，因此也不承认任何国家对邻接南极大陆的水域和其水下区域的海床和底土的任何权利主张。而斐济和汤加的照会则事关它们与新西兰在克马德克海脊、哈佛海沟和科尔维尔海岭地区划分大陆架边界的问题，两国虽然表示不反对委员会审议该部分申请并做出建议，但强调新西兰的申请以及委员会的任何建议将不对它们与新西兰之间的大陆架划界产生影响。值得注意的是法国的照会，新西兰在执行摘要中并未说明与法国之间存在划界争端，但法国政府在 2006 年 7 月 10 日的照会中指出，在新西兰申请中的三王海脊地区，法国的新喀里多尼亚与新西兰之间有一条潜在的边界需要划分。[68] 对此，新西兰同日提交照会表示同意法国政府的这一观点，并确认新西兰的申请不会对将来两国在该地区可能进行的任何划界结果产生影响。[69]

新西兰在申请中共使用了 1811 个（更正后为 1810 个）定点，其中绝大部分是按照大陆坡脚外 60 海里公式确定的，只有少部分使用了沉积厚度公式，而且主要在东区和西区。另外，还使用 2500 米等深线外 100 海里的制约线确定了 127 个定点，而利用 350 海里制约线确定了 1 个定点。新西兰在申请的 4 个区域中都大量利用了海底上的高地，而其中一些已经包括在澳大利亚的申请中，如三王海脊、豪勋爵海隆，以及麦夸里海脊构造。由于委员会已经完成了对澳大利亚申请的审议，因此可以预料，其在审议新西兰申请中的这些部分时基本上会采取相同立场。另外，与澳大利亚的申请一样，新西兰申请中各定点之间的距离绝大部分

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66 Note from the Permanent Mission of New Zealand to the Secretary General of the United Nations accompanying the lodgment of New Zealand's submission, at http://www.un.org/Depts/los/cles_new/submissions_files/nzl06/nzl_doc_es_attachment.pdf, 8 December 2008.

67 Continental Shelf Submission of New Zealand – Corrigendum to the Executive Summary, at http://www.un.org/Depts/los/clcs_new/ submissions_files/nzl06/nzl_exec_sum_corr.pdf, 8 December2008.

68 下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nzl.htm。另外，汤加表示打算提交申请，但日期尚未确定。参见《有关大陆架界限委员会工作量的问题——提交划界案的初定日期》。

69 Note from the Permanent Mission of New Zealand addressed to the Secretariat of the United Nations, at http://www.un.or/Depts/los/clcs_new/submissions_files/submission_nzl.htm, 8 Decernber 2008.

都小于 1 海里。以更正后的北区定点为例，其中点 3—18 各定点之间的距离均为 0.5040 海里；点 19—63 各定点之间的距离均为 0.5018 海里；点 66—169 各定点之间距离均为 0.5078 海里；点 171—182 各定点之间的距离均为 0.4831 海里；点 184—204 各定点之间的距离均为 0.5055 海里；点 233—285 各定点之间的距离均为 0.6484 海里；点 286—3108 各定点之间的距离均为 0.64130 海里。[70] 这样做的主要意图当然是尽可能多的将 200 海里以外的大陆架包围进来。2008 年 8 月 22 日委员会通过了对新西兰申请的建议。

（六）法国、爱尔兰、西班牙、英合申请

2006 年 5 月 19 日，法国、爱尔兰、西班牙和英国向委员会提交了凯尔特海和比斯开湾 200 海里以外大陆架界限的资料。[71] 申请所附的照会说：“申请具有联合的性质，是由 4 个沿海国集体协作准备的单一工程。对 4 个沿海国中的每一个而言，该联合申请都代表着一个部分申请。该部分大陆架没有任何争端，而且在该四国看来，委员会对其审议将不影响该四国与任何其他国家之间的划界事宜”，“为了不影响四国和他们的一些邻国在归属四国的大陆架的其他部分尚未解决的划界问题，那些部分的申请将在以后提出 。”[72] 因此，该申请不仅是一个部分申请，而且还是委员会收到的第一份联合申请，也是目前为止唯一的联合申请。[73] 该联合申请与爱尔兰之前单独提交的部分申请的南部界限相连，利用 3 个大陆坡脚确定了 31 个定点。除一个（定点 30）利用沉积厚度公式，一个利用 200 海里界限外，其余 29 个全部根据大陆坡脚外 60 海里公式产生。定点之间的最大距离为 59.5 海里（点 30—31），在由同一个大陆坡脚点产生的各定点之间的距离均为 1 海里。[74] 由于包括了该地区可能存在划界争端的所有沿海国，因此没有任何国家对该申请提出照会，这是之前没有出现过的情况。

然而，虽然这 4 个沿海国强调其申请的单一性质，但委员会却指出：“在任何

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70 See Table NZ–ES–App 1–1.1–Corr. 1 Fixed points comprising the outer limits of the extended continental shelf in the Northern Region – CORRIGENDUM.

71 《法国、爱尔兰、西班牙、英国根据 1982 年〈联合国海洋法公约〉第 76 条第 8 款就凯尔特海和比斯开湾地区向大陆架界限委员会的申请执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_frgbires.htm，2008 年 12 月 8 日。

72 See Submissions to the Commission: Joint submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland, at http://www.un.org/Depts/los/cles_new/submissions_files/submission_frgbires.htm, 8 December 2008.

73 委员会《议事规则》附件一第 4 段规定：“2 个或更多的沿海国可以通过协议，共同……向委员会提出划界案，请委员会就划界问题提出建议，条件是：（a）不考虑这些国家间划定的边界；或 (b) 在以大地测量坐标标明的范围内，划界案不妨害与本协定另一缔约国或其他缔约国划定边界的事项。”

74 《确定凯尔特海和比斯开湾地区扩展大陆架外部界限的坐标清单执行摘要》，第 8 节。

联合划界案中，每一沿海国必须就大陆坡脚、所用的公式、制约因素和各自的外部界限，自行确定一套标准。”[75] 换言之，联合申请的各个参与国都必须就该联合申请中属于自己的 200 海里以外大陆架的外部界限单独提出主张并加以证明。委员会的理由是，“2 个或更多的国家在存在海岸相向或相邻国家间的争端或其他未解决的陆地或海洋争端的情况下，选择提出联合划界案的问题属于程序性质，因此，这并不改变《公约》第 76 条赋予它们权利的实质内容。因此，联合划界案中提出的大陆架外部界限所导致的大陆架总面积不能大于各国在单独提出划界案时提出的大陆架外部界限形成的大陆架个别面积之和。”[76] 委员会的这种担心并非杞人忧天。因为沿海国虽然可以选择其海岸外对自己最为有利的公式线和制约线来确定其大陆架外部界限，但却不能利用其他国家海岸外的公式线和制约线来实现扩张其大陆架的目的。借助其他国家海岸外的公式线和制约线的情况在沿海国单独提出申请时不容易发生，但在几个沿海国联合提出申请时却可能发生。此时几个申请国可能会将不同沿海国海岸外的公式线和制约线进行组合，以实现扩张共同大陆架的目的。

（七）挪威的申请

2006 年 11 月 27 日，挪威向委员会提交了东北大西洋和北冰洋中下列 3 个区域的 200 海里以外大陆架界限的情报：巴伦支海中的圈洞，北冰洋中的西南森海盆，以及挪威海中的香蕉洞。[77] 一方面，由于位于巴伦支海的圈洞的大陆架覆盖了挪威和俄罗斯 200 海里界限外的全部区域，而位于挪威海的香蕉洞的大陆架覆盖了挪威大陆、丹麦（法罗群岛）、冰岛和挪威的扬马延岛 200 海里界限以外的整个地区，因此挪威在这 2 个地区只进行了权利证明，而没有提出具体的外部界限；[78] 另一方面，在确定北冰洋中的西南森海盆和位于格陵兰海中的香蕉洞的外部界限的全部定点中，只有 2 个基于沉积厚度公式，其余全都基于大陆坡脚点 60 海里公

75 《大陆架界限委员会第二十届会议》，第 28 段。

76 《大陆架界限委员会第二十届会议》，第 27 段。四国代表团协调人在委员会第二十一届会议上发言说明了四国代表团对委员会上述决定的关注。《大陆架界限委员会第二十一届会议》，第 19~20 段。

77 《挪威有关北冰洋、巴伦支海和挪威海的大陆架申请执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm，2008 年 12 月 8 日。

78 巴伦支海的圈洞整个位于大陆坡脚和 2500 米等深线向陆地一侧。《挪威有关北冰洋、巴伦支海和挪威海的大陆架申请执行摘要》，第 7.1 节，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm，2008 年 12 月 8 日。而适用第 76 条第 4 款 a 项的规定则显示，从扬马延向东南扩展的大陆边与从挪威大陆向西扩张的大陆边相重叠，完全覆盖了挪威海的香蕉洞区域。《挪威有关北冰洋、巴伦支海和挪威海的大陆架申请执行摘要》，第 7.3.2 节，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm，2008 年 12 月 8 日。

式，没有使用制约线。定点之间的最大距离为 60 海里（GS1–GS2），而绝大部分定点之间的距离为 0.54 海里（1000 米）。[79] 挪威在申请中表示，除上述地区外，或许会就其他地区提出进一步的申请。[80] 由此，挪威的此次申请也是一个部分申请。

挪威申请的一个突出特点是在提出申请前很好地处理了与周边国家的海洋划界争端，特别是涉及挪威海香蕉洞的部分，从而避免了出现由于其他国家的反对而导致委员会无法进行审议的局面。为了能够顺利地提交申请并由委员会进行审议，2006 年 9 月 20 日，挪威、丹麦以及冰岛外长签署了《关于法罗群岛、冰岛和挪威之间在东北大西洋香蕉洞南部地区 200 海里以外大陆架划界的备忘录》，规定当一国向委员会提交该地区外部界限的资料时，其他国家将按照委员会的《议事规则》通知联合国秘书长，指出它们不反对委员会考虑该申请并在此基础上做出建议。此类建议不影响这些国家后来的申请，也不影响这 3 个国家相互间划分大陆架的问题，最终的界线将通过双边协定加以确定。而这些协定将在委员会审查了这 3 个国家提交的申请并作出建议之后缔结。[81] 按照该《备忘录》的规定，丹麦和冰岛在挪威提出申请后通知联合国秘书长，声明它们不反对委员会考虑该申请并在此基础上提出建议。[82]

挪威申请的另一个特点是，第一次出现了 2 个申请中的区域发生重叠的情况，即位于巴伦支海的圈洞——该地区已经包括在俄罗斯的申请中。当时挪威在照会中指出这是一个争议海域，挪威虽然同意委员会审议俄罗斯有关该区域的申请并提出建议，但强调不影响挪威和俄罗斯之间的大陆架划界。委员会后来建议俄罗斯在其与挪威的海洋边界协定生效后，将界线的海图和坐标提交给委员会。此次，在挪威提出申请后，俄罗斯提交了内容大致相同的照会。[83] 可以预料，委员会将就巴伦支海的圈洞作出与对俄罗斯申请类似的建议。

本次申请还涉及国际法上的一个特殊制度，即按照 1920 年《有关斯匹次卑尔根（斯瓦尔巴德群）群岛条约》所确立的有关斯瓦尔巴德群岛的制度。这一条约规定，挪威对斯瓦尔巴德群岛享有主权，但同时必须承担允许所有缔约国的国民不

79 参见挪威申请的执行摘要，附件 1：挪威大陆架外部界限的坐标和情报。
80 挪威申请的执行摘要，第 2 节。
81 参见挪威申请的执行摘要，第 6.1 节。
82 丹麦和冰岛的照会，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm，2008 年 12 月 8 日。另外，冰岛表示打算不迟于 2009 年 5 月 13 日提交部分申请。参见《联合国海洋法公约》缔约国会议文件：《有关大陆架界限委员会工作量的问题－－提交划界案的初定日期（增编）》，下载于 http://daccessdds.un.org/doc/UNDOC/GEN/N08/331/40/PDF/NO833140.pdf?OpenElement，2008 年 12 月 8 日。
83 俄罗斯的照会，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor. htm，2008 年 12 月 8 日。

受任何歧视地在平等条件下自由开发群岛的生物和矿产资源的义务。[84] 但问题是这里的资源是否包括当时法律上尚未存在的大陆架上的自然资源。挪威在申请中的 3 个地区都利用了该群岛将大陆架扩展到 200 海里以外。俄罗斯在照会中指出，挪威的申请不妨害俄罗斯有关斯匹次卑尔根群岛及其大陆架的立场，而委员会就挪威申请所做建议不应妨害 1920 年条约的规定，因此也不应妨害邻接斯匹次卑尔根海域的制度。而西班牙在照会中更是直接指出，1920 年条约完全适用于 200 海里以外的区域，并声明保留对斯瓦尔巴德群岛可能被确定为大陆架上的资源的权利。[85] 对此，挪威回复说，西班牙在其照会中所表达的观点涉及 1920 年条约某些条款的解释和适用范围问题，在此问题上有不同的观点，但这些问题与委员会的工作无关。[86] 其实，按照国际法院在“爱琴海大陆架案”中的观点，似乎 1920 年条约也适用于斯瓦尔巴德群岛的大陆架区域上的资源。[87]

（八）法国的申请

2007 年 5 月 22 日，法国向委员会提交了有关法属圭亚那和新喀里多尼亚部分 200 海里以外大陆架外部界限的数据和资料。[88] 此前，法国已经于 2006 年与西班牙、爱尔兰和英国就凯尔特海和比斯开湾地区联合提出申请。法国此次部分申请是委员会收到的第一个代表海外领土提出的申请。鉴于法国还有许多类似的海外领地，因此，可以预见今后还会有许多类似的部分申请。法属圭亚那部分的申请与巴西的大陆架申请相邻接，包括 9 个定点，除 1 点外，全部基于沉积厚度公式确定。而确定新喀里多尼亚东南方向大陆架（洛亚蒂海脊地区）外部界限的 191 个定点，除 1 点外，全部基于海登堡公式确定。这两个部分都没有利用制约线。[89] 定点之间的最大距离为 59.99 海里，而新喀里多尼亚东南方向大陆架部分各定点之间距离主要是 1 海里，[90] 这当然是因为使用了大陆坡脚外 60 海里公式的缘故。

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84 参见《有关斯匹次卑尔根（斯瓦尔巴德）群岛条约》，第 1 条、第 2 条、第 3 条、第 7 条和第 8 条。

85 西班牙的照会，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_nor.htm，2008 年 12 月 8 日。

86 挪威的照会，下载于 http://www.un.org/Depts/los/clcs_new/ submissions_files/submission_nor.htm，2008 年 12 月 8 日。

87 国际法院在该案中将出现在 1931 年的一个文件中的“领土”的定义看成包括如今的大陆架。Aegean Sea Continental Shelf Case (Greece v. Turkey), Judgment of 19 December 1978, *ICJ Reports*, 1978, p. 3, para. 86.

88 《按照〈联合国海洋法公约〉第 76 条第 8 款就法属圭亚那和新喀里多尼亚地区向大陆架界限委员会的部分申请执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_fra.htm，2008 年 12 月 8 日。

89 参见法国申请的执行摘要，第 5 节。

90 参见法国申请的执行摘要，附录：确定法属圭亚那和新喀里多尼亚地区大陆架外部界限的定点清单。

新西兰在照会中指出，法国的该部分申请与其已经提交的申请重合，根据委员会审议的结果，两国有可能在三王海脊地区存在划界问题。[91] 就新喀里多尼亚西南方向的大陆架而言，由于 1982 年法国和澳大利亚的划界协定确立了该地区的大陆架边界，[92] 因此，法国在申请中只是证明了大陆边覆盖 200 海里以外的整个地区。[93]

本次申请的一个值得注意的地方是，法国试图掩盖与邻国之间的争端。在法属圭亚那地区，法国通知委员会说在该地区法国和任何国家都不存在争端。[94] 但事实是，法国需要与其东面的苏里南划分大陆架边界。为此，苏里南在照会中强调法国的申请以及委员会的建议不应影响苏里南今后在大西洋地区的申请以及苏里南和法国之间的大陆架划界。[95] 在新喀里多尼亚东南地区，法国仅通知委员会说它与澳大利亚和新西兰有划界问题，从而试图隐瞒与瓦努阿图之间有关马修岛和亨特岛的主权争端。对此，瓦努阿图在致法国总统和委员会主席的信中郑重指出："法国的申请侵犯了瓦努阿图的独立和主权领土以及传统文化遗产。该申请同样妨害了瓦努阿图自己基于马修岛和亨特岛扩展大陆架的努力。"[96] 在这种情况下，法国不得不请求委员会不审议其申请中关于新喀里多尼亚东南部分的内容。[97] 这样，委员会只需审议法属圭亚那和新喀里多尼亚西南方向大陆架的外部界限。鉴于委员会在审议巴西申请时已经对该地区的整体状况有所了解，而在审议澳大利亚和新西兰申请时也已经充分研究了新喀里多尼亚西南方向的主要海底特征——豪勋爵海隆。因此，可以预料，对法国该部分申请的审议不会花费很长时间。

（九）墨西哥的申请

2007 年 12 月 13 日，墨西哥向委员会提交了墨西哥湾西部多边形 200 海里以外大陆架外部界限的资料。[98] 在墨西哥湾西部和东部各有一个由沿海国 200 海里

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91 新西兰的照会，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_fra.htm，2008 年 12 月 8 日。同时参见法国有关新西兰申请的照会。

92 关于该条约，参见 Jonathan I. Charney and Lewis M. Alexander eds., *International Maritime Boundaries*, Leiden/Boston: Martinus Nijhoff Publishers, 1993, Vol. II, pp. 1185~1194.

93 参见法国申请的执行摘要，第 5.2.2 节。

94 参见法国申请的执行摘要，第 4 节。

95 苏里南的照会，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_fra.htm，2008 年 12 月 8 日。苏里南表示将于 2009 年 5 月 13 提交申请。参见《有关大陆架界限委员会工作量的问题——提交划界案的初定日期》。

96 瓦努阿图的信，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_fra.htm，2008 年 12 月 8 日。

97 《大陆架界限委员会第二十届会议》，第 40 段。

98 《根据〈联合国海洋法公约〉第六部分和附件二部分提交墨西哥大陆架外部界的数据和资料执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_mex.htm，2008 年 12 月 8 日。

界限所形成的面包圈——西部为墨西哥和美国；东部为墨西哥、美国和古巴，都呈多边形。本次墨西哥的部分申请针对的是西部的多边形，因为 2000 年墨西哥和美国已经在该地区划分了彼此 200 海里以外大陆架的界线。[99] 由于东部的多边形尚未被划分，因此存在划界争端，墨西哥本次没有提出，而是保留了今后再次就该部分大陆架提出申请的权利。[100] 委员会在 2008 年 3—4 月召开的第二十一届会议上设立了审议墨西哥申请的小组委员会。

与先前所有申请的一个显著不同是，墨西哥本次申请的唯一目的是请求委员会确认一条已经存在的其与邻国间的大陆架边界，并将该界线作为墨西哥 200 海里以外大陆架的外部界限。虽然先前申请中也涉及将已经划分的相邻或相向国家间的大陆架边界作为 200 海里以外大陆架外部界限的问题，如俄罗斯申请中涉及与美国的划界、澳大利亚和新西兰申请中涉及彼此间界线、法国申请中涉及与澳大利亚的界线等，但这些申请中还包含着不涉及与邻国划分 200 海里以外大陆架界线的内容。这一申请目的上的差异明显反映在墨西哥申请的执行摘要中。与先前执行摘要着重介绍大陆架外部界限是如何确定的不同，墨西哥的执行摘要中几乎没有描述这一问题，而只是说外部界限转折点的坐标就是 2000 年墨美大陆架划界条约中议定的坐标。[101] 相反，墨西哥的执行摘要花了很大篇幅讨论法律问题，这与先前的执行摘要着重技术问题的做法也明显不同。讨论法律问题的目的是为了证明墨西哥满足了从属权利检验。墨西哥按照委员会的观点，使用沉积厚度公式来证明其对 200 海里以外大陆架的权利。[102] 就墨西哥拟议的外部界限而言，包括 16 个转折点，间距最大为 21 海里多。[103] 因此符合第 76 条第 7 款关于定点之间的距离不超过 60 海里的要求。由于该申请不包含任何陆地或海洋争端，而且也并不太涉及复杂的公式运用，因此估计委员会将会在较短时间内审议完毕并给出肯定性建议。

（十）巴巴多斯的申请

2008 年 5 月 8 日，巴巴多斯向委员会提交了 200 海里以外大陆架界限的资

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99 2000 年 6 月 9 日《美国和墨西哥之间关于 200 海里以外大陆架划界条约》，2001 年 1 月 17 生效。

100 参见墨西哥申请的执行摘要，第 1 节。

101 参见墨西哥申请的执行摘要，第 6 节。

102 参见墨西哥申请的执行摘要，第 2.1 节。参见《科学和技术指南》第 2.2.3~2.2.4 和第 2.2.6 段。

103 参见墨西哥申请的执行摘要，表 1：确定墨西哥 200 海里外大陆架外部界限的转折点的坐标清单。

料。[104] 申请分为南区和北区，面积大约 60000 平方公里。[105] 巴巴多斯是截至目前提出申请的所有国家中经济最不发达的一个，其申请的执行摘要也最为简略。就申请中所拟议的外部界限而言，共有 15 个定点，其中定点 1—6 确定的是南区界限，而定点 7—15 确定的是北区界限。点 6 和 7 位于 200 海里界限线上，而其余定点则基于沉积厚度公式确定。没有涉及适用任何制约线。[106] 这一特点与法属圭亚那的申请基本完全一致。巴巴多斯在申请中没有指出此次申请是部分申请，由此，似乎应当是其全部申请。然而，巴巴多斯的申请中并未完整确定其大陆架的外部界限——南部和北部各有一个很大的缺口。[107] 这样，该申请仍应是一个部分申请。

巴巴多斯申请中一个值得注意的地方是，巴巴多斯并非依次将定点连接起来确定其大陆架的外部界限。实际上，南区界限的最后一段（点 5—6 段）和北区界限的第一段（点 7—8 段）相互交叉（以下将该交点称为“点 X”），而点 6 和点 7 之间并不连接。[108] 之所以不能将点 5 和点 7 直接连接，而删除点 6，是因为这将损失由点 5、点 7 和交叉点 X 所围成的三角形区域。出于同样的理由，也不能将点 6 和点 8 直接连接，而删除点 7，因为这将损失由点 6、点 8 和点 X 所围成的三角形区域。但问题是，为什么不能将点 X 直接选为定点呢？唯一合理的解释是该位置不符合《公约》第 76 条第 4 款所规定的成为定点的条件。由于点 5 和点 8 的距离明显超过 60 海里，因此巴巴多斯在 200 海里界限线上选取了 2 个分别距离定点 5 和定点 8 为 60 海里的点，即点 6 和点 7，从而可以获得最大化的 200 海里以外的大陆架区域，即由点 6 到点 7 段的 200 海里界限线、点 6 到点 X、以及点 7 到点 X 所围成的区域。

（十一）英国的申请

104 《巴巴多斯政府的大陆架申请执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_brb.htm，2008 年 12 月 8 日。

105 Barbados, UK Make Submissions to Commission on the Limits of the Continental Shelf, at http://www.ireland.com/newspaper/breaking/2007/0407/breakingl.htm, 8 December 2008.

106 参见巴巴多斯申请的执行摘要，第 3 节。

107 参见巴巴多斯申请的执行摘要，图 1：显示巴巴多斯大陆架最终外部界限图。

108 参见巴巴多斯申请的执行摘要，图 1：显示巴巴多斯大陆架最终外部界限图。如此，巴巴多斯执行摘要中的定点坐标清单就有问题。其中，点 5 到点 6 的距离是 39.678 海里，点 6 到点 7 是 60 海里，而点 7 到点 8 是 60 海里。但是，点 6 和点 7 根本没有连接，而即使连接起来，这段长度也大大小于点 7 到点 8 的长度，因此也不可能是 60 海里。另一方面，点 5 到点 6 的距离标的是 39.678 海里，这在图上看也显然有问题。其实，点 5 到点 6 段的长度与点 7 到点 8 段在图上的长度十分类似。因此，点 5 到点 6 段的长度似乎应当是 60 海里。而 39.678 海里则似乎是点 5 到点 7 的距离——虽然这 2 点并没有连接。参见巴巴多斯申请的执行摘要，表 1：确定巴巴多斯大陆架最终外部界限的位置。

2008 年 5 月 9 日，英国就阿松森岛的大陆架向委员会提交了 200 海里以外大陆架界限的情报。[109] 此前，英国已经于 2006 年与西班牙、爱尔兰和法国就凯尔特海和比斯开湾地区联合提出申请。阿松森岛周围的外部界限分为 2 个部分，分别位于阿松森以东和以西，面积大约 200000 平方公里。[110] 在这 2 个区域适用的都是大陆坡脚外 60 海里公式。在东部区域确定了 8 个大陆坡脚点来确定外部界限。在西部区域，外部界限是由 350 海里制约线决定的，因为所有大陆坡脚点均超过从领海基线量起的 350 海里线，因此没有用来确定外部界限。[111] 英国在同时提交的照会中表示，它将在 2009 年 5 月最后期限之前就其他地区提交众多的部分申请。因此，这是一个部分申请。另外，英国在该照会中还就南极问题表达了与新西兰相同的立场，即在本次部分申请中不把附属于南极的大陆架区域包括在内，而或许以后就该部分大陆架提出申请。[112]

英国本次申请最大的特点是，虽然在确定外部界限时只利用了 8 个大陆坡脚点，但确定外部界限的定点数量却高达 1566 个。如果按照定点的顺序，可以将这些定点做如下归类：定点 1 位于 200 海里界限线上，与点 2 的距离为 59.5 海里；定点 2—90（共 89 个）由大陆坡脚点 7E 产生，各定点之间的距离为 1 海里，因此，实际上是一个以 7E 点为圆心的半径 60 海里的弧；定点 91 由大陆坡脚点 9E 产生；定点 92 是距离大陆坡脚点 10E 的 60 海里的弧与 350 海里制约线的交点；定点 93—1472（共 1380 个）位于 350 海里制约线上，除 1 个外，各点之间的距离为 1 海里，因此，实际上是一个半径为 350 海里的弧；定点 1473 是 350 海里制约线与距离大陆坡脚点 1E 的 60 海里的弧的交点；定点 1474—1476（共 3 个）由大陆坡脚点 1E 产生；定点 1477 由大陆坡脚点 3E 产生；定点 1478—1505（共 28 个）由大陆坡脚点 4E 产生，除 1 个外，各定点之间的距离为 1 海里，因此，实际上是一个以 4E 点为圆心的半径 60 海里的弧；定点 1506 由大陆坡脚点 5E 产生；定点 1507—1565（共 59 个）由大陆坡脚点 6E 产生，除 1 个外，各定点之间的距离为 1 海里，因此，实际上是一个以 6E 点为圆心的半径 60 海里的弧；定点 1566 位于 200 海里界限线上，与定点 1565 的距离为 59.5 海里。[113] 如前所述，沿海国之所以不辞辛苦地选取这么多的定点，其目的当然是意图获得最大面积的 200 海里以外

109 《根据 1982 年〈联合国海洋法公约〉第 76 条第 8 款就阿松森岛向大陆架界限委员会的申请执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_gbr.htm，2008 年 12 月 8 日。

110 Barbados, UK Make Submissions to Commission on the Limits of the Continental Shelf.

111 英国申请的执行摘要，第 6 节。

112 Note from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the Secretary-General of the United Nations accompanying the lodgment of thepartial submission of the United Kingdom, at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_ghr.htm, 8 December 2008.

113 参见英国申请的执行摘要，表 1：描绘外部界限的各定点的坐标和确定方法清单。

的大陆架区域。[114]

（十二）印度尼西亚的申请

2008 年 6 月 16 日，印度尼西亚向委员会提交了苏门答腊岛西北地区 200 海里以外大陆架界限的情报。[115] 此次申请是部分申请，印度尼西亚表示今后将就其它地区提出许多的部分申请。[116] 对印度尼西亚申请的审议将包括在委员会将于 2009 年 3—4 月召开的第二十三届会议的临时日程中。

印度尼西亚是第一个向委员会提交划界申请的亚洲国家。此次申请所涉及的一小块 200 海里以外的大陆架区域位于印度洋。印度尼西亚确定了 5 个定点，它们与印度尼西亚的 200 海里界限线一起构成该地区大陆架的外部界限。其中，点 1 位于印度尼西亚 200 海里界限线上，定点 2 和点 3 根据沉积厚度公式确定，点 4 位于印度尼西亚和印度之间的假想中间线上，点 5 位于印度尼西亚 200 海里界限线上。[117] 而从执行摘要所附地图上来看，点 5 也位于印度尼西亚和印度之间的假想中间线上，因此其实是印度尼西亚的 200 海里界限线与印度尼西亚和印度之间的假想中间线的交点。其中，点 4 位置的确定很不清楚。虽然印度尼西亚在执行摘要中说他“在本部分申请地区建立了由 1% 沉积厚度公式（卡地纳或爱尔兰公式）所决定的线。基于所提供的地震数据，证明有足够的沉积厚度来适用 1% 沉积厚度公式”，[118] 但在“坐标清单”中并未指出该点的确定也是基于沉积厚度公式。另外，虽然印度尼西亚通知委员会说在该部分大陆架地区不存在争端，但其将点 4 置于印度尼西亚和印度之间的假想中间线上的做法却表明该地区需要和印度划界，因此存在划界争端。事实是，1977 年印度尼西亚和印度用一条等距离线划分了两国在印度洋的大陆架边界，[119] 但该边界的端点（U 点）距离印度尼西亚的苏门答腊岛和印度的尼科巴岛的海岸均不足 200 海里（183 海里），[120] 因此，两国仍需要划分剩余的 17 海里 200 海里以内的大陆架边界以及 200 海里以外的大陆架边界——如果它们领土的自然延伸超过 200 海里的话。

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114 参见关于巴西申请的论述。

115 《印度尼西亚的大陆架申请：就苏门答腊西北地区的部分申请执行摘要》，下载于 http://www.un.org/Depts/los/clcs_new/submissions_files/submission_idn.htm，2008 年 12 月 8 日。

116 印度尼西亚申请的执行摘要，第 2 节。

117 印度尼西亚申请的执行摘要，附件 1.1：确定苏门答腊西北地区扩展大陆架外部界限的坐标清单。

118 印度尼西亚申请的执行摘要，第 6 节。

119 1977 年 1 月 14 日《印度共和国政府和印度尼西亚共和国政府关于扩展 1974 年两国在安达曼海和印度洋的大陆架边界的协定》，1977 年 8 月 15 日。

120 See Jonathan I. Charney and Lewis M. Alexander eds., *International Maritime Boundaries*, Vol. II, pp. 1371~1378.

三、目前实践的特点和趋势

下表总结了截至 2008 年 10 月按照《公约》第 76 条第 8 款向委员会提交的划定 200 海里以外大陆架外部界限的申请以及委员会的审议情况。

表 1 划定 200 海里以外大陆架外部界限申请一览表

（截至 2008 年 6 月）

序号	申请国家	申请日和公约对其生效日	申请特征	是否获得过帮助	主要公式	未解决的争端	状态
1	俄罗斯	2001.12.21 1997.4.11	全部	否	沉积厚度	有	2002 年 6 月提出建议（协商一致）；正准备订正的申请
2	巴西	2004.5.17 1994.11.16	全部	是	大陆坡脚外 60 海里	无	2007 年 4 月提出建议（15:2:0）
3	澳大利亚	2004.11.15 1994.11.16	全部（南极不采取行动）	是	大陆坡脚外 60 海里	有	2008 年 4 月提出建议（14:3:1）
4	爱尔兰（波丘派恩深海平原）	2005.5.25 1996.7.21	部分	是	大陆坡脚外 60 海里	无	2007 年 4 月提出建议（14:2:2）
5	新西兰（不包括南极）	2006.4.19 1996.8.19	部分	否	大陆坡脚外 60 海里	有	2008 年 8 月提出建议
6	法国、爱尔兰、西班牙、英国（凯尔特海和比斯开湾）	2006.5.19 1996.5.11（法） 1996.7.21（爱） 1997.2.14（西） 1997.8.24（英）部分	联合	是	大陆坡脚外 60 海里	无	小组委员会审议中
7	挪威（巴伦支海、北冰洋、挪威海）	2006.11.27 1996.7.24	部分	是	大陆坡脚外 60 海里	有	小组委员会审议中
8	法国（法属圭亚那和新喀里多尼亚）	2007.5.22 1996.5.11	部分（新喀里多尼亚东南方向不审议）	否	大陆坡脚外 60 海里	有	小组委员会审议中
9	墨西哥（墨西哥湾西部多边形）	2007.12.13 1994.11.16	部分	是	沉积厚度	无	小组委员会审议中
10	巴巴多斯（北区和南区）	2008.5.8 1994.11.16	部分	否	沉积厚度	有	尚未审议
11	英国（阿松森）	2008.5.9 1997.8.24	部分	否	大陆坡脚外 60 海里	无	尚未审议
12	印度尼西亚	2008.6.16 1994.11.16	部分	否	沉积厚度	有	尚未审议

（来源：本文作者根据资料整理所得。）

从上表中可以清楚地看出，目前划定 200 海里以外大陆架外部界限的实践有以下主要特点和趋势：

第一，随着 10 年期限的临近，国家提交申请的数量日益增多。

《公约》附件二第 4 条规定："拟按照第 76 条划定其 200 海里以外大陆架外部界限的沿海国，应将这种界限的详情连同支持这种界限的科学和技术资料，尽早提交委员会，而且无论如何应于本公约对该国生效后 10 年内提出。"2001 年举行的公约缔约国第十一次会议注意到，只是在委员会 1999 年 5 月 13 日通过了《科学和技术指南》后缔约国才有了按照《公约》第 76 条第 8 款提交申请所需的基本文件。考虑到缔约国，特别是发展中国家在遵守《公约》附件二第 4 条所设定的期限方面所面临的问题，缔约国会议决定:对于《公约》1999 年 5 月 13 日前对其生效的缔约国,《公约》附件二第 4 条所述 10 年期限从 1999 年 5 月 13 日起算。[121] 这样，对于许多沿海国而言，[122] 其向委员会提交有关 200 海里以外大陆架外部界限情报的最后期限是 2009 年 5 月 13 日。虽然第 4 条并没有指出不遵守 10 年期限的后果，由此可以主张，不遵守该时限不会对沿海国的大陆架权利基础产生任何后果，因为这仅仅有关划定外部界限的问题;但是，缺少外部界限在某些情况下可能会对大陆架的确切范围产生相当大的疑问。而且，无论如何，在 10 年内提交

121 《关于联合国海洋法公约附件二第 4 条所订向大陆架界限委员会提交资料的十年期间的起算日期的决定》（SPLOS/72），2001 年 5 月 29 日，下载于 http://daccessdds.un. org/doc/UNDOC/GEN/N01/387/63/PDF/N0138763.pdf?OpenElement，2008 年 12 月 8 日。然而，有学者认为不能将缔约国会议的决议等同于对公约有关条款的修改。虽然该决议可以在当时的缔约国之间有效，但不能拘束以后加入或批准《公约》的国家。对于这些没有明确放弃它们权利的国家而言，推迟的申请以及由此产生的外部界限很有可能受到它们的挑战。另外，对于那些早就开始准备申请的国家而言，或许也无法利用这一优势。因为，第一，技术的发展意味着在申请时还适合的数据到 2009 年可能就不再被广为接受了，这将使得申请国进退维谷:或者投巨资收集新数据并重新计算界限，或者将它和委员会都知道是不理想的数据提交上去。第二，组织申请不是一个简单的工作，至少就拥有大面积 200 海里以外大陆架的国家是如此:它要求长期的计划，包括维持一个庞大的科学和法律专家队伍。而中断可能意味着丧失许多专家，他们或许被重新雇佣到其他项目，或甚至完全离开了政府的雇佣。参见 Andrew Serdy, Towards Certainty of Seabed Jurisdiction beyond 200 Nautical Miles from the Territorial Sea Baseline: Australia's Submission to the Commission on the Limits of the Continental Shelf, *Ocean Development and International Law*, 2005, Vol. 26, No. 3, pp. 201~217。就目前的申请国而言，俄罗斯、巴西、澳大利亚、爱尔兰、新西兰、西班牙和英国没有利用这一优势，而是按照《公约》本来的规定，赶在《公约》对其生效 10 年期限到来前提交申请。其中，巴西和澳大利亚应当在 2004 年 11 月 15 日之前，爱尔兰应当在 2006 年 7 月 20 日之前，新西兰应当在 2006 年 8 月 18 日之前，西班牙应当在 2007 年 2 月 14 日之前，俄罗斯应当在 2007 年 4 月 11 日之前，而英国应当在 2007 年 8 月 24 日之前提交申请。另一方面，法国、挪威、墨西哥、巴巴多斯和印度尼西亚申请的时间则比《公约》原定的 10 年期限稍稍超出。

122 在第十一次缔约国会议时，《公约》有 135 个当事国。参见 Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements。

划界申请是《公约》加诸于缔约国的一项义务，它们应当善意履行。[123] 如此，随着这一时限的临近，国家提交申请的数量明显增多。从 2001 年俄罗斯提交第一份申请到 2005 年，委员会总共收到 4 份申请，每年平均不到 1 个，2002 年和 2003 年没有任何国家提交申请。然而，这一情况从 2006 年开始有了明显改观：当年就有 3 份申请提交给委员会；2007 年有 2 份申请；截至 2008 年 6 月，又有 3 份申请提交给委员会。而根据委员会主席在第十五次缔约国会议上所作的保守估计，委员会到 2009 年年底将收到 16 份申请，而且更可能收到 28 份申请。[124]

如此，要及时完成对大量划界申请的审议，对每个申请的审议似乎必然要讲求效率。这一点目前显现得并不清楚。委员会对俄罗斯申请的审议用了半年时间，如果从成立小组委员会正式审议开始计算（2002 年 3 月 28 日），那么这一审议过程仅用了不足 3 个月的时间。相反，由于委员会修改了审议规则，提高了与申请国的互动频率，对巴西申请的审议花了近 3 年时间，对澳大利亚申请的审议花了近 3 年半时间，使对爱尔兰部分申请的审议也花了近 2 年时间。面对各国关于委员会是否有足够的能力来以最高效率最迅速地审查和提出建议的担心，[125] 委员会在第十八届会议上通过了一些提高委员会工作效率的措施。[126] 另外，在委员会第十九届会议上，虽然 1 位成员要求将审查有关爱尔兰申请的建议的工作推迟到第二十届会议，但委员会最后还是决定对建议进行表决。[127] 这在一定程度上反映出委员会尽快完成对各个申请审议的愿望。

第二，沿海国提交部分申请成为趋势。

在目前委员会收到的总共 12 份申请中，前 3 份都是有关国家提交了其 200 海里以外大陆架界限的全部情报。然而，自从 2005 年爱尔兰提交首份部分划界申请后，此后的申请全都是部分申请。应当指出的是，《公约》并未明确规定沿海国可以分批提交其 200 海里以外大陆架的外部界限申请，但委员会的《议事规则》却明确允许部分申请。其附件一第 3 段规定，“虽然有《公约》附件二第 4 条 10 年时限的规定，沿海国可就其一部分的大陆架提出申请，以不妨害以后可能就国

123 International Law Association Toronto Conference (2006) – Second Report on the Legal Issues of the Outer Continental Shelf, Conclusion No. 15, at http://www.ila-hq.org/pdf/Outer%20Con%20Shelf/Draft%20Report%202006.pdf, 8 December 2008.

124 《大陆架界限委员会第十七届会议》，《决定草案：供第十六次缔约国会议审议》。

125 参见联合国大会第六十三届会议《海洋和海洋法：秘书长的报告》（A/63/63），2008 年 3 月 10 日，第 34 段，下载于 http://daccessdds.un.org/doc/UNDOC/GEN/N08/266/25/PDF/N0826625.pdf?OpenElement，2008 年 12 月 8 日。

126 这些措施包括：（1）任何国家申请的全部内容原则上随时提供给委员会全体成员审查，（2）小组委员会内部程序的书面记录不对委员会其他成员保密，（3）小组委员会与沿海国之间的文书往来应抄送委员会所有成员，(4) 委员会所有成员相互之间可自由讨论涉及任何申请的任何事项，（5）小组委员会的会议应非公开举行。《大陆架界限委员会第十八届会议》，第 40 段。

127 《大陆架界限委员会第十九届会议》，第 36 段。

家间划定大陆架任何其他部分界限提出的申请所涉及的问题”。虽然委员会是在存在划界争端的情况下提及部分申请的,但没有理由认为沿海国仅可以在这种情况下提交部分申请。导致沿海国选择提交部分申请的原因是多方面的。

首先,提交部分申请可以避开与其他国家存在陆地或海洋争端的区域。有关划定 200 海里以外大陆架外部界限的规则反复强调,委员会的活动不应妨害国家间的海洋划界问题。特别是按照委员会《议事规则》附件一第 5 条的规定,如果存在陆地或海上争端,除“在该争端所有当事国事前同意的情况下”,委员会不应审议和认可任一争端当事国提出的申请。[128] 这样,如果申请国与其他国家存在陆地或海上争端,而又无法或不愿与该国达成协议使其不反对委员会审议有关争议地区的申请,那么在某种程度上就只能选择将争议地区排除在外的部分申请。因为在这种情况下强行申请也必然招致有关国家的反对,从而导致委员会拒绝审议。例如,委员会就因为日本的反对而拒绝审议俄罗斯在鄂霍次克海的申请,而建议其提交一个不包括争议地区的部分申请。再如,法国由于瓦努阿图的抗议而被迫请求委员会不审议涉及争议岛屿的那部分申请。[129]

其次,提交部分申请可以使有关沿海国先集中力量于一块区域,以增强申请获得委员会认可的可能性。200 海里以外大陆架外部界限的划定涉及复杂的法律、科学和技术问题。由于在某一问题上经常存在科学认识上的差异,因此原则上讲,任何申请本身都不可避免地存在一定程度的不确定性。这在各申请中经常涉及的脊的问题上表现得尤为突出。[130] 另一方面,《公约》的完整性以及 200 海里以外大陆架外部界限的确立最终依赖于对法律标准的遵守,以及所采用的地质标准和解释是否被已知的科学观点所接受。有关专家广泛的科学共识对于委员会和《公约》的可信度至关重要。[131] 这样,如果申请国的主张与审议时公认的结论有所差别,那么除非该国能够提供充分的数据,否则将难以获得委员会的认可。因为 200 海

128 其他的规则还包括:《公约》附件二第 9 条规定:“委员会的行动不应妨害海岸相向或相邻国家间划定界限的事项。”委员会《议事规则》第 46 条规定:“1. 如果存在相向或相邻国家间的大陆架划界争端,或其他未解决的陆地或海洋争端,可以依照本议事规则附件一的规定提出划界案,提出的划界案应依照该附件规定进行审议。2. 委员会的行动不应妨害国家间划定边界的事项。”

129 然而,东帝汶的反对却不能阻止委员会审议澳大利亚有关阿尔戈部分的申请,因为该部分申请与两国之间在帝汶海的划界争端无关。

130 1982 年《公约》第 76 条提到 3 类海底高地:深洋洋底的洋脊(第 3 款)、海脊(第 6 款)以及海底高地(第 6 款),它们具有不同的法律地位。洋脊不属于沿海国陆地领土的自然延伸,海脊和海底高地虽然属于沿海国陆地领土的自然延伸,但海脊上的大陆架外部界限不应超过从测算领海宽度的基线量起 350 海里,而作为大陆边自然构成部分的海台、海隆、海峰、暗滩和坡尖等海底高地却不受该条规定的限制。委员会明确指出,鉴于难以就各种情况做出详细规定,委员会认为有关脊的问题应当逐案审理。《科学和技术指南》第 7.2.11 段。同时参见美国有关俄罗斯和巴西申请中的脊的照会。

131 参见美国有关俄罗斯申请的照会。

里以外大陆架的外部界限是沿海国的大陆架与属于人类共同继承财产的国际海底区域之间的界限，所以当出现科学上的不确定性时，委员会很可能倾向于将不确定性的利益归属于国际社会。在这种情况下，一国先对有充分证据的海域提出部分划界申请无疑是明智的。这对于发展中国家特别适用，因为这些国家在准备申请时往往会面临更多科学、技术或财政方面的问题。[132]

再次，通过提交部分申请可以履行《公约》所规定的 10 年期限的义务。虽然公约缔约国第十一次会议改变了 10 年期限的开始日期，以 2009 年 5 月 13 日作为最早的申请截止期限，但许多国家，特别是发展中国家，可能仍然无法在 10 年期限的要求内提出申请。在如今已提出申请的 12 个国家中，除巴西、墨西哥、巴巴多斯和印度尼西亚这 4 个发展中国家外，都是发达或较发达的西方国家，而尚无一个申请来自非洲国家的事实就充分说明了这一担心的合理性。可以说，在不进一步修改有关 10 年期限的前提下，提交部分申请或许是发展中沿海国满足 10 年期限要求的最佳途径。[133]

这里应当强调的是，提交缺乏具体科学和技术数据支持的“挂号式”声明不是部分申请，也不足以满足 10 年期限的义务。因为第 76 条第 8 款要求沿海国提交给委员会的是“从测算领海宽度的基线量起 200 海里以外大陆架界限的情报”。而《公约》附件二第 4 条对“情报”这一概念的界定是：200 海里以外大陆架外部“界限的详情连同支持这种界限的科学和技术资料”。另外，委员会的《议事规则》规定划界“申请应按照委员会所定要求提出”，[134] 而委员会《科学和技术指南》第 9 部分就扩展大陆架界限的资料规定了详细要求。[135] 而且，在沿海国提交申请后，委员会应“审议沿海国提出的关于扩展到 200 海里以外的大陆架外部界限的资料和其他材料，并……提出建议”。[136] 显然，委员会是无法审议没有科学和技术证据支持的单纯声明的，更无法根据声明提出建议。总之，只有通过提交 200 海里以外大陆架外部界限的“详情连同支持这种界限的科学和技术资料”，沿海国才能履行《公约》规定的申请义务。另一方面，第 76 条和《公约》附件二没有就此类情报

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132 参见美国有关俄罗斯申请的照会，其中指出，若沿海国存在疑虑，它或许就应提出一个部分申请，而将进一步的扩大留待以后的申请。

133 在 2006 年召开的公约第十六次缔约国会议上，若干代表团提议，鉴于委员会预计的工作量以及许多发展中国家在准备其申请时可能面临的困难，会议似可重新讨论有关向委员会提交所需资料的 10 年期限的问题，尤其是 2009 年的期限。但是，一些国家不准备考虑对期限作进一步调整，并认为可以通过其他手段找到满意的解决办法。有代表团就提到用提交部分申请的方法来满足 10 年期限的要求。《联合国海洋法公约第十六次缔约国会议的报告》，第 72 段，下载于 http://daccessdds.un.org/doc/UNDOC/GEN/N06/448/48/PDF/N0644848.pdf?OpenElement，2008 年 12 月 8 日。

134 第 47 条第 1 款。申请的格式参见《议事规则》附件三第 1 段。

135 《科学和技术指南》规定，划界案应包含 3 个不同部分：执行摘要、主要分析说明部分（主要案文），以及载有分析说明部分所提全部数据的部分（科学和技术佐证数据）。参见第 9.1.3~9.1.6 段。

136 《公约》附件二第 3 条 (a)。

的准确性做任何要求，[137] 因此，一旦沿海国向委员会提交了其大陆架外部界限的情报，就应视为履行了《公约》所规定的申请义务，而委员会没有权利拒绝审议沿海国的申请并提出建议，[138] 尽管它可以在审议的任何阶段，要求沿海国提供其所需要的进一步的数据、资料或澄清。[139] 如果委员会认为“划界案附有的数据和其他材料不充分，不足以作为大陆架外部界限的根据”，那么它在建议中可以不认可沿海国所拟议的外部界限，同时还可以指出申请国“编写订正的或新的划界案而可能需要提供的补充数据和其他材料”。[140] 而沿海国如果不同意委员会的建议，则“应于合理期间内向委员会提出订正的或新的划界案”。[141] 何为“合理期间”取决于对特定案件情况的评估。同时，《公约》也没有指出不遵守在合理期间内提出订正的或新的划界申请这一要求的后果。[142]

第三，各国在申请中主要适用大陆坡脚点外 60 海里公式，而非沉积厚度公式，来确定划定大陆架外部界限的定点。

在目前 12 个申请中，沉积厚度公式只在 4 个申请中被用作主要公式，即俄罗斯的申请、墨西哥的申请、巴巴多斯的申请和印度尼西亚的申请。与沉积厚度公式相比，大陆坡脚点外 60 海里公式无疑简便和经济得多。而且，从各申请国的具体操作来看，当其利用大陆坡脚点外 60 海里公式时，为了尽可能多地将大陆架地区包括在国家管辖范围内，它们通常将位于同一大陆坡脚点的 60 海里弧线上的相邻各定点间的距离设置得很小，一般为 1 海里左右，以便尽量减少定点之间的直线与弧线间的面积。这一现象也出现在相邻的定点均位于 350 海里制约线上的情况中。由于《公约》只限制了定点之间的最大距离（60 海里），而没有规定其最小距离，因此各国的这一做法并不违反《公约》。

另一方面，当按照第 76 条所确定的定点与申请国 200 海里界限线相连时，

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137 Ted L. McDorman, A Note on the Commission on the Limits of the Continental Shelf and the Submission of the Russian Federation, in David D. Caron and Harry N. Scheiber eds., *Bring New Law to Ocean Waters*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, p. 473.

138 值得注意的是，委员会设置了对划界申请的初步审查程序，据此，小组委员会应审查划界案的格式是否符合《议事规则》的规定，并确保划界案所需资料齐备无缺。小组委员会认为必要时，可以要求沿海国及时地修改格式和（或）提供任何必要的补充资料。参见《议事规则》附件三第 3 段。但是，没有规定如果沿海国不按照小组委员会的要求修改格式和（或）提供任何必要的补充资料的后果，特别是，委员会是否会因此决定不进行审议。

139 《议事规则》附件三第 10 段规定，在审查的任何阶段，如果小组委员会断定需要进一步的数据、资料或澄清，小组委员会主席应请沿海国提供这种数据或资料，或作出澄清。沿海国应在与小组委员会商定的时间内，根据请求提供数据、资料或澄清。

140 参见《议事规则》附件三第 12 段 (6)。

141 《公约》附件二第 8 条。

142 International Law Association Toronto Conference (2006) – Second Report on the Legal Issues of the Outer Continental Shelf, Conclusion No. 18.

各国一般会将该段距离设置得接近 60 海里的限制要求，[143] 以便包括更大面积的大陆架。这种做法在一些情况下会将未被证明的 200 海里以外大陆架区域包括在申请国的管辖范围内。关于按照第 76 条第 4 款（a）项所述确定大陆边外缘的公式线与 200 海里界限线连接的问题，《公约》和委员会的《科学和技术指南》均未做出规定。《公约》第 76 条第 7 款规定的是“连接以经纬度坐标标出各定点划出长度各不超过 60 海里的若干直线”。而按照委员会《科学和技术指南》的规定，划定 200 海里以外大陆架外部界限的直线可以连接的定点为，在根据第 76 条的 2 项公式或 2 项制约划定的 4 种外部界限之任何一种界限上的定点，或这些界限的任何组合上的定点”，[144] 因此并不包括 200 海里界限线上的点。由此，按照《公约》规定，不能将一个公式点和一个在 200 海里界限线上任意选择的点用直线连接起来构成 200 海里以外大陆架的外部界限。与公式点相连的位于 200 海里界限上的点也必须符合《公约》所规定的成为定点的条件，这样才能确保划定直线时所“包括的海底每一部分都符合第 76 条各项规定”。[145] 例如，可以采用大陆坡脚外 60 海里的弧线与 200 海里界限线相交的办法来确定公式线与 200 海里线的交点，而这就是新西兰在其申请中所采用的方法。[146]

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143 例如，在澳大利亚申请中，定点 ARG ECS—2—ARG—ECS—3，ANT—ECS—3—ANT—ECS—4，ANT—ECS—5—ANT—ECS—6，ANT—ECS—129—ANT—ECS—130，ANT—ECS—131—ANT—ECS—132，ANT—ECS—143—ANT—ECS—144，ANT—ECS—145—ANT—ECS—146 等之间的距离均为 60 海里；在四国联合申请中，定点 30—31 的距离为 59.5 海里；在挪威申请中，定点 GS1—GS2 的距离为 60 海里，而 GS13—GS14 的距离为 52 海里；在巴巴多斯申请中，点 5—6 和点 7—8 之间的距离为 60 海里；在英国申请中，定点 1—2 和定点 1565—1566 的距离为 59.5 海里；在印度尼西亚申请中，定点 1—2 的距离为 60 海里。

144 《科学和技术指南》，第 2.3.8 段。

145 《科学和技术指南》，第 2.3.10 段。

146 参见新西兰执行摘要附录“表 NZ—ES—App 1—1.2：构成东区扩展大陆架外部界限的定点”中关于定点 E840 的描述，该点与前一定点的距离为 16.0889 海里，以及“表 NZ—ES—App 1—1.3：构成南区扩展大陆架外部界限的定点”中关于定点 S455 的描述，其与前一定点的距离为 25.3467 海里。另外，巴西在申请中似乎也采用了这一方法。参见巴西申请的执行摘要补遗“表 1：巴西大陆架外部界限定点的地理坐标和确定各定点所使用的相关标准”中的定点 150—151 和 164—165，它们之间的距离仍为“2 海里或小于 2 海里”。

论海洋法中的“历史性权利”

郭 渊 *

内容摘要：“历史性权利”问题是国际海洋法研究领域中的基本课题之一。本文在借鉴法学界已有的研究成果基础上，综合运用国际海洋法、国际法判例以及政治学有关理论知识，对“历史性权利”的内涵及其本质进行了分析；对一些重要的国际法判例进行了评述，并研究其中所蕴含的“历史性权利”的内容及其现实启迪作用；在此基础上，本文还进一步探讨了“历史性权利”如何实现等相关问题。

关键词：“历史性权利” 国际海洋法 海洋法实践 政治权力

“历史性权利”在领土取得中占有重要的地位，但迄今为止，“历史性权利”在国际法上并无确切的定义，人们对这一词语的运用，依据的是国际习惯法。在国际海洋法发展中，无论是 1958 年的《领海和毗连区公约》，还是 1982 年的《联合国海洋法公约》，都未涉及这个问题。现今学术界对“历史性权利”的划分主要有 2 种观点：一种观点认为其是专属的，有完全主权，例如历史性海湾和历史性海域；另一种观点认为其是非专属的，无完全主权，例如公海的历史性捕鱼权。[1] 这 2 种看法所论述的内容有其专门所指，与海洋区域有着紧密关系。本文将结合国际海洋法、国际法判例以及政治学有关理论，对“历史性权利”的内涵、本质及其相关内容进行探讨，这对捍卫中国海洋权益有积极意义。

一、对“历史性权利”内涵的解析

在国际法上，“历史性权利”、“历史性海域”和“历史性海湾”并不是同等程度的法律概念，他们各有不同的内涵与外延，所适用的法律范围也各有差异。让我们首先来探讨有关“历史性海域”和“历史性海湾”的法律内容。

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1 Zou Keyuan, Historic Right in International Law and in China’s Practice, *Ocean Development and International Law*, Vol. 32, No. 2, 2001, p. 160.

“历史性海域”和“历史性海湾”这 2 个概念，国际法上并无准确界定，人们是依据习惯法来理解其含义。一般认为，一国对“历史性海域”拥有所有权必须具备 3 个要素，即有效地行使主权、长期使用和得到其他国家的默认。[2] 1962 年 3 月 9 日，国际法委员会为联合国秘书处提供的《关于历史性海域，包括历史性海湾的法律制度》研究文件中指出，一国取得历史性海域必须具备 3 个条件：(1) 主张历史性权利的国家对该海域行使权利；(2) 该权利的行使应是在一个相当长的时间内持续，并实际上已发展惯例；(3) 各国的态度，即为各国所默认。[3] 很多学者认为，“历史性海域”是专属的，声称国可以将之作为内水或领海。根据国际社会的习惯，“历史性海域”明显地包含着“历史性海湾”。

海湾是指海洋深入陆地而形成的明显水曲，只有当水曲的面积大于或等于以湾口宽度为直径划成的半圆时，才能视为海湾。从法律地位上看，海湾可分为内海湾和非内海湾。按照《联合国海洋法公约》的规定，如果海湾天然入口两端的低潮标之间的距离不超过 24 海里，则可在这两个低潮标之间划出一条封口线，该线所包围的水域应视为内水，该海湾即属内海湾。如果海湾天然入口两端的低潮标之间的距离超过 24 海里，24 海里的直线基线应划在海湾内，基线以内的水域才是内水，该海湾属非内海湾。但是《联合国海洋法公约》上述规定不适用历史性海湾，这是以湾口宽度作为确定内海湾标准的例外。

“历史性海湾”是指那些海岸属于一国，其湾口虽超过领海宽度一倍，但沿岸国对其享有历史上的权利并一向被承认为内海的海湾。沿岸国对其享有完全的主权权利。[4] 历史性海湾法律制度的确定已有几十年的历史。第一次提出这一概念的是 1910 年“英美北大西洋沿岸渔业仲裁案”，该案的中心问题是解决在北大西洋沿岸有海湾地形的地方如何划定 3 海里领海的起始线，该案认为一般承认历史性海湾须具备 2 个要件：(1) 沿岸国长期将该海湾作为内海而行使主权；(2) 其他国家长期承认（明示或默示）该项控制的事实。但海岸分属 2 个或 2 个以上国家的海湾，其法律地位尚未形成统一的国际法规则。

在国际实践和国际条约中，学者们用来支持“历史性海湾”这一概念的合理理由是：(1) 对于深入国家陆地的海湾的控制有利于构成国家领土完整；(2) 深入陆地的海湾，对于国家的国防安全和经济利益已经或将具有比一般开阔平直海岸更为重要的意义；[5] (3) 沿岸国已经对该海湾长期地实行有效控制，并因此在沿岸国

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2 Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea*, The Hague: Martinus Nijhoff Publishers, 1998, pp. 68~69.

3 刘楠来著：《国际海洋法》，北京：海洋出版社 1986 年版，第 19 页。

4 魏敏主编：《海洋法》，北京：法律出版社 1987 年版，第 45 页。

5 M•N•拉扎列夫著，吴云琪、刘楠来、王可菊译：《现代国际海洋法》，天津：天津人民出版社 1981 年版，第 84~85 页。

和海湾之间形成紧密的、重要的利益关系；(4) 国际社会对沿岸国实行的明确的、有效的、连续的长时期主权权利予以默认或没有提出异议。[6]

由此可见，历史性海域是根据沿岸国在历史中所形成的权利 和其他各国对该国此项权利行使的默认而被确立为沿岸国拥有主权的海域，这种水域包括历史性海湾和内海峡。内海峡即处于一国领海基线以内的海峡，这种海峡如同基线以内的其他水域一样，构成该国内水的一部分，该国对其具有完全和排他的主权，其法律制度由该国国内法规定，沿海国可以拒绝外国船舶通过海峡，外国船舶未经许可不得驶入。内海峡是在国际法上确立了一国对该水域拥有历史性权利。

通过分析历史性海域和历史性海湾的概念，可以发现历史性海域是一个包括着历史性海湾并具有更广泛内容的概念。而“海湾”仅指 2 个甲角之间向陆地凹进的部分，三面为陆，一面为海，《联合国海洋法公约》中称为“明显水曲”;而“历史性海域”则可能出现在沿海国海洋地带的所有海域。二者在本质上都是沿岸国的内海，沿岸国对其享有完全的排他性主权，历史性海湾是历史性海域的最主要表现形式，而贯穿其中的是历史性权利。“历史性权利不仅用来主张海湾，而且也用来主张不构成海湾的海域，如群岛水域以及位于一群岛和邻近大陆之间的水域;历史性权利也可用来主张海峡、河口湾以及其他类似水体。”[7]

“历史性水域”所指的范围要比历史性海域广泛的多。历史性水域有其既定的意义和内涵，且其构成须满足一定的条件。首先，就其法律意义及内涵而言，根据国际法院在判例中的裁示，“历史性水域”乃因有历史性权利之存在而被认为具有“内水”性质之水域。另根据联合国秘书处的相关研究报告指出，“历史性水域”也可能构成“内水”或“领海”。因为历史水域之性质原本就视相关国家在该水域实际行使主权的范围而定。[8] 例如该国容许外国船只无害通过该水域，则该水域具有领海之性质;反之，如果该国禁止外国船只未经许可而进入该水域，则该水域即具有内水之性质。其次，就“历史性水域”构成要件而言，根据习惯国际法，这种法律要件包括:主张“历史性水域”的国家须在其所主张之水域行使权利，并且须

6 Leo J. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, p. 281.

7 邹克渊:《论国际法上的历史性权利》，载于钟天祥等编译:《中外南海研究论文选编》，海口:海南研究中心 2001 年版，第 127 页。

8 UN Secretariat, Judicial Regime of Historic Waters, Including Historic Bays, Doc. A/CN. 4/143 (March 9, 1962).

在相当长时间内继续行使这种权利；以及获得外国之默认。[9] 国际间如有关于“历史性水域”之争议发生，主张这种水域的国家还具有“举证之责任”。[10] 由上述可见，贯穿历史性水域其中的是一国历史性权利在某一水域（包括海域、群岛水域）的实践。

历史性权利表示一个国家对某一陆地或海域的占有，其权利依据并不仅仅是来自于国际法的一般规则，而是该国通过一个历史性巩固的过程所取得的陆地或海洋国土。国际法学者布卢姆指出：“历史性权利是一个长期过程的产物，在该过程中包含了一系列长期的作为、不作为以及行为状态，其整体，并通过其积累性的效果，可以产生历史性权利，并进一步使它们得到巩固，使其成为国际法上有效的权利。”[11] 在国际实践中，“历史性权利”概念一般都是在“历史性所有权”的意义上使用的，一个国家以历史性权利为理由提出权利主张，追求的是主权或所有权。

历史性权利不仅是国际法问题，也是一个历史和政治问题。本文认为历史性权利包括如下几个关键性的要素：

(1) 历史性要素，[12] 在研究“历史性权利”涉及的历史根据时，应按照海域历史归属的自然发展过程，把有关该海域的历史、人物和事件置于当时的国际法和历史条件下进行分析和研究，此外还要将有关该海域的历史、人物和事件等作为该海域的归属历史发展过程和统一的、有联系的有机整体进行分析，从历史演变中把握该海域问题的来龙去脉和发展趋势。“经过充分、系统、客观、严肃地历史研究所产生的历史依据，一方面其本身就具有领土主权的意义，另一方面也给法律研究提供了强有力的保证。”[13] 也就是“把历史当作一个十分复杂并充满矛盾，但毕竟是有规律的统一过程来研究”。[14] 而这一态度和过程，是对历史事实的尊重和对当今问题的深层次把握。

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9 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 2nd ed., revised and enlarged, Manchester: Manchester University Press, 1988, p. 36; Gary Knight and H. Chiu, *The International Law of the Sea: Cases, Documents, and Readings*, Florida: UNIFO Publishers, Inc., 1991, p. 118; L. J. Bouchez, *The Regime of Bays in International Law*, The Hague: Nartinus Nijhoff, 1964, p. 281.

10 UN Secretariat, Memorandum on Historic Bays, Preparatory Doc. No. 1, Doc. A/CNF. 13/1 (Sept. 30, 1957), pp. 164~166.

11 邹克渊：《论国际法上的历史性权利》，载于钟天祥等编译：《中外南海研究论文选编》，海口：海南研究中心 2001 年版，第 126 页。

12 对于“历史性”一词的含义，英文释义为“Based on or true to the facts of history”，“history”英文释义为 (A) an account of past facts and events affecting one or more nations or people, arranged in the order of their occurrence; (B) past facts or events in general, Concerning Some person, thing, nation。本文将其译为：人类社会已发生的、影响个人或国家的事件、经历和过程，以及对这些事件和过程的记述。

13 木水：《中国南海疆域研究的一部力作——评〈中国南海疆域研究〉》，载于《中国边疆史地研究》2002 年第 2 期。

14 《列宁选集》第二卷，北京：人民出版社 1995 年版，第 586 页。

(2) 政治性因素，即“权利”概念，[15] 权利的基本构成要素有 2 个：一是利益，另一个是正当、应得。权利内容关系到习惯权利、法律权利等方面。[16] 在 18、19 世纪以前，国家或民族对某一海域或陆地领土占领的依据是习惯法，如先占、发现等。对国土正当性的要求或主张源于历史事实（居住、生产和生活等）产生的权利依据，如此才获得海疆国土的“权利”。事实上，此时国际社会对该国管辖海域的认可或默认，是确定该国行为正当性的要素之一，但是绝非必需。正当的海域权利，才是有权的，这也正是强制执行某种强制措施捍卫自己海洋国土的原因所在。

(3) 国际社会因素，即国际社会对沿海国行使历史性权利表示认可或默认。“历史性权利”内容贯穿于历史性海湾、历史性海域之中。前苏联学者涅恰耶夫认为，“国家对这一水域长期行使着权利，并且大多数国家对将这一水域的任何地区宣布为历史性水域没有提出过异议”，并认为这是历史性水域所特有的要素。[17] 美国国务院在 1923 年 9 月 17 日《美国关于历史性海湾的立场》的文件中说：“为符合制定该主张的国际标准，该国应说：(1) 沿海国对该海湾行使权利是公开的、众所周知的和有效的；(2) 该权利的行使是连续的；(3) 该权利的行使为外国所默认。”[18]

二、有关“历史性权利”的国际海洋法实践及其启示

随着各国海洋实践的发展，国家间海洋划界中涉及“历史性权利”的案例不断增多，各国使用公平原则来处理有关“历史性权利”案件的法律倾向日益为国际社会所广泛接受。我们选择一些较为重要的国际判例，来进一步分析和研究其中所蕴含的历史性权利的内容，这对于理解历史性权利无疑是有所帮助的，而其中的启示也是多方面的。

（一）1977 年英法大陆架仲裁案

这一国际判例较为具体地涉及了历史性权利内容。英法两国在 1970—1974 年间就英吉利海峡和大西洋区域的大陆架划界问题进行谈判，而海峡群岛是双方

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15 对于“权利”一词的含义，英文释义 (A) that which is correct; That which accords with truth, justice, propriety, virtue; (B) that to which one has a moral or legal claim, interest or ownership。本文认为其含义有二：一是正当、公正，二是法律、道义、利益上的资格。

16 北岳：《关于义务与权利的随想》，载于《法学》1994 年第 8 期。

17 潘石英著：《南沙群岛•石油政治•国际法》，香港：香港经济导报出版社 1996 年版，第 48 页。

18 Gary Knight, *The Law of the Sea: Cases, Documents and Readings*, Baton Rouge LA: Claitor’s Law Books & Publishing Division, 1980, pp. 5~9.

争论的焦点之一。[19] 在达不成协议的情况下，两国于 1975 年同意提交仲裁法院仲裁。

在仲裁过程中，法国陈述认为，“从地理上来看，由法兰西共和国列举的本问题的特点是基于唯一的事实，即由海峡群岛构成的英国岛弧位于法国海岸外的直角形海湾之内，而且距其海岸只有几海里。……按照科学根据：‘海峡群岛无可置疑的是阿摩利肯地区的一部分，而且不存在任何沟豁的属于法国海西架的一部分。’”，[20] 海峡群岛与英国本土分离，“从法律上来讲，海峡群岛的特征首先在于它们与法国本土非常接近……是它们与联合王国本土的分离，这使它们的法律地位区别于那些与一国海岸相毗连、属于该国的海岸岛屿的法律地位。”[21] 而英国认为，海峡群岛“几百年来一直是英国直辖属地，它们设有自己的立法院，财政与法律制度，法院与地方行政系统，以及自己的货币制度及邮政服务”。这一地区“不仅是联合王国与法国之间大陆架分界线的问题，而且是，如仲裁协议中的有关条款所明确说明的，是海峡群岛与法国之间的分界线问题。”[22]

法院调查后指出，海峡群岛“是不列颠王国政府的直辖属地，至今已有几百年了”，[23] 海峡群岛的对外关系完全由联合王国负责。法院认为，就联合王国与法兰西共和国而言，必须将海峡群岛视为联合王国的岛屿，而不是有权拥有与法兰西共和国相对的大陆架的半独立国家。“因此，法院必须对海峡群岛地区与界线（或诸分界线）走向做出决定所处的法律背景，是两个相向国家之一所拥有的岛屿领土靠近另一国家的海岸。”[24] 仲裁法院最后裁决在英法大陆架划界上运用 2 种不同的法律制度：在海峡群岛地区运用习惯法，而习惯法则要求在适用领土自然延伸原则时，也要确保所划的边界符合公平原则；[25] 而在大西洋地区则适用 1958 年《大陆架公约》第 6 条，即划出等距离的中间线。法院指出，区别不是来自法律理论，

19 海峡属群岛离英国本土 150 公里以上，而距离法国不到 30 公里，但其对外关系和防御均由英国负责。在有关大陆架的问题上，联合王国政府是对内对外都负有责任的权威。
20 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 141 页。
21 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 142 页。
22 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 147 页。
23 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 152 页。
24 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 153 页。
25 法院支持英国关于海岛也有其自然延伸部分的主张，认为海峡群岛是英吉利海峡的组成部分，所以在划定大陆架界线时，必须把这个地区放在整个海域中来看，如此既考虑到历史因素，又考虑到国际法因素。

而是来自历史因素、地理因素诸情况。法院在仲裁书的第 191 条强调说：“无论是从《大陆架公约》第 6 条‘特殊情况’一款的插入，还是从习惯法对‘公平原则’的强调来看，都可以清楚地看到，‘领土自然延伸’这一原则的力量不是绝对的，而是可以由特殊情况加以限制的。”[26] 裁决书的一句话中 2 次出现“特殊情况”这一词语，充分说明“历史性权利”是在海域划界中应予以考虑，并在划界中予以尊重的历史事实。

从这一案例看，法国认为海峡群岛临近本国领土而与英国距离遥远，因安全需要，这些岛屿应属于法国。海峡群岛在地理位置上虽然临近法国，但是这一事实却不能成为该国占领海峡群岛的合法依据。在帕尔马斯岛仲裁案中，仲裁人胡伯明确指出，地理上的临近性不能成为决定领土主权的法律依据，美国不能以帕尔马斯岛靠近菲律宾为由认为该岛与菲律宾群岛一起割让给美国。“在任何情况下没有这样的规则，仅仅由于特定国家邻接有关领土在法律中便确立有利于该国的主权假定。”[27] 1975 年，在西撒哈拉案件中，摩洛哥认为由于西撒哈拉与摩洛哥在地理上具有一体性，因而主张对西撒哈拉拥有主权。国际法院否定了摩洛哥的主张，认为任何国家无权对靠近自己海岸的其他国家岛屿提出主权要求。法国以邻近原则对海峡群岛提出主权要求是缺乏法律依据的，而英国基于历史性权利的主张有着坚实的法律依据。

（二）1982 年突尼斯—利比亚大陆架划界案

这是一个充分涉及“历史性权利”的案件。20 世纪 60 年代以来，突尼斯与利比亚分别在相邻的地中海大陆架区域钻探石油，并颁发了一些石油开采许可证。由于两国对各自大陆架范围的权利主张发生了冲突，于是两国决定将其大陆架争端提交国际法院裁决。两国要求国际法院考虑到公平原则、区域特点情况和第三次联合国海洋法会议上公认的最新趋势，判定何种国际法原则和规则应运用于该大陆架划界。国际法院注意到突尼斯从 3 个方面强调它的“历史性权利”：第一，划界在任何一点上都不应该侵犯突尼斯拥有确定历史性权利的区域（这是突尼斯的主要论点）；第二，作为海上边界的 ZV45° 线，是以在该线确定的区域内行使那些权利方面的立法和实践为根据的；第三，在固定渔场捕捉洄游鱼类的权利（被引据作为划出直线基线以测量领海的理由）。

国际法院经过多次审理，于 1982 年作出裁决，对突尼斯所宣布的历史性权利作了重要阐述，认为“突尼斯要求的历史性权利产生于突尼斯人在开发其近海岸

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26 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 155 页。

27 Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia, Singapore*, Oxford: Oxford University, 1987, p. 141.

的地中海海域和海床的渔场方面长期以来的活动和权益”，[28]“突尼斯的历史性权利问题在许多方面可能与本案的决定有关”，[29]“只要在本院认为妥当的划界方法或可能侵犯历史性权利区域的时候，法院才不得不根据大陆架划界的情况来决定这些权利的有效性和范围以及利比亚对这些权利的可反对性”。[30]法院注意到，本案判决涉及“突尼斯要求的‘历史性权利’和‘捕鱼区’”等有关大陆架一般法律规定问题。[31]

为了说明历史性权利的地位与作用，国际法院在判决中对历史性权利发生和发展的状况进行了阐述，指出当 1958 年的海洋法会议有机会考虑这个问题时，它通过了一项决议，即“历史性水域”制度。这项决议被附在“最后文件”中，要求大会安排研究这一问题。1959 年，大会通过一项决议，要求国际法委员会着手研究“历史性水域”的法律制度，包括历史性海湾。但国际法委员会还未这样做。在第三次联合国海洋法公约草案中也没有任何关于“历史性水域”制度的规定，既没有这一概念的定义，也没有对“历史性水域”和“历史性海湾”法律制度的详尽阐述。但是，它以一种对草案中的规定保留的形式，提到了“历史性海湾”、“历史性所有权”、“历史性原因”。

国际法院在判决中着重指出，历史性权利应受到尊重，而且“保留其长期运用的原貌”，“这一问题仍然受到一般国际法支配。一般国际法没有为‘历史性水域’或‘历史性海湾’规定单独的制度，而是为每一个具体的、公认的‘历史性水域’，或‘历史性海湾’的案件作了‘规定’。显然，事实上，基本上可以说，‘历史性所有权’或‘历史性水域’的概念和大陆架概念，是由国际习惯法的不同的法律规章制度支配的。第一种规章制度以获得和占领为根据，而第二种规章制度则以‘根据事实和自始就有’的权利的存在为根据。毫无疑问，两者有时可能部分地或全部地巧合，但这种巧合只是偶然的。如同突尼斯的情况，它的捕鱼区包括其大陆架的入口处，虽然仅此而已。有可能突尼斯的历史性权利和所有权与专属经济区概念（这一概念可以被看作现代国际法之一部分）有更加密切的关系，但是突尼斯并没有选择把自己的要求建立在这个概念的基础上。”[32]

突尼斯的某些历史性权利的主张具有合理性，使其在与有关利益国谈判时处于有利地位。关于突尼斯与利比亚专属经济区的划界，国际法院暗示认为也许与历史性权利有关，而与两国大陆架的划界目的无关，只是当事国没有提出这方面

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28 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 269 页。
29 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 272 页。
30 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 272 页。
31 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 287 页。
32 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 270 页。

的要求。正如有的国际法专家所指出的，“突尼斯不能单方面主张其拥有‘历史性权利’的全部海域为其专属经济区的一部分”，但是“突尼斯的‘历史性权利’在与有关利益国谈判划界条约时将成为一个重要的考虑因素”。[33]

（三）1973 年加拿大对北极水域所主张之权利

北极地区是指北极圈以北的广大地区，周围国家有加拿大、丹麦、芬兰、冰岛、挪威、瑞典、俄罗斯和美国。因渔业资源、矿产资源丰富，地理位置重要，北极的价值越来越受到各国重视。加拿大、丹麦、挪威、俄罗斯和美国也都纷纷提出对北极的主权要求。1973 年，加拿大外交部宣布北极群岛水域“基于历史原因，属于加拿大的内水”，尽管目前冰封海道，但是这条航道是其“国内航线”，并坚持对这条航道拥有主权。加拿大的做法遭到一些国家的反对。在北极主权争夺方面，加拿大与丹麦积怨最深。1973 年，根据相关条约，加拿大与丹麦的边界正好划定在格陵兰岛和加属埃尔斯米尔岛之间。格陵兰岛北部的汉斯岛位于丹麦格陵兰岛与加拿大埃尔斯米尔岛之间，面积狭小、荒无人烟，常年被冰雪覆盖。但由于该岛涉及北冰洋地区的航线开设以及石油资源开发问题，所以加、丹两国一直强调自己对该岛拥有主权，并为此争执不休。[34]

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。”[35] 为了支持上述观点，加拿大学者对北极水域的历史归属提出了如下证据：早在 1880 年大不列颠将其在北美的领土和占据的领地交给加拿大之前，其在该地区的势力范围实际上已经涵盖了加拿大北极群岛水域。移交后，加拿大开始对北极地区进行定期探查，以加强和巩固其对北极群岛的所有权和对该水域的控制权，从而形成历史性权利。第一次世界大战后，加拿大对到北极执行某些补给任务的美国舰船开始实施管辖，美国并未表示反对。这些事实足以满足对该水域在一定时期内行使管辖权和得到外国默认这 2 项条件。最近几年，加拿大持续加强在北极群岛的武装力量，以彰显在这一地区历史性权利的存在。[36]

上述判例对于理解历史性权利的作用和意义具有较为重要的启示。第一，

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33 邹克渊：《论国际法上的历史性权利》，载于钟天祥等编译：《中外南海研究论文选编》，海口：海南研究中心 2001 年版，第 133 页。

34 《加丹争夺北冰洋荒岛汉斯岛，两国政府民众齐上阵》，下载于 http://news.xinhuanet.com/world/2005-08/11/content_3338136.htm，2005 年 8 月 11 日。

35 Donat Pharand, *Canada's Arctic Waters in International Law*, Cambridge: Cambridge University Press, 1988, pp. 107~110.

36 倪基塔：《周边国家争北极，加拿大派军舰》，载于《环球时报》2005 年 8 月 26 日第 4 版。

历史性权利的内容是对一国拥有领土主权的有利界定，从而使一国政府有资格在该海洋和陆地领域进行活动，并要求本国利益得到国际社会的尊重和认可。在突尼斯与利比亚案中，突尼斯所要求的历史性权利产生于长期以来开发其近海岸的地中海海域和海床的渔场方面的活动和权益，这包括开发沿海浅滩为固定渔场、捕获游动渔类，开发更深的浅滩采集定居边类，即海绵。这种开发活动的远古性，突尼斯居民对固定渔场行使的所有权，突尼斯当局对 2 类捕鱼区行使的控制相监督权（相当于行使主权），再加之第三国对这些权利的默认和忍受，导致了承认突尼斯对一大片海床区域有历史性权利。对此，法院认为“必须审查的、与划界有关的重要特征是存在一个靠近突尼斯海岸的海上区域，突尼斯因其长期的捕鱼活动要求对该地区享有历史权利”。[37] 实际上，突尼斯对“定居种鱼类”主张历史性渔业权并没有受到争议，就连与突尼斯有海域争端的利比亚也承认这些权利，“对突尼斯在保护和控制其所主张的定居种鱼类方面的所有权和附属权的普遍承认的证据没有问题。事实表明，这些权利是存在的”。[38] 而这一历史性权利，并不排除外国人开采海绵和捕捉章鱼。

第二，历史性权利只是主权国家在某一海域和陆地实现国家利益的身份和资格，并不是国家利益本身，它必须得到国际社会的承认或默认。“所有划界争议的潜在概念性前提是，存在一个有关各国可以提出权利主张的区域。如果一个国家主张一个区域的一部分历史性权利，只有在另外一个国家接受了这个主张时，其历史性权利才能得到承认。这是禁止反言和默认的议题。”[39] 加拿大主张在北极群岛水域所拥有的历史性权利，受到其他国家，尤其是丹麦的挑战，使其国家利益的实现颇为艰难。“海上区域的划界总是具有国际性的问题。它不能仅仅依照沿海国在其国内法中表现的意志决定。不错，划界行动必然是单方面的行动，因为只有沿海国有权这样行动。但是，与其他国家的划界的有效性则取决于国际法。”[40] 因此历史性权利只是国家通过政治、经济活动实现利益的中介环节。一国应该拥有的历史性权利，并不等于该国已经在国家活动中实现了自己的利益，不过，如果一国对某一领土没有历史性权利，那么它绝不会在该土地上实现自己的利益（公海除外）。

第三，根据现代国际法，对一个地区长时间地、连续地和无可争辩地行使有效管辖权是构成对这一地区领土主权的重要内容，特别是在处理历史遗留的领土争议时，有效管辖具有构成绝对领土主权的法理依据。英国政府对海峡群岛的行

37 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 268 页。
38 邹克渊：《论国际法上的历史性权利》，载于钟天祥等编译：《中外南海研究论文选编》，海口：海南研究中心 2001 年版，第 131 页。
39 [英] 马尔科姆 • D • 伊文斯著，钟天祥译、吴士存审校：《有关情况与海域划界》，海口：中国南海研究院 2005 年 12 月版，第 331 页。
40 许森安主编：《国际海域划界条约集》，北京：海洋出版社 1989 年版，第 263~264 页。

政管理和主权行使，是根据当时的具体历史条件和自然条件而确定的管辖方式。有关取得领土的国际司法实践表明，只要是一国人民居住或者进行经济活动的区域，对确定这个地区属于该国所有具有决定性意义。[41] 例如，1953 年国际法院在关于曼基埃和埃克里荷斯案的判决中，认为英国人在这些岛屿上世代居住，是这些岛屿属于英国的明证。[42] 1968 年印度和巴基斯坦之间涉及库奇兰因地区仲裁案的仲裁，就将巴基斯坦人民使用了 100 多年的 2 个牧场判给巴基斯坦。

第四，在海域划界和疆域确定方面，国际法院在相关判例（或有关国家谈判）中在一定程度上考虑了各方的历史性权利，尤其在涉及相关国家至关重要的经济利益时更是如此。除上述判例外，在英国与冰岛的渔场管辖案中，沿海国家的优先权概念，尤其是沿海国家的渔业情况引起了国际法院的注意。在马耳他与利比亚案中，国际法院认为关于渔场范围的争议中，沿岸全体居民的经济依赖是一个有关要素。在有关国家的边界谈判中，传统的经济利益成为各方考虑和协商的重点内容之一，而最终形成的法律中包涵了历史性权利的内容。例如，北部湾是中国广西、广东和海南三省（区）渔民的传统作业渔场，中国对其拥有历史性权利。中越北部湾划界直接关系到渔业资源的分配利用和广大渔民民的切身利益。为此，谈判伊始，中国政府就极为重视维护渔民的合法权益。中方明确提出，划界的同时必须妥善解决渔业问题，划界协定必须与渔业合作协定同时签署、同时生效。对于渔业捕捞，双方规定在北纬 20 度以南设立一个共同的渔业区（有效期 12 年），由双方政府部门确定每年的捕捞量，再发给双方确定的两国渔船捕捞，由两国渔政部门共同执法，以利于海洋鱼类资源的保护。对于共同渔区以北（自北纬 20 度北）的地区，双方同意对现有渔业活动作出过渡性安排。从渔业协定生效之日（2000 年 12 月 25 日）起逐年削减在对方区域内的渔业活动，4 年内全部退出对方水域。越方主管部门对此给予了充分理解，双方终于在签署划界协定的同一天一并签署了北部湾渔业合作协定。之后，双方的渔业主管部门又经过近三年的谈判，制定了渔业协定的具体落实措施。[43]

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41 黄得林：《评菲律宾对南沙群岛部分岛屿的主权主张》，载于《法学评论》2002 年第 6 期。

42 王可菊：《中国对南沙群岛拥有主权——兼评越南在南沙群岛问题上出尔反尔的行为》，载于《法学研究》1990 年第 2 期。

43 《王毅谈中越北部湾划界协定和渔业合作协定生效》，下载于 http://news.xinhuanet.com/world/2004—06/30/content-1557531.htm，2008 年 10 月 20 日。

三、对历史性权利本质及相关内容的几点认识

历史性权利不过是国际社会成员——主体国家，对某一陆地和海域进行主权管辖的身份与资格、法理依据，或国家间划界的历史、政治和法律条件。根据国际海域划界的历史与现状，对于历史性权利的本质及相关内容可以作如下理解。

1. 在领土争端中，历史性权利的本质是国际社会以国家为代表的权力主体——一国领土利益与他国（一个或几个国家）之间的关系。任何国家领土的历史性权利原初并不一定涉及领土纠纷，而是主权国家长期对其领土（陆地、海洋）实行的和平的、连续的行政管理和主权行使。只有涉及领土主权的纠纷，该领土的历史性权利才引起国际社会的足够重视。任何历史性权利的内容，例如捕鱼权、航行权，都是在历史权利主体的一国利益与他国利益的关系中去理解和分析的，从而确定其作用，才能达到公平效果。

英国法学者马尔科姆•D•伊文斯指出："主张存在历史性权利给了国际法院另外一个试验，国际法院可以通过它来表明结果的公平性。在缅因湾案中，国际仲裁庭把美国关于其国家活动的主张比作是'援引历史性权利'。国际仲裁庭裁定这些活动并不是有关情况，但是接受在划界结果中必须将这些活动考虑进去，而且特别提到传统上有各个国家捕鱼的区域仍然不受所提出的边界线的影响。"[44] 1917 年中美洲法院在萨尔瓦多和尼加拉瓜有关丰塞卡湾地位的判决中指出，丰塞卡湾"是一个历史性的海湾，具有闭海的特征。因此，除 3 个沿岸国 3 海里范围为各国排他性占有外，萨尔瓦多、洪都拉斯和尼加拉瓜这 3 个沿岸国共同占有湾内水域。"[45] 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》，两国政府"愿意以对双方公正与公平的方式"决定两国之间"历史性水域"的疆界线。协定第 4 条规定："每个国家对于在上述疆界自己一边的水域、岛屿、大陆架及其底土，应享有主权和专属管辖权及控制权。"[46] 国际社会成员（国家）实施对某一领土历史性权利，就是从这种关系的权衡或国际社会的裁决去争取和实现自己的利益。

2. 历史性权利包涵着一国对某一陆地和海域进行主权管辖的权利和义务 2 个方面，即权利和义务是一切历史和现实国家关系在国际法上的重要表现。从国家利益实现角度来看，历史性权利表现为主权国家为实现自己的民族或国家利益，在传统历史疆域内或国际社会所承认领土范围内，行使主权和领土管辖权；历史性

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44 [英] 马尔科姆 •D•伊文斯著，钟天祥译、吴士存审校：《有关情况与海域划界》，海口：中国南海研究院 2005 年 12 月版，第 332 页。

45 周忠海：《论海洋法中的"历史性所有权"》，载于海南南海研究中心编：《中外南海研究论文选编》（2001 年），海口：海南南海研究中心 2002 年，第 116 页。

46 潘石英著：《南沙群岛•石油政治•国际法》，香港：香港经济导报出版社 1996 年版，第 53 页。

义务则意味着主权国家，在进行领土管辖和行使主权过程中，在一定海域履行对国际社会所应承担责任。许森安先生在谈到南沙问题时指出，“我们对南沙群岛的主权要强调历史性权利。我们在宣布对南海诸岛的历史性权利时，各方并未提出异议。而在国际法上，这就是默认。南海周边国家对南沙群岛部分岛礁的占领是在默认之后发生的，到现在也不构成历史性权利。”[47]

历史性权利和义务既是矛盾的，又是统一的，即两者是辩证统一的。首先，历史性权利和义务是不可分割的。在国际社会中，历史性权利是一国对某一陆地和海域进行主权管辖，并得到国际社会默认认可的体现。因此，它规定着主权国家拥有该陆地和海域的国际身份，又规定着国家间在领土上的关系。南沙群岛是中国最早发现的，而且持续、和平地占有、开发和经营了千余年的领土，中国历代政府一直对南沙群岛行使管辖权，没有任何国家提出异议和表达主权要求。不仅如此，很多外国人的传记和官方图书也明确承认南沙群岛归中国所有。即使按照现代国际法对领土取得的要求来衡量，中国自汉代始就获得了对南沙群岛的初步权利即“发现”权，为中国建立了一种不完全权利，从而有效地阻止了日本、法国、越南、菲律宾、马来西亚等国对南沙群岛的领土主权要求，这时南沙群岛对于中国以外的其他国家来说已经成为“禁取地”。而且，中国在随后的“合理时期内”连续而又和平地行使了有效的行政管辖权，满足了“先占”的条件。[48] 中国政府的南海 U 形线自绘制颁布后未遭抗议，足以作为我国对南海诸岛享有历史主权之佐证。其次，历史性权利和历史性义务是互为条件的。历史性义务是历史性权利的基础，历史性权利则是义务的前提。在对外交往方面，历史性权利体现为双方享有的权利和应承担的义务。任何国家领土的历史性权利一经确认，就意味着历史性义务的同时确定。任何社会，领土的历史性权利和义务都是统一的（古代社会无此明确意识），即它以对立的方式统一于国际社会中。1883 年荷兰船只在东沙岛搁浅，货物被掠，荷驻中国大使照会清总理衙门称：东沙岛位于中国广东所辖海域，根据中荷签订的条约，荷兰人在中国者，地方官必加以保护，荷船在中国下辖洋面被劫，地方官要设法缉拿，荷船只在中国搁浅或遭风收口，地方官闻报即当设法照料。“查条约第 7 款所载，和民在中国者，地方官必时加保护……和船在中国辖下海洋被劫，地方官闻报迅即设法查拿……和船在中国沿海地方搁浅碰坏或遭风收口，地方官闻报即当设法照料。”[49]（文中的和，即指荷兰）由此可见中国政府在东沙群岛及其附近水域的历史性权利是得到国际社会承认的。再次，历史性权利和义务在量上同等，国际成员拥有多大的历史性权利也就相应地承受多大的历史性义务，反之亦然。历史性权利和义务都经由一国政府来执行，并由国际社

47 《白龙尾岛划归越南》，下载于 http://harm.cyol.com/html/67/25386-9350.html，2008 年 10 月 20 日。
48 郭渊：《从“先占”来看中国对南海诸岛的主权》，载于《北方法学》2007 年第 3 期。
49 韩振华主编：《我国南海诸岛史料汇编》，北京：东方出版社 1988 年版，第 143 页。

会所认可。历史性权利和义务的最终指向都是国家权益的实现。

3. 历史性权利的实现，是建立在特定的历史关系和利益基础上的，以国家权力存在为先决条件和后盾力量。历史性权利的实现是国家权力对某一陆地和海域进行主权管辖实践的体现，因此，一国历史性权利的获得必须以国家权力对某一陆地或海域在相当长的历史时期内持续显示为保障。在菲律宾明目张胆地侵占中国南沙群岛部分岛屿之后，1978 年 6 月 11 日，菲律宾总统马科斯签署第 1596 号总统令，将其非法占据的岛礁以“卡拉延群岛”的名义编入菲律宾巴拉望省。该总统令为菲律宾的主张所提出的理由是：“由于上述区域内大部分属菲律宾群岛之大陆架的一部分，这些区域不仅从法律上不属于任何国家，从历史的根据、不可分之必要性、以及基于国际法确立的有效占领及支配，这些区域现在必须被认为属于并隶属于菲律宾的主权之下。其他国家虽然对这一区域之一部分主张领有权，但这些主张，由于放置的原因而失去效力，不能推翻菲律宾基于法律、历史以及公正的理由而提出的主张。”[50] 菲律宾在这里所陈述的“历史性权利”，国外分析者认为是到过南沙岛礁的菲律宾渔民或航海者，“然而，没有历史证据支持这种观点，因为菲律宾强调的卡拉延群岛是托马斯•克洛姆个人发现的，在此之前没有明确的地图对卡拉延群岛进行领土上的界定。”[51] 马来西亚在主张其大陆架的同时，在 1983 年也指出对南沙群岛的南部岛礁拥有历史性权利，并声称为其领土的一部分。[52] 进而，马来西亚以国际法上的“有效占领”为依据，于 1983 年占领了燕子礁，1986 年又占领了南沙另 2 个岛礁。马来西亚所声称的“历史性权利”和“有效占领”是没有根据的，因为发生的时间较近，而且遭到了其他国家的反对。

历史性权利的产生反映了特定历史阶段一个国家 / 民族对某一陆地或海域持续占有的关系，其基本动因是为了实现自己的利益要求，“把人和社会连接起来的唯一纽带是天然必然性，是要求和人的利益”。[53] 对某一陆地或海域历史性的占有，并与其他国家围绕领土的主权归属所产生的错综复杂的关系，也必然体现为国家间各种不同的利益要求。正因如此，国家间才有了经济、政治、文化、民族等形形

50 Aileen San Pablo-Baviera ed., *The South China Sea Disputes: Philippine Perspectives*, Quezon City: Philippine China Development Resource Center and Philippine Association for Chinese Studies, 1992, p. 55.

51 Bob Catley and Makmur Keliat, *Spratlys: The Disputes in the South China Sea*, Aldershot: Ashgate Publishing Limited, 1997, p. 35.

52 Statement of the Malaysian Foreign Ministry, 1983. 9. 9, quoted Lo Chi-Kin, *China's Policy towards Territorial Disputes: The Case of the South China Sea Islands*, London: Routledge, 1989, p. 155.

53 《马克思恩格斯全集（第一卷）》，北京：人民出版社 1971 年版，第 439 页。

色色的利益交织。在历史性权利的界说中，核心关键词是“权利”和“历史”，二者是权利产生的前提或条件，权利是建立在历史活动（包括占有）基础之上的。这种权利只有建立在历史基础上才是“正当”与“正当的”，“正当”与“正当的”是权利构成要素。[54] 由此我们可以把权利界定为“正当事物”或“正当东西”；义务则是应当事物；利益是权利的基本要素，利益关系是一种最复杂的关系。只有正当的，也唯有正当的利益才能产生历史性权利。这就涉及历史性权利的法律要素，从国际法的理论和实践上看，如果说领土是历史性权利产生、发展的目标，那么国家主权则是实现历史性权利过程的核心。

首先，对领土的取得来说，著名国际法学家奥本海默认为：“在 15、16 世纪以前，单纯的发现而无需任何其他的行为，就可以取得对无主地的完全主权；但是对 18、19 世纪，特别是以后而言，领土的取得必须同时符合‘最先占领’和‘有效管理’这 2 项原则。”[55] 19 世纪以后，对某一陆地或海域的行为和活动都是以国家主权为中心内容展开的，这其中，人们的一切活动都具有私人和国家属性，人们对该领土或海域的行政管理和主权行使都是运用国家政权力量来实现的，人们的生产和经济、文化活动是通过以特定方式来确定对土地的所有关系来实现自己的利益要求，但是这种土地的所有关系是与国家政权的行为紧密相关的。

其次，近代以来，历史性权利的实现是以政治权力 / 主权国家为核心力量的。历史性是作为国家行为长期历史积累的结果。在英挪渔业案中，挪威政府认为：“除非有长久习惯的支持，否则一国无法获得一个历史性权利，时间的持续乃必要之因素。公认取得一个习惯的有效性，必须经过的时间是和平地，并且持续不停地。如果未达此要求，绝对无法取得有效性。但是，正如该字义本身清楚显示的，一个‘历史性’权利，其拘束力源自历史，也就是说，源自于时间的经过。”[56] 自近代以来，有关领土的历史性权利内容是围绕着政治权力凝结而成的，这其中，国家或民族是历史性权利的主要载体或承担者，统治阶级是执掌、影响和探求历史性权利的政治组织，而个人或集体则是代表不同利益、以影响历史性权利形成和发展的践行力量之一。

再次，陆地或海上疆域形成中所体现出来的地缘文化，是以政治权力为中心内容和价值取向的。一方面，在历史性权利实践过程中而实现 / 形成的地缘文化，反映着一个民族 / 国家的思想行为方式、文化价值取向，例如：中国人在开发与建设南海诸岛过程中的信仰崇拜和在建筑上的文化寄托，如妈祖神庙，就体现出对海洋的理解；另一方面，地缘文化依附于国家历史性权利的实践，特定的地缘文化为特定历史阶段的历史性权利服务。在英挪渔业争端案中，英国和挪威对某些挪

54 范进学著：《权利政治论》，济南：山东人民出版社 2003 年版，第 20 页。
55 Lanterpacht ed., *Oppenheim's International Law*, Vol. 1, 8th edition, London: Longman, p. 558.
56 傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 330 页。

威沿海水域的地位有所争执，挪威主张对这些沿海水域享有历史性权利，而英国则认为这些区域是公海的一部分。最终，双方达成一致：提出历史性权利主张者，应负举证责任。[57] 政治权力不仅是地缘文化的构成素材和内容，而且影响甚至支配着地缘文化的发展进程、发展方式和发展方向，这对一国历史性权利的形成不能不产生影响。

政治权力的发展是推动历史性权利发展的主要动力。政治权力是凌驾于社会和特定组织之上的巨大力量，因此，它的特定性质、组织构成、运行方式、规则规范都影响着历史性权利的内容和实现程度，也影响着国际社会对该国历史性权利的认知。一般来说，当一国国力雄厚，国家政治权力向外不断延伸，向外拓展管辖空间范围之时，那么该国对某一土地占有的历史性权利内容就越丰富。政治权力对历史性权利所起的作用较大，它能够极大地推动、阻碍乃至破坏历史性权利的发展。例如，在世界范围，社会民间力量对一国海洋权益的形成、发展所起的作用较大，当国家认可并鼓励社会民间力量作为时，它会促进该国人对海洋国土的开发和建设，历史性权利就得到实现，内容也不断发展。

政治权力在运行过程中所形成的历史性权利，在不同的地域表现为不同程度的主权要求，这与政治权力的延伸有关，也与同他国的交往有关。在某些地域 / 海域，地理距离决定了实施政治权力的范围和程度，距离越近，历史性权利所体现的内容越丰富。在古代，各国并未有明确的领土主权意识，而只有一些对外交往、航海、贸易等的内容规定。在对外交往中，一国逐渐形成并巩固了对近海岛屿或其势力所及之处的历史性权利，而在一些遥远的海域，沿海人民经营与开发某些岛礁的各种活动形成了当时一国主权权利的主要景观，沿海国的主权也就体现在这些岛礁上。早在秦汉时期，中国人民就已经开辟了通过南海与其他国家交往的海上丝绸之路，很早就发现了南海诸岛，并且对之进行了记载和描述。东汉时期杨孚《异物志》载有：“涨海崎头，水浅而多磁石，缴外大舟，值之多拔。”[58] “涨海”是中国古代对包括南海诸岛在内的南中国海称谓。“崎头”为古代对海中礁屿沙滩的称呼。“涨海崎头”即泛指南海诸岛礁滩。《汉书•地理志》又称：“天地四方，皆海水相通，茫然一巨浸焉，茹而不吐，满而不溢，故涨之名归之。”[59] 公元 225—230 年（三国吴黄龙 4 年—黄龙 2 年），到过南海一带的康泰在《扶南传》中说：“涨海中倒珊瑚洲，洲底有盘石，珊瑚生其上也。”[60] 这里所说的“珊瑚洲”就是由珊瑚虫造成的已经露出海平面的南海诸岛的珊瑚岛屿和沙洲。由此可见，自汉代始，

57 傅崐成著：《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 329 页。
58 杨孚：《异物志》，见明•唐胄：《正德琼台志》卷九，上海：上海古籍书店 1964 年影印版，第 14 页。
59 《汉书•地理志》卷二十八，粤地条。
60 《太平御览》卷 69 上，北京：中华书局 1963 年影印版。

有关南海的方志记载，是与海南岛东南海面上的西、南沙群岛有直接关系的。[61]

中国古代人民发现南海诸岛后将之称为“九乳螺州”、“石塘”、“千里石塘”、“千里长沙”、“万里石塘”、“万里长沙”等。宋代时将西沙群岛称为“九乳螺州”，将南沙群岛称为“石塘”。而后中国典籍中所谓“长沙”、“千里长沙”、“万里长沙”，大多数情况指的就是西沙群岛。而“石塘”、“千里石塘”、“万里石塘”，大多数情况指的就是南沙群岛。南沙群岛的这些名称，在历史上曾经为外国人所使用。如《宋会要辑稿》记载占城和真里富使者叙述其来华行程时，都用“石塘”、“万里石塘”来称呼南沙群岛。[62] 而中国渔民给南海诸岛中一些岛屿所命名的名称，有一部分也被西方国家的非法勘测者所沿用，有的音译，有的意译。[63] 古代文献以及近现代在南沙群岛考古工作的发现，都证明中国人民从秦汉时代起就已经在南沙群岛及其附近海域进行渔业生产。考古工作者在南沙群岛上及其附近海域海底，都发现了一些古代文物和建筑遗迹，足以证明中国人民最早开发和经营南沙群岛。[64]

对这些地方的治理也出现了某些特别方式，这与当时的航海技术条件、海洋开发意识有直接关系。正是这种经常性占有和持续、和平的权利行使，才使一国对该地域形成了较为稳固的历史性所有权，岛礁周围海域也成为沿海国人民开发和沿海国治理的主要对象。中国政府在发现南海诸岛以来就对其实施有效管辖，即“先占”。但是，中国历代政府不可能在那些远离大陆的南沙群岛上设官分职，不可能如陆地疆域那样进行缜密的行政管理，中国历代政府对南海诸岛的行政管辖的主要方式是巡海。[65] 正如国际司法实践和判例所认为的，对领土主权的行使，是根据当时的具体历史条件和自然条件而确定管辖方式的。“为此目的（领土主权）的管辖程度，因具体情况而不同。例如对一块相对落后的领土，就不需要像对文

61 韩振华编：《我国南海诸岛史料汇编》，北京：东方出版社 1988 年版，第 24 页。

62 《宋会要辑稿》第 179 册，北京：中华书局 1957 年缩印本，第 7784,7763 页。

63 如 1868 年，英国海军部测绘局在大量勘测的基础上，出版了《中国海指南》一书，书中记述了许多南沙群岛岛礁的中文名称，如所载的鸿庥岛为 NamYit I, 景宏岛为 Sin Cown，太平岛为 Taiping, 中业岛为 Thitu, 渚碧礁为 Subi, 这些名称分别是从海南岛渔民所称的“南乙”，“秤钩”，“黄山马峙”，“铁峙”，“丑未”等音译过来的。张鸿增：《从国际法看中国对西沙群岛和南沙群岛的主权》，载于《红旗》1980 年第 4 期。

64 潘石英著：《南沙群岛•石油政治•国际法》，香港：香港经济导报出版社 1996 年版，第 519 页。20 世纪 70 年代，厦门大学南洋研究所调查组经过实地考察，在南沙群岛的太平、中业、南威等岛屿上看到了明清时代渔民建立的水井、茅屋、土地庙和石碑等物，罗孔、红草峙、奈罗、铁峙、黄山马、鸟仔峙等岛都有中国渔民挖的水井。

65 郭渊：《从“先占”来看中国对南海诸岛的主权》，载于《北方法学》2007 年第 3 期。

明与发达的领土那样精心管辖和治理。”[66]“任何国家权力都不是每时每刻都及于它的每一部分土地。”[67]

历史性权利这一概念的探讨还将继续存在下去，并被各国用作扩展其管辖领域的一种手段，它不仅适用于海洋区域，而且也适用于陆地区域。在国际海域划界谈判中，历史性权利也是被当事国和国际法院及有关仲裁部门考虑的重要因素之一，而且会对判定结果产生一定影响。

66 [英]J•G•斯塔克著，赵维田译：《国际法导论》，北京：法律出版社 1980 年版，第 142 页。
67 梁淑英主编：《国际法教学案例》，北京：中国政法大学出版社 1999 年版，第 55 页。

白礁岛主权争议案评论

熊良敏*

内容摘要: 2008 年 5 月 23 日，国际法院对新加坡与马来西亚白礁岛主权争议案作出了判决，将白礁岛的主权判给了新加坡。本文首先介绍了该案的背景，随后归纳了本案的争议焦点和判决的主要内容，最后对本案在国际社会上的影响进行了简要的评论。本文认为，在领土主权的争端问题上，国际法庭越来越偏重于考虑有效控制因素。因此，中国应该加强对海域主权的有效控制，从而捍卫自己的海洋权益。

关键词: 白礁岛主权　有效控制　主权宣示

自从新加坡在 1965 年脱离马来西亚独立后，因为历史的渊源，两国长期以来因供水、填海、修建新马大桥及新加坡军用飞机使用马来西亚领空等诸多问题时有摩擦。1980 年又因白礁岛的主权问题互不相让，直到 2003 年 2 月两国达成协议，同意把白礁岛主权争执提交国际法院仲裁。本案是马来西亚继 2002 年，第二次把岛屿主权纷争交由国际法庭裁决。2002 年国际法院在马国与印尼针对婆罗洲潜水天堂西巴丹岛与利吉丹岛主权纷争时，判决两岛的主权归马国所有。而在本案中，国际法院接受了新加坡的陈词，判新加坡保有白礁岛主权。

这一案例显示了通过第三方解决争端机制的效用，为探讨和平解决领土争议的国际法规则提供了新的启示，也给中国在当前形势下捍卫自己的主权提供了新的思考。本文对此案进行了简要的评论，旨在为中国捍卫海域主权提供借鉴。

一、案件背景

本案系白礁岛的主权归属所引发。白礁（新加坡称 Pedra Branca，马国称 Pulau Batu Puteh）来源于葡萄牙语，因礁上终年为白色的鸟粪覆盖而得名。最早见于 1583 年荷兰航海家林斯霍滕所著的《早期东印度的葡萄牙航行者》一书。该

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岛位于柔佛海峡东部，面积仅为 2000 平方米，离马来西亚柔佛州 13 公里，距新加坡东部海岸 60 多公里。

图 1 白礁岛位置图

（资料来源：《星洲早报》，下载于 http://www.sinchew-i.com/special/pulaubatuputih/images/sing_ma.gif，2008 年 7 月 7 日。）

英国政府在 1840 年占领了白礁岛，并于 1851 年在岛上建造了一座灯塔，即霍士堡灯塔。随后，新加坡接管了灯塔，在此期间，柔佛王国或马国并未对此提出抗议。直到 1980 年，马国出版地图将白礁岛划归为本国领土，以此宣示对白礁岛的主权，此举引起新加坡的不满，新加坡于 1980 年 2 月 14 日向马来西亚递交外交照会，抗议马来西亚地图把白礁岛列为马来西亚领土，两国对白礁岛主权的争夺正式拉开序幕。为强化对白礁岛的控制，1989 年，新加坡在白礁岛装置了一个雷达系统，同年，新加坡派出军舰巡逻，禁止马来西亚渔夫在白礁岛附近水面捕鱼，新加坡和马来西亚对白礁岛的主权争夺进一步加剧；1991 年，新加坡在岛上建造了直升机停机坪。1994 年，新加坡和马来西亚两国同意把白礁岛主权争执提交到国际法庭裁决；1995 年至 1996 年，两国举行会谈，商议将争端提交国际法院处理的细节；1998 年 4 月 14 日，双方就特别协议的内容达致共识，同意除了白礁岛，也将附近的中岩岛及南礁岛列入主权争议范围。2002 年 12 月，随着国际法院判西巴丹岛与利吉丹岛主权归马来西亚，白礁岛争端再度受到瞩目。2002 年 12 月 25 日，一艘马来西亚的水警巡逻艇在驶近白礁岛时，遭新加坡海军舰只驱逐；2003 年 2 月 6 日，新马双方签署一项特别协议，决定将该岛争端交由国际法院裁决；2007 年 11 月，国际法院对此举行了听证会；2008 年 5 月 23 日，国际法庭对此作出判决。[1]

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1 白礁岛主权争议进程表，下载于 http://sea.nanyang.lycosasia.com/hotarticledisplay.htm?hotnews_rn=1514&article_rn=224694，2008 年 7 月 7 日。

二、争议焦点及判决[2]

新马两国对该岛的主权归属各执一词，针锋相对。马国主张白礁岛原属于柔佛王国，其继承并且一直保有该项主权；新加坡则声称该岛最早由英国合法占有，其继承了英国对白礁岛的领土主权，并且在过去的 150 年间一直对白礁岛行使主权。双方争议的焦点主要集中在 3 个方面：

首先，谁拥有白礁岛的原属权。马来西亚认为，白礁岛并非无人荒岛，其拥有原始主权（可追溯到前任柔佛苏丹王朝），到现在也继续保有该项主权。而新加坡却认为，在 1847 年之前白礁岛是个无人拥有的荒岛，从未被任何国家并入辖区。英国在该岛上建造了灯塔并合法占有了该岛，新加坡独立后继承了该岛的领土主权。从 1851 年到现在，先是英国，尔后是新加坡对白礁岛行使主权。

其次，英国人在白礁岛上建造灯塔是否构成先占。马来西亚认为，首先，该岛原权属归马来西亚，不是无主地，不适用先占原则；其次，英国当年是获得柔佛统治者的批准后才在白礁岛上建造并管理灯塔，英国自始至终都没有占有白礁岛的主观动机和实质的占有行动，英国要求在白礁岛建造灯塔和要求占有白礁岛完全是两回事，不构成先占。新加坡则主张，从英国占有的意向和当年在岛上的一系列举动这两大要点，已足以说明英国殖民地政府从 1847 年到 1851 年之间，已实际合法地拥有白礁岛。

最后，新加坡接管灯塔后是否构成有效行使主权。马来西亚认为，新加坡接管英国建造的灯塔后，只是延续了霍士堡灯塔的管理员身份，并未变更白礁岛的法律地位；另外，马国在 1979 年就出版地图把白礁岛列为马国领土，而新加坡直至 1995 年才第一次把白礁岛列为新加坡领土，新加坡并未有效行使主权。新加坡认为，从 1847 年至 1979 年这 130 年期间，新加坡是在“公开、连续而又众所周知”的情况下占有白礁岛，马来西亚从未提出过该岛主权归属问题，新加坡才是白礁岛的主人。

国际法庭首先根据所描述的历史背景，确认白礁岛的主权争议于 1980 年 2 月 14 日才具体化，即新加坡抗议马来西亚在 1979 年出版的地图中把白礁岛描绘在马来西亚的领海中。

针对以上 3 个问题，法院首先确定白礁岛最早为柔佛的领土。柔佛苏丹最早发现了白礁岛并且实际控制了白礁岛，该占有并未受到任何权力的干涉和限制，其“持续并且和平地宣示了对白礁岛的主权”。并且，多个世纪以来，在白礁岛附

2 International Court of Justice, at http://www.icj-cij.org/docket/files/130/14492.pdf, 7 July 2008.

近捕鱼的海人都是效忠柔佛王国，这进一步论证了白礁岛在关键日期前不是无人岛，最早属于柔佛苏丹。

随后，国际法院对白礁岛在殖民统治时期的主权进行了分析。1824 年，柔佛苏丹沦为英国和荷兰的殖民地，英国和荷兰将柔佛苏丹一分为二，划分了各自的势力范围。法庭认定殖民统治时期的领土划分并未改变白礁岛的主权。从当初英国遴选灯塔的地点和建设的过程，随后英国和新加坡对霍士堡灯塔、海峡灯光系统实施的有关法律、柔佛于 1860 年实施的渔业管制这些因素看来，法院认为白礁岛主权在 1953 年之前并未发生改变。

但法院认为，1953 年之后，因新加坡和马来西亚两国的行动，白礁岛的主权状况发生了变化。首先，1953 年 6 月 12 日柔佛政府秘书回复新加坡英殖民政府询问的公函中明确表明柔佛州政府不拥有白礁岛主权。法院认为这一信件和对信件内容的诠释是核心的、关键性的，也是确定双方对白礁岛主权的协议。其次，法院认为，从新加坡和马来西亚此后在白礁岛的所作所为也可以推断，该岛的主权已经转移。一方面，新加坡在白礁岛采取了一系列行动，包括插军旗、安装军事通讯设备、大兴土木、在附近海域巡逻等，以及新加坡在其水域内调查船只沉没事件、批准马来西亚官员测量白礁岛附件的水域，皆可被视为是主权归属行为，宣示了新加坡对该岛的主权。另一方面，马来西亚对新加坡的主权宣示行为无所作为。比如没有针对新加坡在该岛上空的飞行权提出异议，且当新加坡在岛上设立军事联络器材、建议填土扩大该岛面积，在出版的刊物和地图中将该岛纳入新加坡主权领土范围的时候，马拉西亚也未对这一系列主权活动作出回应。

最终，国际法庭根据历史和国际法律论据，以及管理因素等其他事项，作出判决认为，尽管加入马来西亚的柔佛州原本拥有白礁岛的主权，但百年以来，没有在该岛行使主权活动，此种原始主权已经无法对抗新加坡统治当局后来的有效控制，故判决主权归新加坡所有。而此项判决是属于最后且有约束力的裁决，两国都不能再提出上诉，因此，这起绵延近 30 年的主权纷争亦尘埃落定。

三、评　议

这是马来西亚将领土争议提交国际法院解决的第二个案件，对东南亚国家关系具有深远意义。国际法院的判决对马新两国关系具有重大的影响，特别是对海域划分、区域内的海产和天然资源的获取，以及航线的控制。对新加坡这个“飞机一起飞就要飞出国界”的国家而言，一直以来为马来西亚及印尼南北包围，自此判决以后，终于名正言顺地突破马来西亚与印尼南北两面的包围，其海域与领土在一夜之间向东扩张，延伸至南海。同时，新加坡赢得白礁岛的主权后，有利于新加坡及其盟友美国控制南海至马六甲海峡的水道，加强它在该区域的军事地位。此

外，白礁岛海域也有丰富的海产，其海域还可能拥有丰富的石油。

这项判决所产生的影响不仅仅局限于马新两国，对世界各地岛屿主权纷争也带来很大的冲击，其中包括中国与亚洲许多国家存在着的岛屿主权争议。中国制定政策时，应当通过白礁岛判决密切关注国际法在岛屿主权争议案件中的发展动向。

反观白礁岛和西巴丹岛与利吉丹岛的主权案判决[3]可以得出如下结论：岛屿主权的归属关键在于有关国家是否对争议岛屿行使了主权，而不在于距离争议岛屿的远近，也不在于岛屿的原始权利归属于谁。国家对领土的有效控制在决定领土主权的归属上具有举足轻重的作用，这意味着在今后的类似案例中，国际法院都会偏重于国家有效控制，而不是依据历史的因素、地理位置。[4]

新加坡赢得主权关键的一点在于，新加坡有效管理白礁岛上的霍士堡灯塔将近 160 年，而且成功控制周遭水域，驱赶马来西亚渔民，形成主权上的控制；而马来西亚之所以痛失岛屿是因为其在新加坡对白礁岛进行主权控制长达一百多年的时间里未作出反应。正是马来西亚统治者长期的漠视与疏忽，导致最终失去了白礁岛主权。

目前中国的海洋权益正遭受海上邻国的蚕食，日本占据钓鱼列岛，越南、菲律宾及马来西亚也分别占据南沙群岛的个别岛屿。如何构建和谐海洋，捍卫中国的海域主权，是当前亟待解决的问题。在处理岛屿主权争端时，从本案的判决中，我们可以借鉴正反两方面的经验教训，主要有以下几个方面：

第一，在保护海域主权问题上，政府除了依靠历史证据外，更应高度重视对争端领土的有效控制。

在国际法院的这一判决中，国际法院再次确认了领土主权的关键在于“有效控制”。新加坡索讨白礁岛主权的有力论点是过去 150 多年一直对该岛行使主权。而马来西亚用以索讨白礁岛主权的论点仅是柔佛苏丹王国自古就拥有白礁岛的原属权。尽管马来西亚能够证明白礁岛一百多年前确实是柔佛苏丹领土，然自 1853 年后，新加坡殖民当局真正控制了白礁岛。这种自古以来即是马来西亚不可分割领土的历史权属，面对新加坡的实际控制，其国际法效力顿时土崩瓦解。从国际法院处理的相关案例来看，实际控制的时间越长，解决争议时就越有优势。那么，对于中国，显然应当采取一定的行动及措施以显示对争端领土进行了有效统治。

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3 2002 年，国际法院把位于婆罗洲的西巴丹岛与吉丹岛主权判给马来西亚，其论据也是因为这 2 个岛屿长期以来由马国所管理，印尼一方并未提出抗议。Case concerning Sovereignty over Paulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia), Summary of the Judgement of 17 December 2002.

4 朱利江：《试论解决领土争端国际法的发展与问题》，载于《现代国际关系》2003 年第 10 期，第 25~28 页。

否则，将陷于非常被动的局面。[5] 比如，关于钓鱼岛的主权，中国能拿出充分证据证明最早发现、最早命名、最早开发经营。但日本抱定了“先占”和“有效控制”2 条国际法原则企图确立对岛屿的主权。日本政府采取“租借”方式从所谓“日本国民手中”获得对钓鱼岛的“管理权”，日本自卫队和水警驱赶中国籍船只和渔民，其目的在于进一步限制中国人登上钓鱼岛，造成有效控制钓鱼岛和周边海域的所谓“主权事实”。[6]

白礁岛判决中，国际法院在考虑主权归属的因素时，强调了特定的连续证据，亦即有效占领、管理或控制某地相当长的时间和争议方的无所作为，历史权属因素反而置于次要地位。从中，我们不难得出结论：对某一领土主权的法律基础产生争议时，仅仅证明在某一时候有效地取得了领土主权是不够的，还必须证明所主张的领土主权在被认为是解决争端的关键时刻继续存在，而且确实存在。[7] 我们应当看到，在处理钓鱼岛和南沙群岛领土主权争端时，主张这些岛屿自古以来即是中国领土，根据传统 U 型线宣称中国对这些岛屿具有原属权等，意义显然不大，而积极强化海域主权的控制，才是当务之急。

第二，多管齐下。中国应借鉴新加坡保卫白礁岛的策略来维护领土主权，切实加强对争端领土的主权控制，有所为，有所不为。

在本判决中，法院认为新加坡派遣海军进行巡逻及调查发生于白礁岛周围水域的船只失事事件，以及新加坡批准马来西亚官员测量白礁岛附近的水域，其所作所为均构成主权宣示，形成对岛屿的实际控制。我国应借鉴新加坡保护白礁岛主权的策略，通过立法、行政、司法等多种手段确立对争议海域的实际控制权，行使国家功能，强化主权主张，以此作为日后在国际法庭上的裁决依据。一方面，中国应加紧制定发展、保护和控制岛屿的法律；另一方面，通过驻军、升旗、划界等方式保持对岛屿的实际控制，并且还应该考虑到对周边海洋的有效控制，增强定期维权巡航，以此防止周边国家对我国岛屿的进一步侵占，并为以后解决这些争端创造条件。

除了加强对争议海域的行政管理，中国在宣示海洋主权、争取海洋权益上要充分借助民间力量进行经济开发、科研调查、文化传播及旅游开发，从而强化中国在争议海域的主权存在。可以考虑在相关岛屿兴建军事基地，或者组织旅游观光团进行参观，强化国家对这些岛屿的主权行使，形成事实控制的态势；也可以鼓励本国国民向海岛移民，强化控制和行政管辖，显示主权；同时也可以发动民间力量对上述岛屿进行资源调查，这既是一种显示主权的行动，又能为将来进行资源开

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5 韩占元：《试析解决领土主权争端的有效控制原则》，载于《太原师范学院报》2008 年第 3 期，第 55~57 页。

6 黄凤珍：《日本政府“租借”钓鱼岛的背后》，下载于 http://www.people.con.cn/GB/guoji/14549/1969989.html，2008 年 7 月 7 日。

7 梁淑英著：《国际法案例教程》，北京：知识产权出版社 2001 年版，第 48~49 页。

发打好基础。

另外，该案给我们的另一个启示是，当对方国家在有争议的领土上进行主权宣示或者开展实际控制行为时，本国进行抗议以及采取对应的行动和措施显得尤为重要。完全搁置争议的建议与做法有可能使中国丧失掉越来越多的主动权。马来西亚 130 年来保持沉默，既未对新加坡在白礁岛上的有效控制行为提出异议，也从未展示其对白礁岛的主权，这是马来西亚最终失去原本属于自己领土的重要原因。当然，值得注意的是，对于其他国家侵犯中国海域主权的行为，单纯靠政府“抗议”与“声明”是远远不够的，中国的民间力量也必须行动起来，采取具体措施，借此明示中国的主权，并打断其他国家在争议海域上有效控制的连续性。

“九段线”法律地位探析

——以四种学说为中心

罗婷婷 *

内容摘要：“九段线”作为我国南海传统疆域线，自 1948 年公布以来，在半个多世纪得到了包括南海周边国家在内的国际社会的默认。但是随着《联合国海洋法公约》的生效和南沙群岛主权争端的加剧，近年来，周边国家却对“九段线”的法律地位提出了质疑。对于“九段线”的法律地位，我国法律一直没有明确的规定。而学界对此也有着多种不同的主张和解释，众说纷纭、莫衷一是。因此，对“九段线”的法律地位作出界定，以明确我国的权利主张，对坚持和维护我国的南海主权权益意义重大。

关键词：“九段线”法律地位　历史性水域

“九段线”作为我国南海传统疆域线，历来为我国政府所坚持。然而，由于种种原因，时至今日，这九条线段的法律地位仍不明晰。一方面，新中国成立后，中国政府一直没有作过正式说明；另一方面，我国学界对于“九段线”的法律地位也有着多种不同的主张和解释。总结起来，对于“九段线”法律地位的主张主要有 4 种，即“国界线”说、“岛屿归属线”说、“历史性所有权线”说及“历史性水域线”说。这 4 种学说都认为“九段线”内的岛屿属于中国，受中国主权管辖，但是对于线内水域的主权要求却不尽相同。本文拟以这 4 种有关“九段线”法律地位的学说为基点，分析它们的优劣得失；进而在此基础上表明，“历史性水域线”说是一种对“九段线”法律地位界定较为理想的理论，有利于明确我国的权利主张，对坚持和维护我国在南海的权益具有重要的意义，值得我们进一步充实发展。

一、“九段线”的历史渊源

在抗日战争胜利后，根据《开罗宣言》等关于要求“日本所窃取之中国领土……

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归还中华民国”的规定，当时的中国政府经过重新核定，确定了南海的领土范围。为使确定的领土范围具体化，1948 年 2 月，中国政府首次公开出版发行了《中华民国行政区域图》（内政部方域司傅角今主编、王锡光等人编绘，商务印书馆印制，1947 年 12 月制版）。该图及附图《南海诸岛位置图》在南海海域标绘了东沙群岛、西沙群岛、中沙群岛、南沙群岛的位置并标明其属于中华民国领土。从北部湾中越陆地边界向海至台湾省东部，在南海诸岛四周标绘有 11 条断续界线，其最南端至北纬 4 度左右，包括曾母暗沙在内。这是中国政府首次对外表明对南海的权利主张。1949 年 5 月 20 日，国民政府的《海南特区行政长官公署组织条例》，把“海南岛、东沙群岛、西沙群岛、中沙群岛、南沙群岛及其他附属岛屿”包括在海南特区之内，行使行政管辖。[1] 但是，关于这条断续线以及线内水域的法律地位，当时的中国政府并未表明立场。

新中国成立后，基本上延续了用该“断续线”表示南海疆域范围的做法。1953 年去掉了北部湾的 2 段，其他各段线的位置也有所调整，形成了现在所谓的“九段线”。[2] 这条线通常被称为我国南海传统疆域线。“九段线”公布后，当时的国际社会并未提出任何异议。此后，包括南海周边国家在内的许多国家出版的地图中也标绘有此线，并注明属于中国。可见，该线已得到国际社会的默认达半个世纪之久。

有关“九段线”的产生背景和绘制方法，在《南（中国）海法律地位之研究》》一书中，台湾学者傅崐成先生认为，此线之划定是在 1947 年，亦即美国总统杜鲁门在 1945 年宣布建立美国渔业保护区及大陆架之后的 2 年。与此同时，世界各国都因杜鲁门宣言而引发了海洋圈地的风潮，纷纷扩大本国的海洋权益范围，当时中国政府之主张，实为对此全球风潮的反应。U 型疆界线的名称、绘制方法，均与陆地上中国的疆界线无异，且其位置适处于中国南海诸岛与邻国海岸线之间的中线；加之 U 型线系由 11 段线“断续”组成（1953 年经我国政府批准，去掉了北部湾内的 2 条），足以证明当时划定 U 型线时，系作为中国在此一海域之“未定疆界”（如陆地上中缅、中印之未定疆界），仍然保留了将来与邻国正式划定“疆界线”的弹性。[3]

在台湾海峡的另一边，台湾当局在其出版的地图上一直沿袭 1948 年《中华民国行政区域图》的画法，在南海标绘由 11 段线组成的南海传统疆界线。长期以来，海峡两岸都一直在地图上标绘着这条传统疆界线，但是一直没有对其作任何的文字说明。[4]

20 世纪 70 年代以来，随着南海海域丰富的自然资源陆续得到发现，南海周

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1 吴士存主编：《南海问题文献汇编》，海口：海南出版社 2001 年版，第 37 页。
2 “九段线”又被称为“U 型线”、“九段虚线”、“海上疆界线”、“舌型线”等。
3 傅崐成：《南（中国）海法律地位之研究》，台北：123 资讯有限公司 1995 年版，第 204 页。
4 张良福：《南海万里行——在南沙群岛巡航的日子》，北京：海洋出版社 2006 年版，第 197 页。

边一些原本从未对此海域主张过主权的国家开始不断提出领土要求。无疑，这些领土要求与我国将“九段线”看作南海传统疆域线的主张相对立，“九段线”的法律地位问题摆在了我国政府和理论界面前。法律地位即是法律对相关对象的定位，如果在理论上确定的“九段线”法律地位对我国较为有利，无疑能够弱化周边国家的领土要求，同时也为我国政府的相关主张提供理论基础。

二、对现有学说的批评

目前，有关此问题较为成熟的学说大致有 4 类，即“国界线”说、“岛屿归属线”说、“历史性所有权线”说及“历史性水域线”说。应该说，这 4 种学说大致涵盖了当下学者们对此问题的基本观点，换而言之，即便存在新论，也是从这 4 种观点推演而得，在一定程度上是 4 种观点的变种。因此，如果说“九段线”法律地位问题的解决至少在当下无法脱离这 4 种学说的话，分析这 4 种学说的优劣得失对我们最终界定“九段线”法律地位来说便是一件极富意义的事情。

“九段线”法律地位问题的难点在于我国的南海权益与相关国际海洋法之间的张力。我国政府早年在主张“九段线”时，相关的国际海洋法制度与实践并不够成熟和完善。而二战之后，国际海洋法飞速发展，尤其是 1982 年《联合国海洋法公约》（以下简称“《公约》”）的出现，为世界各国之间的海洋争端提供了重要准则。显然，在国际海洋法大行其道的当今世界，我们不可能完全抛开这些法律准则，去主张国际海洋法完全无法容纳的权益。同时，又不能囿于这些法律准则，以致损害我国的南海权益。理想的做法是，在尊重最基本的国际海洋法制度与实践的基础上，利用这些制度与实践，维护国家权益。由此，下文对各种学说的批评将围绕着上述张力而展开。

（一）“国界线”说

“国界线”说认为，该线划定了中国在南海的领土范围，线内的岛、礁、滩、沙以及海域均属于中国领土，我国对它们享有主权。[5] 也就是说，认为“九段线”内海域属于我国领海，线外区域则属于其他国家或公海。

该学说的主要理由是“九段线”用国界线标示。其名称、绘制方法均与陆地上的中国疆界线无异，且其位置处于中国南海诸岛与邻国海岸线之间的中线。毫无疑问，在国际法上，领土被看作一个国家主权行使最基本也是最为重要的空间范围，若南海海域系我国领土，我国在南海的权益将得到最大限度的保护。然而问

5 许森安：《南海断续国界线的内涵》，载于《“21 世纪的南海问题与前瞻”研讨会文选》2000 年版，第 80~81 页。

题在于，主张“九段线”系国界线，法律依据不足，存在较大的论证难度。

首先，如上文所述，该线是断续线，足以证明当时划定时系为中国在此海域之“未定疆界”（如陆地上中缅、中印之未定疆界）。它不是一条已经划定的实在疆界线，我们不能根据这条线将线内的岛屿和海域说成是中国的领土。其次，自从在地图上标绘了“九段线”以后，中国历届政府从来没有明示或暗示地宣布过线内的整个海域是中国的领海，也从来没有对它行使过领海权。再次，将“九段线”线解释为“国界线”的观点有悖于国际海洋法的理论和实践。国际海洋法有一条基本理论和基本原则，即陆地统治海洋。基于这一理论和原则，沿海国有权在其海岸外选定一条领海基线，将这条线作为起始线以一定的距离标准向外划定本国的领海。1958 年《领海与毗连区公约》和 1982 年《公约》都对沿海国的这一权利和划定领海的方法作出了明确的规定。[6] 在地图上标绘一条线以圈定领海范围的想法和做法，明显缺乏一定的法律依据。

可见，“国界线”说将整个“九段线”视为中国的领海，旨在最大限度地实现我国在南海的利益。但是，鉴于该学说缺乏一定的国际法理论和实践的支持，在理论上的论证和实践上的实现都具有较大的难度。

（二）“岛屿归属线（或岛屿范围线）”说

“岛屿归属线（或岛屿范围线）”说认为线内的岛屿及其附近海域是中国领土的一部分，受我国的管辖和控制，即通过该线来确定南海中哪些岛屿属于我国。[7] 而对于“其附近海域”的权利为何属性，该学说并未明确阐释。根据学理推知，依照《公约》和我国相关国内法的规定，我国对该部分水域分别享有内水、专属经济区、大陆架的主权权利。

秉持该观点的中国社会科学院的刘楠来教授认为，从历届中国政府的行为可以推断出“九段线”是岛屿归属线。首先，在 1948 年 2 月国民党政府出版《中华民国行政区域图》之前，1947 年内政部方域司就主持编绘过《南海诸岛位置图》。《南海诸岛位置图》是最早标绘断续线的地图，通过该图的图名以及当时中国政府收复南海诸岛的历史背景可以看出，其直接的目的就是要标明中国对其享有主权的南海诸岛的范围和位置。此外，1947 年 4 月 14 日内政部同有关部门讨论了《西、南沙群岛范围及主权之确定与公布案》，并就“南海领土范围最南应至曾母暗沙”等事项作出了决定。同年同月，内政部又为了“西、南沙群岛的范围和主权的确定与公布”事由，专门向广东省政府发出了一封编号为 0434 号的公函，商请

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6 刘楠来：《从国际海洋法看“U”型线的法律地位》，下载于 http://www.nansha.org.cn/study/9.html，2008 年 1 月 17 日。

7 赵理海：《海洋法问题研究》，北京：北京大学出版社 1996 年版，第 38 页。

后者“查照办理”。内政部的这 2 项活动都是为了一个目的，即确定和公布南海诸岛的范围和主权。其次，新中国成立以后，从中国政府的一系列声明中可以看出，中国政府实际上一直是把它当作岛屿归属线或者岛屿范围线对待。1958 年《中华人民共和国政府关于领海的声明》规定了我国 12 海里领海宽度，并宣布此项规定适用于“中华人民共和国的一切领土，包括中国大陆及其沿海岛屿，和同大陆及其沿海岛屿隔有公海的台湾及其周围各岛、澎湖列岛、东沙群岛、西沙群岛、中沙群岛、南沙群岛以及其他属于中国的岛屿。”很明显，该声明是把南海诸岛看作中国领土的一部分，并宣布它们与中国领土的其他部分一样都有 12 海里领海；同时也以承认南海诸岛与中国大陆及其沿海岛屿之间隔有公海的方式，排除了误将南海诸岛与中国大陆及其沿海岛屿之间的海域和“九段线”以内的全部海域解释为中国管辖海域的可能性。中国政府在各种不同场合都是用南海诸岛“是中国领土的一部分，中华人民共和国对这些岛屿及其附近海域享有无可争辩的主权”的同样措词来表述中国在南海问题上的基本立场，这实际上就是将“九段线”看作岛屿归属线。[8]

但是，主张“岛屿归属线”的学者们忽略了“九段线”产生及 1958 年《中华人民共和国政府关于领海的声明》发布时的历史背景。如上文所述，“九段线”划定的背景是 1945 年的杜鲁门宣言引发的全球海洋圈地风潮。中国政府在这样的历史背景下公布的这条断续海疆线，就决不会仅仅是一条岛屿归属线。这条线除了表明中国对线内岛屿及其周围一定宽度的海域享有领土主权外，还表明中国对线内其他水域及海床底土的自然资源拥有主权权利。[9] 另外，1958 年《中华人民共和国政府关于领海的声明》发布时，《公约》并未颁布。当时国际海洋法承认的国家管辖之下的海域仅有内水和领海。故该声明认为东沙群岛、西沙群岛、中沙群岛和南沙群岛和台湾一样，和大陆隔有公海。《公约》生效后，中国台湾和中国大陆间并无公海存在，台湾海峡水域的性质已经全部成为我国管辖之下的专属经济区。同样，南海四群岛和大陆之间的水域性质也应该随着《公约》承认专属经济区海域的存在而发生变化，不再为公海的性质。[10]

可以说，“岛屿归属线”说将“九段线”弱化为了一种确定岛屿主权归属的技术手段。对于线内的水域，采取了以岛屿为中心，根据《公约》来确立权利范围的方法。这样，必然会使得我国对线内大面积水域主权的丧失。这表现在以下 3 个方面：

第一，丧失南海暗礁、暗沙的权益。根据《公约》第 121 条，岛屿是四面环水

8 刘楠来：《从国际海洋法看“U”型线的法律地位》，下载于 http://www.nansha.org.cn/study/9.html，2008 年 1 月 17 日。

9 赵理海：《海洋法问题研究》，北京：北京大学出版社 1996 年版，第 38 页。

10 王志坚：《历史性权利与历史性水域——“U”型线及线内水域的法律性质浅析》，下载于 http://hhlawaid.blog.hex.un.com/6802909_d.html，2008 年 1 月 17 日。

并在高潮时高于水面的自然形成的陆地区域。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。[11] 这样，就使我国对于线内大量没于水下的暗礁、暗沙的权利主张陷入不能。

第二，丧失距海岛较远海域的权利。国家并不能对“九段线”内岛屿享有的专属经济区和大陆架以外的水域行使主权，即离岛屿较远水域成为了权利盲区。

第三，丧失不能维持人类居住或其本身经济生活的岩礁附近海域的权益。根据《公约》的规定，不能维持人类居住或其本身经济生活的岩礁，不应有专属经济区或大陆架。这样一来，我国对于这些岩礁的主权将限于其狭小的内水和领海，专属经济区和大陆架权利都无法实现。

“岛屿归属线”说将“九段线”解释为岛屿范围线，大大弱化了“九段线”的权利主张和法律地位。由于“九段线”内的海岛是确定的，如果该学说成立的话，那么，我们完全可以利用技术手段绘制出一张囊括这些海岛的地图，将“九段线”内的海岛一网打尽。由此，我们只需强调此图所示海岛的主权归属即可，为什么偏偏要用现存的那条“九段线”来确定海岛呢？可见，“岛屿归属线”说放弃了我国在“九段线”内的某些权利。从一定程度上说，是对“九段线”的否定，必然会影响我国在南海战略与经济利益的实现。

（三）“历史性所有权线”说

“历史性所有权线”说认为该线标志着中国的历史性所有权，这一权利包括对于线内的所有岛、礁、滩、沙的主权和对于线内内水以外海域和海底自然资源的主权权利，同时承认其他国家在这一海域内的航行、飞越、铺设海底电缆和管道等自由。换言之，这种观点在主张线内的岛、礁、滩、沙属于中国领土的同时，把内水以外的海域视同中国的专属经济区和大陆架。[12]

此学说和“岛屿归属线”说的相似之处在于两者都是以岛屿为中心，根据《公约》来确定我国对于南海的主权范围。所不同的是，该学说认为线内的岛、礁、滩、沙属于中国，内水以外的海域为中国的专属经济区和大陆架。这样，线内的所有海域都属于中国的主权管辖范围。相较于“岛屿归属线”说，该学说的权利主张范围更为广泛。但是，该学说也存在明显的不足。

首先，我国对于专属经济区和大陆架的主张应以《公约》为依据。根据《公约》的规定，沿海国可以主张从领海基线算起不超过 200 海里的海域范围，对其中的自然资源享有主权权利；大陆架是沿海国陆地领土的自然延伸，不到 200 海里的

11 《联合国海洋法公约》（汉英），北京：海洋出版社 1996 年版，第 57 页。

12 潘石英：《南沙群岛、石油政治、国际法》，香港：香港经济导报出版社 1996 年版，第 60~63 页。

可以扩展到 200 海里。这 2 种海洋区域的范围都是从领海基线开始计算。目前，我国还没有公布在南沙海域的领海基线。即便将来确定了南沙海域的领海基线，也很难设想所确定的界限会与“九段线”完全重合。[13] 另外，在国际实践中，“历史性权利”概念一般都是在“历史性所有权”的意义上使用的，一个国家以历史性权利为理由提出权利主张，追求的是主权或所有权。而沿海国对于专属经济区和大陆架的权利则是特定的主权权利，它们与历史性权利所指的主权和所有权，在质和量上都存在不同程度的区别。[14]

因此，“历史性所有权线”说本身就具有一定的矛盾性。我国对“九段线”内海域的权利与对专属经济区和大陆架的权利是性质不同的 2 个问题。历史性权利的主张依据是权利的法律性和历史性，而专属经济区和大陆架的主张是以《公约》为法律依据的。[15] 若主张南海水域为我国专属经济区和大陆架，则我国在南海的专属经济区和大陆架必须按照《公约》中的技术手段来确定，无法完全照顾到我国以“九段线”所确定的海域，由此，“九段线”很可能名存实亡。

以上 3 种学说虽有其一定的合理性，却在上文提及的国家权益与国际海洋法制度的张力中来回摇摆，缺陷极为明显：要么完全不顾现有的国际海洋法制度，主张无法获得相关法律准则支持的权益；要么局限于《公约》中明示的各种规定与制度，忽视了“九段线”的特殊地位，进而损害了我国的南海权益。在笔者看来，比起以上 3 种学说的摇摆，“历史性水域线”说在国家权益与国际海洋法制度之间找到了一个较为恰当的平衡点，克服了上述张力所带来的极端倾向，殊值赞同，特进行重点分析。

三、“历史性水域线”说的优势

“历史性水域线说”认为中国不仅对线内的岛、礁、沙、滩以及海域享有历史性权利，而且线内的整个海域都是中国的历史性水域。[16]

“历史性水域”作为一种特殊的制度，并不受到《公约》的排斥或否认。《公约》作为一个综合性的法典，在规定新的海洋法律秩序的同时，自始至终都体现着承认和保护各国既得利益的原则。[17] 根据《公约》第 15 条，有关国家在划定海上疆界线时，因“历史性权利”或其他特殊情况，可应用不同于一般的方法来划定。可

13 贾宇：《南海“断续线”的法律地位》，载于《中国边疆史地研究》2005 年 6 月。
14 许森安：《南海断续国界线的内涵》，载于《“21 世纪的南海问题与前瞻”研讨会文选》2000 年，第 80~81 页。
15 贾宇：《南海“断续线”的法律地位》，载于《中国边疆史地研究》2005 年 6 月。
16 赵国材：《从现行海洋法分析南沙群岛的主权争端》，载于《“21 世纪的南海问题与前瞻”研讨会论文选》2000 年，第 20 页。
17 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。

见，《公约》承认“历史性权利”在海洋划界中的特殊作用。而“历史性水域”的实质就是一国对其邻接水域享有的“历史性权利”。需要说明的是，不应将此历史性权利与前文所谓“历史性所有权线”说相混淆，前者主张历史性水域系《公约》容许但未作明确规定的水域，后者则认为历史性所有权线内的具体权限依然应按《公约》中有关专属经济区和大陆架的具体规定而定。

对于“历史性水域”的定义，现行国际法律制度并无明确规定。有学者指出，“历史性水域是指沿海国对一水域明确、长期、有效、持续地行使主权权利而形成的特定水域。历史性水域的产生不以国际法的一般规则为依据”。[18]“历史性水域法则原则上是一项例外法则，使得主张国家可以适用一般海洋法划界规则以外的规则来完成划界工作。这种规则的运用，必须依照各个不同个案的特殊环境来加以判定。”[19]对于历史性水域的构成要件，1962 年联合国秘书处在起草的文件《历史性水域，包括历史性海湾的法律制度》中指出：（1）主张“历史性权利”的国家对该海域行使权力；（2）行使这种权力应有连续性；（3）这种权力的行使获得外国的默认。[20]

历史性海湾是典型的历史性水域。国际实践一般认为，海岸属同一国家，湾口宽度超过两岸领海宽度的海湾，沿海国在长期的历史中对这样的海湾主张并持续行使主权，此等主权得到了国际社会的默认，这样的海湾就是历史性海湾，属于内水。[21] 此外，台湾学者傅崐成先生认为，还有 2 种历史性水域，一种是沿岸水域，因为海岸附近特殊的地理条件，沿海国不能运用一般海洋法规则将其划为内水而基于历史因素主张此水域为“历史性水域”；另一种是公海海域，一国基于“历史利益”之因素，主张应将之例外地划归其主权之下，成为其“历史性水域”。我国在“九段线”内的水域，应该被认为是最后一种类型的“历史性水域”。[22]

我国在“九段线”内的水域完全符合历史性水域的构成要件。首先，我们有充分的历史依据证明中国政府和人民在南海诸岛有着长期开发经营和主权行使的历史，并且这种权力的行使具有连续性。其次，1948 年国民党政府内政部公开发行《中华民国行政区域图》，向国际社会宣布“九段线”为中国政府在南海诸岛及其附近海域的主权管辖线。在此后相当长的一段时间里，南海周边国家都未对其提出任何异议，且在国外出版的许多地图中，均标绘有“九段线”，并注明归属中国。可见，

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18 Leo J. Bouchez, *The Regime of Bays in International Law*, Leyden: A.W. Sijthoff, 1964, p. 281.

19 D. P. O’Connell., *The International Law of the Sea*, Vol. I, Oxford: Clarendon Press, 1982, p. 417.

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

21 梁淑英主编：《国际法》，北京：中央广播电视大学出版社 2002 年版，第 116 页。

22 傅崐成：《历史性水域之定义》，载于《海洋法专题研究》，厦门：厦门大学出版社 2004 年版，第 324 页。

这种权力的行使获得国际社会的默认已达半个世纪之久。只是 20 世纪 70 年代以来，某些周边国家因为觊觎线内的自然资源，才对此提出质疑，并依据《公约》确定的专属经济区和大陆架制度对线内水域提出权利要求。但是，这些都不能否认“九段线”为中国“历史性水域线”的法律地位。我国在 1998 年颁布的《专属经济区和大陆架法》第 14 条规定：“本法的规定不影响中华人民共和国享有的历史性权利。”中国对“九段线”内水域的历史性权利产生于半个多世纪前，其产生早于以《公约》为代表的现代海洋法律制度的确立。因此，《公约》有关专属经济区和大陆架的规定不能完全适用于南海水域。实际上，以“九段线”为标志的南海水域为“历史性水域”的主张完全覆盖了我国在南海一贯的权利要求。

四、结　论

笔者认为，“历史性水域线”说凸现了“九段线”的法律效力，也充分维护了我国对“九段线”内海域的主权权利。确定“九段线”为历史性水域线既最大限度地维护了我国在南海的权益，又不缺乏一定的灵活性。南海问题具有极大的复杂性和特殊性。我们不能仅仅局限于现有的法律制度和已有的实践经验，试图仅借助《公约》中现有的制度（如专属经济区、大陆架制度）而一劳永逸地解决问题。既然《公约》已经承认了“历史性权利”这一特殊权利，而又未对其内涵作出明确规定，这就说明我国可以在不违反《公约》的前提下，充分发挥实践智慧，在与邻国的斗争与合作中最大限度地实现我国的利益，而主张南海水域为历史性水域应成为我国解决南海问题的基本方向。而对于“历史性权利”的具体内涵，“九段线”之内“历史性水域”邻近国家和其他国家权利的保有及许可等问题则需要理论上的不断充实和实践中的进一步探索。

再论海洋倾废概念

曹英志 * 范晓婷 **

内容摘要: 海洋在21世纪的人类生活中越来越重要，然而人类故意向海洋倾倒废弃物，海上或沿海操作性事故和自然灾害等使得海洋环境及海洋资源受到严重污染。受各种因素的影响，人类对海洋倾废的理解不尽相同，并存在一些片面的理解，正确揭示海洋倾废概念显得尤为迫切。人类对海洋倾废概念的理解，亦经历了从萌芽、发展到成熟的历史演变，这在世界各国的海洋倾废立法当中得到了充分的体现。《联合国海洋法公约》和《1972年伦敦倾废公约》对海洋倾废概念提出了新的内涵和外延。当前，我国的海洋倾废立法面临着重大修改，研究海洋倾废概念，对我国海洋倾废管理具有重大的理论与实践意义。

关键词: 海洋倾废　国际环境　法律概念　《1972年伦敦倾废公约》　《联合国海洋法公约》

一、海洋倾废概念的法理分析

（一）如何理解海洋倾废法律概念

“概念”是法律思想的基本要素，是我们将杂乱无章的具体事项进行重新整理归类的基础。[1] 而作为法的要素之一的法律概念，指的是在法律上对各种事实进行概括，抽象出它们的共同特征而形成的权威性范畴。[2] 海洋倾废概念是以法律规范的形式概括、抽象、提炼出来的，在长期的海洋倾废管理和实践中逐步形成的，具有海洋倾废共同特征的有关法律及其现象的理论范畴。海洋倾废概念是研究海洋倾废管理的一种工具，是对与海洋倾废相关的事物、状态、行为进行概括而形成的法律术语。

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1 《牛津法律大辞典》（中译本），北京：光明日报出版社1988年版，第533页。

2 张文显主编：《法理学》，北京：法律出版社1997年版，第75页。

因而，我们谈海洋倾废的概念，需要了解：

第一，海洋倾废概念的专业性。海洋倾废概念毕竟是借助于词汇来表达，因此，该概念在表达之时涉及一些专业用语，例如关于“倾废”的概念，需要作为海洋专用术语加以解释。[3] 而且海洋倾废概念在使用时，需要与原有的日常含义相区别。

第二，海洋倾废概念的相异性。这包括两层意思：第一层意思是，受到语言习惯、法律传统因素的影响，海洋倾废概念在某一国内部会有差异。第二层意思是，世界各国关于海洋倾废立法的不同使得在世界范围内的海洋倾废观念必然有所不同，尤其是发展中国家和发达国家的海洋倾废概念。

这里面有语言的冲突问题，有法律习惯问题，同时不排除政治和经济上的某种目的。解决这些问题的根本办法是国际法的普及化，在斗争中求同存异。[4] 认识了以上 2 点，也就能进一步加深对海洋倾废的认识。

（二）海洋倾废法律概念的特征

法律概念是法律逻辑研究的重要内容，谈海洋倾废概念的特征，既要与海洋倾废的特征、海洋倾废立法的特征相区别开来，又要把握三者之间的联系。因为海洋倾废概念本身就是在长期的海洋倾废管理和实践中逐步形成的，是具有海洋倾废共同特征的有关法律及其现象的理论范畴，首先有海洋倾废这种行为，然后才有海洋倾废概念这一理论范畴。[5] 海洋倾废概念是对海洋倾废的抽象，海洋倾废概念中自然要容纳海洋倾废立法的特征。具体来说，海洋倾废概念有如下特征：

第一，海洋倾废概念是主观任意性和客观性的统一。

从定义上看，海洋倾废概念毕竟是人类通过感知外部事物，获得生动、形象、丰富的感性认识，在此基础上，运用比较、分析、综合、抽象、概括等方法，使感性认识上升为理性认识，逐步认识到事物的本质属性，在头脑中形成概念，并借助于词语表现出来，[6] 海洋倾废概念的主观任意性表现为，海洋倾废概念因不同时代，

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3 海洋倾废概念的专业性还表现在其无法替代，这意味着，一方面海洋倾废领域的概念是无法用其他领域的内涵和外延来概括的，同时也无法与其他领域割裂开来。比如“海上焚烧”，它无法与其化学意义上的概念相等，但是依据《1972 年伦敦公约》以及第二次《伦敦公约》缔约国协商会议而定义的海上焚烧概念，也正是在实践中参考了化学意义上的焚烧特点而做出的。

4 王黎明指出“国际法的普及化已经是一个不争的事实，作为海洋倾废领域也是如此。”参见王黎明：《加强国际法普及工作意义重大》，载于《苏州市职业大学学报》1999 年第 1 期。

5 “海洋倾废行为先于海洋倾废概念。”参见中宣部理论局：《理论的源泉在于实践，理论的价值通过实践体现》、《理论热点面对面•2007》，北京：学习出版社、人民出版社 2007 年版。

6 魏凤荣、司国林：《试论法律概念的特征》，载于《当代法学》2001 年第 10 期，第 41 页。

不同的国家区域，不同的政治目的和经济目的而具有不同的涵义。[7] 以《1972 年伦敦倾废公约》为界，以 1954 年签署的《国际防治海上油污公约》为标志，是该概念的萌芽阶段，这个时期的海洋倾废基本处于“无法”制约的境地。因为，除了油类污染方面，其他倾废不受约束，从经济利益分析的角度，这有利于经济发达国家的利益，因为对于强盛的美国、英国等，无一不是海洋强国，他们对海洋倾废的需求量最大。这种状态持续到《1972 年伦敦倾废公约》的出台，该公约是控制种类繁多的物质造成海洋污染的第一个全球性公约。[8] 应该说公约的出台，代表的是绝大部分国家的整体利益。在海洋倾废概念主观任意性的背面，我们也必须认识到其客观性，因为，客观性是认识对象的本质属性的反映，[9] 海洋倾废概念无疑是人类爱护环境、保护环境的一种美好愿望的体现，背后潜藏着破坏环境人类将受到惩罚的道理。

第二，海洋倾废概念是确定性和灵活性的统一。

海洋倾废概念的确定性是指海洋倾废的内涵和外延是确定的，不得随意增加和减少，因为法律概念的确定性决定了法律的稳定性。[10] 海洋倾废概念的内涵是海洋倾废的本质特征，通过合理、科学地控制海洋倾废行为，达到从整体上规划海洋倾废、保护海洋环境的目的。海洋倾废概念的外延是海洋倾废的范围，在不同的立法中表现不一样，例如在 1954 年签署的《国际防治海上油污公约》中，主要针对的是油类污染，在《1972 年伦敦倾废公约》中，采用列举的方式出台一个“禁止名单”，附件 1 是禁止倾倒的物质，附件 2、附件 3 的物质需要获得特别许可方可倾倒，如此分析，凡是没有被列入附件 1、附件 2、附件 3 的物质均可倾倒，[11] 而《1996 议定书》则采用了反列的方式制定了“反列”名单，《1996 议定书》将可以倾倒的名单列出来，反之没有列上来的均不可倾倒，[12] 这样一来，海洋倾废概念所表达的外延实际上就大大扩大了。但是，客观事物是不断变化的，社会也在不断地发生变化，海洋倾废的概念表现出了灵活性，对于那些不再适应新形势的情况已经予以修改、废止，海洋倾废概念中由“禁止名单”到“反列名单”就体现出这一灵活性的特点。在现实生活中，我们要辩证地把握海洋倾废概念的确定性和灵活性。

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7 蒋玲媛、朱彤：《区域经济一体化与世界多极化》，载于《求是》2006 年第 14 期。

8 司玉琢主编：《国际海事立法趋势及对策研究》，北京：法律出版社 2002 年 1 月版，第 279 页。

9 叶若思、钱翠华：《试论构建知识产权技术审判难题解决机制——以专家咨询为视角》，下载于 http://www.chinaiprlaw.cn/file/2007112312308.html，2008 年 9 月 10 日。

10 朱继萍：《论不确定性对法律的基本建设作用》，载于《法律科学：西北政法学院学报》2006 年第 2 期。

11 杨文鹤主编：《伦敦公约二十年》，北京：海洋出版社 1999 年 1 月版，第 326~328 页。

12 杨文鹤主编：《伦敦公约二十年》，北京：海洋出版社 1999 年 1 月版，第 345~350 页。

另外，海洋倾废概念还体现了法律适用上的权威性和涵义的严格法定性。[13]

（三）海洋倾废概念的法律功能

曾经有专家指出：法律概念之成熟、科学与完备与否，是衡量法律文明程度的重要标志。[14] 海洋倾废概念也是如此，这一点从海洋倾废概念所包涵的外延能反映出来。比如，最初的海洋倾废范畴不包括围填海的吹填行为，[15] 对海上焚烧问题也有争论，而随着实践的发展，海洋倾废的范围逐步扩大，反映出人类重视海洋环境的重大变化，这亦体现出人类的进步。海洋倾废概念的功能反映在以下几个方面：

第一，海洋倾废概念对我国海洋法律法规运作和海洋法律法学研究具有重大的意义。只有借助海洋倾废法律概念，立法者才能制定出立法文件；只有借助海洋倾废法律概念，司法者才能对事物进行法律分析，做出司法判断；只有借助海洋倾废法律概念，民众才能认识法律，法学研究者才能描述法律、评价法律、改进法律。因此，海洋倾废概念具有法律概念通用的功能。[16]

第二，海洋倾废概念具有负载价值的功能。

“特定价值是经由个别的承认到群体的共识而融入特定文化的过程”，[17] 海洋倾废概念负载的价值功能体现在 2 个方面：

其一，提高全民遵守海洋倾废法律的意识。保护海洋环境、防止海洋污染有赖于执法人员和普通公民海洋倾废法律意识的提高，以及他们对海洋倾废知识的理解和对海洋倾废危害后果的认识。明确海洋倾废的概念，有利于公民更好地了解海洋倾废的后果，提高守法意识。

其二，从总体上保证海洋环境，从整体上规划海洋倾废，达到保护海洋环境的目的。以我国海洋倾废管理为例，1985 年的《海洋倾废管理条例》以及海洋行政主管部门于 1990 年 9 月 25 日发布的《中华人民共和国海洋倾废管理条例实施细则》对海洋倾废的范围做出了类似于《1972 年伦敦倾废公约》的规定，[18] 然而我们看到，这个范围本身来说是有限的，而且已经难以适应日益发展的海洋实践的需要，海洋倾废的概念也需要重新诠释。对海洋倾废概念的正确认识，有利于海洋行政主管部门对废弃物、倾倒区进行正确的分类，有利于许可证制度的建立和完

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13 沈宗灵主编：《法学基础理论》，北京：北京大学出版社 1994 年版，第 59 页。
14 陈金钊主编：《法理学》，北京：北京大学出版社 2004 年版，第 91 页。
15 这主要是由我国海洋管理相对迟延，围填海的吹填行为的规范管理工作也是近些年才受到国家和社会的关注与重视所致。
16 卓泽渊主编：《法学导论》，北京：法律出版社 1998 年版，第 75 页。
17 法理专家黄茂荣教授的观点。参见黄茂荣著：《法学方法与现代民法》，北京：中国政法大学出版社 2001 年版，第 53 页。
18 《中华人民共和国海洋倾废管理条例实施细则》。具体条文参见国家海洋局主编：《中华人民共和国海洋法规选编》第 3 版，第 128 页。

善，有利于海洋倾倒区检测系统的建设，能从总体上保证海洋环境，从整体上规划海洋倾废。当海洋倾废管理达到有序发展的时候，我们有理由相信海洋环境的保护必然前进一大步。[19]

另外，海洋倾废概念还具有认识功能、表达功能以及改进法律、提高法律科学化程度之功能。

二、海洋倾废概念在国际立法上的演变

如果从欧洲工业革命之日算起，海洋倾废也有 100 多年的历史了，[20] 实际上，我们若按照倾倒的种类和海洋倾废的范畴来划分，可以分别以 1972 年斯德哥尔摩《人类环境宣言》的发表和 1982 年《联合国海洋法公约》的出台为时间界限，划分为海洋倾废立法的萌芽、发展、成熟 3 个阶段，而海洋倾废概念的沿革自然也是随着海洋倾废立法的演变而发生着变化。国际立法关于海洋倾废概念的演变可以参见下表：

阶段	时间	标志	特点
萌芽	1972 年前	1954 年《国际防止海上油污公约》、《1969 年国际干预公海油污事故公约》、《1969 年国际油污损害民事责任公约》	1. 海洋污染已成为国际化的问题； 2. 海洋环境保护的关心主要在防止海洋油污方面； 3. 确定了直接责任或绝对责任，但未能触及国家责任；[21] 4. 区域性协定开始订立。
发展	1972 年—1982 年	1972 年斯德哥尔摩《人类环境宣言》、《1972 年伦敦公约》	1. 海洋倾废管理的对象不再只局限于防止油类污染源； 2. 确立了多项原则； 3. 区域性协定大量增加，协定从单一内容向综合内容发展。
成熟	1982 年—	1982 年《联合国海洋法公约》、《1972 年伦敦公约 1996 议定书》，1990 年《关于石油污染的准备、反应和合作的国际公约》	1. 海洋倾废管理的范围更加广泛； 2. 国际保护海洋环境的体制已初步建立； 3. 海洋倾废管理更加规范化、标准化。

注：本表是作者综合国际海洋环境立法以及世界海洋倾废立法的历史、特点总结而来。

19 崔绍珍著：《中国海洋倾废管理》，北京：海洋出版社 1994 年 8 月版，第 53 页。

20 崔绍珍著：《中国海洋倾废管理》，北京：海洋出版社 1994 年 8 月版，第 1 页。

21 国际法上的国家责任，又称国家的国际责任，是指国家违反国际义务而应承担的法律责任，或者国家对国际不法行为所承担的责任。参见周洪钧主编：《国际法》，北京：中国政法大学出版社 1999 年版。目前为止，环境保护领域一直强调的是直接责任，即在海洋倾倒领域，行为一旦发生，追究的往往是直接责任人的行为，不涉及国家责任，例如 1954 年的《国际防止海上油污公约》第 10 条规定，“任何缔约国政府可向有关领土的政府以书面提供该船违反本公约任何规定的证据细节。如果实际可行的话，前者政府的负责当局应通知被指责违章船舶的船长。”该公约也主要追究的是船长的责任。

（一）海洋倾废立法萌芽阶段的海洋倾废概念

1926 年，美国出面召集华盛顿会议，谋求在限制海洋油类的排放方面达成国际协议，虽然未获成功，但它标志着海洋倾废国际统一立法意识的开始。各国政府单方面的行动相对于迅速扩展的海洋污染问题已显得苍白无力，海洋污染已成为国际化的问题。终于在 1954 年签署了《国际防止海上油污公约》，这标志着国际海洋倾废立法的萌芽。[22] 这一阶段还签订了《1969 年国际干预公海油污事故公约》和《1969 年国际油污损害民事责任公约》等。区域性公约有《1969 年关于北海对付油污合作协定》和《1971 年国际建立油污损害赔偿国际基金公约》等。[23]

这一阶段，海洋倾废概念并未形成。因为在萌芽阶段，国际社会对海洋环境保护的关心主要在防止海洋油污方面，还未考虑到从防止其他方面的污染来保护海洋环境。这一阶段所签订的协定及所制定的某些规则，都还不能突破传统国际法的范围，涉及的范围很窄。例如，在关于环境损害事故责任的确定方面，虽然也适用无过失责任原则，确定了直接责任或绝对责任，但未能触及国家责任；又如在管辖权问题上，公约都坚持船旗国管辖权。但这些都为今后海洋倾废立法的发展奠定了基础。

（二）海洋倾废立法发展阶段的海洋倾废概念

从 1972 年斯德哥尔摩《人类环境宣言》[24] 的发表到 1982 年《联合国海洋法公约》签订前夕，国际海洋环保协定大量签订，是国际海洋倾废概念的发展时期。

从这个阶段签订的协定来看，海洋倾废所调整的对象不再只局限于防止油类

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22 关于 1954 年签署的《国际防止海上油污公约》的颁布是否为国际海洋倾废立法萌芽的标志，目前国内外学者在这个问题也有所讨论。例如，刘泽慧提出“1954 年的《国际防止海上油污公约》是国际社会签订的第一个国际海洋环境保护协定，这标志着海洋环境保护法的萌芽。”参见刘泽慧：《船舶污染的现状及防治对策》，下载于 http://www.Mush-room.gov.cn/bbs/frame.php?frameon=yes&referrer=http%3A//www.mushroom.gov.cn/bbs/redirect.php%3Ftid%3D25279%26goto%3Dnextoldset，2008 年 1 月 24 日。

23 关于这一阶段的区域性协定，仍然更多的是关注防止海洋油污方面，还有如丹麦、芬兰、挪威、瑞典等国在 1971 年签订的《关于防止船舶和飞机倾废造成海洋污染公约》，客观上对保护环境也起到了一定作用。

24 1972 年 6 月 5 日—15 日在斯德哥尔摩举行的联合国人类环境会议是人类环境保护的重大事件，会议以“宝贵的地球”为主题，对环境问题展开了充分的讨论，为国际、也为各国国内海洋倾废立法及制定海洋倾废政策提供了方针及原则，为国际社会绘制了一幅采取环境保护具体行动的蓝图。大会总共宣布了 26 条宣言，通过了《人类环境宣言》和保护海洋环境的基本方针和原则，要求必须采取一切手段，防止各种污染物引起的海洋污染。根据斯德哥尔摩会议的建议而成立的联合国环境署，被赋予全球环境保护的规划、设计、组织及协调的职能，为促进海洋环境保护的立法，特别是海洋环保区域协定的签订做出了重要的贡献。

污染源，还涉及海洋所有污染源的防止，这样一来海洋倾废概念的范围大大扩大了。并且这个阶段的海洋倾废协定已经在确立某些规则，而某些规则所依据的原则已超出传统国际法的范畴，孕育着新原则的胚胎。例如，在海洋倾废协定中包括一些较为严格的执行条款，不仅具有更大的约束力，更便于各国执行。因此，海洋倾废概念特征中自然容纳了对修订协定程序的规定，定义起来也较为灵活，原因是考虑到使已签订的协定易于修订，以便能适应变化的形势；再比如，协定有从单一内容向综合内容发展的趋势，因而海洋倾废概念已经由萌芽时期的单一性向综合性方向发展。

（三）海洋倾废立法成熟阶段的海洋倾废概念

从 1982 年《联合国海洋法公约》签署到现在，是海洋倾废立法的成熟时期。

由联合国第三次海洋法会议发起，经过 8 年多时间讨论并最后制定的《联合国海洋法公约》，是国际社会管理海洋的划时代事件。《联合国海洋法公约》的签订，标志着国际海洋倾废立法法律体制已初步建立。[25] 因《联合国海洋法公约》的制定，这一阶段所签订的国际海洋保护公约和区域性协定也多起来。

该阶段的海洋倾废概念已经更加成熟、规范，表现在公约的大量修订和制定上，例如 1989 年联合国环境规划署主持制定的《控制危险废物越境转移及其处置巴塞尔公约》，公约规定了危险废物越境转移及其处置所应遵循的原则，并对危险废物跨越国境的转移和处置做出了较为全面的规定。[26] 1994 年 5 月，国际海事组

25 刘泽慧提出“1982 年《联合国海洋法公约》的签订，标志着国际保护海洋环境的体制已初步建立……”参见刘泽慧：《船舶污染的现状及防治对策》，下载于 http://www.Mushroom.gov.cn/bbs/frame.php?frameon=yes&referrer=http%3A//www.mushroom.gov.cn/bbs/redirect.php%3Ftid%3D25279%26goto%3Dnextoldset，2008 年 1 月 24 日。此外，我国著名海洋法专家赵理海也持此观点，认为“《公约》是国际法发展过程中的一个里程碑，是‘国际社会在编纂和逐步发展国际法方面取得的最卓越的成就……’”。参见赵理海著：《海洋法问题研究》，北京：北京大学出版社 1996 年 7 月版，第 148 页。

26 全国人大环境保护委员会办公室编：《国际环境与资源保护条约汇编》，北京：中国环境科学出版社 1993 年 12 月版，第 84~85 页。

织颁布了《国际船舶安全营运及防止污染管理规则》（习惯称为《ISM 规则》），[27]《ISM 规则》最大的特点便是加强了岸基方面的管理，形成了船岸管理制度，[28] 因此，海洋倾废概念由对物的控制开始向人员素质和管理机制方面全面发展。

三、关于海洋倾废概念的正确理解

（一）涉及海洋倾废定义的两大公约中相关条款评析

20 世纪 50 年代末，由于有意识的海洋倾倒活动引起区域性环境污染的实践不断增多，使得人们开始探讨“海洋倾废”的概念，人们对海洋倾废概念的理解基本上都是来源于《联合国海洋法公约》和《1972 年伦敦倾废公约》。这 2 个公约从正面和排他性 2 个角度对倾废进行了界定，相比较而言，《1972 年伦敦倾废公约》规定的内容更为具体和全面。

1. 对《联合国海洋法公约》第 1 条 [29] 的理解

根据这一条款，我们可以推知：首先，“倾倒”包括 2 个方面，其一是从船只、飞机、平台或其他人造海上结构故意处置废弃物或其他物质的行为；其二是故意处置船只、飞机、平台或其他人造海上结构的行为。

其次，“倾倒”排除的行为有：

第一，对船只、飞机、平台或其他人造海上结构及其装置正常操作所附带发生或产生的废弃物或其他物质的处置，但为了处置此种物质而操作的船只、飞机、平台或其他人造海上结构所运载或向其输送的废弃物或其他物质，或在这种船只、飞机、平台或其他人造海上结构上处置这种废弃物或其他物质所产生的废物或其他物质除外。

第二，并非为了单纯处置物质而放置物质，但以这种放置不违反《联合国海洋法公约》的目的为限。

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27 1994 年 5 月制定的《国际船舶安全营运及防止污染管理规则》（《ISM 规则》）旨在提供船舶安全管理、安全营运和防止污染的国际标准，《ISM 规则》全新的管理理论和方法及实施后所取得的巨大成效表明，把这种理论和方法运用于国内公司及其船舶的安全管理将会取得同样的效果。1997 年中国海事局开始着手立项研究《ISM 规则》的国内化问题，2001 年 4 月“ISM 规则国内化研究”课题通过了交通部科教司组织的专家评审，并于 2001 年 7 月发布了《关于发布〈中华人民共和国船舶安全营运和防止污染管理规则〉（试行）的通知》（交海发 [2001]383 号）。参见《聚焦〈国内安全管理规则〉（NSM)》，下载于 http://www.zzmsa.gov.cn/news_show.php?id=172，2008 年 1 月 24 日；《对海事行政违法行为主体的认定》，下载于 http://www.jsmsa.gov.cn/art/2005/10/20/art_727_1235.html，2008 年 1 月 24 日；及《航运公司安全管理体系中的产品质量控制》，下载于 http://www.9lny.cn/html/xingyeyanjiu/20070818/10543/.html，2008 年 1 月 24 日。

28 司玉琢主编：《国际海事立法趋势及对策研究》，北京：法律出版社 2002 年 1 月版，第 280 页。

29 《联合国海洋法公约》（中英文版），北京：法律出版社 1996 年版，第 3 页。

2. 对《1972 年伦敦倾废公约》第 3 条的理解

从该条款我们可以推知，首先，“倾倒”包括 2 个方面：从船舶、航空器、平台和其他海上人工构造物上有意地在海上弃置废物或其他物质的任何行为；有意地在海上弃置船舶、航空器、平台和其他海上人工构造物的任何行为。[30]

其次，“倾倒”排除伴随船舶、航空器、平台和其他海上人工构造物及其设备的正常操作而产生的废物或其他物质，但为了处置这类物质而操作的船舶、航空器、平台和其他海上人工构造物所载运的或向这类器具所运送的废物或其他物质，或在这类船舶、航空器、平台和其他海上人工构造物上处置这些废物或其他物质所产生的废物或其他物质的处置除外；倾倒也不包括并非为了单纯处置物质的目的而放置物质，但以这类放置不违反《伦敦倾废公约》的目的为限。

再次，《伦敦倾废公约》对由于海底矿物资源的勘探、开发及相关的海上加工所直接产生的或与此有关的废物或其他物质的处置做了例外的规定，出现种情况便不受该公约规定的约束。

最后，《伦敦倾废公约》认为，废物或其他物质指任何类型、任何形状或任何种类的材料和物质。[31]

（二）关于海洋倾废概念的正确理解

在综合分析和比较两大公约的基础上，海洋倾废的概念应为：以任何方式、途径有意向海洋处置、弃置废弃物和其他物质的行为，非有意向海洋处置、弃置废弃物和其他物质的行为除外。

1. 关于海洋倾废的范围

随着人类生态环境保护意识的深化，海洋倾废的立法范围得以扩大，国际社会对海洋倾废范围的关注扩展到以下几个领域：

第一，废弃物的海上倾倒。《1972 伦敦公约 1996 年议定书》中就对废弃物的海上倾倒概念进行了完善和修正，而且，其附件 1 以反列的方式详细地列举了可考虑倾倒的废物或者其他物质，其中包括：疏浚挖出物，污水、污泥，鱼类废物或工业性鱼类加工作业产生的物质，船舶、平台或其他海上人造结构物，惰性、无机地质材料，自然起源的有机物，以及主要由铁、钢、混凝土和对其的关切是物理影响的类似无害物质构成的大块物体，并且限于此类废物产生于除倾倒外无法使用其他实际可行的处置选择地点，如与外界隔绝的小岛。附件 2 要求对废弃物的海

30 杨文鹤主编：《伦敦公约二十年》，北京：海洋出版社 1999 年 1 月版，第 310 页。

31 关于废物的定义在各个国家并不相同，2007 年 4 月，美国出台固体废物定义的修正案，环保署根据《美国资源保护回收法案》，从法规中将某些危险的二次原材料排除。该提案旨在鼓励安全、对环境无害的回收再利用和节约资源，并对几项关于固体废物定义的法院裁决做出响应。美国的废物定义与《1972 年伦敦公约》第 1 条第 4 款所述定义不同。

上倾倒进行评定。

第二，国际海底勘探开发中的海洋倾倒行为。国际海底区域是指国家管辖区域以外的海床、洋底和底土，约占海洋总面积的 65%，国际海底区域内蕴藏着极其丰富的矿物资源，具有极高的开发价值，还具有巨大的科研和军事价值，成为大国争夺的重点海域。[32] 1982 年通过、1994 年生效的《联合国海洋法公约》确定了国际海底区域及其资源是人类的共同继承遗产原则，《关于执行〈联合国海洋法公约〉第十一部分的协定》也于 1996 年生效。截至 2007 年 1 月，共有 152 个国家批准《联合国海洋法公约》、126 个国家批准《关于执行〈联合国海洋法公约〉第十一部分的协定》，使国际海底区域资源勘探开发有法可依。[33] 另一方面，西方主要工业发达国家，早已相继制定出各自国际海底区域矿物资源开发的国内法律，[34] 它们通过国内立法，达到在国际海底勘探开发中于己有利目的。因此，国家海洋倾废管理范围也扩大到了国际海底开发区域，因而，海洋倾废概念外延必然包括向海洋处置由于海底矿物资源勘探开发和与勘探开发相关的海上加工所产生的废弃物和其他物质的行为。

第三，大气和陆地向海洋排放废弃物等。《1972 年伦敦倾废公约》中并没有单独对工业废物的海洋处置作出规定，但是随着海洋环境的日益恶化，国际社会对大气和陆地向海洋排放废弃物的倾倒问题日益关注，《1972 伦敦公约 1996 年议定书》在附件 1“可以考虑倾倒的废物和其他物质”名单中列出了工业废物的豁免物质类别，如疏浚物，下水道污泥，渔业废物，船舶平台，惰性无机地质材料，自然起源的有机材料，钢、铁、水泥等大体积废物等。[35]《1972 伦敦公约 1996 年议定书》扩大了海洋倾废管理的范围，明确规定了哪些列入清单的工业废物可以在海上倾倒。

第四，原油、燃油、重柴油、润滑油等油气资源的废弃行为以及近海石油平台的原址废弃和推倒行为。依据 1954 年 5 月 21 日签订的《国际防止海上海洋石油污染公约》，签署该公约的主要目的是为了防止海水被船舶所排出的油类污染，该公约对“油”、“油性混合物”、“船舶”等给予了明确的定义，将“油”解释为原

32 《海洋专家呼吁尽快立法促中国进行国际海底勘探开发》，下载于 http://www.chinanews.com.cn/cj/news/2007/03-11/888588.shtml，2008 年 3 月 6 日。

33 《海洋专家呼吁尽快立法促中国进行国际海底勘探开发》，下载于 http://www.chinanews.com.cn/cj/news/2007/03-11/888588.shtml，2008 年 3 月 6 日。

34 这些国家包括美、德、英、法、日、意等。

35 杨文鹤主编：《伦敦公约二十年》，北京：海洋出版社 1999 年 1 月版，第 320 页。

油、燃油、重柴油、润滑油。[36] 无论是《1972 年伦敦倾废公约》还是后来经修改的《1972 伦敦公约 1996 年议定书》，海洋倾倒的对象都应该包括油类物质，而且随着海洋开发的持续升温，油类的海洋排放必将逐渐进入人们的关注视野。尤其是 2002 年《中华人民共和国海域使用管理法》的颁布实施，海洋工程中用海设施和构筑物的拆除问题也摆在人们面前，[37] 海洋工程竣工后，多余的用海设施和构筑物算不算一种海洋倾倒行为？根据海洋管理的实践来看，应该认定是海洋倾倒的一种类型，也应该在海洋倾废管理的调整范围。

第五，海上焚烧行为。[38] 这里的海上焚烧是指故意在海上焚烧废物或者其他物质的行为，焚烧的条件必须是借助于一定的焚烧工具。至于船舶、海上平台或者其他人工构造物在正常营运过程中附带的焚烧则不包括在海洋倾废调整范围之内。海上焚烧行为是《1972 年伦敦倾废公约》缔约国会议第 50 号协议的内容，海上焚烧行为被纳入海洋倾废行为也经历了很多的谈判和协调。

第六，围填海项目等海洋工程中的吹填行为等。围填海项目等海洋工程中的吹填行为是随着海洋开发的日益增多而出现的一种比较新型的海洋倾废行为。关于围填海项目等海洋工程中的吹填行为有几点要说明：首先，无论是 1954 年 5 月 21 日签订的《国际防治海上油污公约》、《1972 年伦敦倾废公约》，还是后来经修改的《1972 伦敦公约 1996 年议定书》，均未将围填海项目等海洋工程中的吹填行为纳入海洋倾废范畴。[39] 根据目前世界海洋管理体制的变化以及海洋管理内容的

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36 1954 年《国际防止海上海洋石油污染公约》是第一个针对海洋环境保护的国际公约。该公约于 1958 年生效。公约规定，禁止 150 总吨位以上的油轮和 500 总吨位以上的其他船舶在离岸 50 海里以内排放油类或油类混合物。1962 年修正案将 50 海里扩大到 100 海里。该公约又于 1969 年、1971 年进行了修改。但是，由于船旗国尤其是方便旗国既未严格遵循公约的标准，也未严厉惩罚造成油污的船舶，因此，公约在实践中难以奏效，油污情况仍然严重。此外，该公约并未涉及因船舶发生事故造成油污应如何处理的问题。

37 依据《中华人民共和国海域使用管理法》第 29 条规定，海域使用权期满，未申请续期或者申请续期未获批准的，海域使用权终止。海域使用权终止后，原海域使用权人应当拆除可能造成海洋环境污染或者影响其他用海项目的用海设施和构筑物。实际上，海洋工程后的用海设施和构筑物的拆除问题已经列入了海洋管理的范畴。

38 关于海上焚烧问题，各国对是否将其列入《1972 年伦敦倾废公约》的范围的态度并不一致，一些发达国家，如美国，不想把海上焚烧问题列入《1972 年伦敦倾废公约》的范围，认为现在制订一个终止海上焚烧的日期还为时过早，条件还不成熟。但是因大多数国家的赞同最终取得比较一致的意见，即将海上焚烧纳入《1972 年伦敦倾废公约》的范围，但是在是否限制海上焚烧或者怎么限制的问题上还需要讨论。具体可见 1977 年 9 月 26 日在伦敦国际海事组织总部举行的第二次《1972 年伦敦倾废公约》缔约国协商会议和 1978 年 10 月 9 日在伦敦国际海事组织总部举行的第三次《1972 年伦敦倾废公约》缔约国协商会议文件。

39 究其理论原因，在于公约制定初期，海洋开发活动较少，围填海活动尚未引起人们更多关注所致。

增加，围填海已经逐步被纳入法制化轨迹，[40] 对于围填海过程中的吹填行为，如若不加以管理，势必对环境造成重大影响，一般情况下，对于内海以内的围填海项目，在海域使用论证和海洋环境影响评价中往往对吹填行为提出了一些要求，而在领海以外区域，尤其是公海施行围填海却很少有国家的法规或者国际公约进行约束，这应该引起重视。

2. 关于海洋倾废的排外性规定及归责原则

海洋倾废不包括非有意向海洋处置、弃置废弃物和其他物质的行为，如海上事故、战争等不可抗力因素所造成的倾倒行为。这与倾废管理中的无过错责任原则相适应。无过错责任制是相对过失责任而言的，系指在某些情况下，行为人没有故意或者过失，也要承担责任。[41] 目前世界上很多国家对公害损害赔偿均采用无过失责任制。我国的环境保护法也规定了环境损害的无过失责任原则，因海洋环境污染受到损害的单位和个人，有权要求造成污染损害的一方赔偿责任，[42] 海洋环境保护中的损害赔偿责任的承担，不取决于肇事者是否有过失，造成污染损害的行为是否违反有关法律的规定，只要客观上存在污染的事实，肇事者就应该承担赔偿责任。防止海洋倾废造成环境污染是我国海洋环境保护法的一个重要内容。《海洋倾废管理条例》依据《海洋环境保护法》制定，系子法和母法的关系，自然适用的是无过失责任制度，即海洋倾废引起的损害赔偿适用无过失责任原则。然而，无过失责任原则存在例外的情况，依据我国《海洋环境保护法》的规定，[43] 在遇到战争行为和自然灾害等不可抗力的情形时，即使海洋倾废造成了巨大的海洋环境污染损害，倾倒单位也不承担赔偿责任。

3. 关于海洋倾废行为的特点分析

首先，海洋倾倒行为的范围大大扩大，也就是说只要是有意向海洋处置、弃置

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40 关于围填海管理的法律法规，《中华人民共和国海域使用管理法》第 4 条规定：国家严格管理填海、围海等改变海域自然属性的用海活动。而在《国务院关于进一步加强海洋管理工作若干问题的通知》（国发 [2004]24 号）中，提出要严格控制围填海和开采海砂。目前，关于围填海管理，国家海洋局也正在制定相关政策，对围填海进行合理控制。

41 张明新：《对环境民事责任无过错责任制度的法理分析》，载于《徐州师范大学学报（哲学社会科学版）》2003 年第 2 期。实际上，现代世界各国包括中国大都把无过错责任原则作为环境侵权民事责任的归责原则。其法理基础在于，日益严重的环境污染给受害人带来了损害并引发一系列严重的社会问题，而许多污染行为却并无过错甚至合法。传统民法过错责任原则难以对环境侵害提供充分、有效的救济，因而要求在环境侵权领域适用无过错责任原则。同时，无过错责任原则的出现和广泛适用作为对过错责任原则的补充和修正，也与 20 世纪法律由个人本位发展到个人本位与社会本位并重的过程相一致的。在现代侵权行为法中，无过错责任已成为一项基本归责原则，与过错责任原则一起构成现代侵权行为法的基础。

42 条文可参见《中华人民共和国环境保护法》第 41 条和 42 条的规定。

43 1999 年新修订的《中华人民共和国海洋环境保护法》第 92 条规定：“完全属于下列情形之一，经过及时采取合理措施，仍然不能避免对海洋环境造成污染损害的，造成污染损害的有关责任者免予承担责任：（一）战争；（二）不可抗拒的自然灾害；（三）负责灯塔或者其他助航设备的主管部门，在执行职责时的疏忽，或者其他过失行为。”实际是无过失责任原则存在例外。

废弃物和其他物质的行为都是海洋倾废的范围。

其次，人类生产、生活产生的废弃物按其来源主要划分为 2 类，即一类来源于陆地，一类来源于海上作业装置，由专用器具（如船舶、航空器、平台和其他运载工具）向海洋倾倒和由来源地直接倾倒入海。这 2 类废物只是倾倒方式不同而已，其目的和结果都是一样的，关键是合理、科学地向海洋倾倒。

再次，区分“倾倒”和“非倾倒”2 种行为的差异。“非倾倒”是运载工具自身正常操作所产生的废弃物在海上的处理。例如某一船只或其他运载工具为了处置的目的，将疏浚物运到海上去倾倒，这种行为是“倾倒”；而运送船只或其他运载工具在航行或其他正常作业中产生的机舱含油污水和生活垃圾及其他废弃物向海上排放或处置，均属于“非倾倒”行为。

四、解释海洋倾废概念的理论与实践意义

（一）海洋倾废概念的理论意义

1. 是完善环境保护法律制度的客观要求

环境保护是由环境问题引起的。从起点上看，没有环境问题就没有环境保护问题，环境保护是为了应对环境问题而实施的。[44] 环境保护是为了解决现实的和潜在的环境问题，妥善处理人类对自然环境和人工环境的利用与维护、人类社会的生存与发展同自然的固有秩序之间的关系而采取的各种措施。污染防治、环境破坏的预防与修复、资源的保护、生物多样性的保护是环境保护的主要内容。从目前的环境保护法律制度来看，海洋倾废管理属于危险废物管理范畴，[45] 因此法学界对海洋倾废管理立法的研究首先要从危险废物的管理入手，例如国际法关于废物的管制就是首先从给废物下定义开始的。

从国际立法关于海洋倾废概念的演变可以看出，海洋倾废的定义也是历经多次法律观念的洗礼才渐入完善，法律概念的不完善，对法律制度健全的损害往往是巨大的，法律概念对某一环节的忽略，往往是以实践中的某种巨大损失为代价，比如在海洋倾废的萌芽阶段，忽略了对陆源物质控制，英国伦敦市的垃圾于 1887 年开始向泰晤士河口湾倾倒，英国的利物浦港、步里斯托尔海峡、普利茅斯海湾等都有疏浚物倾倒，[46] 其结果便是国际上出现了大量的公害事件，当地海域环境遭

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44 徐祥民主编：《环境法学》，北京：北京大学出版社 2005 年 9 月版，第 16 页。

45 这一点在国际法上得到普遍认同。参见王铁崖主编：《国际法学》，北京：法律出版社 1995 年 8 月版，第 481 页；周忠海著：《国际法》，北京：中国政法大学出版社 2004 年 9 月版，第 554~559 页；及朱晓青主编：《国际法》，北京：社会科学文献出版社 2005 年 5 月版，第 225~228 页等。

46 崔绍珍著：《中国海洋倾废管理》，北京：海洋出版社 1994 年 8 月版，第 26 页。

到严重破坏。

正确揭示海洋倾废概念的内涵，无疑有助于环境保护法律制度的健全和完善。因为通过正确揭示海洋倾废概念，使海洋倾废管理有了具体的管理对象、管理范围和管理目标，尤其是对于一些发展中国家，他们的海洋管理体制还处于一种无序的状态，为了追求经济的增长，忽视了对海洋环境的保护，更不用提海洋倾废管理。[47] 即使是在发达国家，由于理念上的差距，他们对海洋倾废概念范围的定义也有差异，比如关于海上焚烧问题，一些发达国家，例如美国不想把海上焚烧问题列入《1972 年伦敦倾废公约》的管辖范畴。因此，一方面需要对海洋倾废概念有准确的认识，另外一方面，需要时刻关注新的海洋倾废形式，适应环境保护法律制度的客观需要。

2. 是可持续发展理论在国际海洋倾废领域的渗透

《我们共同的未来》对可持续发展所作解释是："满足当代人的需求，又不对后代人满足其需求的能力构成危害的发展"。[48] 按照这个解释，除了发展这个总概念之外，还有 2 个基本的要素：一个是需要，另一个是限制。发展当然是为了需求，为了满足人们的需要，包括眼前的需要和将来的需要、当代人的需要和后代人的需要、发达国家和地区的人们的需要和贫困地区人民的需要等。限制体现在对影响环境的活动及其强度等的限制。不限制眼下的开发利用就可能使环境在将来不堪利用。

海洋倾废概念从发展到成熟，从《1972 年伦敦倾废公约》到后来经修改的《1972 伦敦公约 1996 年议定书》，其指导思想也在发生变化。早期的海洋倾废概念指导思想是控制理论，这通过 1954 年《国际防治海上油污公约》和《1972 年伦敦倾废公约》都可以明显地看出来。1954 年《国际防治海上油污公约》本意在于控制油污对海洋的污染，控制理论在环境理论发展初期有着巨大的影响，《1972 年伦敦倾废公约》将各缔约国应个别地或集体地促进对海洋环境污染的一切来源进行有效的控制，并特别保证采取一切切实可行的步骤，将防止倾倒废物及其他物质污染海洋列为宗旨，[49] 控制原则在《1972 年伦敦倾废公约》也得到了充分的体现。但是随着环境理论的发展，海洋倾废管理理念得到了升华，可持续发展渗透进入海洋倾废管理领域，这充分地体现在修改后的《1972 伦敦公约 1996 年议定书》中。《1972 伦敦公约 1996 议定书》的订立也是为了保护和保全海洋环境，为了对人

47 王佩儿、刘阳雄、张珞平、陈伟琪、洪华生：《海洋功能区划立法探讨》，载于《海洋环境科学》2006 年第 4 期。

48 可持续发展是 20 世纪 80 年代提出的一个新发展观。它的提出是应时代的变迁、社会经济发展的需要而产生的。1989 年 5 月举行的第 15 届联合国环境署理事会，经过反复磋商，通过了《关于可持续发展的声明》。

49 《1972 年伦敦倾废公约》第 1 条：各缔约国应当个别地及共同地促进对海洋环境污染的一切来源进行有效的控制，特别是保证采取一切切实可行的步骤，防止倾倒废物及其他物质污染海洋，因为这类废物和物质可能危害人类健康，损害生物资源和海洋生物，减损环境优美，或妨碍对海洋的其他合法利用。

类活动加以管理从而使海洋生态系统可以继续承受对海洋的各种合法利用并继续满足当代人和后代人的需求，能够而且必须不迟延地采取新的国际行动来防止、减轻并在切实可行时消除倾倒造成的海洋污染。[50] 应该说，这种变化顺应了环境事业发展的大趋势。

3. 是批驳关于海洋倾废概念错误理解的客观需要

海洋倾废概念并不是被每个国家、每个人所接受的，正确理解海洋倾废概念，是克服当前存在的错误理解的客观需要。

一种观点认为，海洋倾废就是向海洋或者在海上倾倒废弃物，片面强调“倾废”的表面含义。这种错误观念在于忽略了岸上排污这种典型的海洋倾废方式。

一种观点认为，海洋倾废是海上倾废，认为专指海上进行的处置、弃置废弃物的行为。实际上陆源是海洋污染最主要的来源，经统计约有 80% 的海洋污染是陆源废弃物造成的。这种错误的观点在于忽略了从陆地向海洋直接排放废弃物和其他物质的行为。

一种观点认为，海洋倾废仅仅是固体废弃物和其他物质的倾倒，实际上，液体废弃物和其他物质的排放也属于海洋倾废的管理范畴。

关于海洋倾废的定义问题一直是《1972 年伦敦倾废公约》内部关于公约长期发展战略问题讨论的集中点，[51] 为了从根本上解决海洋倾废的问题，国际社会必须回到海洋倾废的正确理解上来。

（二）海洋倾废概念的实践意义

1. 有利于树立正确的海洋倾废价值观

海洋价值观包括了维护海洋自然系统的基本平衡，如生态平衡、动态平衡等，以达到海洋对人类生存与发展的长久支持能力。由于海洋对世界经济影响的提高，人类可利用的海洋新领域越来越多，并产生了切实的经济效果，海洋开发利用可能是人类走出当前困境和走向未来发展的出路；而且海洋在全球气候中的作用也越来越明显……在这些条件下，人们滋生了新的海洋价值观，例如海洋调节着全球的气候，创造了人类适宜生存的自然环境，海洋生物资源是人类食物的重要

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50 《1972 年伦敦公约 1996 议定书》前言之第 8 段：为了保护和保全海洋环境，为了对人类活动加以管理从而使海洋生态系统可以继续承受对海洋的各种合法利用并继续满足当代人和后代人的需求，能够而且必须不迟延地采取新的国际行动来防止、减轻并在切实可行时消除倾倒造成的海洋污染。

51 司玉琢主编：《国际海事立法趋势及对策研究》，北京：法律出版社 2002 年 1 月版，第 276 页。

来源，海洋是连接各大陆的基本通道，海洋是人类生存发展的新空间等等。[52] 海洋价值观反映在海洋倾废领域，就是要海洋倾废管理与世界环境保护相协调，海洋倾废管理走向科学化趋势。

目前，我们仍然是在使用上个世纪 80 年代中期制定的《海洋倾废管理条例》。[53] 这些条款难以适应日益变化的海洋倾废管理实践的需要，为此我们迫切需要树立正确的海洋倾废价值观。唯有如此，才能制定出切实可行的海洋工作发展战略和相应的海洋政策，运用法律法规和业务技术标准制度，采用行政、经济以及宣传手段，通过各种信息系统，组织有效的群众监督使海洋倾废法律制度得到实施。

要使海洋倾废立法得到贯彻实施，搞好海洋环境管理，除加强海洋倾废的执法工作外，还需要走群众路线，获得广大海洋工作者的大力支持。群众性的守法是我国法律力量的源泉和法制工作的坚实基础。[54] 我国海洋倾废法律制度建设历史较短，群众对现行海洋法律法规还不熟悉，尽管一些法律已经颁布执行，但由于未能采用多种方式进行深入、广泛的宣传教育，因此仍有不少群众对有关法规理解不深透。在这种情况下，人民群众的自觉守法，就不可能做到。必须高度重视对广大群众的法律宣传教育工作，组织群众学习并进行讲解指导，切实做到增强国民海洋倾废管理意识的目的。

2.正确理解海洋倾废概念是修改《海洋倾废管理条例》的关键环节

自 20 世纪 80 年代以来，我国先后加入了《联合国海洋法公约》等近 20 个有关海洋污染防治和海洋生态保护方面的国际公约，[55] 在国内我们也制定了多部海洋环境保护的法律法规，如 1982 年颁布的《中华人民共和国海洋环境保护法》中明确提出了防治倾废污染的措施和法律要求；1985 年又颁布了《中华人民共和国海洋倾废管理条例》，1990 年 9 月 25 日颁发了《中华人民共和国海洋倾废管理条例实施办法》。可以说，我国在海洋环境保护的立法上已经给予了足够的重视。

一方面，我国 1985 年《海洋倾废管理条例》在海洋倾废管理遵守的原则及目的、“倾倒”的定义、法规的适用范围、废弃物的分类、关于许可证与许可证种类、法律责任等方面的规定与《1972 年伦敦倾废公约》是一致的，并且在其基础上对上述各方面作出了较为具体的规定。

另一方面，《1996 年议定书》在很大程度上对《1972 年伦敦倾废公约》作了

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52 我国著名的海洋专家，原海洋行政主管部门海域管理司司长鹿守本同志在其著作《海洋管理通论》中就新的海洋价值观提到了其产生的 5 大条件和 10 个新的海洋价值观念，这些海洋价值观念的日益增强，才会促使海洋倾废立法越来越完善。参见鹿守本著：《海洋管理通论》，北京：海洋出版社 1997 年 9 月版，第 6~14 页。

53 《中华人民共和国海洋倾废管理条例》于 1985 年 3 月 6 日由国务院颁布，海洋行政主管部门于 1990 年 9 月 25 日发布了《中华人民共和国海洋倾废管理条例实施细则》。

54 崔敏：《培养守法观念维护法律尊严——重新学习董老在第二次全国宣传工作会议上的讲话》，载于《中国人民公安大学学报（社会科学版）》2008 年第 1 期。

55 《上千海洋违法案无一受刑事处罚，我国海洋环境保护法律制度亟需完善》，下载于 http://news.sohu.com/20070911/n252072975.shtml，2008 年 9 月 14 日。

修改，例如把污染者付费原则纳入了协定书，在适用范围上做出了一定程度的调整，用一个“可以考虑在海上倾倒的物质清单”（即“反列名单”）代替了原来的“禁止名单”，将近海石油平台的废弃和推倒纳入了协定书的管辖范围，对立法豁免问题增加了选择性条款，把降低有害物质产生的清洁生产工艺技术纳入“技术合作和援助”条款之中，增加了争端解决条款，增加了关于《议定书》遵守管理的规定，新增了“科学和技术研究”条款。而 1985 年《中华人民共和国海洋倾废管理条例》对上述新增内容涉及较少，或根本没有涉及。[56] 因此，我国的《海洋倾废管理条例》须与国际公约保持一致，关于海洋倾废概念也需要吸收国际公约关于海洋倾废的正确理念。

1985 年《中华人民共和国海洋倾废管理条例》是根据 1982 年 8 月 23 日第五届全国人民代表大会常务委员会第 24 次会议通过，1983 年 3 月 1 日起施行的《中华人民共和国海洋环境保护法》制定的。1999 年 12 月 25 日中华人民共和国第九届全国人民代表大会常务委员会第 13 次会议通过了修订的《中华人民共和国海洋环境保护法》，并于 2000 年 4 月 1 日起施行。随着新修订的《中华人民共和国海洋环境保护法》的施行，1985 年制订的《中华人民共和国海洋倾废管理条例》也应该根据新的法律规定做相应的调整。目前我国《海洋倾废管理条例》修订工作已经由国家海洋局牵头进行，就海洋倾废概念也多次展开讨论，相信即将修订的《海洋倾废管理条例》会妥善解决这个关键问题。

3. 正确理解海洋倾废概念有利于加强与相关国家和地区在海洋倾废管理方面的合作与交流

国际合作是现代国际法上的一个重要原则，也是国际环境法的一项基本原则。[57] 它对于国际环境保护事业而言，具有特别的意义。这是因为，环境问题不同于经济问题，也不同于政治、军事问题，任何国家可以随心所欲的控制经济、军事、政治等方面的对外来往，但是，对于许多环境问题，像海洋污染、大气污染等全球性的环境污染问题，任何一个国家，无论它的经济实力和科技实力多么雄厚，单枪匹马都是无能为力的；另一个方面，环境污染目前已经成为了一个全球性环境危机，国际社会统一行动的时代已经到来。因此除了全球共同努力，没有其他途径。《人类环境宣言》明确宣告了国际环境合作的基本原则。正如《人类环境宣言》规定：“种类越来越多的环境问题，因为它们在范围上是地区性或全球性的，或者因为它们影响共同的国际领域，将要求国与国之间广泛合作和国际组织采取行动以

56 如在推广清洁生产工艺技术以减少废物的产生上根本没有涉及。

57 关于国际合作原则是国际环境法的基本原则，目前已经得到了绝大部分学者的赞同。参见林灿铃主编：《国际环境法》，北京：人民出版社 2004 年 4 月版，第 260 页；韩成栋、潘抱存主编：《国际法教程》，南京：南京大学出版社 1988 年 9 月版，第 441 页；及王铁崖主编：《国际法》，北京：法律出版社 1995 年 8 月版，第 451 页。

谋求共同的利益。”[58]《内罗毕宣言》中也重申“要进一步加强和扩大在环境保护领域内的各国努力和国际合作”、“各国政府和人民应共同合作履行历史职责”。2 个《宣言》都对加强国家之间的协商、合作原则进行了规定。

20 世纪 70 年代初，大量有毒物质向海上倾倒，以及沿海一些国家对海洋倾倒出现的污染危害事件表示不满，激发了国际社会对海洋倾倒控制的强烈要求，开始了全面控制海洋倾倒的努力。特别是国际上 2 起海洋倾倒事件（1971 年英国轮船公司计划在英国南部海域倾倒一批化学毒品；1971 年荷兰一艘船舶正从鹿特丹港载运 650 吨氯烃废弃物，准备倒在北海北部海区，顿时引起北海沿岸国家以及挪威、冰岛等国人民的强烈抗议），[59] 促使各国认识到在控制海洋倾倒方面进行国际合作的必要性。

随着世界经济、政治一体化进程的加快，废物出口和越境运输，特别是危险废物出口和越境运输问题近些年来在全球范围内愈加严重，一些发达国家将第三世界国家作为自己的垃圾处理站进行污染转移，海洋越境废物运输则作为一种主要的达到其出口目的的方式。对此进行管理的国际公约是《控制危险废物越境运输的巴塞尔公约》，而伦敦公约管辖的仅仅是以海上处置为目的的废物出口和越境运输。从本文前述部分可以看出，《1996 年议定书》也强调了国际合作原则，专门单列了第 12 条、第 13 条、第 14 条、第 17 条，对海洋倾废管理领域的国际合作做出了规定。

由于岸上直接向海洋倾倒废弃物的特点，以及在管辖权等方面的冲突，现阶段在这方面制定统一的国际公约的条件还不成熟，许多国家或地区已经就此订立了区域性条约来防止、控制和减少岸上直接向海洋倾废造成的海洋污染。[60] 随着经济的发展，产生的废弃物数量不断增大，加上管道排污的快速发展，岸上直接向海洋倾倒废弃物造成的海洋污染不断向远海延伸，我国必须加强同邻国的合作，共同保护好海洋环境，避免海洋倾废造成海洋污染。

目前，我国海洋倾废管理参考的法律依据仍是《海洋倾废管理条例》和《海洋倾废管理条例实施办法》，在新的条例和办法出台之前，这些条例仍然具有指导意义。但是这 2 部法律中根本就没有谈及国际合作原则，这显然与目前的国际形势严重不符，也会步入作茧自缚的路子，因此我国在海洋倾废领域也应坚持国际合

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58 Declaration of the United Nations Conference on the Human Environment, at http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=97&ArticleID=1503&l=fr, 14 September 2008.

59 崔绍珍著：《中国海洋倾废管理》，北京：海洋出版社 1994 年 8 月版，第 3 页。

60 1974 年在巴黎签署的《防止陆源物质污染海洋的公约》、在赫尔辛基签署的《保护波罗的海区域海洋环境的公约》、1976 年在巴塞罗那签署的《保护地中海免受污染的公约》、1981 年在利马签署的《保护东南太平洋海洋环境和沿海地区公约》、1990 年在金斯敦签署的《保护和开发大加勒比海区域海洋环境公约关于特别保护区和受保护的野生物的议定书》等等。这些海洋保护公约均为区域性的全面保护海洋的公约，其中包括海洋倾废的规定。

作原则，并注意以下几个方面：

第一，看清国情，我们是一个发展中国家，在坚持加强与世界各国扩大海洋倾废领域的合作外，要充分重视联合国环境与发展会议的有关原则，[61] 充分维护我国作为一个发展中国家的利益。同时，要坚持自主和独立，不要过分依赖发达国家，要走自主创新之路。

第二，在关于是否对我国内水的海洋倾废也采取国际合作原则的问题，本文作者建议内水倾废不采取国际合作原则，从而维护国家主权和海上安全。

第三，要找到合适的合作项目，例如清洁生产技术、废物生产最小化技术等。

第四，国际合作的途径包括技术合作和援助，具体包括：在国际组织的协调下，要求有关国家提供双边和多边支持，如培训研究、监测和执行方面的科学和技术人员；提供必要设备和设施，以加强国家能力；提供实施相关议定书的建议；有关废物最少化和清洁生产工艺的信息和技术合作；有关废物的处置和处理及防止、减轻和在切实可行时消除倾倒造成的污染的其他措施的信息和技术合作；以彼此同意的条件，包括减让和优惠条件，提供和转让无害环境技术和相应的专门知识。

第五，注重区域合作。其中包括我国与日本、韩国、朝鲜以及东南亚邻国在海洋倾废领域的合作，抑或是与国际海底管理局、经济合作与发展组织等国际组织展开海洋倾废领域的合作与交流，力争达到“多赢”的效果，这样既能对世界环境的净化起到一个负责任的世界大国的作用，又能使本国的海洋倾废管理更加合理化、科学化。

61 这次大会是在全球环境持续恶化、发展问题更趋严重的情况下召开的。会议围绕环境与发展这一主题，在维护发展中国家主权和发展权，发达国家提供资金和技术等根本问题上进行了艰苦的谈判。最后通过了《关于环境与发展的里约热内卢宣言》、《21世纪议程》和《关于森林问题的原则声明》3 项文件。会议期间，对《联合国气候变化框架公约》和《联合国生物多样性公约》进行了开放签字，153 个国家和欧共体已正式签署。这些会议文件和公约有利于保护全球环境和资源，要求发达国家承担更多的义务，同时也照顾到发展中国家的特殊情况和利益。这次会议的成果具有积极意义，在人类环境保护与持续发展进程上迈出了重要的一步。

《控制和管理船舶压载水和沉积物国际公约》研究

管 松*

内容摘要：随着国际贸易和船运技术的迅速发展，压载水所含的有害水生物和病原体越来越成为全球环境和资源安全以及人类健康的重大威胁。国际海事组织肩负起起草第一部关于压载水管理国际公约的重任，并于 2004 年通过了《控制和管理船舶压载水和沉积物国际公约》。该公约虽然尚未生效，但其具体明确和循序渐进的管理措施对各国实践具有重要的指导意义。对中国而言，随着石油进口量的激增，每天经由中东、非洲和东南亚进入中国港口的油轮班次也在不断增多，其携带的压载水必然含有大量外来物种，必须对其进行及时、有效的管理和控制。本文在对该公约进行评述的同时，还介绍了 1982 年《联合国海洋法公约》的相关规定，并对中国目前相应的立法情况进行总结，提出立法建议。

关键词：压载水 有害水生物和病原体 外来物种 生物多样性 《控制和管理船舶压载水和沉积物国际公约》

近年来，中国石油进口量猛增，其中 90% 以上需要通过海上油轮运输，[1] 主要运输线路包括：①中东：波斯湾—霍尔木兹海峡—马六甲海峡（或者望加锡海峡）—台湾海峡—中国；②非洲：北非—地中海—直布罗陀海峡—好望角—马六甲海峡—台湾海峡—中国；西非—好望角—马六甲海峡—台湾海峡—中国；③东南亚：马六甲海峡—台湾海峡—中国。[2] 这些线路不仅路程遥远而且跨洲越洋，需要经停多个国家和地区。由此可见，每天必然有大量经由上述线路进入中国港口的油轮，而且其携带的压载水必然含有大量外来物种，若不对其进行及时、有效的管理和控制，必然会损害港口地区的资源、生态环境乃至居民健康。

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1 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，第 137 页。

2 李兵：《国际战略通道研究》（博士学位论文），北京：中共中央党校 2005 年版，第 291 页。

一、公约的背景分析

（一）压载水问题的产生

压载物是指为控制船舶横倾、纵倾、吃水、稳定或应力而加装到船上的固体或液体物质，对于减少船壳压力、增进船舶推动力和机动性，尤其是保证海上航行安全有着重要作用。在木质船舶时期，人们一般选用石头和沙子作为压载物。随着19世纪船运业的现代化，铁壳船舶和钢壳船舶开始使用压载水（又名“压舱水”）。[3]到了二战期间，这一做法已经成为主流，[4]毕竟，对于船舶而言，无论是停靠在港口还是处于航行中，抽取和排放压载水都是十分便利的。最常见的使用压载水的情形是弥补船舶因装卸货物而发生的重量变化。船舶从一个港口出发时，因未装载货物或未载满货物而加载压载水，到了目的地港时，再因装载货物而排放压载水。此外，船舶在航行过程中，也会由于天气等航行条件的变化而改变压载水的承载数量。尤其是吃水较深的船舶，在例行的装载货物和运输过程中，常常会多次抽取和排放压载水。随着贸易全球化的迅速发展，船运业承担了世界贸易近8成的运输量，并有继续扩大的趋势，[5]因此船舶排放压载水的数量是惊人的。据统计，每年从外国港口进入美国水域的船舶所排放的压载水可以高达210亿加仑。[6]

起初，人们认为使用水作为压舱物不仅是最便利的也是最无害的，尤其是使用未遭污染的压载水不会对海洋环境造成损害。然而，压载水中含有大量生物，包括鱼类、细菌、微生物、浮游生物、无脊椎生物、海草、深海底生物、海藻以及更多物种的卵和幼虫。[7]有数据显示，随着压载水的排放，每天有5000甚至更多种

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3 Jason R. Hamilton, All Together Now: Legal Response to the Introduction of Aquatic Nuisance Species in Washington through Ballast Water, *Washington Law Review*, Vol. 75, 2000, p. 251.

4 Sharonne O’Shea and Allegra Cangelosi, Trojan Horses in Our Harbors: Biological Contamination from Ballast Water Discharge, *Toledo Law Review*, Vol. 27, 1996, p. 381.

5 David Ciesla, DevelopmentinVessel-Based Pollution: the International Maritime Organization’s Ballast Water Convention and the European’s Regulation to Phase out Single-Hull Oil Tankers, *Colorado Journal of International Environmental Lawand Policy*, 2003, p. 107.

6 Jason R. Hamilton, All Together Now: Legal Response to the Introduction of Aquatic Nuisance Species in Washington through Ballast Water, *Washington Law Review*, Vol. 75, 2000, p. 251.

7 Sarah McGee, Proposals for Ballast Water Regulation: Biosecurity in an Insecure World, *Colorado Journal of International Environmental Law and Policy*, Vol. 13, 2001 Yearbook, 2002, p. 141.

生物被带到新的生态环境中。[8] 此时，这些生物便成为所谓的“非本地物种”或“外来物种”，通常经过漫长的航行时间，压载水中含有的生物已经奄奄一息，很难在新的水域环境中存活。但是，随着船舶航行速度的大幅度提高，越来越短的航行时间减轻了对这些生物的毁损，使其更有能力适应新环境。加之，新环境中缺乏这些外来物种在自然界中的天敌，它们会迅速繁殖，大量杀害本地物种，扰乱食物链，这不仅严重破坏了新环境中的生态系统，也会给当地的经济造成巨大损失，这种现象被称为“外来物种入侵”。历史上最著名的案例要数发生于 20 世纪 80 年代中期的欧洲斑马贝入侵北美五大湖。当时，随着压载水的排放而进入北美五大湖的斑马贝大量繁殖，不仅阻塞了城市和工厂的进水管，而且促使海藻反常地生长，妨碍了休闲水域的使用，并威胁到当地物种，[9] 给美国造成了 30 亿至 50 亿美元的经济损失。[10] 现在，外来物种空前的入侵速度对本地物种造成的威胁已成为全球性问题，其严重性仅次于栖息地流失。[11]

此外，压载水还可能携带人类和非人类病原体（例如使用未经处理的生活或工业污水作为压载水）。[12] 许多研究人员认为，20 世纪 90 年代初期南美地区霍乱流行的元凶是来自亚洲船舶的压载水。这场灾难致使 73 万多人染病，6 千多人死亡。[13] 最新的研究结果表明，压载水中含有霍乱病原体的情况比以往所认为的更严重。曾经在进入美国切萨皮克湾的 15 艘船舶的压载水中取样发现，每一艘船舶的压载水中均携带了 01 号弧菌霍乱病原体 , 而其中 14 艘船舶的压载水中还携

8 Albert G. McCarraher, The Phantom Menace: Invasive Species, *New York University Environmental Law Journal*, Vol. 14, 2006, p. 736.

9 Lisa A. Brautigam, Control of Aquatic Nuisance Species Introductions via Ballast Water in the United States: Is the Exemption of Ballast Water Discharges from Clean Water Act Regulation a Valid Exercise of Authority by the Environmental Protection Agency?,*Ocean and Coastal Law Journal*, Vol. 6, No. 1, 2001, pp. 38~39.

10 Liwen A. Mah, Sailing by Looking in the Rearview Mirror: EPA’s Unreasonable Deferral of Ballast-Water Regulation to a Now Ineffective Coast Guard, *Ecology Law Quarterly*, Vol. 31, No. 3, 2004, p. 665.

11 Sandra B. Zellmer, Enjoy the Donut: A Regulatory Response to the White Paper on Preventing Invasion of the Great Lakes by Exotic Species, *Toledo Journal of Great Lakes’ Law, Science & Policy*, Vol. 2, No. 2, 2000, p. 207.

12 Brent C. Foster, Pollutants without Half-lives: The Role of Federal Environmental Laws in Controlling Ballast Water Discharges of Exotic Species, *Environmental Law*, Vol. 30, No. 1, 2000, p. 99.

13 Laura Tangley, Unwelcome Sea Voyagers Marine Stowaways Take Advantage of Increased Global Trade and Travel, *U.S. News & World Report*, 26 October 1998.

带了 0139 号弧菌霍乱病原体，之前从未在美国发现过该病原体。[14]

压载水是现代船运业必不可少的，它在为贸易全球化发展作出贡献的同时，也成为了外来物种入侵和疾病传播的重要媒介。防止外来物种和病原体入侵，保护生物多样性和人类健康，必须对压载水的排放进行管制。许多港口大国（如美国、加拿大和澳大利亚）和国际组织（如国际海事组织）纷纷开始立法尝试。

（二）公约的出台

1903 年，由于亚洲海藻在北海的大面积出现，科学家们第一次承认了外来物种入侵现象。但是，直到 70 年代霍乱在秘鲁的爆发，世界卫生组织才第一次证实了压载水在传播有害物种方面的潜力，科学界也才开始细致地研究该问题。[15] 尽管 1982 年《联合国海洋法公约》意识到了外来物种入侵的危害性，[16] 但在 1990 年之前，这种危害并没有引起国际社会太多关注。[17] 1990 年，加拿大第一次向国际海事组织的海上环境保护委员会报告了欧洲斑马贝入侵北美五大湖的损害情况。为此海上环境保护委员会于 1991 年通过了第 50(31) 号决议，即《防止由船舶压舱水和沉积物排放引入有害生物和病原体指南》（以下简称“《1991 年 MEPC 指南》”），供各国自愿遵守。1992 年，在里约热内卢召开的联合国环境与发展大会通过了 21 世纪可持续发展的蓝图和行动计划，即“21 世纪议程”，号召世界各国通过国际海事组织和其他机构共同致力于创设“压载水排放规则以防止非本地生物体的传播”。[18] 1993 年 11 月，国际海事组织对《1991 年 MEPC 指南》进行稍

14 Brent C. Foster, Pollutants without Half-lives: The Role of Federal Environmental Laws in Controlling Ballast Water Discharges of Exotic Species, *Environmental Law*, Vol. 30, No. 1, 2000, p. 99.

15 Cato C. ten Hallers-Tjabbes, Prevention: Marine Biodiversity Threatened by Ballast Water Transported by Ships; Curbing the Threat, at http://www.iucn.org/congress/2004/documents/outputs/biodiversity-loss/preventioncato.pdf, 23 July 2008.

16 1982 年《联合国海洋法公约》第 196 条第 1 款：各国应采取一切必要措施以防止、减少和控制由于在其管辖或控制下使用技术而造成的海洋环境污染，或由于故意或偶然在海洋环境某一特定部分引进外来的或新的物种致使海洋环境可能发生重大和有害的变化。

17 Cato C. ten Hallers-Tjabbes, Prevention: Marine Biodiversity Threatened by Ballast Water Transported by Ships; Curbing the Threat, at http://www.iucn.org/congress/2004/documents/outputs/biodiversity-loss/preventioncato.pdf, 23 July 2008.

18 《21 世纪议程》第 17 部分第 30 条第 a 款第 vi 项。

许修改后又通过了第 A774(18) 号决议（以下简称“《1993 年 MEPC 指南》”）。[19]

1997 年 11 月，国际海事组织对《1993 年 MEPC 指南》进行了拓展，出台了《控制和管理船舶压载水使有害水生物和病原体的转移降至最小程度指南》，其中包含了多种压载水管理办法，各国可以在国内立法时选择性采用。这就使得各个辖区的管理规则出现了差异，从而加大了船运业遵守沿海国和港口国法律的难度。与此同时，指南的自愿性也不足以对抗外来物种入侵给国际社会造成的严重危害。意识到有必要建立一套所有港口均适用的有拘束力的统一规则，海上环境保护委员会于 1999 年成立了压载水工作组，开始为压载水管理起草一份有拘束力的国际公约。此后，国际社会曾借助 2002 年可持续发展世界峰会的契机，敦促国际海事组织尽快完成国际公约的起草工作。[20] 工作组经过 5 年的努力终于提出了《控制和管理船舶压载水和沉淀物国际公约》（以下简称“《压载水公约》”）草案。2004 年 2 月 16 日，国际海事组织召开了“船舶压载水管理国际会议”，出席会议的代表来自 74 个成员国、1 个合作成员国以及来自 2 个政府间国际组织和 18 个非政府间国际组织的观察员，他们以协商一致的方式通过了《压载水公约》草案。现在，该公约正在国际海事组织成员国内部流通签字，等待生效。尽管如此，作为第一部试图建立具有约束力的压载水管理制度的国际公约，《压载水公约》仍值得我们重视和研究。

二、公约的内容分析

作为第一部专门针对压载水的有拘束力的国际公约，《压载水公约》在预警原

19 IMO, Guidelines for Preventing the Introduction of Unwanted Organisms and Pathogens from Ships' Ballast Water and Sediment Discharges, Resolution A. 774(18)(1993).

20 Plan of Implementation of the World Summit on Sustainable Development, paragraph 34.

则和可持续发展原则基础上，为压载水管理设置了一套法律制度。[21]

（一）公约的形式

在《压载水公约》制定的初期，国际海事组织曾经考虑采用《防止船源污染国际公约》附件而非独立的国际公约的形式。该设想之所以最终被摒弃，主要出于3方面原因。首先，《防止船源污染国际公约》的生效及修改条件倾向于保护船旗国利益；其次，相对于港口国控制，《防止船源污染国际公约》将重心放在船旗国义务上；最后，压载水管理的目的之一是保护生物多样性，这在传统的污染防治概念中无法得到准确地体现。[22] 最终，国际海事组织决定以独立公约的形式建立压载水管理制度，这预示着国际海事组织的权力从传统的确保航行及船员安全与防治海洋环境污染扩张到了保护生物多样性。

此外，《压载水公约》沿袭了国际海事组织公约的传统，将缔约国的基本义务与技术要求分别规定在公约的主体和附件2部分中。但是，附件与公约构成一个整体，除非另有明文规定，提及公约同时意味着提及其附则。[23]

（二）公约的生效与修改

国际海事组织公约的生效条件通常是批准国家的数量及其商船的吨位比例。例如，《防止船源污染国际公约》的生效需要至少15个国家批准，并且这些国家的商船总吨位应不少于世界商船总吨位的50%。[24] 该吨位比例要求也是修改《防止船源污染国际公约》附件的条件之一。[25] 但是，随着联合国会员国从1973年的135个上升到现在的191个，如此少的批准国家已经无法跟上时代的步伐，而如此高的吨位比例，也无法平衡船运国家与沿海国、港口国家之间的利益。[26] 因此，《压载水公约》将批准国家数量增至30，将吨位比例降至35%，[27] 在其附件的修

21 Albert G. McCarraher, The Phantom Menace: Invasive Species, *New York University Environmental Law Journal*, Vol. 14, 2006, p. 736.

22 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 303.

23 《控制和管理船舶压载水和沉积物国际公约》第2条第2款。

24 《防止船源污染国际公约》第15条第1款。

25 《防止船源污染国际公约》第16(2)(f)(ii-iii）条。

26 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 303.

27 《控制和管理船舶压载水和沉积物国际公约》第18条第1款。

改条件中，甚至取消了吨位比例的要求。[28] 这势必会降低那些实行船舶开放登记制的国家（如巴拿马、利比里亚）对《压载水公约》的影响力，显示出国际海事组织在压载水管理方面将更倚重港口国的作用。

（三）公约的适用

《压载水公约》不仅对当事国船舶适用，包括所有悬挂当事国国旗的船舶和虽无权悬挂当事国国旗但在该当事国的权力下营运的船舶；[29] 而且对于非当事国船舶也具有一定程度的适用作用，因为当事国只有以适用该公约或者更严格的标准作为非当事国船舶的入港条件，才能“保证不给此种船舶以更优惠的待遇”。[30]

《压载水公约》一般适用于上述所有船舶，但是也有例外情形，包括：未跨国界营运的船舶，除非其排放的压载水会影响或损害有关国家的环境、人类健康、财产、资源；军用和政府用船舶，但是各当事国应采取措施确保此类船舶在合理和可行时符合《压载水公约》；不携带压载水的船舶以及压载水装载于封闭的压载舱中且不排放压载水的船舶。[31] 除了上述公约明确规定的例外，当事国还可以在风险评估的基础上遵循特定程序豁免某些船舶。[32]

《压载水公约》所指船舶外延十分广泛，即“在水域环境中运行的任何类型的船舶，包括潜水船、水上船艇、浮动平台、浮动式储存装置和浮动式生产、储存和卸货装置”。[33] 由此可见，《压载水公约》的适用范围也将十分广泛。

此外，《压载水公约》并不排斥当事国采取更加严格的管理措施。[34] 也就是说，在压载水管理的某个环节，只要当事国国内法设置了更加严苛的管理制度，就可以排除《压载水公约》在该环节的适用。

（四）公约的执行

为确保压载水管理措施的有效实施，《压载水公约》不仅规定了港口国的检查权，还将对违章船舶的处罚以及采取有效措施防止其排放压载水设置为当事国的义务，从而增强了公约的“硬度”。

1. 检查权

一方面，当事国有权主动对进入本国任何港口或近岸装卸站的另一当事国船

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28 《控制和管理船舶压载水和沉积物国际公约》第 19 条。
29 《控制和管理船舶压载水和沉积物国际公约》第 3 条第 1 款。
30 《控制和管理船舶压载水和沉积物国际公约》第 3 条第 3 款。
31 《控制和管理船舶压载水和沉积物国际公约》第 3 条第 2 款。
32 《控制和管理船舶压载水和沉积物国际公约》附件规则 A-4。
33 《控制和管理船舶压载水和沉积物国际公约》第 1 条第 12 款。
34 《控制和管理船舶压载水和沉积物国际公约》第 2 条第 3 款。

舶进行检查，以确定其是否遵守《压载水公约》的要求。一般情形下，这种检查应限于：检验船上是否备有有效的“国际压载水管理证书”；检查压载水记录簿，以及／或者根据国际海事组织即将制定的指南对船舶的压载水进行采样。[35] 赋予港口国以采样检查权而非单纯的文书检查权，将在促进公约实施方面发挥重要作用。[36] 另一方面，港口国也可以在收到另一当事国请其进行调查的请求和有关某船正在或曾经违反公约规定进行操作的充分证据时，对进入其港口或近岸装卸站的该船舶进行检查。

此外，在某些情形下，港口国还有权进行更加具体的检查，即船舶未持有有效的证书或有确凿证据表明：船舶的状况或设备实质上不符合证书资料；或船长或船员不熟悉船上压载水管理的基本程序，或未执行该程序。[37] 对于此种情形，《压载水公约》还要求检查国必须采取措施确保违章船舶不排放压载水，直到危险解除。[38]

2. 处罚义务

《压载水公约》要求船旗国和港口国对违反公约的行为进行处罚，这既是当事国的权利也是当事国的义务。[39] 对于进入其管辖水域的违反公约要求的当事国船舶，港口国除了可以将其交付船旗国进行处理以外，还可以直接进行处罚，而决不能袖手旁观。《压载水公约》并没有像《〈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》那样明确赋予船旗国执法特权。[40] 因此，当港口国的处罚程序启动后，不会因船旗国的请求而终止。换而言之，如果港口国决定自行处罚违章船舶，其没有义务在船旗国提出请求时移交违章船舶。并且，如果港口国选择将处罚的权利和义务交由船旗国，船旗国的调查和处罚程序必须尽快展开，并将处理结果立即通知该港口国和国际海事组织。

至于具体的处罚措施，《压载水公约》并没有给予直接规定，而是将其交由当事国国内法，唯一的要求是处罚措施的严厉程度应当足以遏制对公约的违反。[41] 除此之外，《压载水公约》还允许港口国警告、滞留或遣散违章船舶或者禁止任何

35 《控制和管理船舶压载水和沉积物国际公约》第 9 条第 1 款。
36 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 297.
37 《控制和管理船舶压载水和沉积物国际公约》第 9 条第 2 款。
38 《控制和管理船舶压载水和沉积物国际公约》第 9 条第 3 款。
39 《控制和管理船舶压载水和沉积物国际公约》第 8 条。
40 《〈联合国海洋法公约〉有关养护和管理跨界鱼类种群和高度洄游鱼类种群的规定执行协定》第 21 条第 12 款。
41 《控制和管理船舶压载水和沉积物国际公约》第 8 条第 3 款。

不安全的压载水排放。[42]

三、公约的评价与分析

（一）公约的特色

1. 强制性

与《1993 年 MEPC 指南》相比较，《压载水公约》最大的特色在于它的强制性，这也是压载水问题日益严峻的现实需要。根据《压载水公约》的规定，船旗国不仅应要求其船舶遵守该公约，还应采取有效措施确保其船舶符合公约要求；港口国也应为促进公约目标的实现而制定国内法律、政策。[43] 尤其是《压载水公约》的核心部分，即压载水的置换和处理，规定的均是强制性义务，从而使这些措施较之《1993 年 MEPC 指南》能够发挥更大的影响力。[44]

2. 确定性

《压载水公约》不仅限于宣言性的表述，还规定了具体的标准和时间表，[45] 防止当事国通过解释削弱该公约的适用效果。例如，公约规定了具体的压载水置换要求和许可排放密度，以及实施压载水处理标准的时间表。按照该时间表，当事国将在技术和资金等方面均具备最终实施压载水处理标准的能力。总之，只有如此具体的条款才能建立起经久耐用的制度。[46]

3. 公平性

考虑到各当事国不同的政治、历史或经济情况，《压载水公约》向不同处境的当事国提出了不同的要求。例如，《压载水公约》为压载水排放设置了时间表，目的就是减轻那些有大量船队需要更新压载水系统的当事国的履行负担。这种差别待遇是《压载水公约》公平性的体现，可以促进其有效实施。

4. 开创性

《压载水公约》中的任何规定都不得被解释为妨碍某一当事国在符合国际法的前提下，单独地或与其他当事国联合通过控制和管理船舶压载水和沉积物，就防止、减少或消除有害水生物和病原体的转运采取更严格的措施。[47] 对于一部国

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42 《控制和管理船舶压载水和沉积物国际公约》第 10 条第 2、3 款。
43 《控制和管理船舶压载水和沉积物国际公约》第 4 条。
44 Albert G. McCarraher, The Phantom Menace: Invasive Species, *New York University Environmental Law Journal*, Vol. 14, 2006, p. 736.
45 《控制和管理船舶压载水和沉积物国际公约》附件规则 B-4, B-5, D-2。
46 Albert G. McCarraher, The Phantom Menace: Invasive Species, *New York University Environmental Law Journal*, Vol. 14, 2006, p. 736.
47 《控制和管理船舶压载水和沉积物国际公约》第 2 条第 3 款。

际公约而言，如此明示承认当事国建立更严标准的权利是不寻常和毫无先例的。[48]

5. 扩张性

（1）权力的扩张

尽管存在关于“有害水生物或病原体”是否属于污染物的争论，但是《压载水公约》已经明确表达了其保护生物多样性的目的，[49] 从而扩大了国际海事组织的职权范围。并且，《压载水公约》有 10 处援引了即将由国际海事组织制定的指南，[50] 这意味着国际海事组织对由压载水引发的生物多样性保护问题的管辖权仍有进一步扩大的空间。同样得到强化的还有港口国的管辖权。《压载水公约》通过规定港口国的采样检查权和处罚义务，提升了港口国在管理压载水方面的地位。

（2）规则的扩张

如前文所述，《压载水公约》的适用范围可以扩张至非当事国船舶，因为公约要求各当事国“保证不给此种船舶以更优惠的待遇”。[51] 换而言之，对于非当事国船舶，各当事国要么适用公约要求的标准，要么适用更加严格的标准。由此可见，当事国对非当事国船舶适用《压载水公约》的可能性极大。

《压载水公约》还要求当事国在国内法中设立对违章船舶的处罚制度。[52] 既然对违反公约要求的船舶进行处罚成为了当事国的国内法要求，那么该处罚就可以直接适用于进入该当事国管辖范围的包括非当事国船舶在内的任何船舶，从而在实质上起到了将《压载水公约》的规则适用于非当事国船舶的作用。

（二）公约的不足

《压载水公约》提出的压载水置换和处理标准需要较高的技术和资金支持，令许多发展中国家望而止步。为此，海上环境保护委员会启动了“全球压载水项目”，帮助部分发展中国家熟悉《压载水公约》的管理规范，提高其履行公约的能力。由此可见，《压载水公约》是否能尽快生效并在全球范围内得到普遍遵守，不仅仅是时间的问题，实际上是技术水平和资金能力的阻碍，这使公约的前景令人堪忧。

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48 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 303.

49 《控制和管理船舶压载水和沉积物国际公约》前言和第 1 条第 8 款。

50 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 295.

51 《控制和管理船舶压载水和沉积物国际公约》第 3 条第 3 款。

52 《控制和管理船舶压载水和沉积物国际公约》第 8 条。

四、1982 年《联合国海洋法公约》的相关规定

作为“海洋宪法”的 1982 年《联合国海洋法公约》（以下简称“1982 年《公约》”）并没有条款直接提及压载水管理，但是其第 12 部分“海洋环境的保护和保全”中第 196 条关于“技术的使用或外来的或新的物种的引进”的规定与压载水管理密切相关。该条第 1 款规定：“各国应采取一切必要措施以防止、减少和控制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。”由此可见，该条款包含了 2 项义务——控制使用技术造成的污染和外来物种入侵，其中，只有后者才是挪威代表在 1974 年提出该条草案时的初衷。换言之，1974 年挪威提案的出发点是控制引进外来物种对海洋生态平衡造成的破坏而非污染。[53] 有观点认为，1982 年《公约》对挪威提案的实质性修改模糊了外来物种入侵与污染之间的区别。[54] 然而，1982 年《公约》关于“海洋环境的污染”的定义，即“人类直接或间接把物质或能量引入海洋环境，其中包括河口湾，以致造成或可能造成损害生物资源和海洋生物、危害人类健康、妨碍包括捕鱼和海洋的其他正当用途在内的各种海洋活动、损坏海水使用质量和减损环境优美等有害影响”，定义范围十分广泛，足以将外来物种入侵纳入其中。[55] 因此，1982 年《公约》就防止海洋污染而为当事国设置的权利和义务，同样可以被当事国援用于控制由压载水排放引发的外来物种入侵和病原体传播。

五、中国的相关立法

中国尚未签署《压载水公约》，自己也没有关于压载水管理的专门性法律法规，只有包含与压载水管理有关的条款的法律法规。包括：

《中华人民共和国国境卫生检疫法》（2007 年 12 月 29 日修正），所涉条款为第 18 条：“国境卫生检疫机关根据国家规定的卫生标准，对国境口岸的卫生状

53 Shabtai Rosenne and Alexander Yankov eds., *United States Convention on the Law of the Sea 1982: A Commentary*, *Volume IV*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, p. 76.

54 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 303.

55 1982 年《联合国海洋法公约》第 1 条第 4 款。

况和停留在国境口岸的入境、出境的交通工具的卫生状况实施卫生监督：……（四）监督和检查垃圾、废物、污水、粪便、压舱水的处理。”

《中华人民共和国国境卫生检疫法实施细则》（1989 年 3 月 6 日），所涉条款包括：

第 78 条：“对染有霍乱的船舶、航空器，应当实施下列卫生处理：……（六）人的排泄物、垃圾、废水、废物和装自霍乱疫区的压舱水，未经消毒，不准排放和移下……”

第 109 条：“《国境卫生检疫法》和本细则所规定的应当受行政处罚的行为是指：……（八）未经卫生检疫机关实施卫生处理，擅自排放压舱水，移下垃圾、污物等控制的物品的……”

《防止拆船污染环境管理条例》（1998 年 5 月 18 日），所涉条款为第 13 条：“排入洗舱水、压舱水和舱底水，必须符合国家和地方规定的排放标准；排放未经处理的洗舱水、压舱水和舱底水，还必须经过监督拆船污染的主管部门批准。监督拆船污染的主管部门接到拆船单位申请排放未经处理的洗舱水、压舱水和舱底水的报告后，应当抓紧办理，及时审批。”

《中华人民共和国防止船舶污染海域管理条例》（1983 年 12 月 29 日），所涉条款包括：

第 10 条：“为保证油轮的安全引航、靠泊和防止海域污染，所有进港的空载油轮留存的压舱水不得少于该油轮载重量的四分之一。港务监督对于不按规定留足压舱水的油轮，要调查其压舱水的去向，并视情况进行处理。”

第 20 条：“按本条例第 19 条批准的船舶排放含油污水，必须分别符合以下各项规定：

（一）一般情况

……

2. 在航行中，瞬时排放率不大于 60 公升 / 海里；

……

4. 船上油水分离设备、过滤系统和排油监控装置，处于正常工作状态；

……

（三）150 总吨以上油轮的压舱水、洗舱水的排放，除满足上述（一）项之 2、4 外，还应满足：

1. 距最近陆地 50 海里以外；

2. 每压载航次排油总量，现有油轮不得超过装油总量的一万五千分之一，新油轮不超过装油总量的三万分之一。

第 25 条：“来自有疫情港口船舶的压舱水，应申请卫生检疫部门进行卫生处理。”

《中华人民共和国国境口岸卫生监督办法》（1982 年 2 月 4 日），所涉条款

为第 14 条：“交通工具上的粪便、垃圾、污水处理的卫生要求：……（二）来自鼠疫疫区交通工具上的固体垃圾必须进行焚化处理，来自霍乱疫区交通工具上的粪便、压舱水、污水，必要时实施消毒。”

《中华人民共和国对外国籍船舶管理规则》（1979 年 9 月 18 日），所涉条款为第 36 条：“船舶排放压舱水、洗舱水、舱底水，必须向港务监督申请批准。如果船舶来自有疫情的港口，应经过卫生检疫机关卫生处理。装运危险货物和其他有害污染物船舱的污水、洗舱水，应经有关卫生部门鉴定合格后，方可在指定地点排放。”

上述压载水条款不仅数量少，而且内容多是概括性的，缺乏具体的管理措施，也没有形成体系。此外，上述法律法规可以分为 2 大类——环境污染和卫生检疫，尚无从生物多样性的角度出发关注压载水的法律法规。此外，我国虽然是《生物多样性公约》和《濒危野生动植物种国际贸易公约》的缔约国，却并没有关于生物多样性保护的国内法，而这 2 部国际公约也没有提及由压载水引发的外来物种入侵问题。由此可见，尽管我国尚未加入《压载水公约》，但是，由于我国关于压舱水管理的国内法十分不完善，所以应认真研究该公约，并积极借鉴其先进之处。作为重要的港口国家，《压载水公约》的生效将不可避免地对我国产生重大影响，因此，我国必须提前做好应对准备。

六、结语

通过控制和管理船舶压载水和沉积物的方法来防止、减少或消除有害水生物和病原体的转运，这对技术和成本都提出了很高的要求。现阶段，最适宜的方法是控制和管理船舶压载水的置换，尽管这种方法只能治标。而治本的方法则是船舶压载水的处理，这将是船运业更远大的目标。《压载水公约》不仅建立了具体明确而循序渐进的压载水管理措施，还为这些措施的实施制定了有效的法律制度，包括当事国之间的合作以及船旗国与港口国之间权利与义务的配置。总之，要寻求压载水所引发的外来物种入侵与病原体传播等问题的解决方法，在技术方面，应以船舶为基础，在执法方面，应以港口为基础。由于我国关于压载水管理的国内法十分薄弱，所以无论《压载水公约》是否生效，其先进的管理措施和管理理念都值得我国研究和借鉴。

论海事强制令的适用与完善
——从民事保全理论出发

黄西武*

内容摘要:海事强制令是为了弥补民事保全制度缺陷而实施的一项制度创新。本文以民事保全理论为基础，结合海事诉讼实际，就如何完善海事强制令以及在现阶段如何适用该制度提出自己的见解。同时，本文认为，海事法院在适用过程中应特别注意被申请人权益的保护;注意总结经验，为我国民事诉讼法的修订、民事保全制度的完善做出应有的贡献。

关键词:海事强制令　民事保全

我国《民事诉讼法》仅规定了财产保全程序，而在海事审判实践中，常常出现一些不能归属于财产保全的保全申请，而又无法通过现行的财产保全或先予执行程序得到解决。为弥补这一不足，1999 年制定的《海事诉讼特别程序法》（以下简称“《海诉法》”）创设了类似于行为保全性质的海事强制令制度。根据该项制度，海事法院可以根据海事请求人的申请，责令被请求人实施特定的作为或不作为。[1]“海事强制令作为一种保全措施”，[2] 在及时保护当事人合法权益、避免损失扩大等方面发挥了重要作用，但也暴露了一些令人困扰的问题。本文以民事保全理论为基础，结合海事诉讼实际，就如何完善海事强制令以及在现阶段如何适用该制度提出自己的见解。

一、关于海事强制令的完善

“民事保全是指法院为了确保将来执行文书的顺利执行，或者为了避免不可挽回的损害，在执行文书生效之前，采取一定的强制性措施限制义务人处分其财

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1　李国光：《关于提请审议〈中华人民共和国海事诉讼特别程序法〉（草案）的说明》，载于《中国海事审判年刊》编辑部编：《中华人民共和国海事诉讼特别程序法》，第 54 页。
2　张晓茹：《论我国海事强制令制度的完善》，载于《人民司法》2006 年第 4 期，第 79 页。

产或者责令义务人作为或不作为的程序。”它具有暂定性、紧急性、附属性与密行性等特点。[3] 根据民事保全的上述性质与特征，笔者认为，海事强制令应作以下 4 个方面的完善：

（一）海事强制令当事人称谓是“请求人”/“被请求人”还是“申请人”/“被申请人”

作为一种民事诉讼法律制度，民事保全案件当事人之间的法律关系属于民事诉讼法律关系，当事人称谓不是根据诉争实体法律关系来确定，而是根据当事人在诉讼法律关系中的地位来确定。我国司法实践中，一直将保全案件当事人称为“申请人”与“被申请人”。

根据最高人民法院公布的海事诉讼文书样式，与民事保全“性质相同，程序上也十分相似”[4] 的海事强制令案件，其当事人被称为“请求人”与“被请求人”。在关于该文书样式的说明中，笔者没有找到这种称谓的依据，但猜测可能是依据《海诉法》第四章中多次出现的“请求人”与“被请求人”。笔者认为这种称谓方式混淆了实体法律关系与诉讼法律关系，与我国保全案件当事人的传统称谓不一致，应称“申请人”与“被申请人”。

海事请求人是商事实体法律关系中的权利主体，而海事强制令当事人的称谓应根据其在海事诉讼法律关系中所处的地位来确定。海事请求人与提出海事强制令申请的当事人在物理意义上相同，但其在不同法律关系中的地位与称谓应有所区别。在我国民事诉讼法中，保全案件当事人一直被称为“申请人／被申请人”。即便在同一部《海诉法》中，扣押船舶及船载货物的保全案件当事人仍被称为“申请人／被申请人”，而只有海事强制令与海事证据保全案件当事人被称为“请求人／被请求人”。这种变化没有实际意义，反而破坏了法律术语的一致性。

（二）根据民事保全暂定性的特点，完善海事强制令适用条件

民事保全是在实体判决产生之前，为保证将来的判决能得到圆满执行，或者避免正在发生的损害而采取的临时性强制措施，具有暂定性的特点。这一特点一方面表现在采取民事保全措施的裁定不是经过严格的对审辩论程序做出的，法官对申请人胜诉可能性的判断在很大程度上建立在对诉争法律关系的假定或者说暂定上；另一方面表现在民事保全裁定对当事人权利义务的调整对本案争议没有既判力。在德国、日本和我国台湾地区，民事保全分为“假扣押”、“假处分”，其中

3 李仕春：《民事保全程序研究》（博士学位论文），北京：中国政法大学 2002 年版，第 18 页。
4 金正佳主编：《海事诉讼法论》，大连：大连海事大学出版社 2001 版，第 220 页。

的“假”字，并非是真假之“假”字字义，假扣押乃真扣押债务人之财产或权利，惟其扣押系暂时之目的。“假”字应做“暂时、临时”解释。[5]

《海诉法》第56条将“需要纠正被请求人违反法律规定或者合同约定的行为”作为做出海事强制令的条件。由此可见，海事强制令的做出本身就意味着认定申请人主张的权利成立，被申请人的行为“违反法律规定或者合同约定”，已经对当事双方争议的权利义务关系进行了裁决。这不仅不符合民事保全暂定性的特征，也与海事强制令在整个海事诉讼制度体系中居于临时性救济手段的地位不符。

海事强制令的制度功能在于避免损失发生与扩大，它只能是一种临时性救济手段，对申请人的请求权是否成立、被申请人是否享有抗辩权只能进行初步审查，是中间禁令而不是最终禁令。作为一种临时性救济手段，海事强制令并不承担最终确定权利、实现权利的功能，不需要对被申请人是否违反法律规定或者合同约定进行认定。只要双方对法律关系存在争议，并且这种争议的局面会导致一方当事人面临巨大且难以弥补的损失即可。至于争议双方孰对孰错，只有通过最终判决才能确定。

（三）根据民事保全密行性的特点，强化事实披露机制

在民事诉讼中，一般适用对审程序。即通过双方当事人举证、质证、辩论查明事实。但在民事保全程序中，“由于情况紧急，申请人发现被申请人正在从事危害申请人债权的行为，应当趁债务人发觉之前，迅速、秘密地对被申请人采取保全措施。否则会打草惊蛇，影响民事保全的效果。对于这一点，大陆法系的立法体现得更为明显。德、日和我国台湾地区的民事诉讼法都规定，可以无需经过通知被申请人而采取民事保全措施，更无需经过对审辩论程序。”[6]此即民事保全的密行性。

海事强制令具有紧急性，必须在收到申请后48小时内做出并立即执行；同时，海事强制令又是以未经充分质证的证据、未经充分辩论的事实做出，且复议不停止执行，强制令一旦执行对被申请人带来的后果往往是不可恢复的。要在效率与公正之间保持平衡，就应该在立法上强化海事强制令程序中的事实披露机制。笔者认为可以从2个方面着手：

1. 强化申请人的事实披露责任

在海事强制令所借鉴的英美中间禁令制度中，“中间禁令的申请，是以誓词证据为支持。”“要求申请人的代表律师以宣誓书的证据加上文件证件向法官提供一个全面与坦诚的陈述，如果内容有错漏，会遭受法官惩罚性的否决／撤销原来的

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5 陈计男著：《民事诉讼法论》（下），台北：三民书局印行，第362页。转引自周翠《论民事诉讼中的临时性救济措施》，载于陈光中、江伟主编：《诉讼法论丛（第6卷）》，北京：法律出版2001年版，第431页。

6 李仕春：《民事保全程序研究》（博士学位论文），北京：中国政法大学2002年版，第18页。

禁令，甚至严重情况会构成蔑视法院的刑事罪”。[7]

申请人出于自身利益的考虑，在申请时往往对争议事实进行筛选过滤。以(2001)广海法强字 3 号案为例，申请人持海域使用权证书请求海事法院强制被申请人停止侵占其海域使用权的行为。海事强制令做出后，发现被申请人也持有另一个海域使用权证，这不是简单的侵权纠纷，而是存在权属争议。因此，笔者认为，申请人在向海事法院提出海事强制令申请时，不仅要说明自己申请所依据的事实与理由，还要披露对方拒不履行义务的原因，即充分披露纠纷的争议全貌，以方便法院做出判断。对故意隐瞒争议事实可能影响强制令做出的，不仅要撤销强制令，还应处以一定的民事强制措施。

2. 设置必要的听审程序

海事强制令的做出与执行会对争议双方当事人之间的权利义务关系产生根本性影响，请求人可以直接实现其权利主张，义务人却可能由此面临巨大损失，所以查明双方争议所在尤为重要。设置一个由双方当事人参加的听审程序是实现这一目的最有效的方式。不论是大陆法系的保全制度还是英美法系的禁令制度，均要求在做出“定暂时状态”的决定前经过听审程序。“在英美国家，临时性救济程序在通常情况下也要适用对审程序。只有因为情况非常紧急，受到的损失无法挽回时，法官才允许不经对席审理就做出民事保全的裁定，但也要求当事人尽可能快地通知当事人，举行对席辩论。”[8] 中国台湾地区 2003 年修订的《民事诉讼法》第 538 条（“定暂时状态”之假处分）规定，在做出定暂时状态的裁定之前，“应使两造当事人有陈述之机会。但法院认为不适当者，不在此限。”[9] 日本《民事保全法》第 23 条第 14 款规定，“未经过口头辩论或债务人能参加的审问期日，不得发出（定临时地位的假处分）”。[10]

设置听审程序不仅便于了解争议全貌，确定担保范围及数额，而且还能对被申请人提供平等的司法保护，便于化解矛盾，消解被申请人对海事强制令的抵触情绪，便于执行。在(2007)广海法强字第 5 号案中，托运人提起海事强制令申请，称货运代理人因其他航次运输产生的纠纷扣留了托运人的提单，请求强制货运代理人交付提单。由于货运代理行业的复杂性，仅仅根据申请人提交的证据难以认定双方之间的法律关系是运输合同关系还是货运代理合同关系，仅凭一面之词也难以确定担保数额。如果不予受理，必然导致当事人之间矛盾的进一步激化。经组织，双方当事人到庭对案件事实进行调查，不仅查明了争议事实，为海事强制令的准确做出奠定了基础，同时还帮助当事人准确理解了自己的权利义务，为海事

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7 杨良宜、杨大明著：《禁令》，北京：中国政法大学出版社 2002 年版，第 19、236 页。
8 李仕春：《民事保全程序研究》（博士学位论文），北京：中国政法大学 2002 年版，第 22 页。
9 台湾地区《民事诉讼法》第 538 条第 4 款，下载于 http://ericpan.fyfz.cn/blog/ericpan/index. aspx? blogid=11.6239，2008 年 1 月 16 日。
10 白绿铉编译：《日本新民事诉讼法》，北京：中国法制出版社 2000 年版，第 272 页。

强制令的顺利执行创造了条件。

对那些通知被申请人可能导致强制令难以执行的，可以在接到申请后凭单方披露的事实发出临时强制令，要求被申请人在一个较短的时期内不得变更事实状态，但可以提出复议，试图撤销强制令。

（四）根据民事保全附属性的特征，要求申请人提起本案诉讼

民事保全程序“以确保终局执行为目的，属于手段方法的性质，那么保全程序只有依赖于本案诉讼才有意义。也就是说，保全程序对于本案诉讼而言，仅是附属性和阶段性的措施。”[11] 此处所谓“本案诉讼”，是指保全申请人请求判令其在保全程序中所主张的实体请求权依法成立的诉讼程序。如果在诉前申请保全，就必须在规定的时间内提起本案诉讼，否则，民事保全措施将被撤销。在本案诉讼进行过程中，如果原告撤诉，也必然引起民事保全程序的终止。不论是英美的中间禁令、还是德日的民事保全，都有关于要求申请人提起本案诉讼的规定。

海事强制令只能是一种临时性的救济措施，是保护当事人权利范围的方法。在不经过充分举证、辩论的情况下，不可能对当事人之间的权利义务做出最终裁决。申请人的海事请求权是否成立并不确定，当事人之间的争议依然存在。在诉前申请海事强制令的情况下，当事人之间的争议还没有进入诉讼程序。

《海诉法》没有就海事强制令这一保全措施与“本案诉讼”的关系进行规定，没有关于颁发诉前海事强制令之后如何启动本案诉讼的规定，只是规定被申请人可以就海事强制令是否错误提起诉讼。我们知道，不同的诉讼主体地位在举证责任、诉讼成本以及风险承担方面都有所区别，海事强制令由申请人提起，理应由其主动证明自己享有海事请求权。

诉前保全后“本案诉讼”程序的启动有 2 种立法体例：

一种是法律主动要求保全申请人在一定期间内提起诉讼，作为保全措施继续存在的条件。例如：我国《民事诉讼法》规定，申请人民法院采取财产保全措施后 15 日内应当向有管辖权的法院起诉，否则人民法院应当解除财产保全措施。澳门地区《民事诉讼法典》规定：保全程序需存有以此保全之权利为依据的案件，并得于宣告之诉或执行之诉开始前提起或作为其随附事项提起（第 328 条）。申请人自接获命令采取保全措施之裁判通知之日起 30 日内，仍未提起该措施所取决之诉讼，保全措施失效（第 334 条）。[12]

另一种是将申请人是否必须提起本案诉讼的决定权交给被申请人。例如，德

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11 周翠：《论民事诉讼中的临时性救济措施》，载于陈光中、江伟主编：《诉讼法论丛（第 6 卷）》，北京：法律出版 2001 年版，第 431 页。

12 赵秉志主编：《澳门民事诉讼法典》，北京：中国人民大学出版社 1999 年版，第 112、115 页。

国《民事诉讼法典》第 926 条规定：本案尚未系属时，假扣押法院应依申请，不经言词辩论，命令申请假扣押命令的当事人在规定期内起诉。不遵从此项命令时，应依申请以终局判决宣布撤消假扣押。根据该法第 936 条的指引，此项规定也适用于假处分。[13] 日本、我国台湾地区的民事保全都有类似的规定。在英国法中，如果“原告不尽推进诉讼的责任，被告就会向法院申请撤销已经给予的中间禁令”。[14]

考虑到在海事强制令案件中，部分被申请人对申请人的海事请求并无异议，只是借助自己在双方交易中的某项优势地位为条件，要求满足在其他法律关系中的权利主张，或者根本就是无故拒不履行法定义务或合同义务。因此，可以采取第二种立法体例：如果被申请人对申请人的海事请求有异议，可以要求申请人在一定期间内提起诉讼，确认其海事请求，否则就撤回海事强制令。

二、谨慎适用海事强制令，注意保护被申请人合法权益

海事强制令弥补了现有诉讼法律制度对权利人保护不及时的缺陷，但不应矫枉过正。海事强制令在程序上缺乏相应的事实披露机制以及暂定性规定，不能充分保护被申请人利益；在给予法官过多自由裁量空间的同时，也增加了法院做出准确判断的难度。当前，在办理海事强制令案件时应特别注意以下几个问题。

（一）牢记当事人平等原则，注意被申请人权利保护

当事人平等原则是民事诉讼基本原则之一，这一原则是民事法律领域平等自愿原则在诉讼领域中的自然延伸，这一原则“主要是通过对当事人的诉讼权利作统一性规定和对等性规定而具体化。”[15] 在强制令做出时，人民法院对争议法律关系的是非曲直很难做出全面而准确的判断。海事强制令一经做出，被申请人必须执行，且执行结果大多无法恢复。海事强制令一旦错误，给被申请人造成的损失可能是无法恢复的。因此，在海事强制令程序中贯彻当事人平等原则尤为重要。

1. 注意保障被申请人参与诉讼程序的机会

当前的海事强制令缺乏配套的事实披露程序作保障，法院往往在不完全的信息披露情况下做出海事强制令，对被申请人的权利主张以及可能造成的损失难以做出准确判断。法律只赋予被申请人事后复议的权利，在程序设计上对被申请人的权利保护不足。在这种情况下，法院在做出海事强制令之前必须充分了解当事

13 谢怀栻译：《德意志联邦共和国民事诉讼法》，北京：中国法制出版社 2001 年版，第 256 页。

14 杨良宜、杨大明著：《禁令》，北京：中国政法大学出版社 2002 年版，第 271 页。

15 江伟主编：《民事诉讼法专论》，北京：中国人民大学出版社 2005 年版，第 91 页。

双方争议的全貌，特别是了解被申请人可能的权利主张以及可能受到的损失，据此确定充分的反担保。为了弥补这一程序缺陷，海事法院在办理一些海事强制令案件时，往往会在做出决定前召集双方当事人举行一个“听证程序”。在立法完善之前，这种程序应普遍化。

2. 确定必要、充分的反担保

海事强制令的执行使申请人直接实现其所主张的海事请求，该海事请求是否成立在未经审判之前并未最终确定，海事强制令的执行对被申请人可能造成的损失不仅包括直接损失，还应包括间接损失，比如海事强制令的执行导致被申请人对第三人的损失承担责任。在笔者看来，海事强制令是“定暂时状态”的法律程序，所谓“定暂时状态”就是假定争议双方的权利主张都是成立的，通过被申请人执行强制令满足申请人的权利主张，通过申请人提供反担保来保障被申请人权利主张的实现，反担保数额应该与被申请人的权利主张一致。比如，提单持有人申请强制承运人交付货物，如果承运人认为申请人无权提货，请人就应该按照货物实际价值以及承运人可能面临索赔时产生的法律费用提供担保；如果承运人只是主张在收回运费之前对货物享有留置权，那么申请人只需按照承运人主张的运费数额提供担保即可。当然，对被申请人明显不合理的反担保主张，海事法院有最终决定权。

3. 重视被申请人复议的权利，合理适用“复议期间不停止裁定的执行”

从司法实践来看，海事强制令的申请内容以交付提单、货物等积极履行合同义务的事项居多。许多海事强制令的执行事项事后难以甚至无法恢复，如提单签出后就会流转。特别是在未经听审、凭单方申请及证据做出海事强制令时，申请人与被申请人的诉讼权利明显缺乏平等性。尽管《海诉法》规定“复议期间不停止裁定的执行”，但如果被申请人在执行过程中提出复议，且复议理由可能导致海事强制令撤销，应暂时中止海事强制令的执行，尽快对复议进行处理。但应要求被申请人不得在复议期间故意破坏强制令执行的条件，增加强制令执行的难度。

（二）申请人的请求事项必须依据实体权利，且不得超出权利范围

实体性权利与程序性权利是人们按照内容及功能的不同，在理论上对法律权利的分类。实体性权利是指直接以一定的财产或人身利益为指向的权利；程序性权利是权利主体在一定法律程序运行过程中享有的，不以具体物质或精神利益的满足为目的的权利。

《海诉法》关于海事强制令适用条件第 1 项规定：请求人有具体的海事请求。尽管海事请求没有一个明确的定义，但毫无疑问，海事请求应该是实体性权利，即申请人的请求事项必须是实体性权利主张。如：船东怀疑租船人对船舶进行不合理的改动，在租赁期间要求对船舶进行检验，遭到租船人的拒绝，于是向海事法院

提出海事强制令申请。这一申请应否得到准许？如果在租船合同中约定船东在租期内的某一时间点可以登船检验，租船人拒绝，则是违反合同义务，船东当然可以申请海事强制令。但如果没有约定，则该申请缺乏合同依据，不应得到支持。但租船人可以通过海事证据保全来行使自己的程序性权利 。

同时，任何权利都有一定的界限。申请人的请求事项不应超出其海事请求的范围。以申请强制承运人签发提单为例，托运人有依据法律要求承运人出具提单的权利，但要求承运人签发清洁提单就超出了该项权利的范围，请求强制承运人签发清洁提单的海事强制令申请就不应得到准许。

（三）请求事项必须能够直接强制执行

海事强制令是一种司法强制措施，由此要求请求事项必须具有可强制执行性。海事强制令不仅适用于制止侵权行为，也适用于强制合同相对人履行合同义务，即强制相对人实际履行合同。《合同法》第 110 条规定：“当事人一方不履行非金钱债务或者履行非金钱债务不符合约定的，对方可以要求履行，但有下列情形之一的除外：1. 法律上或者事实上不能履行；2. 债务的标的不适于强制履行或者履行费用过高；3. 债权人在合理期限内未要求履行。”由此可见，并非所有的合同义务都可以强制履行。比如，人身自由是基本人权，当债权人主张的债权内容与其相冲突时，该权利主张是不能直接强制执行的，只能代为执行，而由债务人承担代为执行的费用，即转化为金钱请求。比如，演出合同纠纷，不能强制演员继续履行合同，只能要求其赔偿损失，承担代为履行的费用。

同理，对债务标的不适于强制履行或者履行费用过高的海事请求，不能适用海事强制令。

（四）全面理解“情况紧急”的适用条件

海事强制令直接要求被申请人履行民事义务，是国家权力对民商事领域社会生活的强力干预。而在社会生活的这一领域，意思自治才是普遍性的原则，国家干预只应在必要时出现。情况紧急就是做出海事强制令的必要条件，准确理解何谓情况紧急是正确适用海事强制令的重要前提。《海诉法》将“情况紧急，不立即做出海事强制令将造成损害或者使损害扩大”作为做出海事强制令的 3 个条件之一。后半句可以看作是对情况紧急的补充说明，但仍然十分笼统。笔者认为，判断情况是否紧急应考虑以下因素：申请人的请求能否被替代，即能否通过代为履行转化为金钱请求；申请人由此扩大的损失能否通过损害赔偿救济得到足够补偿，包括申请人在搜集证据、进行诉讼方面是否存在障碍，申请人所受到的损害或面临的风险与被申请人因海事强制令所产生的损失孰轻孰重等。

（五）谨慎发出“履约强制令”

现行的海事强制令制度以纠正被申请人的侵权／违约行为为目的，既可以禁止被申请人为一定的行为，也可以强制被申请人为一定的行为，实践中相当多的海事强制令案件都是要求被申请人履行合同义务。笔者认为，强制被申请人为一定的行为比不为一定的行为应更谨慎。海事强制令以避免损害发生或者扩大为目的，从比较法的角度出发，其与大陆法系民事诉讼保全制度中的“定暂时状态”相同，“定暂时状态之处分，本质是保护当事人权利范围之方法，非保全强制行之方法。在法院裁定准予处分在该裁定执行时起，权利人即暂时实现其权利。”[16] 为一定的行为是改变事实状态，改变了就难以恢复。以“作为”为内容的海事强制令往往要求被申请人履行合同义务，且这种履约行为执行回转的可能很小。对当事人权利义务的影响比“不作为”的强制令要大的多。既然强制令具有暂定性，不具有既判力的特点，在实践中，对难以恢复、改变事实状态的行为，理应更加谨慎。

我国经济领域的成功经验之一就是开辟了经济特区，通过经济特区探索发展道路。《海诉法》在一定意义上可以看作是民诉法的“特区”，对民诉法中一些有待改进、完善的制度，可以通过海诉法进行探索，为民事诉讼法的完善积累经验。事实上，海诉法关于送达、证据保全等方面的规定都对民诉法的现有制度有所发展。海事法院应该认识到海诉法作为民诉法“特区”的地位与使命，在工作中及时总结经验、发现问题，为我国民事诉讼法律制度的完善做出应有的贡献。

16 郑中人：《专利权之行使与定暂时状态之处分》，下载于 http://www.iprcn.corn/view-new. asp? idnarne=813，2008 年 1 月 16 日。

我国船舶物权登记对抗主义的实际运行与匡正

刘本荣 *

内容摘要：对船舶物权变动，我国《物权法》仍延续了《海商法》的登记对抗主义立法例，但在登记对抗主义的具体表述上，摒弃了《海商法》等法规先要求“应当登记”，后规定“未登记，不得对抗第三人”的做法，同时将第三人明确限定为善意第三人。这一本来更符合登记对抗主义真义的表述，却在海商法界引发了较普遍的疑虑、困惑和担忧。这既暴露了长期以来在理解登记对抗主义上的纷争和分歧，也暴露了我们司法实践中的一般理念和做法与登记对抗主义真义的偏离，同时还说明我们不仅在船舶物权变动，而且在其他采登记对抗主义的物权方面，均缺乏对登记对抗主义真义的完整、准确解读。本文采用实证分析方法，通过 43 个样本案例，较客观真实地描述、总结了当前我国司法实践中船舶登记对抗主义的实际运行及特点。在此基础上，通过对登记对抗主义的真义探寻，针对司法实践中涉及登记对抗的典型判断，就如何匡正提出了自己的看法。

关键词：船舶　物权　登记对抗主义　实际运行　匡正

一、登记对抗主义的新表述

对船舶的物权变动，我国《物权法》仍继承、保持了《海商法》的登记对抗主义立法例。一般认为，这不仅符合世界多数国家立法，符合船舶本身特性，而且也是我国海商法多年来的实践证明“有其合理性”、“实践中也没有问题”。[1] 但是，《物权法》对登记对抗主义模式采用了一种新的表述：《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”，而《海商法》第 9 条第 1 款的规定是，“船舶所有权的取得、转让、消灭，应当登记；未经登记的，不得对抗第三人”。《物权法》第 188 条等也用了同

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1 参见全国人大常委会法工委民法室编著：《中华人民共和国物权法解读》，北京：中国法制出版社 2007 年版，第 54 页；最高人民法院物权法研究小组编著：《中华人民共和国物权法》，北京：人民法院出版社 2007 年版，第 114 页。

样的表述。[2] 新的表述有 2 个突出的特点：一是在规定“未经登记，不得对抗”前，没有了《海商法》中“应当登记”的强制性要求；二是将第三人明确限定为了“善意第三人”。[3] 由于海商法司法实践中一般都认可应根据诚实信用原则将《海商法》第 9 条中第三人解释为善意的第三人，因此，《物权法》第 24 条“善意第三人”的限定，没有引起大家特别重视。但是，摒弃《海商法》中船舶所有权“应当登记”的强制性要求，则引发了较普遍的疑虑和担忧，尤其是对执行层面可能出现的难题的担忧。一种很有代表性的观点认为：“司法实践中如果按照《物权法》规定实施，以船舶买卖为例：出售人和买受人会根据自己是否会承担民事责任的情形，随时以合同等形式证明船舶所有权已经交付转移或未交付转移，这样做必然给责任主体识别带来困难，或使责任人很容易逃避追究。而《海商法》在同一条文中既规定登记生效主义又规定登记对抗 2 项内容，实在是画蛇添足。因为只要登记生效，则所有权或抵押权成立的问题即可确认，对抗也就不成为问题了。”[4]

应该说，《物权法》第 24 条有关登记对抗主义的表述，与法国、日本等登记对抗主义立法例的代表性国家的表述一致，[5] 与日本、韩国和我国台湾地区“商法典”、“海商法”中船舶物权登记对抗的表述也几乎完全相同，更符合登记对抗主义物权变动模式的真义。因为，从字义看，它较清晰地表明了未登记也能产生物权变动的效果（而非债权效果），只是这种未登记的物权及变动不得对抗善意第三人；由此，作为公示方式的登记，并非物权变动的生效要件，而是对抗要件；登记公示并不是物权形成、变动和生效的必须要求，而是依有无登记公示，存在 2 种物权，即未登记的物权（无对抗力）、登记的物权（有对抗力）；由此也可以进一步说，登

2 还有，《物权法》第 188 条规定“以本法第一百八十条第一款第四项、第六项（交通运输工具）规定的财产或者第五项规定的正在建造的船舶、航空器抵押的，抵押权自抵押合同生效时设立；未经登记，不得对抗第三人”，而《海商法》第 13 条第 1 款的规定是，“设定船舶抵押权，由抵押权人和抵押人共同向船舶登记机关办理抵押权登记；未经登记，不得对抗第三人”。

3 物权法第 24 条的规定还扩大了登记对抗主义的适用范围，将登记对抗主义扩大到了海商法之外的所有船舶。

4 关正义、刘安宁：《〈海商法〉适用的若干物权问题研究（摘要）》，下载于 http://www.chi-najudge.cn/topic—560.aspx，2008 年 7 月 16 日。

5 日本《民法典》第 177 条规定：“关于不动产物权的得丧及变更，非依登记法所定之规定进行登记，不得以之对抗第三人。”第 178 条规定：“关于动产物权的让与，非有动产的交付，不得以之对抗第三人。”日本《商法典》第 687 条规定：“船舶所有权的转移，若非进行其登记，且于船舶国籍证书上记载时，不得以此对抗第三者。”韩国《商法典》第 743 条规定：“有关船舶所有权的转移，只要当事人之间达成协议，即可生效。但如果不进行登记并在船舶国籍证书上载明的，不得对抗第三人。”我国台湾地区《海商法》(2000) 第 9 条规定：“船舶所有权的移转，非经登记，不得对抗第三人。”第 36 条规定：“船舶抵押权的设定，非经登记，不得对抗第三人。”

记实际上是一种选择的结果，而非必须的强制性要求。因此，这也就否定了“应当登记”的强制性要求（在物权变动的效力层面）。

然而，从《海商法》第 9 条的字面含义看，人们一般会联系该条前面“应当登记”的强制性要求，或者说，视前面“应当登记”的强制性要求为前提和条件，来理解后面“未经登记，不得对抗第三人”的法律后果。这样，极易将“未经登记，不得对抗第三人”理解为：未经登记，仅在双方当事人之间有效力，对第三人无效力。由于债权具有的是双方当事人之间的相对性、对人性，只有物权才具有双方当事人之外的对世性、排他性。因此，上述理解又极易把“在双方当事人之间有效”视为一种合同债权的效力，把“对第三人无效”，视为对全部第三人无效力、无对抗力，就是无物权的对世性、排他性。这样，也就实际上把未登记的法律后果理解为了无物权，这实际上等同于登记生效主义的后果。实际上，1992 年我国《海商法》颁布后，交通部主编的权威学习读本就是按照上述理解来解释第 9 条的：“那么，‘不得对抗第三人’的含义是什么呢？船舶的所有权必须要登记，如不登记，买卖双方之间的合同是有效的，但不能由于这个买卖的订立对第三人主张权利或者在第三人主张权利的时候据此进行抗辩。”[6]

这样，一方面是几乎都认为《海商法》第 9 条是登记对抗主义模式立法例，另一方面，由于该条“应当登记”的导引，又将人们实际引到登记生效主义。《海商法》字面上的这种矛盾性长期以来困扰着海商法界，使“未经登记，不得对抗第三人”这一本来就“初视之下，似甚简明易解，惟深思之余，则可发现实蕴藏甚多疑义”[7]的字义，更加令人费解。应该说，我国海商法界围绕如何理解“未经登记，不得对抗第三人”，如何理解船舶登记的效力等问题的纷争一直存在，认识从未统一，但司法实践中已形成一些习惯做法。例如，一般仅以船舶登记证书作为是否享有所有权的认定依据，一般不认可实际所有人对第三人主张权利，等等。《物权法》第 24 条的新表述将《海商法》第 9 条的自身矛盾暴露，将海商法界长期以来对登记对抗主义的理解分歧和疑义暴露，将《物权法》实施与司法实践中已形成的习惯理念和做法的冲突以及人们的疑虑推至眼前。在此形势下，探寻登记对抗主义的真义，总结、理晰并检讨我国登记对抗主义之实际运行，以《物权法》的新表述为标准，匡正我们的认识和司法判断，既属必要，更显迫切。

本文仅以船舶物权的登记对抗为探讨点。根据我国《物权法》，除船舶物权外，适用登记对抗主义的还有航空器、机动车等特殊动产物权变动（第 24 条）；土地承包经营权互换转让（第 129 条）；地役权设立（第 158 条）；船舶外的其他动产抵押权设立（第 188 条、第 189 条第 1 款）。但是，由于对社会生活影响较大的机动车

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6 交通部政策法规司、交通部交通法律事务中心编：《〈海商法〉学习必读》，第 52 页。

7 王泽鉴著：《民法学说与判例研究第一册》（修订版），北京：中国政法大学出版社 2005 年版，第 226 页。

物权、地役权等都属于物权法新规定、新明确的，因此，在《物权法》出台之前，《海商法》船舶登记对抗主义的适用实践，实际上在很大层面代表了我国登记对抗主义模式的适用。这样一来，本文以船舶为例的探讨，在一定意义上又超出了船舶之外。

二、我国船舶物权登记对抗主义的实际运行

本文采用实证分析法，通过具体案例看司法实践中船舶登记对抗主义的相关法条是如何适用的，以此描述、总结我国船舶登记对抗主义的实际运行情况及特点。笔者从北大法律信息网中国法律检索系统中的“最高人民法院公报案例库”和“中国法院裁判文书库”，[8] 以“未经登记，不得对抗第三人”、“不得对抗第三人”、“海商法第 9 条”、“海商法第 13 条”、“船舶登记条例第 5 条”（以下简称“《条例》第 5 条”）、[9] “船舶登记条例第 6 条”（以下简称“《条例》第 6 条”）[10] 等为正文关键词搜索案例（裁判文书），在排除重复及没有样本意义的案例后，最后确定了 43 个案例（裁判文书）为分析样本。从样本案例的分布情况看，涉及了全国 8 家海事法院（全国共 10 家）和 1 家地方中院；除一审案例外，二审和再审案也占到 35%；时间跨度主要在 2000—2007 年间（系案号时间）。总体来看，在较大程度上具有了代表性。

这个 43 样本案例的具体分布是：大连海事法院 3 例，其中 1 例再审；[11] 上海海事法院 1 例；[12] 宁波海事法院 4 例，其中 1 例再审；[13] 武汉海事法院 1 例；[14] 厦

8 北大法律信息网中国法律检索系统的案例库是目前我国网上收集案例、裁判文书最多的，包括了所有的最高院《公报》案例、《人民法院案例》的案例，以及其他互联网上可搜索到的法院案例、裁判文书。

9 该条规定，“船舶所有权的取得、转让和消灭，应当向船舶登记机关登记；未经登记的，不得对抗第三人。”

10 该条规定，“船舶抵押权、光船租赁权的设定、转移和消灭，应当向船舶登记机关登记，未经登记的，不得对抗第三人。”

11 该院 3 例案例，系案例评析文，案号不详。

12 该法院 1 例案例，案号为 (2003) 沪海法商初字第 113 号。

13 该法院 4 例案例，案号分别为，(2006) 甬海法温商初字第 23 号（《人民法院案例选》案例）、(2002) 甬海法温初字第 83 号、(2006) 甬海法事初字第 5 号、(1997) 甬海事初字第 28 号，其中，(1997) 甬海事初字第 28 号案一审生效后因抗诉再审，案号为 (2000) 浙法告申民再抗字第 8 号。

14 该法院 1 例案例，案号为（2002) 武海法商初字第 4 号。

门海事法院 2 例；[15] 广州海事法院 13 例，其中 2 例二审；[16] 北海海事法院 9 例，其中 8 例二审；[17] 海口海事法院 9 例，其中 2 例二审，1 例再审；[18] 海口市中级法院 1 例。[19] 上述一审的 43 个案例中，有 12 件案件二审，3 件再审。这样，实际解析的案例（裁判文书）达到了 58 例之多。

在具体解析中，笔者重点考察：（1）《海商法》第 9 条、《条例》第 5 条的适用（船舶所有权的登记对抗），《海商法》第 13 条、《条例》第 6 条的适用（船舶抵押权的登记对抗），《条例》第 6 条的适用（光船租赁权的登记对抗）；(2) 登记对抗效力争议、判断的具体纠纷、情形；（3）登记对抗效力判断时的一般倾向、主要理解分歧；(4) 未涉及第三人与涉及第三人的船舶物权变动效力判断及特点。

（一）相关法条适用的主要情形及争议、判断情况

1.《海商法》第 9 条、《条例》第 5 条（船舶所有权的登记对抗）的适用（30 例）

（1）船舶所有权权属争议纠纷案件中的适用（6 例）

除 1 例系船舶实际共同所有人诉登记所有人、另一实际共同所有人擅自转让船舶，请求确认转让无效外，其他 5 例均系以下情形：

典型判断 1—1: 法院扣押或拍卖船舶登记所有人名下或其他人的船舶后，实际所有人或其他人提出权属异议，请求确认所有权或赔偿。法院适用《海商法》第 9 条、《条例》第 5 条判断谁为所有权人。

5 例案件法院均在最终结果上认定了扣押或拍卖的船舶系被扣押拍卖人所有的财产，登记证书记载的所有人系船舶所有人，实际所有人或其他人主张的权利，

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15 该法院 2 例案例，均为评析案例，案号不详。

16 该法院 13 例案例，案号分别为 (2003) 广海法初字第 264 号、(2005) 广海法初字第 240 号、(2001) 广海法初字第 109 号、(2001) 广海法初字第 89 号、(2000) 广海法湛字第 36 号、(2001) 广海法湛事字第 61 号、(2002) 广海法初字第 134 号、(2002) 广海法初字第 220—221 号、(2003) 广海法初字第 264 号、(2005) 广海法初字第 120 号、(2004) 广海法初字第 44 号、(2003) 广海法初字第 387 号，其中 (2004) 广海法初字第 44 号、(2003) 广海法初字第 387 号二审的案号分别为 (2005) 粤高法立民终第 530 号、(2004) 粤高法民四终字第 96 号。另有一例系“拉菲贡公司诉德兴船务有限公司、海南青龙船务实业总公司及其广州分公司海运欺诈案”（最高人民法院公报案、案号不详）。

17 该院 9 例样本案例，案号为北海 (2006) 海事初字第 024 号，另 8 例二审，二审案号为 (2003) 桂民四终字第 17 号、(2004) 桂民四终字第 4 号、(2006) 桂民四终字第 17 号、(2002) 桂民四终字第 8 号、(2006）桂民四终字第 1 号、(2006) 桂民四终字第 14 号、(2002）桂民四终字第 19 号、(2007) 桂民四终字第 40 号。

18 该院 9 例案例，案号为 (2006）海商初字第 054 号、(2000) 海商初字第 141 号、(2000) 海商初字第 157 号、(2001) 海商初字第 004 号、(2002）海商初字第 47 号、(2007) 海确字第 5 号，另 2 例二审，二审案号为 (2001) 琼经终字第 28 号、(2003) 琼民二终字第 46 号；另 1 例再审，再审案号为 (2005) 琼民再终字第 4 号。

19 该院 1 例案例，案号为 (2001) 海中法民初字第 101 号。案由为财产损害赔偿纠纷，但实际是船舶所有权损害赔偿纠纷，应由海事法院专门管辖。

因未登记不得对抗第三人。特别是有一例案件，一海事法院在因另案债务扣押船舶登记所有人名下的船舶后，实际所有人在另一海事法院起诉请求确认所有权，该海事法院判决认定，船舶系挂靠在登记所有人名下，实际属实际所有人所有。对此判决，扣押法院在驳回执行异议裁定中称，据《海商法》第 9 条，此确权判决只对登记所有人“有约束力，而不能对抗第三人”。[20]

值得注意的有 2 点：其一，法院在具体法条适用时，并不考虑对抗第三人是何种第三人，是否是善意第三人，是否系可以对抗的第三人，还是不对抗的第三人等。事实上，几例案件中的第三人多为船舶登记所有人的一般债权人。其二，有个别案件，体现出了与以船舶登记证书作为所有权认定基本（唯一）依据的一般认识不同。[21]

（2）船舶侵权、船舶碰撞纠纷案件中的适用（5 例）

典型判断 1—2：船舶碰撞造成了船舶损害、油污损害，船舶建造发生了“产品责任”等，引发损害赔偿诉讼。船舶登记所有人、实际所有人或为原告，或为被告。法院适用《海商法》第 9 条、《条例》第 5 条判断主体是否适格。

5 例案例中，在登记所有人和实际所有人因挂靠或转让未过户登记而分离的情形下，法院适用《海商法》第 9 条、《条例》第 5 条，均支持了登记所有人应为原告，而对实际所有人以原告身份起诉的，判定不适格，认为“在涉及第三人的场合，船舶所有人的识别应以在船舶登记机关的登记为依据”。

（3）船舶转让买卖纠纷案中的适用（6 例）

典型判断 1—3：船舶买受人诉出卖人非登记所有人，系无权处分，请求确认转让无效，要求返还；船舶出卖人诉买受人支付船款，买受人抗辩出卖人非所有人，无权处分，或“未办登记，转让合同无效”。法院适用《海商法》第 9 条、《条例》

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20 见 (2001) 海中法民初字第 101 号判决。该判决事实认定部分记载：2000 年 11 月 23 日，针对本案原告提出的执行异议，广州海事法院下达了 (1999) 广海法执字第 211—26 号《民事裁定书》，认为：“‘南洋一号’轮从购进到被本院依法扣押、拍卖之前，船舶证书上登记的所有人均为被执行人南洋航运集团股份有限公司。根据《中华人民共和国海商法》第 9 条之规定，船舶所有权的取得、转让和消灭，应当向船舶登记机关登记，未经登记的，不得对抗第三人。故‘南洋一号’轮作为南洋航运集团股份有限公司的财产，被本院依法拍卖，没有违反法律规定。海口海事法院作出的确权判决书，只能对南洋航运集团股份有限公司具有约束力，而不能对抗第三人，本院依据法律规定拍卖‘南洋一号’轮，并根据债权人的申请进行债权分配。没有任何不当。故驳回本案原告的异议申请。”

21 此案为广州海事法院 (2005) 广海法初字第 240 号案，该判决认为：本案是一宗确认船舶所有权纠纷案件。《中华人民共和国船舶登记条例》第 5 条规定：“船舶所有权的取得、转让和消灭，应当向船舶登记机关登记；未经登记的，不得对抗第三人”。因本案争议的船舶是没有进行船舶所有权登记、没有船舶名称和任何船舶证书的船舶，故原告李锡棠不能通过船舶登记来证明其取得或拥有本案争议船舶的所有权和对抗其他第三人。原告主张本案争议船舶的所有权，必须提供其他充分的证据予以证明。笔者认为，此理解与其他案有不同，符合登记对抗主义的真义，没有把登记作为所有权的唯一依据。

第 5 条判断出卖人是否系所有权人，其处分是否有效。

就“未办登记，转让合同无效”是否成立，有 1 例案例，一审、二审法院一致认为，应根据《海商法》第 9 条“未办登记，不影响合同生效”。在判断出卖人是否系所有权人、享有处分权上，总体来看，几例案例最后结果都没有以登记作为认定依据，而是看出卖人是否实际享有了所有权。尽管在一案例中，在出卖人辩称其为实际所有人，登记所有人系名义上的被挂靠人情形下，法院仍据《海商法》第 9 条认定登记所有人为船舶所有人，但是，从其理由看，是因为出卖人“没有提供充分的证据证明其享有船舶所有权，是该船的船舶所有人”。[22] 然而，也有案例显示在这一判断上，仍客观存在着一定分歧和认识模糊。[23]

（4）船员劳务及人身伤害纠纷案中的适用（6 例）

典型判断 1—4：受雇船员向登记所有人、实际所有人主张劳动报酬，或因受雇船员伤亡，其亲属向登记所有人、实际所有人主张损害赔偿。法院适用《海商法》第 9 条、《条例》第 5 条判断应由谁担责，特别是被挂靠或已转让船舶的登记所有人应否担责。

6 例案例虽然都在最终结果上，在登记所有人、实际所有人因挂靠、转让而分离的情形下，判不得对抗第三人（原告），具体责任或判共同连带担责，或登记所有人担责、实际所有人补充责任。但是，从当事人争议，一审、二审裁判差异对比看，此类判断的认识分歧尤为突出。有 2 例系二审案，二审均改判。1 例一审认为，被挂靠的登记所有人与原告无雇佣劳动关系，不应担责。二审认为，据《海商法》第 9 条，登记所有人为船舶所有人，判登记所有人担责，实际所有人（同时为实际经营人）补充清偿。[24] 另 1 例一审认为，未登记，不得对抗第三人，“但该第三人的权利应当是与船舶物权存在系争关系的权利”，原告的请求是一种债权，两被告船舶转移的效力可以对抗原告。二审认为，“未办变更登记，不能对抗的第三人应当

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22 见广州海事法院 (2005) 广海法初字第 120 号张爱党等诉张保国等船舶买卖合同纠纷案。

23 见（2006）桂民四终字第 17 号彭绍田与岑桂东船舶买卖合同纠纷上诉案。该案一审认为，案涉船舶的所有权人为登记船舶所有人。虽然船舶受让人称从登记所有人手中购买了案涉船舶，“但因其未付清价款，未办理船舶转让登记手续”，故尚未取得案涉船舶的所有权。二审则认为，据《条例》第 5 条，“我国法律对船舶所有权的登记实行登记对抗主义，船舶登记机关的登记只是船舶所有权对抗第三人的法律要件。结合本案，案涉船舶所有权登记证书记载的船舶所有权人至今仍是梁添（登记所有人），由此产生的法律后果仅在于彭绍田（受让人）不能以其基于买受案涉船舶而取得的权利对抗第三人，即本案船舶抵押权人西山信用社，但因此而否定彭绍田对案涉船舶的处分权进而认定其将该船卖给被上诉人岑桂东属于无权处分，有悖于法律的前述规定。”

24 见（2004）粤高法民四终字第 96 号麦日东等与广州市花都区炭步水上运输公司水上工伤事故社会保险费纠纷上诉案。

为船舶买卖合同当事人之外的人”，改判不能对抗原告。[25] 特别是还有 1 例再审案，一审认为《海商法》第 9 条的规定，“其立法本意是指某一船舶的所有权发生争议的时候，当事人可以以该船舶有无登记作为必要的形式要件来主张权利 / 承担义务。本案争议的焦点是船员身亡后的经济赔偿问题，故不属本法条的调整范围”，仅判船舶经营人担责。该案一审生效后，检察院抗诉认为《海商法》第 9 条“规定了船舶转让是要式的民事法律行为，必须经过一定的程序才能成立”，本案中的船舶转卖，“均未依法向船舶登记机关办理有关注销、变更登记手续，因此所有权并没有转移”，船舶的所有人应和经营人共同担责。再审改判。[26]

（5）海上、水路运输货物侵权损害赔偿纠纷案中的适用（7 例）

典型判断 1—5：因承运船舶发生海事事故等[27] 导致货物损害，托运人或提单持有人诉合同承运人（船舶实际所有人、经营人）时，同时诉被挂靠或已转让船舶的登记所有人承担损害赔偿责任。法院适用《海商法》第 9 条、《条例》第 5 条判断应由谁担责，特别是被挂靠或已转让的登记所有人应否担责。

7 例案例中有 6 例均判定登记所有人应担责。仅有 1 例一审认为，据《条例》第 5 条，“该登记仅有对抗第三人的效力，而非船舶所有权取得、转让和消灭的生效要件”，本案登记所有人（盐业海运）并非实际的所有权人，“因本案非船舶所有权权属纠纷，故应按船舶所有权的实际情况认定船舶所有权的归属”，一审判实际所有人承担了货物损害责任。当事人不服上诉，二审调解结案，基本维持一审。[28]

2.《海商法》第 13 条、《条例》第 6 条（船舶抵押权的登记对抗）的适用（8 例）

典型判断 2—1：未登记或已登记的船舶抵押权人诉抵押人，承担抵押责任。法院据《海商法》第 13 条、《条例》第 6 条判断抵押权的效力。

对已登记的抵押权，法院均认定了抵押权有效成立。但对未登记的抵押合同，法院的认定显示出了一定的差异。总体来看，是不予认定，但是也有 1 例案件，法院认为据《海商法》第 13 条，“船舶抵押权自抵押合同签订之日起生效”。据此逻辑，尽管抵押未登记，原告已享有生效的抵押权。但此案最后判决项中，并没有对原告的抵押权予以判定，仅对保证人在“船舶抵押权以外的上述债权承担连带责任”予以判定。[29]

典型判断 2—2：被挂靠的船舶登记所有人将船舶设定抵押并登记，挂靠的实际所有人或船舶受让人起诉，请求确认抵押无效；或者是已登记的船舶抵押权人诉请主债务及享有抵押权，实际所有人或船舶受让人请求以第三人身份参加诉讼，

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25 司玉琢著：《海商法专论》，北京：中国人民大学出版社 2007 年版，第 69 页。

26 见 (2000) 浙法告申民再抗字第 8 号王爱苏等 4 人与杨贻和等 4 人海上人身伤亡损害赔偿纠纷抗诉案。

27 除船舶触礁等海事事故外，有一件系船舶货物被盗事件。

28 见厦门好丽服饰有限公司诉石狮市东方渔业有限公司海上货物运输侵权纠纷案。

29 见 (2000) 广海法湛字第 36 号郭丙华诉邱日和等船舶供应合同纠纷案。

并提出抵押无效。法院据《海商法》第 13 条、《条例》第 6 条判断抵押权的效力。

此类判断，从最后结果看，几例案例都认定了挂靠船舶抵押权的效力，但从当事人的争议，一审、二审裁判差异看，认识分歧尤为突出。由于此类对抗系典型的物权性对抗，有案例从登记的抵押权人是否“善意”，即知晓、应当知晓实际物权变动情况来判断、认定其是否属于《海商法》第 13 条、《条例》第 6 条中的不得对抗的（善意）第三人。[30] 此案例为所有样本案例中唯一的 1 例从“善意”来判断能否对抗的案例。

3.《条例》第 6 条（光船租赁下的登记对抗）的适用（10 例）

10 例案件中有 5 例仅涉及光船租赁下登记对抗效力的判断，另有 5 例系在判断船舶所有权、抵押权的登记对抗时，又涉及到了光租登记对抗的判断。在上述的船舶碰撞船舶侵权纠纷案、海上人身伤害案、海上水路货物侵权损害赔偿纠纷案及其判断中，均有案例单纯或同时涉及到了作为船舶所有人的光船出租人，在光租未登记情形下，应否同承租人连带担责的问题。除此之外，光船租赁的登记对抗判断，还集中出现在船舶物料供应纠纷案件中。一般情形是：船舶物料供应人起诉光船出租人和承租人连带担责。从合同或要约看，系光船承租人债务，但同时盖有船章。法院适用《条例》第 6 条，判断未登记的光船出租人应否担责。

从法院裁判的最后结果来看，在船舶碰撞船舶侵权纠纷案、海上人身伤害案、海上水上货物运输侵权损害赔偿纠纷案等侵权案中，均据《条例》第 6 条认为光船租赁未登记不得对抗第三人，判出租人承担责任。在船舶物料供应合同纠纷案中，认为《条例》第 6 条不适用，应依据合同由光船承租人承担，光船出租人不应担责。但是，认识分歧也在一定程度上存在。有 1 例船舶物料供应纠纷的再审案很有代表性，对船舶供油人诉未登记的光船出租人和承租人连带担责的诉请，一审、二审及再审形成了鲜明的对比。[31]

（二）小结

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30 见 (2001) 琼经终字第 28 号上海浦东轮船公司诉南洋航运集团股份有限公司、第三人中国银行海南分行船舶买卖纠纷案。

31 见 (2005) 琼民再终字第 4 号唐山海达船务有限公司与海南国盛石油有限公司船舶燃油供应合同纠纷再审案。该案一审认为，“光船租赁关系不是本案审理范围，也不影响供油合同关系的成立。因此，国盛公司以光船租赁未登记为由，请求海达公司承担还款责任，理由不能成立”。二审则认为，“据《条例》第 6 条，承租人未依法办理登记，出租人对此存在过错，在本案中不得对抗原告债权，因为光船租赁是以登记为要式条件，否则不能产生对抗第三人的效力”。再审认为，《条例》第 6 条的含义“应当是船舶所有权、抵押权、光船租凭权等物权的取得、转移和消灭应当登记，否则，在物权权属上不得对抗已经登记的第三人。该登记制度，是为了解决光船租赁等行为有多个时，哪一个是受法律承认和优先保护的问题。而非解决船舶运营中形成的债权债务如何承担的问题。本案因不涉及光船租赁权纠纷，无须适用。”

从上述类型化考察看，司法实践中对船舶物权登记对抗主义的理解、对相关法条的适用表现出以下一般倾向：（1）一般以船舶登记证书作为船舶所有人认定的基本依据。（2）在涉及第三人情形时，一般认定登记的船舶所有人为船舶所有人；在不涉及第三人情形时，均认可实际船舶所有人享有所有权。（3）在理解、解释“未登记，不得对抗第三人”的含义时，一般将不得对抗第三人解释为不得对抗当事人之外的一切第三人，但同样不乏其他解释。比较多的解释是将“第三人”解释为“与案涉船舶具有物权关系的人”，而且这种解释集中在一审的海事法院，从最后结果看，这种解释几乎最后都被上诉审高院推翻。（4）在涉及第三人时，一般不认可未登记的船舶实际所有人以原告身份对第三人主张损害赔偿权利，一般也不认可登记的船舶所有人在虚假登记、船舶实际转让情形下免除责任承担。而法院在判断上述实际所有人的权利、登记所有人的义务“对抗”时，一般并不考量“对抗”的第三人是何种第三人。（5）光船租赁下登记对抗效力的判断，一般做法是，对光船租赁未依法登记的，侵权案中作为登记所有人的出租人不能免责，合同案中可以免责。

司法实践中，分歧和难点突出集中在：（1）因挂靠、船舶转让未过户，出现登记所有人、实际所有人分离情形时，如何适用、理解《海商法》第 9 条、第 13 条以及《条例》第 5 条、第 6 条中的“未登记，不得对抗第三人”。（2）在出现海上人身伤害纠纷、海上水上货物运输侵权损害赔偿纠纷以及船舶碰撞、船舶侵权纠纷时，如何判断非实际所有人、经营人的登记船舶所有人的责任。

三、登记对抗主义真义探寻及司法实践之匡正

（一）我国登记对抗主义模式的特殊性

不少著作、论文在界定和解释我国登记对抗主义模式时，简单地把它视为意思主义模式，认为依此主义，当事人之间一旦形成物权变动的意思表示即发生物权变动的效果，只不过在具体公示之前，物权变动的事实不能对抗第三人。[32] 这种理解同我国物权法规定是有差异的。

尽管我国物权法规定的物权变动模式以债权形式主义为原则、以意思主义为例外，但作为例外的意思主义仍与以法国、日本为代表的纯粹意思主义有差别。纯粹意思主义的物权变动要件是债权性合意＋公示对抗。但是，根据我国《物权法》，只有第 158 条的地役权、第 188 条和第 189 条的动产抵押的物权变动是债权性合意＋公示对抗要件，而第 24 条的船舶、航空器、机动车等特殊动产的物权

32 司玉琢主编：《海商法》（第二版），北京：法律出版社 2007 年版，第 35 页。

变动，则应当是债权性合意＋交付＋公示对抗要件。特殊动产的物权变动如果仅有债权性合意，仍只有债权效力，并不能发生物权变动的效果，还必须有实际交付行为。

上述对《物权法》第 24 条的理解，是综合《物权法》第 6 条、第 23 条系统解释的结果。有观点认为，第 24 条是第 23 条所言的“法律另有规定”的情况，由此，特殊动产的物权变动不以交付为要件。此解释既不符合系统解释，也不符合现实生活。既然物权法把船舶、航空器、机动车明确界定为动产，而不是界定为特殊的不动产，就应受制于《物权法》第 6 条、第 23 条的动产物权变动一般原则，动产物权的设立和转让自交付时发生效力，单纯的债权性合意的合同不宜发生物权变动。而“第 23 条所言法律另有规定的情况，主要是指动产抵押等无需交付的动产物权的设定。”[33]

明确船舶等特殊动产物权登记对抗主义的特殊性，对司法实践有着重要意义。例如，在典型判断 1—1 下，当法院对登记所有人名下的船舶采取了扣押强制措施后，如果案外人以船舶转让、买卖、抵债合同等主张其为现在的实际所有人时，法院首先应特别注意审查扣押时的船舶占有情形，以是否有实际交付行为、非现实的拟制交付是否成立等来判断案外人主张的真实性。其次，再判断案外人是否系可以对抗的第三人，而不能简单地以案外人的船舶受让未登记不能对抗第三人为由驳回异议。事实上，只要法院注意审查债权性合意之外，是否存在实际交付行为，一般情况下，都能排除案外人的弄虚作假。从这点上看，只要我们真正把握了登记对抗主义的真义，对物权法实施后可能带来的让一些人有空子可钻的执行难题，并非难以破解。

（二）未登记的物权与已登记的物权、可以对抗的第三人与不能对抗的第三人

根据《物权法》第 24 条的新表述，船舶等特殊动产的物权变动，在登记公示之前，物权变动已生效（而非债权效力），但不能对抗善意第三人。那么，未登记公示前没有对抗力的物权，到底是一种怎样的物权？有观点认为，物权是一种排他的权利，既然“生效”的物权不能对抗第三人，也即该“物权”没有公认的物权对世权的性质，它的设立又怎么能“生效”，所以，该“物权”就不可能成为真正的物权，是没有意义的物权。[34] 此种观点同《海商法》第 9 条的传统理解一致，同司法实践中的一般倾向一致。因此，如果我们首先不能在理论上弄清未登记的没有

33 王利明著：《物权法研究》（修订版），北京：中国人民大学出版社 2007 年版，第 386 页。

34 孙宪忠：《论不动产物权登记》，载于《中国法学》1996 年第 5 期，转引自武钦殿：《物权意思主义——我国现行法上的物权变动模式研究》，北京：人民法院出版社 2007 年版，第 251 页。

对抗力的物权到底是何种排他性的物权、对抗力到底是何含义，我们就无法真正理解登记对抗主义，也无法解决司法实践中的困惑。

根据《物权法》第 2 条，物权是一种对特定物直接支配、排他的权利。但是，物权人这种直接支配、排他的权利，并非都是绝对的、完全的、完整的，而是实际存在着相对性，存在着不同效力层次。在笔者看来，在我国物权法中，根据物权及其变动是否经过了登记公示，以及物权法本身赋予登记公示的效力不同，而实际存在着 3 种不同效力层次的物权。一是《物权法》第 24 条、第 129 条、第 158 条、第 188 条、第 189 条第 1 款体现的登记对抗主义下未登记公示的物权和已登记公示的物权。前者无对抗善意第三人的效力，后者有。二是《物权法》第 31 条规定的未登记公示前不具有处分效力的物权，以及登记后具有处分效力的物权。根据该条规定，因先占、继承、征收、强制执行或者法院判决和事实行为等非法律行为取得的不动产，自继承或受遗赠开始，法律文书或政府征收决定等生效，事实行为成就时，即发生了物权变动效力；但是，未经登记，其处分行为将不发生效力。由此，又形成了未登记公示前的无处分效力的物权和登记公示后有处分效力的物权。[35] 三是《物权法》第 14 条、第 23 条体现的公示要件主义下的登记公示或交付公示后的物权。无对抗力的物权、无处分效力的物权，既然我国《物权法》明确赋予其物权变动已生效的效力，那么它们就都具有物权应具有的直接支配性、排他性，而不是债权的相对性、对人性，只不过其直接支配性、排他性受到一定限制、抑制。在笔者看来，无对抗力就是在侧重从一定程度上抑制排他性；而无处分效力则是在直接支配性方面的一定抑制。但是，这种抑制都应当理解为相对抑制，不是根本排除。

未登记的无对抗力的物权，到底在排他性上受到的是怎样的限制、抑制呢？学术界的纷争从来没有停止，主要有这样几种看法：（1）相对无效说，认为未经登记，在当事人间虽然已发生物权变动的效力，但在对第三人的关系上则完全不发生物权变动的效力；（2）不完全物权变动说，认为未经登记，虽在当事人间及对第三人之关系上应认为已发生物权变动的效力，但不完全，即不发生具有完全排他效力的物权变动；（3）第三人主张说，认为未经登记，在当事人间及对第三人关系上均应认为已发生了完全物权变动之效力，但在第三人为一定主张时，如否认物权变动的效力或提出与该物权抵触的事实，则在对该第三人的关系上不发生物权变动的效力；（4）诉讼法构成说，认为“对抗”原意是“抗辩”，是程序法上的问题，对抗力问题不是物权实际存在与否的问题，而是法院认定与否的问题。日本的学说和判例倾向于不完全物权变动说和第三人主张说。[36] 我国许多学者倾向于第三

35 韩松等编著：《物权法》，北京：法律出版社 2008 年版，第 31 页。

36 武钦殿著：《物权意思主义——我国现行法上的物权变动模式研究》，北京：人民法院出版社 2007 年版，第 251 页。

人主张说。[37] 笔者认为，第三人主张说，更符合登记对抗主义的真义。根据这一学说的观点，没有对抗力的物权，必须是第三人主张物权变动效力不存在时才发生对抗力的问题，而并非因未登记的事实而自然发生。

进一步理解、把握没有登记的、无对抗力的物权是何种物权，还需要我们进一步明晰未登记的物权在第三人主张无物权变动效力时，哪些第三人可以对抗，哪些第三人不能对抗？

上述问题实际是登记对抗主义最核心的问题。本文的实证考察已揭示了司法实践中的一般观点及主要分歧。而从理论层面看，海商法学界主要有 3 种观点：第一种观点是广义第三人说，将第三人解释为船舶物权变动当事人之外的任何人。2001 年全国海事法院院长座谈会纪要就明确指出，“船舶物权变动未经登记，不得对抗第三人的物权主张和抗辩，也不能对抗其他第三人的海事债权请求”；第二种观点是善意第三人说；第三种观点认为不得对抗的第三人应是“与船舶有系争关系的善意第三人”。[38] 我国民法学界则一般认为，根据物权法“善意第三人”的限定，可以对抗的第三人应包括一般债权人、恶意第三人，“所谓善意是指第三人不知道、不应当知道物权已经发生变动”。[39] 而不得对抗的第三人应是，“交易关系中特定的善意第三人，这个‘特定’，按照通说是不得对抗交易关系中取得物权这种权利的第三人。”[40]

弄清第三人的范围，区分哪些是可以对抗的第三人、哪些是不得对抗的第三人，关键是找到区分的理论依据、基本原则。上述民法学界的一般观点认为，不得对抗的第三人“应指对同一标的物享有物权之人，债务人之一般债权人并不包括在内”，其理由主要是：（1）就法律性质言，物权具有排他性，其效力恒优于债务人之一般债权，此为一项基本原则；（2）就文义而言，对抗云者，系以权利依其性质有竞存抗争关系为前提，对抗应是同为物权的对抗；（3）就交易安全而言，将一般债权人包括在不得对抗范围内，不利于交易安全。[41] 应该说，民法学界的上述一般解释，是比较有说服力的。事实上，从本文的实证考察看，上述观点也一定程度地在司法裁判中体现。但是，在笔者看来，此观点仍没有彻底解读出登记对抗主义的真义，仍没有从根本上找到区分可对抗、不得对抗的基本原则。

笔者认为，实际上物权法“善意”第三人的限定已为我们从根本上区分哪些是

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37 黄松有主编：《物权法条文理解与适用》，人民法院出版社 2007 年版，第 115 页；武钦殿：《物权意思主义—我国现行法上的物权变动模式研究》，人民法院出版社 2007 年版，第 251 页。

38 司玉琢著：《海商法专论》，北京：中国人民大学出版社 2007 年版，第 68 页。

39 王利明著：《物权法研究》（修订版），北京：中国人民大学出版社 2007 年版，第 388 页。

40 王轶：《物权法的基本原则和结构原则》，王轶教授在北京法院学习《物权法》系列讲座上的内容。

41 王泽鉴：《民法学说与判例研究第一册》（修订版），北京：中国政法大学出版社 2005 年版，第 228~229 页。

可以对抗的第三人，哪些是不得对抗的第三人揭示了答案，问题是我们还没有充分重视“善意”限定的重要意义。我们一般仅从字面上解释“善意”，将“善意”解释为不知情，即不知道并且不应当知道物权变动，而忽略了目的解释。《物权法》为什么要规定“未登记，不得对抗善意第三人”，为什么要将未登记的物权变动、不得对抗的效力限定在善意的第三人？此首先合乎逻辑地表明，未登记的物权变动，可以对抗非善意的第三人；其次，其限定的主要目的是保护善意第三人的利益，也是同物权公示原则相适应。因为只有经过登记公示，将物权及其变动的状态对外宣示，此物权及变动才具有对抗、排他的效力，对不知悉并且不应当知悉的善意第三人，此物权变动的效力应被排除。由此，“善意”的限定，是同登记公示的影响密切联系的，实质上或者说从根本意义上是为了保护那些权利义务会因为是否登记公示而受到影响的第三人。因此，笔者认为，区分哪些第三人可以对抗、哪些第三人不得对抗的基本原则应是：第三人的权利义务是否因为物权变动、是否因为登记公示以及登记公示的状况，而实际或将会受到法律意义上的影响。显然，物权交易关系下，第三人的权利义务会因是否登记公示而受到最直接影响。但是，按照笔者的解释，非交易关系下，一些对物权享有特殊请求权和特殊法律利益的人，例如船舶优先权人，也会因登记公示而受到影响。

基于以上对登记对抗主义真义的解读，当前司法实践中的一些做法应当匡正：

（1）典型判断 1—2 情形下，排除实际船舶所有人对船舶侵权人主张权利，不符合登记对抗主义的真义。因为第三人为不法侵权人，物权及其变动的登记公示对其权利义务没有法律意义上的影响。

（2）典型判断 1—1 情形下，一般债权人也成为了物权变动未登记不得对抗的第三人，不符合登记对抗主义的真义。因为一般债权人的权利是由与物权变动无关系的其他法律关系发生的，船舶物权变动的登记公示状态对其权利没有直接影响。

（3）典型判断 2—1 情形下，未登记的船舶抵押权已经自抵押合同生效时设立，视其对任何人无优先受偿权，实际上将这种物权效力等同于合同债权效力不符合登记对抗主义的真义。因为，此时船舶抵押权人相对于抵押登记公示对其无法律影响的一般债权人、恶意第三人等，应有优先受偿权，仅不得对抗善意第三人等优先受偿。

（4）典型判断 1—4、1—5 情形下，我们应在判定理由、裁判逻辑上匡正，应在诉讼请求上指导。此时未登记的船舶物权及变动，之所以不能对抗是因为第三人是一种特殊的对船舶享有优先权的人，登记公示对其权利有实际影响。

（5）典型判断 2—2 情形下，我们应在审查重点上匡正。对此船舶物权交易关系下的对抗，应重点审查第三人（登记的抵押权人）是否属于善意，而对善意的判断，应定位在不仅不知道，而且不应当知道船舶物权变动，而不应是不知道或者

不应当知道。

（三）登记对抗主义下公信力、登记所有人和实际所有人的分离

不少人主张赋予我国船舶物权登记以公信力，[42] 但是，登记对抗主义模式下的登记能具有公信力吗？或者说这种公信力是一种怎样的公信力呢？显然，它应当同登记生效主义下的登记公信力有区别。登记生效主义下的公信力是一种完全的、绝对的公信力，它建立在登记的实质审查基础上，更建立在只有登记才有生效的物权、没有登记就没有生效的物权这一登记生效主义的基本要旨上。此种登记，法律赋予的公信力是：在法律上推定登记人为真正权利人，在登记权利人和实际权利人发生争议时，以登记为准；信赖登记所记载的权利而进行的交易，在法律上应受保护。但是，在登记对抗主义下，并非只有登记才有生效的物权，而是既存在有对抗力的物权，也存在没有对抗力的物权，二者都具有法律效力，而且客观上也存在着多个物权的矛盾和对抗；同时，登记并非进行了实质审查。在此情形下对登记公示的信赖，就不能是一种绝对的、完全的信赖，而应是一种具有对抗力、证明力的相对信赖。同样，在发生权利争议时，也不能一律以登记为准，而应基于第三人的情形作出不同判断。

基于以上解读，对司法实践中较大量存在的船舶登记所有人与实际所有人的分离，应注意以下问题：

（1）区分因船舶转让未登记的分离与因挂靠、隐名共有等虚假登记而导致的分离。二者实际影响到第三人“善意”与否的判断。

（2）登记，不是所有权的唯一证据，甚至也不能原则上成为所有权判断的基本证据，而应区分第三人进行判断。

（3）判断是否客观存在登记所有人与实际所有人的分离，应由实际所有人承担举证责任。

物权法登记对抗主义的新表述引出了矛盾、困惑和担忧，但同时也带来了机遇。以物权法的实施为契机，匡正我们的传统理念和习惯做法，我们司法实践者应视之为一种责任，而不懈努力。

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42 刘耀东、沈琳：《中国船舶物权的变动模式》，载于《大连海事大学学报（社会科学版）》2008 年第 1 期，第 5~8 页；初北平、周谨：《物权法确立的船舶物权制度解析》，载于《人民司法》2007 年第 15 期。

日本《海洋基本计划草案》述评

金永明 *

内容摘要: 日本综合海洋政策本部近期出具的《海洋基本计划草案》，细化了《海洋基本法》规定的 6 个理念，提出了推进海洋政策的 12 项具体措施。在听取各方意见后，修改出台的《海洋基本计划》将是今后 5 年指导日本海洋事务的行动方针，我们必须予以关注，以应对可能发生的不测事态。

关键词: 海洋基本法　综合海洋政策本部　海洋基本计划草案　具体措施

于 2007 年 7 月 20 日施行的日本《海洋基本法》第 16 条规定，为全面而有计划地推进海洋政策的实施，政府应制定有关海洋的基本计划。同时，根据《海洋基本法》第 29 条设置的综合海洋政策本部于 2008 年 2 月 8 日出台了《海洋基本计划草案》（以下简称“《草案》”）。经征求各方的意见后提交内阁，并于 2008 年 3 月 18 日在内阁会议上获得批准。以《草案》为基础的日本《海洋基本计划》将是指导日本海洋事务的行动指南，有效期为 5 年。5 年后将对其实施情况进行评估，并修改《草案》，予以完善。为进一步了解日本的海洋工作与具体措施，有必要考察《草案》的相关内容，并期望其对中国有关部门根据《国家海洋事业发展规划纲要》制定具体实施细则有参考与借鉴作用。

一、主要内容

日本的最新《草案》由 4 部分组成，分别为总论、实施海洋政策的基本方针、为实施海洋政策政府应采取的综合而规范的措施、其他为综合而规范地推进海洋措施所必需的事宜。

1. 关于总论部分。《草案》指出，海洋支撑着地球上多种生物的生存。日本毗邻太平洋西部，是一个由 6000 多个岛屿组成的岛国，不仅享受海洋的恩惠，还广泛地利用海洋来运输物资和确保食物供应；但同时，海洋引发的各种灾害也成了威

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胁陆地居民生命财产安全的重要原因，而日本就是面临上述困难的国家之一。一方面，由于海洋广袤、问题错综复杂，人类对海洋的未知领域还有很多，迄今对海洋的认识与研究仍远远不够；另一方面，从与海洋有关的各种现象探究其原理，对于解决诸如全球环境之类的问题很有必要。所以，《草案》建议，必须继续对海洋进行调查研究，以使人类更好地开发利用海洋。

可喜的是，自 20 世纪 60 年代以来，随着发展中国家的兴起以及海洋勘探与利用技术的发展，各国尤其是发达国家之间对资源竞争日趋激烈，国际社会关于海洋法律制度的制定与完善也不断推进。尤其是综合性的海洋法律制度《联合国海洋法公约》的制定（1982 年）与生效（1994 年），使原先领海以外即公海的制度发生了根本性变化，各国可以合理使用该公约规范的海域，例如专属经济区、大陆架以及国际海底区域等。换言之，扩大沿海国管辖权的国际海洋新秩序已日渐成型。

面对人口增长、经济社会活动发展带来的负面影响，以及全球气候变暖引发的气候异常与自然灾害频发及生物多样性减少等全球问题，人类应充分地认识其对海洋的危害并积极考虑对策，而日本应为人类的安宁发挥先导作用。针对上述情形，《草案》指出，对四周被海包围的日本来说，必须进一步推进与完善海洋政策，以适应形势并应对挑战。为此，日本制定了《海洋基本法》，并为推进该法律规定的政策，要求政府制定海洋基本计划（包括具体的实施方针），以发挥综合海洋政策本部的作用，并实现《海洋基本法》中规定的“海洋立国”的目标。

最后，《草案》为综合推进海洋政策，提出了 3 个目标。第一，海洋需在解决全人类的问题中发挥先导作用；第二，需构筑与完善持续利用海洋资源与空间的制度；第三，为使国民安全与安心生活要求海洋领域作出必要的贡献。

2. 在第二部分，即实施海洋政策的基本方针部分，《草案》细化了《海洋基本法》第 2 条至第 7 条规定的 6 个理念的内容，即海洋的开发利用与海洋环境保护的协调，确保海洋安全，增强对海洋的认识，海洋产业的健康发展，海洋的综合管理，海洋的国际合作。具体内容为：

（1）协调海洋开发利用与海洋环境保护之间的关系。《草案》指出，日本先前对海洋的利用主要限于水产业和运输 2 个方面，但现已判明人类可广泛利用的海洋资源还有很多，例如，矿物资源、海洋自然能源（海洋波浪、涨潮力）、海洋微生物资源等。同时，人类在开发利用海洋资源时，也应考虑海洋环境保护，以实现可持续利用，因为目前海洋环境严重恶化，尤其是水产资源状况严重退化；另一方面，人类对开发利用海洋能源的认识与开采技术还有待深化，因此在开发利用海洋资源时，应协调其与海洋环境保护的关系，为此，应在技术开发、制定合理计划等方面予以完善。

（2）确保海洋安全。鉴于日本陆地周边为日本具有管辖权的海域，经济发展与生活所需的必要能源资源，包括运输食物等物资多依赖于海洋；同时，日本的人

口、资产和社会资本等多集中于沿海地区。所以，《草案》指出，日本应采取措施，确保包括维护航行安全等海洋权益在内的海洋安全，应对来自海洋自然灾害的威胁。这对于国民整体生活来说，是至关重要的课题。

（3）充实海洋科学知识。对人类来说，海洋的未知领域众多，而海洋与地球环境之类的全球问题、应对巨大海沟型地震、确保能源资源安定供应等关系密切，因此继续调查和研究海洋对于开发利用海洋资源显然具有重大的作用。同时，由于调查海洋需要特殊的设施与设备，在短期内不可能产生有效的成果，而需要长期努力，所以，《草案》指出，对海洋的调查与研究是一个战略性的课题，必须持续推进。其次，必须统一管理海洋调查与研究的最新成果，改变以前分散于各机构的现状，应完善一体化管理模式，使其更加有效与合理，为推进海洋产业的发展、促进海洋基础研究和提高海洋调查的效率等服务。再次，《草案》指出，为进一步提升日本的海洋科技水平，必须培养海洋方面的优秀研究者、技术者和研究援助人员，以改变日本目前在海洋先端领域缺乏支撑未来海洋事业的年轻人才的局面。最后，《草案》指出，必须在对青少年的教育中增加认识海洋和培养青少年从事海洋方面工作的教育活动。总之，鉴于海洋涉及的领域众多，即使初期投资很大，也不会有很快很好的效果，所以，必须整合各机构的力量，明确以上的想法或提案实施的可能性及其效果。

(4) 健全发展海洋产业。由于几乎全部的日本贸易量和近 40% 的国内物资运输量均依赖于海上运输，同时，国民生活中供应的动物蛋白质有 40 % 由水产品提供，所以支撑这些活动的海运业、水产业、造船业等海洋产业是维系日本经济、社会健康发展与国民生活安定有序的基础 。因此，为了使这些产业健康发展，必须调整海洋开发利用与海洋环境保护的关系、确保安全。有鉴于此，《草案》指出，海洋开发利用与海洋环境保护之间是有机联系、不可分割的。根据《海洋基本法》第 5 条的规定，海洋产业是指从事海洋开发、利用和保护等方面的产业。为此，《草案》建议日本政府为正确把握海洋产业的现状，必须调查、收集和研究海洋产业的基本情况。《草案》指出了日本当前面临的 2 大难题：第一，服役船舶的陈旧与高龄化，第二，从事海洋产业人员的减少与老龄化。为此，《草案》建议政府应采取紧急措施，以强化国际竞争力与海洋产业的经营基础，包括整合产学研部门的力量，制定实现具体目标的行动计划。

(5) 海洋的综合管理。由于海洋问题紧密相连，不可分割，所以《草案》指出，应对海洋的开发利用采取综合管理。同时，《草案》指出了管理日本管辖海域的 3 个立场：保持可持续利用海洋的合适状态，促进海域开发利用可能性研究，维持海洋利用秩序。为此，《草案》建议，应采取措施减少对海洋的污染、保护海洋环境，积极收集、管理和监视与海洋资源开发利用有关的各种情报，并实施统一处置；协调海洋利用者之间的关系，包括根据国际规则处理与他国间的海域划界争议；进一步推进日本调查 200 海里外大陆架工作，以向联合国大陆架界限委员会提交

申请;应研究损害专属经济区制度中日本海洋权益的对策与措施;应推进远离陆地的岛屿的开发与管理工作。

(6) 海洋问题的国际合作。达到确保海洋航行自由、海洋安全的目标，实现海洋水产资源的可持续利用不仅是日本的课题，也是世界各国面临的课题。为此，《草案》指出，在相关国家间推进国际合作的同时，在形成、发展及遵守国际秩序方面，日本应发挥先导性的作用;日本也应在应对气候变化问题、确保生物多样性之类的全球问题上，进一步增强国际合作。而为确保海洋航行自由和海洋安全，《草案》建议，日本应与相邻国家构筑与推进相关体制，以确保马六甲海峡附近海域的运输安全、控制海盗事件的发生。为此，日本应积极利用应对海盗事件的《亚洲区域海盗事件合作协定》，并尽可能地让更多的国家参与。同时，为确保海峡航行安全，应与海峡沿岸国、海峡利用国共同研究新的合作体制。再次，为确保放射性物质的安全运输，应与对运输该物质有影响的国家共同强化双方的信赖关系，建议日本政府积极参与国际海事组织等制定国际公约的工作，尽早缔结应对海洋恐怖事件及运输大规模杀伤性武器的国际公约。为此，应积极计划国际合作问题。最后，对于水产资源的开发利用问题，《草案》指出，为保持日本在水产业上的传统优势，建议在中日韩的专属经济区内构筑合理利用资源的合作体制，以养护管理该海域的水产资源。另外，在应对地球温暖化引发的海洋灾害问题上，《草案》指出，日本应积极采取措施支援亚太区域的地区合作工作，及时向可能受到海洋自然灾害的国家或地区提供相关情报，积极支援海洋自然灾害后的振兴复兴工作。

3. 在第三部分，即关于海洋政策实施方面，政府应采取综合而规范的措施。

(1) 推进海洋资源的开发与利用。鉴于日本广泛地依赖与利用海洋，《草案》指出，日本应在恢复渔业环境方面，引入合理的管理措施;在海洋能源资源方面，应进一步调查资源状况、开发海洋生产技术、处理好开发引起的海洋环境污染问题，以合理开发利用海洋资源。具体为:养护与管理水产资源，包括充实养护与管理水产资源的措施、确保措施的遵守，保护水产动植物的生育环境、增强渔场的生产力;推进海洋能源资源的开发活动，包括石油、天然气、矿物资源、海底热液体矿物资源以及其他资源的研究开发活动。

(2) 保护海洋环境。主要包括确保生物多样性、减轻与减少对海洋环境的污染、研究保护海洋环境的对策与措施，并切实贯彻落实。

(3) 推进专属经济区内资源开发活动。日本认为其拥有管辖权海域的面积达 447 万平方公里，居世界第六位，且该海域存在着丰富而多样的生物资源与矿物资源，所以，必须有计划地采取措施，实施开发活动，包括依据国际规则解决与他国间存在的海域划界争议，于 2009 年 5 月前向联合国大陆架界限委员会提交 200 海里外大陆架申请，制定完善管理专属经济区海域的监视与处罚制度，取缔外国船舶非经同意在日本海域从事的海洋科学调查活动。

(4) 确保海上运输竞争力。鉴于日本在外运中的国籍船舶与船员的减少，在内

运中船员的减少与老龄化，为确保日本的海上运输，消除不安定的要素，《草案》建议日本应采取相应的对策。同时，在亚洲与欧美间的主要航路中，日本的港湾地位相对低下，致使日本的海运费用与时间增加，所以应采取强化港湾地位，提升国际竞争力的措施。再次，《草案》指出，由于船舶在航行中的重大海难事件频发，引发了全球性的环境问题，所以，应提升海运安全性与改善海上运输的品质。具体措施为：应提升外运中日本的国际竞争力、增加日本国籍的船舶与船员；培育船员；整备海上运输据点；提升海上运输品质。

(5) 确保海洋安全。对日本来说，维护海洋权益，维持海洋秩序和确保海洋安全是很重要的。在维持海洋秩序方面，《草案》指出应采取以下措施：为维持周边海域秩序，日本应对非法入侵海域、损害航行秩序等行为在制度上采取措施，予以取缔；进一步构建应对紧急事件的体制，包括增强巡视船舶与舰艇、航空飞机等的紧急出动体制；构建应对非法船只的共同处理方案，有关机构应紧密合作，包括共享监视得来的情报；与其他国家强化管理马六甲海峡的合作关系；根据国际法，采取合理措施控制与取缔公海海盗行为；尽早缔结防止海洋航行安全不法行为条约议定书，以控制大规模杀伤性武器的使用与输送；积极参加基于防止海上扩散安全保障设想的预防训练活动；合理检查船舶，以防止放射性物质的扩散、对船舶与港湾等的恐怖袭击行为，同时，应提升港湾运载、装卸货物的能力。

另外，在确保海上交通安全方面，《草案》指出，为防止海盗事件的发生，日本应在应对海上交通量的增加与船舶的大型化、高速化等方面确保船舶航行所需的航路整备，活用船舶自动识别装置，评价运输安全管理制度，在分析海难事件的基础上修改海上交通规则，并对航路标识等进行研究。同时，为确保海上交通要道——马六甲海峡的安全，日本应参加沿岸国与利用国合作的体制，并推进维持与管理航行支援设施；再次，应推进预报台风的精确度，更新航海用电子海图等工作。最后，为清除不符合国际标准的外国船舶，日本应与各国合作处理这些问题。此外，《草案》建议日本为贯彻海上交通安全，应与民间海难预防团体合作，并普及有关知识，以指导实践并推进取缔工作。

而在应对来自海洋的自然灾害问题上，《草案》指出，首先，应对海岸线附近预防海洋自然灾害的设施进行检查与更新；其次，促进居民遇难事件的情报工作，适时有效地对居民进行避难与防灾训练；再次，检修运送受灾地区物资的运输与仓储设备，培养派员救援人员；最后，利用防震设备与仪器，观测地震灾害工作，以增强防震能力。

(6) 推进海洋调查。《草案》建议政府应采取以下措施：第一，切实实施海洋调查。即各政府机构应通过各种方法切实调查海洋，活用调查结果；迅速采取措施，更换不适应调查任务的船舶与设备；为有效实施海洋调查，应研发相关设备、活用人工卫星；各机构应通力合作，包括合作调整调查计划、共享调查结果、共用调查船与观测仪器；为实施海洋调查工作，应尽力得到大学、地方公共团体及民间企业等单

位的援助。第二，收集整理与海洋管理有关的基础情报。第三，统一管理海洋情报。第四，加强国际合作，即各国应共享、交换海洋调查情报数据。

(7) 研发海洋科技。《草案》指出，日本应推进海洋基础研究；加强海洋问题对策研究；整备研究基础，包括充实研究船舶、研究基础设备，培养、保护海洋研究者、技术者及研究支援者，强化海洋科技创新体制，加强合作。

(8) 振兴海洋产业与强化国际竞争力。《草案》指出，日本在支撑国家经济社会的海洋产业上，应通过研发引入尖端新技术、培养海洋产业方面的人才等手段，维持与强化国际竞争力；为活用海洋资源与海洋空间，应创设新的海洋产业，把握海洋产业的动向。

(9) 实施海岸带综合管理。《草案》指出，第一，日本应对沿海与陆域一样实施统一管理。主要包括：应研究处理因开发陆地造成土壤流向海域的措施；修复海洋营养盐类供给与调整，以确保海洋生物生存与养育环境；减少流向海域的陆源污染物，避免超过海洋承载力；减少向海洋倾倒垃圾；有效利用海岸附近的公园与绿地设施。第二，调整海岸利用规划。第三，构筑联合管理沿海岸的体制。即根据各海岸的实情与特性采取措施，以明确管理内容。

(10) 有效利用与保护离开陆地的岛屿。考虑到日本离开陆地的岛屿众多，且这些岛屿是设定管辖海域的重要根据，同时，他们还在确保海上交通安全、开发利用海洋资源、保护环境等方面也具有重要的作用。所以，《草案》建议，政府应明确这些岛屿在推进海洋政策上的位置，采取相应措施管理与保护这些岛屿。

(11) 加强国际联系与促进国家合作。鉴于国际社会在更具体地细化、补充《联合国海洋法公约》内容，《草案》建议日本应积极参加国际公约的制定与运用、国际体制下的海洋活动、海洋争端解决、海洋资源管理、海洋环境保护、海洋安全、海洋科技等，并加强国际合作。

(12) 增强国民对海洋的理解与促进人才培养。《草案》建议，日本应采取措施提升国民对海洋的关注、促进青少年对海洋的理解、制定培养海洋人才计划。

4. 在第四部分，即其他为综合而规范地实施海洋措施所必要的事宜。为切实推进海洋政策，《草案》建议日本政府应采取以下措施。第一，有效实施海洋政策。即在听取各方意见后，应修正《海洋基本计划》中的具体实施内容。第二，在利用海洋之际，相关者应互相协调、合作，尤其在保护海洋环境、开发利用海洋、确保海洋安全等方面，以推进海洋政策措施的实施。第三，及时公布海洋政策情报。即通过互联网及时公布海洋情况与海洋政策现状，每年度发表海洋状况及其政策报告书。

二、预期影响

《草案》是《海洋基本法》实施以来综合海洋政策本部的第一个实际成果，将于内阁决议后公布实施。尽管经内阁会议审议批准而公布实施的《海洋基本计划》（有效期为 5 年，5 年后对其进行评价与修改）为不具法律拘束力的文件，但因其是由各机构大臣组成的综合海洋政策本部制定的文件，可以预期，各方将会切实实施，并使其成为指导日本海洋事务的行动指针。笔者认为，根据《草案》修改的《海洋基本计划》的实施将会给我国带来以下几个方面的消极影响：

第一，日本可能在“中间线”附近实施海洋调查活动。为此，我国应该事先做好准备，以应对日本可能在“中间线”附近实施海洋调查活动的行为。

第二，日本可能在“中间线”附近构筑海洋建筑物。鉴于中日关于东海问题的磋商一时不会有很大的进展，日本保守派将会要求政府在“中间线”附近构筑开发海底资源的建筑物，为此，我国应考虑如何使日本不构筑海洋开发建筑物，以及在日本构筑了建筑物的情况下我们将如何应对的问题。

第三，日本可能采取措施进一步保护钓鱼群岛。日本一直认为，钓鱼群岛为日本的领土，为确保航行通道安全及其周围资源，日本可能会采取措施，以进一步保护钓鱼群岛，为此，我国应考虑如何在钓鱼群岛附近实施巡航等活动，以体现对钓鱼岛的管辖权。

日本《海洋基本法》（中译本）

庄玉友* 译 金永明** 校

（2007 年 4 月 27 日法律第 33 号，2007 年 7 月 20 日生效）

第一章 总 则

【目的】

第一条 占地球大部分面积的海洋是维系以人类为首的生物生命所不可缺少的要素。我国四面环海，根据《联合国海洋法公约》和其他国际条约及为实现海洋的可持续发展与利用而努力的国际框架下，实现海洋的和平、积极开发利用与保护海洋环境之间的协调，对于实现海洋立国的目标尤为重要。为了规定关于海洋的基本理念，明确国家、地方公共团体、企业及国民的义务，制定海洋基本计划，并规定与其他海洋相关的基本政策事项，与此同时，通过设置综合海洋政策本部，综合而有计划地推进海洋政策，以实现我国经济社会健康发展和国民生活稳定提高、为海洋与人类的共存作出贡献，制定本法。

【海洋的开发、利用与海洋环境保护的协调】

第二条 鉴于海洋的开发与利用是我国经济社会发展的基础，同时，确保海洋生物的多样性、维持良好的海洋环境是人类生存的基础，海洋对丰富国民生活也不可或缺，为了将来仍能享受到海洋的恩泽，应以保护海洋环境和海洋的可持续开发利用为宗旨，积极开发和利用海洋。

【确保海洋安全】

第三条 考虑到我国四面环海，确保海洋安全极其重要。为此，必须积极推进确保海洋安全工作。

【增进对海洋的科学认识】

第四条 为了合理地开发利用海洋、保护海洋环境等，必须对海洋有科学的认识。同时，考虑到对海洋尚有众多无法科学解释的领域，应增进对海洋的科学

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认知。

【海洋产业的健康发展】

第五条 考虑到从事海洋的开发利用、保护等产业（以下称为“海洋产业”）是我国经济社会健康发展和国民生活稳定提高的基础，必须促进其健康发展。

【海洋的综合管理】

第六条 考虑到海洋资源、海洋环境、海上交通、海洋安全等与海洋有关的，诸多问题相互之间具有密切关系， 同时需要作为一个整体加以考虑，因此应当对海洋开发、利用、保护等实行综合而一体化的海洋管理。

【关于海洋的国际协调】

第七条 考虑到海洋是人类共同财产，而且我国经济社会处于紧密的相互依赖的国际关系中，因此海洋政策的推进必须在国际协调的前提下进行，以期对国际海洋秩序的形成及发展起到领导作用。

【国家的职责】

第八条 国家按照第二条至第七条规定的基本原则（以下简称“基本原则”），负责全面而系统地制定和实施海洋政策与措施。

【地方公共团体的职责】

第九条 在与国家合理分担任务的基础上，地方公共团体根据基本原则，负责制定和实施与本地区的自然社会条件相适应的海洋政策与措施。

【企业的职责】

第十条 从事海洋产业的企业，应在依据基本原则从事经营活动的同时，努力配合国家和地方公共团体实施海洋政策与措施。

【国民的职责】

第十一条 国民应在认识到海洋所带来的恩惠的同时，努力配合国家和地方公共团体实施海洋政策与措施。

【相关当事方的合作与协调】

第十二条 国家、地方公共团体、海洋产业经营者、从事海洋活动的组织以及其他相关当事方，应当相互合作并进行协调以实现基本原则。

【海洋节日活动】

第十三条 国家及地方共同团体应在《国家节日法》（昭和23年法律第178号）第二条规定的海洋节日举行活动，以加深国民对海洋的理解与关心。

【法制上的措施等】

第十四条 为实施海洋政策与措施，政府应当采取必要的法律、财政或金融措施以及其他措施。

【资料的制作与公布】

第十五条 政府应当就有关海洋的情况以及政府采取的海洋政策与措施制作资料，并以适当的方法及时公布。

第二章 海洋基本计划

第十六条 1. 为了全面系统地推进海洋政策的实施，政府应当制定有关海洋的基本规划（以下称“海洋基本计划”）。

2. 海洋基本计划应当包括以下事项：

（1）关于实施海洋政策的基本方针；

（2）政府为实施海洋政策而应采取的全面系统的措施；

（3）除上述两项外，为全面系统地推进海洋政策所需的其他必要事项。

3. 内阁总理大臣应就海洋基本计划方案征求内阁会议的意见。

4. 在前项规定的内阁会议通过后，内阁总理大臣应当及时公布海洋基本计划。

5. 在考虑海洋情势的变化并对海洋政策的效果进行评估的基础上，政府应当每隔五年左右，重新研究海洋基本计划，并作出必要的修改。

6. 第三项及第四项的规定准用于海洋基本计划的变更。

7. 为确保实施海洋基本计划所需的必要经费，政府应当尽力采取必要措施，如每年在国家财政许可的范围内将所需资金列入预算，以顺利实施海洋基本计划。

第三章 基本政策

【推进海洋资源的开发和利用】

第十七条 为保护海洋环境以及将来可持续地开发和利用海洋资源，并为推进海洋资源的积极开发和利用，为保存和管理水产资源、保护和改善水产动植物的生长环境、增进渔场生产力、推进海底或海底下储存的石油、可燃性天然气、锰矿、钴矿等矿物资源的开发和利用，国家应当完善相关体制并采取其他必要的措施。

【对海洋环境的保护等 】

第十八条 1. 考虑到海洋对防止全球变暖等地球环境的保护具有重要影响，国家应当采取必要措施，以达到保护和改善生存环境、确保海洋生物多样性、减少对海洋的污水排放、防止向海洋倾倒废弃物、迅速清除因船舶事故造成的油污、保护海洋自然景观，以及保护其他海洋环境的目的。

2. 国家应以海洋科学为依据，从预防对海洋环境产生负面影响的角度，努力实施上述措施，并适时修正。

【推进专属经济区等海域的开发】

第十九条 鉴于对专属经济区等（指平成 8 年法律第 74 号《专属经济区与大

陆架法》第一条第一项的专属经济区及第二条的大陆架，下同）实施进一步开发、利用和保护等（以下简称“专属经济区等”的开发）的重要性，家应采取必要措施，以推进适合海域特性的专属经济区等的开发，防止侵害日本在专属经济区等的国家主权权利行为，以及推进对专属经济区等的其他开发活动。

【确保海上运输】

第二十条 为实现高效而稳定的海上运输，国家应当采取必要的措施，确保日本船舶数量、培养船员、完善作为国际海上运输网络据点的港口湾建设。

【确保海洋安全】

第二十一条 1. 由于我国四面环海，我国经济社会发展的大部分主要资源依赖进口，开发和利用海洋资源、确保海上运输安全等以及维护海洋秩序对我国经济社会发展不可欠缺，因此，国家应采取必要措施，确保我国的和平与安全以及海上安全和治安。

2. 为防止因海啸、海潮等灾害给国土、国民生命、身体和财产造成损失，国家应采取必要措施，以预防灾害、应对灾害发生时避免损害扩大和灾后重建工作（以下称为“防灾”）。

【推进海洋调查】

第二十二条 1. 为了合理制定和实施海洋政策，国家应努力把握海洋状况、预测海洋环境变化、制定和实施其他有关海洋政策的必要调查（以下称为“海洋调查”）以及完善海洋调查所必需的监视、观测和测定等的体制。

2. 国家应努力提供海洋调查所获得的资料，以帮助地方共同体制定和实施海洋政策，并资助企业和其他当事人从事海洋活动。

【推进海洋科学技术的研发等】

第二十三条 为推进有关海洋的科学技术（以下称“海洋科学技术”）的研究开发及成果普及，国家应当采取必要措施，在海洋科学技术方面，健全研究体制、推进研究开发、培育研究和技术人员，强化与国家、独立行政法人（指平成 11 年法律第 103 号《独立行政法人通则法》第二条第一项规定的独立行政法人，下同）、都道府县以及地方独立行政法人（指平成 15 年法律第 118 号《地方独立行政法人法》第二条第一项所规定的地方独立行政法人，下同) 的试验研究机构、大学和民间组织等之间的合作。

【振兴海洋产业和加强国际竞争力】

第二十四条 为振兴海洋产业和加强国际竞争力，国家应采取必要的措施，在海洋产业方面，通过推进尖端科技的研究开发、提高技术水平、培养和确保人才、完善竞争条件等方法，强化经营基础并开拓新的领域。

【沿岸海域的综合管理】

第二十五条 1. 沿岸海域的诸多问题起因于陆地区域的活动，如果仅对沿岸海域采取措施，将难于在将来也持续地享受沿岸海域的资源和自然环境的恩惠。

因此，从自然和社会条件来看，国家应对宜于实施一体化管理的海域和陆域采取措施，通过规制相关活动、实施综合政策等手段，进行适当管理。

2. 鉴于沿岸海域、陆地区域，特别是海岸，在严峻的自然条件下，仍然是多种生物栖息繁殖的场所，并且拥有独特的景观，所以国家在采取前项措施时，应该充分考虑到海啸、海浪以及其他海水问题或者地质活动会造成的灾害，以适当的措施保护海岸、健全海岸环境并合理地利用海岸。

【保护孤岛等】

第二十六条 由于孤岛对保护我国领海及专属经济区、确保海上交通安全、开发与利用海洋资源、保护海洋环境等方面具有重要作用，所以，国家应采取必要措施，以保护孤岛、海岸等，确保海上交通安全、完备开发与利用海洋资源的设施、保护周边海域的自然环境、完善居民的生活基础设施。

【确保国际协调与促进国际合作】

第二十七条 1. 国家应当采取必要的措施，确保我国主动参加与海洋有关的国际规则等的制定工作，以及其他与海洋有关的国际协调。

2. 为在国际社会中积极发挥我国对海洋事务的作用，国家需在海洋资源、海洋环境、海洋科技、取缔海上犯罪、防灾、海难救助等方面采取推进国际合作的必要措施。

【增进国民对海洋的理解等】

第二十八条 1. 为加深国民对海洋的理解与关心，国家需采取以下措施，即在学校和社会教育中推进海洋教育、启发《联合国海洋法公约》和其他国际规则以及为实现海洋可持续开发和利用上的国际合作、普及有关海洋的娱乐活动。

2. 为培养具有正确应对与海洋有关的政策与问题所需知识和能力的人才，国家需努力在大学等机构推进在学科教育和研究方面的措施。

第四章 综合海洋政策本部

【设置】

第二十九条 为集中而综合地推进海洋政策的实施，在内阁设置综合海洋政策本部（以下简称“本部”）。

【职责】

第三十条 本部负责以下事务：

1. 推进海洋基本计划方案的制定和实施；

2. 根据海洋基本计划，统一调整相关行政机构实施的政策；

3. 除上述两项事务外，策划、起草和综合调整海洋方面的重要政策。

【组织】

第三十一条 本部由综合海洋政策本部部长、副部长以及其他成员组成。

【综合海洋政策本部部长】

第三十二条 1. 本部的首长为综合海洋政策本部部长（以下简称“本部长”），由内阁总理大臣担任。

2. 本部长全面负责本部事务，领导和监督所有职员。

【综合海洋政策本部副部长】

第三十三条 1. 本部设综合海洋政策本部副部长（以下简称“副本部长”），由内阁官房长官及负责海洋政策的大臣（指接受内阁总理大臣的命令、协助内阁总理大臣集中而综合地推进海洋政策实施为职责的国务大臣）担任。

2. 副本部长协助本部长工作。

【综合海洋政策本部成员】

第三十四条 1. 本部配设综合海洋政策本部成员（以下称为“本部成员”）。

2. 本部成员由本部长及副本部长以外的国务大臣担任。

【提供资料与其他合作】

第三十五条 1. 本部在履职期间认为必要时，可向有关行政机构、地方公共团体、独立行政法人的首长以及特殊法人（指依法直接设立的法人，或依特别法进行特别行为而设立的法人、适用平成 11 年法律第 91 号《总务省设置法》第四条第十五款的规定者）的代表提出提供资料、发表意见、进行说明的必要合作要求。

2. 本部在履职期间认为特别需要时，也可向上述人员以外的其他人员提出予以必要合作的要求。

【事务】

第三十六条 有关本部的事务，在内阁官房处理，由受命的内阁官房副长官助理掌管。

【主任大臣】

第三十七条 有关本部的事项，《内阁法》（昭和 22 年法律第 5 号）所称的，主任大臣为内阁总理大臣。

【政令委任】

第三十八条 除本法规定外，有关本部的必要事项由政令规定。

附 则

【施行日期】

1. 本法自公布之日起三个月内，由政令规定的日期起开始施行。

【评估】

2. 本法实施五年后，应对本部进行综合评估，根据结果采取必要措施。

港口规划管理规定

（2007 年 11 月 30 日交通部经第 12 次部务会议通过，自 2008 年 2 月 1 日起施行）

第一章 总 则

第一条 为规范港口规划工作，科学利用、有效保护港口资源，促进港口健康、持续发展，根据《中华人民共和国港口法》，制定本规定。

第二条 本规定适用于港口规划的编制、审批、公布、修订与调整、实施和监督管理等活动。

第三条 交通部负责全国的港口规划管理工作。

省、自治区、直辖市人民政府港口行政管理部门负责本行政区内的港口规划管理工作。

港口所在地的市（指设区的市，下同）、县（包括县级市）人民政府港口行政管理部门或者省、自治区人民政府设立的负责特定港口管理的部门具体实施该港口的规划管理工作。

本规定所称港口行政管理部门，包括承担港口行政管理职能的交通主管部门或者与交通主管部门分设的港口管理部门。

第四条 港口规划应当根据国民经济和社会发展的要求以及国防建设的需要，统筹考虑产业布局、港口资源条件、综合运输网状况等因素制定，体现贯彻科学发展观、合理利用岸线资源的原则。

第五条 港口规划应当符合城镇体系规划，并与土地利用总体规划、城市总体规划、江河流域规划、防洪规划、海洋功能区划、水路运输发展规划和其他运输方式发展规划以及法律、行政法规规定的其他有关规划相衔接、协调。

第二章 港口规划的编制

第六条 港口规划包括港口布局规划和港口总体规划。

港口布局规划是指港口的分布规划。港口布局规划包括全国港口布局规划和省、自治区、直辖市港口布局规划。对港口资源丰富、港口分布密集的区域，可以

根据需要编制跨省、自治区、直辖市或者省、自治区行政区内跨市的港口布局规划。

港口总体规划是指一个港口在一定时期的具体规划。

第七条 港口布局规划主要确定港口的总体发展方向，明确各港口的地位、作用、主要功能与布局等，合理规划港口岸线资源，促进区域内港口健康、有序、协调发展，并指导区域内港口总体规划的编制。

港口总体规划主要确定港口性质、功能和港区划分，根据港口资源条件、吞吐量预测和到港船型分析，重点对港口岸线利用、水陆域布置、港界、港口建设用地配置等进行规划。

第八条 直辖市根据实际情况可不编制港口布局规划，仅编制港口总体规划。

第九条 编制和修订、调整港口布局规划和港口总体规划时，应当根据需要编制相关的专项规划。

港口布局规划的专项规划包括分层次港口布局规划、分运输系统港口布局规划、港口资源整合规划及其他专项规划。

港口总体规划的专项规划包括港区总体规划、港口集疏运设施规划和港口仓储、保税、物流等园区规划及其他专项规划。

专项规划是港口布局规划和港口总体规划的组成部分。

第十条 组织编制港口总体规划的部门应当根据经审批的港口总体规划组织编制有关港区、作业区控制性详细规划。

港区、作业区控制性详细规划，是指对港口总体规划中的港区规划的深化方案。

第十一条 全国港口布局规划由交通部组织编制；跨省、自治区、直辖市的港口布局规划由交通部组织有关省、自治区、直辖市人民政府港口行政管理部门共同编制。

省、自治区、直辖市港口布局规划由省、自治区、直辖市人民政府港口行政管理部门组织编制；省、自治区行政区内跨市的港口布局规划由省、自治区人民政府港口行政管理部门组织有关市人民政府港口行政管理部门共同编制。

第十二条 主要港口的总体规划由港口所在直辖市、市人民政府港口行政管理部门或者省、自治区人民政府确定的具体实施港口行政管理的部门编制。

主要港口以外港口的总体规划，由港口所在市、县人民政府港口行政管理部门编制。

第十三条 编制港口规划应当符合以下要求：

（一）有效保护和节约使用港口资源，实现港口可持续发展；

（二）适应国家对外开放和东中西部区域经济协调发展及产业合理布局的要

（三）促进现代化综合运输体系协调发展，发挥港口衔接各种运输方式的综合运输枢纽作用；

（四）统筹不同层次港口的合理布局和功能分工，优化港口资源配置，提高港口群体的综合竞争力；

（五）依靠科技进步，适应国际国内航运、现代物流等发展的要求，提高港口专业化、规模化、集约化、现代化水平。

第十四条 跨省、自治区、直辖市的港口布局规划和省、自治区、直辖市港口布局规划应当符合全国港口布局规划。

省、自治区行政区内跨市的港口布局规划应当符合省、自治区港口布局规划。

港口总体规划应当符合相应的港口布局规划。

第十五条 编制和修订、调整港口布局规划和港口总体规划时，涉及新港区开发或者对现有港区功能有重大调整的，应当进行新港区选址论证或者有关专题论证。其中港口总体规划论证完成后应当编制港区总体规划。

第十六条 港区、作业区的控制性详细规划的编制，应当优化港区水陆域总体布局，统筹安排港区内集疏运、给排水、供电、通信信息、安全监督、口岸管理、环境保护等配套设施的布置，并与城市规划 , 相关设施协调、衔接。

第十七条 港口规划的编制部门在编制港口规划时，应当征求同级发展和改革、城市规划、国土、铁路、水利、海洋等有关部门和有关军事机关以及海事、航道等管理机构的意见。港口管理部门与交通主管部门分设的，还应当征求同级交通主管部门的意见。

第十八条 港口规划应当按照交通部统一制定的港口规划编制内容及文本格式的要求编制。

第十九条 编制港口规划应当依法进行环境影响评价，并符合国家规定的环境影响评价的程序、内容及深度要求。

第二十条 编制港口规划应当符合港口工程相关规范及有关技术要求，并统筹考虑航道、通航安全与港口规划布置的关系。

第二十一条 港口规划的具体编制工作，应当委托具备国家规定的相应资质的单位承担。

港口布局规划、主要港口和地区性重要港口的总体规划（包括相应的专项规划和港区、作业区控制性详细规划，下同），应当委托持有港口河海工程专业甲级工程咨询资格证书或者水运行业甲级工程设计证书的单位编制；其他港口的总体规划，应当委托持有港口河海工程专业 L 级以上工程咨询资格证书或者水运行业乙级以上工程设计证书的单位编制。

前款所称地区性重要港口，是指省、自治区、直辖市人民政府按照《港口法》的规定确定的本地区的重要港口。

第三章　港口规划的审批与公布

第二十二条　全国港口布局规划由交通部报国务院批准后公布实施。

第二十三条　跨省、自治区、直辖市的港口布局规划由交通部征求相关省、自治区、直辖市人民政府和国务院有关部门意见后批准并公布实施。

第二十四条　省、自治区、直辖市港口布局规划和省、自治区行政区内跨市的港口布局规划由省\自治区、直辖市人民政府港口行政管理部门报省、自治区、直辖市人民政府审查同意后，书面征求交通部意见。交通部应当自收到征求意见的材料之口起 30 个工作日内提出意见。交通部同意或者提出的修改意见被采纳或者在上述规定期限内未提出意见的，有关省、自治区、直辖市人民政府可依法公布实施。有关省、自治区、直辖市人民政府对交通部提出的修改意见有异议的，报国务院决定。

第二十五条　主要港口所在城市是直辖市的，其港口总体规划由直辖市人民政府港口行政管理部门报交通部和直辖市人民政府审批。

主要港口所在城市不是直辖市的，其港口总体规划由港口所在市的港口行政管理部门报经市人民政府审核后，由市人民政府报交通部和省、自治区人民政府审批。

港口总体规划范围因特殊原因涉及跨行政区域的，港口总体规上报前，相关人民政府应当就规划内容协调一致。

交通部会同省、自治区、直辖市人民政府对上报的港口总体规划进行审查，审查过程中应当征求国务院有关部门和有关军事机关的意见。经审查予以批准的，由交通部会同省、自治区、直辖市人民政府公布实施。

第二十六条　地区性重要港口的总体规划由港口所在地的市、县港口行政管理部门报经市、县人民政府审核同意后，由市、县人民政府报省、自治区人民政府审批。

省、自治区人民政府对上报的地区性重要港口的总体规划进行审查，审查过程中应当书面征求交通部意见。经审查予以批准的，由省、自治区人民政府公布实施。港口行政管理部门应当将公布实施的地区性重要港口总体规划报交通部备案。

第二十七条　主要港口和地区性重要港口以外港口的总体规划，由港口所在市、县的港口行政管理部门报市、县人民政府审批。

市、县人民政府对上报的港口总体规划进行审查，审查过程中应当书面征求省、自治区人民政府港口行政管理部门意见。经审查予以批准的 9 市、县人民政府公布实施，并报省、自治区人民政府备案。

由县人民政府审批的港口总体规划在征求省、自治区人民政府港口行政管理部门意见前，应当先征得市人民政府同意。

第二十八条 主要港口所在城市是直辖市的，其港区、作业区控制性详细规划由直辖市人民政府港口行政管理部门书面征得交通部同意后，报直辖市人民政府批准并公布实施。直辖市人民政府港口行政管理部门应当将公布实施的港区、作业区控制性详细规划报交通部备案。

主要港口所在城市不是直辖市的，其港区、作业区控制性详细规划由港口所在市人民政府书面征得交通部和省、自治区人民政府同意后批准并公布实施，同时报交通部和省、自治区人民政府备案。

第二十九条 地区性重要港口的港区、作业区控制性详细规划由港口所在市、县人民政府书面征求交通部意见并征得省、自治区人民政府同意后批准并公布实施，同时报交通部和省、自治区人民政府备案。

由县人民政府审批的地区性重要港口的港区、作业区控制性详细规划在征求交通部和省、自治区人民政府意见前，应当先征得市人民政府同意。

第三十条 主要港口和地区性重要港口以外港口的港区、作业区控制性详细规划由港口所在市、县人民政府书面征求省、自治区人民政府港口行政管理部门意见后批准并公布实施，同时报省、自治区人民政府港口行政管理部门备案。

由县人民政府审批的港区、作业区控制性详细规划在征求省、自治区人民政府港口行政管理部门意见前，应当先征求市人民政府意见。

第三十一条 审批部门在审查港口规划时，应当听取相关专家的意见。

第三十二条 审批部门对送审的材料进行审查后，认为需要作重大修改的，应当提出书面审查意见。报审单位应当按照审查意见的要求进行修改。审查部门对修改后的送审材料可以重新组织审查。

第三十三条 交通部和省、自治区人民政府及其港口行政管理部门收到港口总体规划和港区、作业区控制性详细规划相关的专项规划征求意见文件及相关材料后，应当在 30 个工作日内提出书面意见，逾期视为同意。

第三十四条 报批港口规划，应当提交以下材料：

（一）申请报批的文件；

（二）报批的规划报告和规划文本；

（三）征求意见的情况；

（四）其他相关材料。

规划文本应当基于规划报告编制，是对规划有关内容提出规定性要求的文件。

第三十五条 港口规划经批准后，审批部门应当在其政府信息网站或者其他便于公众知悉的政府信息发布渠道上公布规划文本。国家规定需要保密的除外。

第四章　港口规划的修订与调整

第三十六条　港口规划经批准后，未经规定程序任何单位和个人不得随意更改。

第三十七条　组织编制港口规划的单位可以根据经济社会和港口发展的需要修订或者调整港口规划。

港口规划的修订是指对规划范围、港口性质及功能、岸线利用、港口布局及水陆域布置等进行重大变更。

港口规划的调整是指对港口规划进行局部修改。

第三十八条　修订或者调整港口规划，应当通过编制相应专项规划的方式进行。

第三十九条　对港口规划进行修订的专项规划，按照相应港口规划的编制、审查、批准、公布的程序办理。

对港口布局规划进行调整的专项规划，按照相应港口布局规划的编制、审查、批准、公布的程序办理。

对港口总体规划进行调整的专项规划，由原组织编制单位组织编制，报同级人民政府审批。同级人民政府征得原审批部门同意后批准并公布实施。

第五章　港口规划实施与监督管理

第四十条　建设港口设施应当符合港口布局规划和港口总体规划，在港口总体规划确定的港区范围内进行。不得违反港口规划建设任何港口设施和其他设施。

需要在尚未纳入港口总体规划的区域建设港口设施或者在港口总体规划中新开发的港区建设港口设施的，应当首先按港口总体规划修订程序编制新港区总体规划，经批准后作为建设港口设施的规划依据。

第四十一条　拟建设港口项目的功能及选址与港口总体规划有较大差异，经专题论证认为确需改变港口总体规划按所选方案建设的，应当按规定程序修订或者调整港口总体规划后，方可办理港口建设项目的审批、核准手续。

第四十二条　建设港口设施使用港口岸线的，必须符合港口规划，并按国家有关规定办理港口岸线使用审批手续，取得港口岸线使用权。

第四十三条　建设码头（包括单点系泊及水上过驳设施）、船坞、船台、滑道等设施的港口建设项目，建设单位在申请水上水下施工作业许可时，应当提交由发展和改革部门、交通主管部门按照规定的权限出具的港口建设项目审批文件和

交通主管部门按照规定的权限出具的港口岸线审批文件。海事管理机构在审批上述港口建设项目水上水下施工作业许可时，应当审查申请人是否依法办理了港口建设项目审批和港口岸线审批的相关手续。未依法办理的，海事管理机构不得批准其施工许可。

第四十四条 任何单位和个人需要使用港口总体规划区内的土地和水域，或者建设任何跨越、穿越港口总体规划区水陆域及其上下部相关空间的高施，建设项目的审批部门审批时应当征求港口所在地港口行政管理部门的意见，港口行政管理部门应当出具其是否符合港口规划及是否影响港口规划实施的审查意见。

第四十五条 在港口总体规划区周边建设工程项目，可能引起港口岸线及港区水陆域、通航水域、航道、锚地等水文、地形、地貌变化，从而影响港口规划实施的，建设项目的审批部门在审批前应当征求港口行政管理部门的意见。

第四十六条 交通部和各级港口行政管理部门应当依法对港口规划的实施情况进行监督检查，核查港口建设项目是否依法办理了项目审批和港口岸线审批手续，并公布检查结果。

港口行政管理部门在监督检查中发现未按规定程序取得批准，违反港口规划建设港口、码头及其他设施的行为，应当及时制止，依法查处，并通报相关部门。主要港口的港口行政管理部门应当将上述违法情况及处理意见书面报告交通部和省、自治区、直辖市人民政府港口行政管理部门；其他港口书面报告省、自治区、直辖市人民政府港口行政管理部门。

交通部和省、自治区、直辖市人民政府港口行政管理部门接到书面报告后，对处理意见无异议的，应当检查、督促有关港口行政管理部门落实对违法行为的处理意见；认为处理意见不当的，应当回复书面意见，并予以督促、落实。

第四十七条 任何企业、单位和个人投资、建设、经营港口、码头及相关设施的行为涉及港口规划的，应当接受各级港口行政管理部门依法进行的监督检查，并如实提供有关情况和相关的文件、资料；港口行政管理部门应当为被检查者保守有关技术秘密和商业秘密。

第六章 法律责任

第四十八条 港口规划审批部门违反规定的审批权限和程序批准规划，或者在审批中徇私舞弊、滥用职权或者玩忽职守的，由其上级行政主管机关责令改正，情节严重的，对其直接负责的主管人员和其他直接责任人员依法给予行政处分；构成犯罪的，依法追究刑事责任。

第四十九条 建设项目的审批或核准部门对违反港口规划的建设项目予以批准的，对其直接负责的主管人员和其他直接责任人员，依法给予行政处分。

第五十条 未经依法批准，违反港口规划建设港口、码头及其他设施的，由县级以上地方人民政府或者港口行政管理部门责令限期改正；逾期不改正的，由作出限期改正决定的机关申请人民法院强制拆除违法建设的设施；可以处五万元以下罚款。

第五十一条 港口行政管理部门不依法履行监督检查职责，对未经依法批准违反港口规划建设港口、码头及其他设施的行为不依法予以查处的，对其直接负责的主管人员和其他直接责任人员依法给予行政处分；构成犯罪的，依法追究刑事责任。

第五十二条 港口行政管理部门滥用规划职权导致破坏港口规划的，对其直接负责的主管人员和其他直接责任人员依法给予行政处分；构成犯罪的，依法追究刑事责任。

第五十三条 不依法履行职责，有下列行为之一的，有关部门对其直接负责的主管人员和其他直接责任人员，依法给予行政处分：

（一）未征求港口行政管理部门意见，违反港口规划擅自批准使用港口总体规划区内土地和水域的；

（二）未征求港口行政管理部门意见，违反港口规划擅自批准建设跨越、穿越港口总体规划区水陆域及其上下部相关空间的设施的；

（三）对违反项目审批、岸线使用审批规定的建设项目批准其水上水下施工作业许可的；

（四）对港口总体规划区周边可能影响港口自然条件变化的工程项目，负责审批该项目的部门在审批前不征求港口行政管理部门意见的。

第七章 附 则

第五十四条 本规定自 2008 年 2 月 1 起施行。交通部 1990 年 2 月 4 日 (90) 交计字 58 号文发布的《港口总体布局规划编制办法》同时废止。

海洋听证办法

（2007 年 11 月 6 日经国家海洋局局长会议审议通过，自 2008 年 1 月 1 日起施行）

第一章 总 则

第一条 为规范海洋行政许可、行政处罚、行政立法、行政决策等行政行为，保护公民、法人和其他组织的合法权益，根据《中华人民共和国行政许可法》、《中华人民共和国行政处罚法》、《中华人民共和国立法法》等法律、法规和规章的规定，制定本办法。

第二条 组织听证工作的各级海洋行政主管部门及其派出机构是听证机关。听证由起草法律、法规、规章草案，制定行政决策，拟作出行政处罚、行政许可等行政行为的各级海洋行政主管部门或者其派出机构组织。

第三条 依照本办法具体办理听证事项的机构为听证机构，听证机构包括听证机关的法制机构或者负责法制工作的其他内部机构（以下简称“法制机构”）和听证事项承办机构。

依申请组织的听证由法制机构具体承担。

依职权组织的听证由听证事项承办机构具体承担。

第四条 听证应当遵循公平、公正、公开、便民和效率的原则。

第五条 上级听证机关应当加强对下级听证机关听证工作的指导；下级听证机关应当于每年 12 月底前将本部门的听证工作情况报送上级听证机关。

派出机构应在听证报告书完成后 5 日内，将听证报告书报其主管部门法制机构备案。

第六条 各级海洋行政主管部门应当保障组织听证所需费用，并列入年度预算。

第二章 一般规定

第七条 听证会由听证主持人主持，根据工作需要可设二至四名听证员，听证主持人和听证员总数应当是单数，由听证机关主管听证机构的负责人指定。

听证会设一名记录员，记录员由听证主持人指定。

第八条 听证主持人履行以下主要职责，听证员负责协助听证主持人工作

（一）确定举行听证会的时间、地点、是否公开听证；

（二）主持听证并维护听证秩序，对违反听证纪律的行为予以制止；

（三）就案件的事实、证据和与之相关的法律问题进询问；

（四）要求听证参加人提供或者补充证据；

（五）决定有关证人、鉴定人、勘验人是否参加听证；

（六）决定延期、中止听证；

（七）制作听证会报告；

（八）其他由听证主持人决定的事项。

第九条 听证记录员主要履行以下职责：

（一）听证笔录制作；

（二）听证文书的收发、听证联络通知工作；

（三）听证材料的立卷和整理；

（四）听证主持人交办的其他工作。

第十条 听证主持人、听证员、记录员应当公正地履行职责，保证听证参加人行使陈述、申辩、质证等权利，对听证中涉及的国家秘密、商业秘密和个人隐私负有保密的义务。

第十一条 听证参加人包括当事人、利害关系人、当事人和利害关系人代理人、听证事项承办机构陈述人、听证代表、鉴定人、证人、翻译人员、勘验人等。

第十二条 当事人、利害关系人可以委托一至二名代理人参加听证;委托代理人参加听证的，应当于举行听证会前向听证机关提交由当事人、利害关系人签名或捺印的授权委托书以及委托人和受托人的身份证明。授权委托书应载明委托事项、权限和时间。

当事人或利害关系人为无民事行为能力人或者限制民事行为能力人的，由其法定代理人代为参加听证。法定代理人参加听证的，应在举行听证会前向听证机关提交其身份证明。

第十三条 当事人或者利害关系人超过五人以上时，可以推举一至二名听证代表参加听证。听证代表的行为对推举其参加听证的当事人及利害关系人发生效力。听证代表应当于举行听证会前向听证机关提交由当事人或利害关系人签名的推举函。

第十四条 当事人、利害关系人在听证中享有以下权利，代理人在委托授权范围内享有与当事人、利害关系人同等的权利：

（一）知悉拟作出行政行为的事实、证据和法律依据；

（二）申请不公开听证及听证人员回避；

（三）陈述主张和理由，进行申辩、举证、质证；

（四）查阅、核实听证笔录。

第十五条 听证参加人应当按时参加听证会，服从听证主持人指挥，守听证会纪律。

第十六条 听证主持人、听证员、记录员有下列情形之一的，应当自行回避。当事人、利害关系人及其代理人也可以申请其回避：

（一）参与拟听证行政许可申请审查或者行政处罚案件调查的；

（二）是当事人、利害关系人及其代理人的近亲属的；

（三）与听证事项有其他关系可能影响听证公正进行的。

第十七条 当事人、利害关系人及其代理人提出回避申请的，应在听证会开始前提出，并说明理由；在听证会开始后知道回避事由的，可以在听证会结束前提出。

听证主持人、听证员的回避，由听证机关主管听证机构的负责人决定；其他人员的回避，由听证主持人决定。

决定回避的，应当按照本办法第七条规定另行确定听证人员。

第十八条 有下列情形之一的，可以延期听证：

（一）听证主持人认为听证过程中提出新的事实、理由和依据，或者提出的事实有待调查核实的；

（二）当事人、利害关系人及其代理人有正当理由在听证会当天提出回避申请的；

（三）其它应当延期听证的情形。

延期听证由听证主持人决定，并书面通知听证参加人。延期情形消除后，应在 5 日内恢复听证，并书面通知听证参加人恢复举行听证的时间、地点。

第十九条 有下列情形之一的，中止听证：

（一）申请听证的公民死亡、法人或者其他组织终止，尚未确定权利、义务承受人的；

（二）因不可抗力导致听证参加人无法继续参加听证的；

（三）其他应当中止听证的情形。

中止听证由听证主持人决定，并以书面形式通知听证参加人。中止情形消除后，应在 5 日内恢复听证，并书面通知听证参加人恢复举行听证的时间、地点。

第二十条 有下列情形之一的，经听证机关主管听证机构负责人批准，可以终止听证：

（一）申请人撤回听证申请或者被视为放弃听证权利的；

（二）有权申请听证的公民死亡，没有继承人或者继承人放弃听证权利的；

（三）有权申请听证的法人或者其他组织终止，承受其权利的法人或者其他组织放弃听证权利的；

（四）出现导致听证会无法举行的其他情形。

第二十一条 听证笔录应当载明以下内容：

（一）听证事由；

（二）听证主持人、听证员、记录员的姓名；

（三）听证参加人的姓名或者名称；

（四）听证会的时间、地点；

（五）听证事项承办机构陈述人、当事人、利害关系人等人的陈述、质证、辩论的内容；

（六）其它需要载明的事项。

第二十二条 听证笔录应当当场交由听证主持人、听证员、听证参加人确认无误后签名或捺印，对笔录有异议的，听证参加人应当及时要求补正。听证参加人拒绝签字或捺印的，记明情况附卷。

第二十三条 听证机构应当在举行听证会后，根据听证笔录制作包括下列内容的听证报告，报主管听证机构负责人：

（一）听证会的基本情况；

（二）听证事项的说明；

（三）听证会参加人的意见陈述；

（四）听证事项的意见分歧；

（五）对听证会意见的处理建议。

第三章 依申请听证

第二十四条 依申请听证是指直接涉及当事人或利害关系人重大利益关系的行政事项，因当事人、利害关系人提出申请而组织的听证。

第二十五条 法律、法规、规章规定应当告知当事人或者利害关系人有权提起听证申请的事项，听证事项承办机构应当书面告知当事人享有申请听证的权利。听证告知的具体内容如下：

（一）拟作出的行政行为、认定的事实、理由和法律依据；

（二）享有要求举行听证的权利；

（三）提出听证要求的法定期限；

（四）听证申请的受理部门及机构。

第二十六条 当事人或利害关系人应在法定期限内向听证机关的法制机构提出听证申请。当事人或利害关系申请不公开审理的，应在申请书中或在举行听证会前以书面形式向听证机关提出。

听证申请以邮寄方式提交的，以信函的寄出邮戳日期为准。已经开通网上受理听证申请的，以网络系统显示的提交时间为准。

第二十七条 法制机构收到听证申请后，应及时向听证事项承办机构出具案卷移交单调取卷宗，听证事项承办机构应在 3 日内向法制机构移交听证所需材料。

当事人直接向听证事项承办机构提交听证申请的，听证事项承办机构应在 3 日内将听证申请及听证所需材料移交给法制机构。

第二十八条 法制机构在 3 日内对听证申请进行审查。有下列情形之一的，不予受理：

（一）当事人或者利害关系人以外的人提出申请的；

（二）未在法定期限内提出听证申请的；

（三）其他不符合听证申请条件的。

不予受理的，法制机构应当在 3 日内书面告知申请人。

第二十九条 法制机构应当在举行听证会 7 日前，向当事人、利害关系人等听证参加人送达听证通知书，听证通知书应当包括以下内容：

（一）听证事由；

（二）听证会的时间和地点；

（三）当事人、利害关系人姓名或名称；

（四）听证主持人、听证员、记录员的姓名和职务；

（五）提出回避申请的期限、途径；

（六）听证时享有的权利和义务；

（七）其他需要通知的事项。

第三十条 听证参加人无正当理由不按时参加听证，或者未经听证主持人允许中途退场的，视为放弃听证。

放弃听证或者被视为放弃听证的，不得就同一事项再次要求听证。

第三十一条 听证会按照以下步骤进行：

（一）听证主持人查明听证参加人身份和到场情况，宣布听证会纪律；

（二）听证主持人宣布听证事由、听证人员名单，当事人、利害关系人及其代理人在听证会中的权利义务等；

（三）听证事项承办机构陈述人提出认定的事实、证据和法律依据、处理意见；

（四）当事人、利害关系人及其代理人进行质证、辩论、提出理由和依据；（五）听证主持人、听证员就有关问题进行询问；

（六）听证主持人征询听证参加人的最后意见；

（七）听证主持人宣布听证会结束。

第三十二条 听证会结束后，法制机构应在 6 日内将听证报告书报听证机关主管法制机构负责人，同时将上述材料复制件和听证笔录移送听证事项承办机构。听证事项承办机构应当结合听证报告书和听证笔录，依法作出行政行为。

第四章　依职权听证

第三十三条　法律、法规、规章规定实施行政行为应当组织听证的，听证机关必须组织。

第三十四条　有下列情形之一的，海洋主管部门可以根据需要组织听证：

（一）起草、修订法律、法规、规章草案的；

（二）需要拟订有关征收、补偿标准的；

（三）编制或者修改海洋功能区划、海洋环境保护规划、重点海域开发与保护规划等有关区划、规划的；

（四）作出直接涉及公民、法人或者其他组织重大利益的海洋行政决策的；

（五）听证机关认为有必要举行听证的其他事项。

第三十五条　听证机构可以采取通知、邀请或公告等方式确定听证参加人。

以公告形式确定听证参加人的，听证机构应当在听证会 15 前公告听证会的时间、地点、拟听证的内容和听证会参加人报名条件等。

第三十六条　听证机构按照广泛性、代表性的原则确定听证参加人，一般由下列人员组成：

（一）与听证事项有利害关系的公民、法人或者其他组织；

（二）了解听证事项的专业技术部门代表或相关专业人员；

（三）法律、法规或规章规定应当征求其意见的有关部门或者组织；

（四）其他由听证机构确定的听证参加人。

第三十七条　听证机构应当在举行听证会 7 日前通知听证参加人参加听证，向其送达有关通知材料。

第三十八条　听证会按照以下步骤进行：

（一）听证主持人查明听证参加人身份和到场情况，宣布听证会纪律；

（二）听证主持人宣布听证事由、听证人员名单，当事人和利害关系人及其代理人在听证会中的权利义务等，宣布听证会开始；

（三）听证事项陈述人介绍听证事项的主要内容；

（四）听证参加人陈述意见和质询；

（五）最后陈述；

（六）听证主持人宣布听证结束。

第三十九条　法律、法规、规章规定实施行政许可依职权应当听证的事项，同时涉及申请人与他人之间重大利益关系的，若当事人或利害关系人提出听证申请，听证机关依照本办法第三章规定的程序组织听证。

第四十条　听证机构应当认真研究听证会反映的各种意见，立法、决策等事项在报送审查时，应当说明对听证会意见的处理及其理由。

第五章 附 则

第四十一条 海洋听证文书样式，由各级海洋行政主管部门统一制作。

第四十二条 组织听证不得向当事人和利害关系人收取或者变相收取任何费用。

第四十三条 本办法所规定的听证日期均指工作日，不含法定节假日。

第四十四条 本办法颁布之前有关听证的规范性文件与办法规定内容不一致的，适用本办法的规定。

第四十五条 海洋行政主管部门办理行政复议案件，组织听证的具体程序参照本规定执行。

第四十六条 本办法自 2008 年 1 月 1 起施行。

海洋计量工作管理规定

（2008 年 1 月 16 日经国家海洋局局长办公会议审议通过，自 2008 年 1 月 16 日起施行）

第一章　总　则

第一条　为了保障海洋工作中计量单位制的统一和量值的准确可靠，加强海洋行业计量监督管理，促进海洋事业和谐发展，依据《中华人民共和国计量法》及相关法律法规，制定本规定。

第二条　在海洋行业内，建立计量标准，开展计量检定、计量校准、计量检测，使用计量单位和海洋专用计量器具，实施计量认证、能力验证和计量监督管理，以及从事其他海洋计量活动，必须遵守本规定。

本规定所称海洋专用计量器具是指专门用于海洋行政管理、监测调查、环境保护、防灾减灾、科学研究和海洋开发等海洋业务的计量器具。

第三条　从事下列活动应当使用法定计量单位：

（一）制发公报、公文、统计报表；

（二）编制涉及海洋数据资料的广播、电视节目，发布海洋环境、灾害预报；

（三）制作、发布广告，出版、发行图书、报纸、期刊等出版物；

（四）制定海洋技术标准、技术规范、检定规程；

（五）进行海洋调查、观测、监测、监视及海洋环境评价活动；

（六）海洋科学研究、工程建设、资源开发活动；

（七）收集、存贮、加工、交流海洋数据资料；

（八）出具检定、校准、检测证书和试验数据；

（九）国家规定应当使用法定计量单位的其他活动。

第二章　组织管理

第四条　海洋计量工作是国家计量工作的组成部分，业务上接受国务院计量行政主管部门的指导和监督。

国家海洋局负责监督计量法律、法规、方针和政策在海洋工作中的实施，对全

国海洋计量工作的统筹规划和组织领导，制定、发布和实施海洋计量工作的相关规定。

第五条 国家海洋标准计量中心（国家海洋计量站）及海区标准计量中心（国家海洋计量站青岛、上海、广洲分站）是由国家海洋局领导、代表国务院计量行政主管部门在全国及海区范围内开展海洋行业中有关计量工作的职能机构，主要职责是：

（一）宣传并贯彻执行国家有关计量工作的方针、政策和法律法规；

（二）研究建立海洋行业中特殊量值的计量基准、标准；

（三）承担授权范围内的量值传递，执行强制检定和法律规定的其他检定、校准和检测任务；

（四）开展计量检测手段和检定方法的研究，参加专业计量技术法规的制定；

（五）负责海洋计量技术仲裁；

（六）负责海洋计量业务培训及海洋计量信息服务工作；

（七）负责授权范围内专业项目的计量管理并承办有关计量监督工作；

（八）组织实施海洋技术机构能力验证；

（九）组织实施海洋检／监测人员的海洋计量工作培训及考核。

国家计量认证海洋评审组的具体工作由国家海洋标准计量中心（国家海洋计量站）承担。

第六条 海洋技术机构或其他组织在科技成果的鉴定、验收、评价和评估等活动中，应提供相关计量技术评价报告；在从事生产、科研、经营活动中使用海洋计量器具以及从事其他海洋计量活动，应根据本规定制定相应的计量管理制度和责任制度，完善管理体系，加强内部计量管理工作。

第三章 计量标准

第七条 国家海洋标准计量中心（国家海洋计量站）及海区标准计量中心（国家海洋计量站青岛、上海、广州分站）负责建立用于统一全国或海区海洋特殊量值的社会公用计量标准，经国务院计量行政主管部门组织考核合格，由国务院计量行政主管部门颁发计量标准证书和社会公用计量标准证书后使用。

第八条 国家海洋标准计量中心（国家海洋计量站）负责建立、保存、维护和使用海洋行业的最高计量标准，作为统一全国海洋特殊量值的依据。

第四章　海洋专用计量器具的管理

第九条　在海洋工作中使用的海洋专用计量器具应符合国务院计量行政主管部门和国家海洋局提出的有关技术要求，经国家海洋标准计量中心（国家海洋计量站）或海区标准计量中心（国家海洋计量站青岛、上海、广州分站）组织检测合格。

第十条　具备计量检定条件的海洋专用计量器具，使用者应当向计量行政主管部门授权的法定计量检定机构申请计量检定。未申请计量检定、计量检定不合格或者超过计量检定周期的海洋专用计量器具，不得使用。

第十一条　海洋专用计量器具的计量检定必须执行国家计量检定系统表和计量检定规程，国家未制定计量检定规程的，由国家海洋局组织制定海洋部门计量检定规程，并报国务院计量行政主管部门备案。

第十二条　不具备计量检定条件的海洋专用计量器具，使用者可以委托有关法定计量检定机构实施计量校准，保证其量值的溯源性。

第十三条　法定计量检定机构对社会开展计量校准服务，应当与委托方签订合同，按照计量校准规范或者委托合同的要求进行计量校准，具计量校准报告或者计量校准证书。国家未制定计量校准规范的，由国家海洋局组织制定海洋计量校准规范。

第十四条　不具备计量检定和校准条件的海洋专用计量器具，使用者可以依据自校方法、互校方法或现场比对方法进行自校、互校或现场比对，考核其量值的有效性。

自校方法、互校方法或现场比对方法由使用者制定，报国家海洋标准计量中心（国家海洋计量站）备案。

第五章　海洋技术机构计量认证

第十五条　从事下列活动的海洋技术机构应当通过计量认证：

（一）为行政机关做出的行政决定提供具有证明作用的数据和结果的；

（二）为司法机关做出的裁决提供具有证明作用的数据和结果的；

（三）为仲裁机构做出的仲裁决定提供具有证明作用的数据和结果的；

（四）为社会公益活动提供具有证明作用的数据和结果的；

（五）为经济或者贸易关系人提供具有证明作用的数据和结果的；

（六）其他法定需要通过计量认证的。

第十六条　申请计量认证的海洋技术机构以下简称申请人，应当具备以下条件：

（一）依法设立，保证客观、公正和独立地从事检测、校准和检查活动，并承

担相应的法律责任；

（二）具有与其从事检测、校准和检查活动相适应的专业技术人员和管理人员；

（三）具备固定的工作场所，其工作环境应当保证检测、校准和检查数据及结果的真实、准确；

（四）具备正确进行检测、校准和检查活动所需要并能够独立调配使用的固定的及可移动的检测、校准和检查设备设施；

（五）建立能够保证其公正性、独立性和与其承担的检测、校准和检查活动范围相适应的质量体系，按照计量认证基本规范或者标准制定相应的质量体系文件并有效实施。

第十七条 国家认证认可监督管理委员会（以下简称国家认监委）委托国家计量认证海洋评审组在海洋行业具体实施计量认证评审工作。国家计量认证海洋评审组由经国家认监委考核合格获得实验室资质认定评审员证书的海洋行业专业人员组成，组长由国家海洋局机关职能处室的领导担任。

国家计量认证海洋评审组的主要任务是：

（一）组织海洋技术机构计量认证申请事宜；

（二）组织实施对申请计量认证的海洋技术机构的技术评审，并将技术评审结果报国家认监委；

（三）提供海洋技术机构计量认证的技术咨询。

第十八条 计量认证程序：

（一）申请人应向国家计量认证海洋评审组办公室提出书面申请，并提交符合本规定第十六条规定的相关证明材料；

（二）国家计量认证海洋评审组办公室对申请人提交的申请材料进行初步审查，初审合格后报国家认监委，纳入国家计量认证工作计划；

（三）国家计量认证海洋评审组办公室根据国家计量认证工作计划，提出评审时间和评审员人选的建议，经国家计量认证海洋评审组长审核后报国家计量认证办公室批准，按批准的时间对申请人进行技术评审，并书面通知申请人；

（四）国家计量认证海洋评审组将技术评审结果报国家认监委，国家认监委根据技术评审结果做出是否批准的决定。

（五）国家计量认证海洋评审组及时将是否批准的决定通知申请人和所在海区标准计量中心（国家海洋计量站青岛、上海、广州分站）。

第十九条 计量认证证书的有效期为 3 年。申请人应在证书有效期届满前 6 个月向国家计量认证海洋评审组提出复查申请，国家计量认证海洋评审组按本规定第十八条规定的程序进行复查。

第二十条 获证机构需新增检测项目时，应当按照本规定第十八条规定的程序，申请计量认证扩项。

第二十一条 获证机构在3年有效期内应接受一次国家计量认证海洋评审组组织的监督评审。

第六章 能力验证

第二十二条 海洋技术机构应依法参加能力验证活动，利用海洋技术机构间指定检测数据的比对，确定海洋技术机构从事特定测试活动的技术能力。

第二十三条 国家海洋标准计量中心（国家海洋计量站）按照国家认监委制定的实验室能力验证的基本规范和实施规则，统一监管和综合协调海洋计量认证获证机构的能力验证活动。

第二十四条 能力验证的提供者是指从事能力验证设计和实施的海洋技术机构。国家海洋标准计量中心（国家海洋计量站）对能力验证的提供者是否符合国家相关标准或者技术规范的要求进行评价，并将评价结果上报国家认监委， 国家认监委确定其是否作为能力验证的提供者。

第二十五条 能力验证的参加者应当向能力验证的组织者及时反馈相关信息，并保存相关记录。

第二十六条 国家海洋标准计量中心（国家海洋计量站）应当于每年年底向国家认监委和国家海洋局报告下一年度的能力验证计划，包括：名称、目的、能力验证的内容和关键技术要素设计、组织单位、实施时间、拟参加机构的范围和数量、能力验证提供者的资质证明和审核材料等。

第二十七条 国家海洋标准计量中心（国家海洋计量站）应当及时向国家认监委和国家海洋局通报年度能力验证计划的完成情况、能力验证结果、后续处理措施等有关事项。

第七章 海洋检／监测人员的资质管理

第二十八条 本规定所称海洋检／监测人员是指在海洋工作中，获取、反演、整编、处理和评价数据的人员。

第二十九条 海洋系统的海洋检／监测人员应当通过技术培训并经考核合格，取得资格证书后方可从事相应专业技术工作。

第三十条 对海洋系统的海洋检／监测人员的技术培训和考核工作由国家海洋标准计量中心（国家海洋计量站）统一管理，由各海区标准计量中心（国家海洋计量站青岛、上海、广州分站）具体组织实施。

海洋检／监测人员考核采取笔试和现场操作考核相结合的形式，国家海洋标准计量中心（国家海洋计量站）负责拟定海洋检／监测人员考试科目、考试大纲、

考试试题。经国家海洋标准计量中心（国家海洋计量站）对考核结果进行审核并签署书面意见后，由国家海洋局海洋环境保护司签发海洋系统的海洋检／监测人员资格证书。

第三十一条 申请参加海洋检／监测人员考核，必须同时具备以下基本条件：

（一）具有国家承认的中专或高中以上（含中专或高中）学历，或具有 5 年以上（含 5 年）专业工作经历的技术工人；

（二）熟悉国家相关法律法规；

（三）熟练运用本专业技术标准、规范和规程，正确使用相关测量设备，较好地完成所从事项目的检／监测工作；

（四）能正确地出具所从事项目的检／监测报告。

第三十二条 海洋检／监测人员资格证书有效期为 3 年，由所在单位集中保管、存档。

第三十三条 海洋检／监测人员资格证书在有效期届满前 6 个月需申请复审，拒绝复审、复审不合格或 2 年不从事相应专业技术工作的人员将由发证机关注销资格证书。

第八章 海洋计量监督检查

第三十四条 国家海洋标准计量中心（国家海洋计量站）及海区标准计量中心（国家海洋计量站青岛、上海、广州分站）负责全国及海区的计量监督检查工作，监督检查的范围包括：

（一）重大海洋调查监测项目的实施；

（二）海洋专用计量器具和标准物质的使用情况；

（三）海洋计量检／监测人员的资质情况；

（四）海洋行业内法定计量单位的使用情况；

（五）向社会提供的海洋数据和结果等；

（六）管理体系的有效运行状况情况；

相关单位或者个人必须接受计量监督检查，如实反映情况，提供相关资料。

第三十五条 海区海洋标准计量中心（国家海洋计量分站）应当于每年十一月三十日前，将海区下一年度计量监督检查计划报送国家海洋标准计量中心（国家海洋计量站）和所在分局。

国家海洋标准计量中心（国家海洋计量站）应当于每年十二月底前向国家海洋局报送下一年度的计量监督检查计划，经国家海洋局批准后实施。

第三十六条 国家海洋标准计量中心（国家海洋计量站）及海区海洋标准计

量中心（国家海洋计量分站）应当及时向相应的海洋行政主管部门如实报告监督检查结果及年度计量监督检查计划的完成情况。

第三十七条 国家海洋局及各分局对海洋计量监督检查情况定期或不定期发布通报。

第三十八条 国家海洋局及各分局根据计量监督检查结果，对严重违反工作程序，导致检 / 监测过程或结果重大失误的，给予相关机构及人员通报批评。

对出具虚假报告、伪造篡改检测结果、检测报告严重失实等造成恶劣影响的行为，依法追究相关机构和人员的责任。

第九章 附 则

第三十九条 本规定自 2008 年 1 月 16 起施行，2001 年 4 月 28 日国家海洋局发布的《国家海洋局计量工作管理暂行规定》同时废止。

Mr. GAO Zhiguo (China) Elected as New Member of the Tribunal

(ITLOS/Press 119 31 January 2008)

Hamburg, 31 January 2008. Mr Gao Zhiguo was elected at a Special Meeting of States Parties to the United Nations Convention on the Law of the Sea held yesterday to fill the vacancy created by the resignation of Judge Xu Guangjian (China) on 15 August 2007. In accordance with article 6 of the Statute of the Tribunal, Mr Gao will hold office for the remainder of his predecessor's nine-year term, which expires on 30 September 2011. Mr Gao was the only candidate, obtaining 136 votes out of 137 ballots cast, with one abstention.

Until his election, Mr Gao was Executive Director of the China Institute for Marine Affairs. From 2003 to 2007 he served as Deputy to the Tenth National People's Congress of China and was a Member of the Foreign Affairs Committee of the National People's Congress. He is Honorary Lecturer at the University of Dundee and Adjunct Professor at the China University of Oceanography, the Chinese Academy of Sciences and the University of Xiamen, and has acted as legal consultant to numerous States and international organizations on ocean development policy. Mr Gao has published many books and articles in the field of international law and law of the sea.

Judge Gao's detailed biographical information may be found on the website of the Tribunal at htt://www. itlos. org/general_inform ation/ j udges/text en.shtml.

中华人民共和国水污染防治法

（2008 年 2 月 28 日中华人民共和国第十届全国人民代表大会常务委员会第三十二次会议修订通过，自 2008 年 6 月 1 日起施行）

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第一章 总 则

第一条 为了防治水污染，保护和改善环境，保障饮用水安全，促进经济社会全面协调可持续发展，制定本法。

第二条 本法适用于中华人民共和国领域内的江河、湖泊、运河、渠道、水库等地表水体以及地下水体的污染防治。

海洋污染防治适用《中华人民共和国海洋环境保护法》。

第三条 水污染防治应当坚持预防为主、防治结合、综合治理的原则，优先保护饮用水水源，严格控制工业污染、城镇生活污染，防治农业面源污染，积极推进生态治理工程建设，预防、控制和减少水环境污染和生态破坏。

第四条 县级以上人民政府应当将水环境保护工作纳入国民经济和社会发展规划。

县级以上地方人民政府应当采取防治水污染的对策和措施，对本行政区域的水环境质量负责。

第五条 国家实行水环境保护 H 标责任制和考核评价制度，将水环境保护目标完成情况作为对地方人民政府及其负责人考核评价的内容。

第六条 国家鼓励、支持水污染防治的科学技术研究和先进适用技术的推广应用，加强水环境保护的宣传教育。

第七条 国家通过财政转移支付等方式，建立健全对位于饮用水水源保护区区域和江河、湖泊、水库上游地区的水环境生态保护补偿机制。

第八条 县级以上人民政府环境保护主管部门对水污染防治实施统一监督管理。

交通主管部门的海事管理机构对船舶污染水域的防治实施监督管理。

县级以上人民政府水行政、国土资源、卫生、建设、农业、渔业等部门以及重要江河、湖泊的流域水资源保护机构，在各自的职责范围内，对有关水污染防治实施监督管理。

第九条 排放水污染物，不得超过国家或者地方规定的水污染物排放标准和重点水污染物排放总量控制指标。

第十条 任何单位和个人都有义务保护水环境，并有权对污染损害水环境的行为进行检举。

县级以上人民政府及其有关主管部门对在水污染防治工作中做出显著成绩的单位和个人给予表彰和奖励。

第二章 水污染防治的标准和规划

第十一条 国务院环境保护主管部门制定国家水环境质量标准。

省、自治区、直辖市人民政府可以对国家水环境质量标准中未作规定的项目，制定地方标准，并报国务院环境保护主管部门备案。

第十二条 国务院环境保护主管部门会 H 国务院水行政主管部门和有关省、自治区、直辖市人民政府，可以根据国家确定的重要江河、湖泊流域水体的使用功能以及有关地区的经济、技术条件，确定该重要江河、湖泊流域的省界水体适用的水环境质量标准，报国务院批准后施行。

第十三条 国务院环境保护主管部门根据国家水环境质量标准和国家经济、技术条件，制定国家水污染物排放标准。

省、自治区、直辖市人民政府对国家水污染物排放标准中未作规定的项目，可

以制定地方水污染物排放标准;对国家水污染物排放标准中已作规定的项目,可以制定严于国家水污染物排放标准的地方水污染物排放标准。地方水污染物排放标准须报国务院环境保护主管部门备案。

向已有地方水污染物排放标准的水体排放污染物的,应当执行地方水污染物排放标准。

第十四条 国务院环境保护主管部门和省、自治区、直辖市人民政府,应当根据水污染防治的要求和国家或者地方的经济、技术条件,适时修订水环境质量标准和水污染物排放标准。

第十五条 防治水污染应当按流域或者按区域进行统一规划。国家确定的重要江河、湖泊的流域水污染防治规划,由国务院环境保护主管部门会同国务院经济综合宏观调控、水行政等部门和有关省、自治区、直辖市人民政府编制,报国务院批准。

前款规定外的其他跨省、自治区、直辖市江河、湖泊的流域水污染防治规划,根据国家确定的重要江河、湖泊的流域水污染防治规划和本地实际情况,由有关省、自治区、直辖市人民政府环境保护主管部门会同同级水行政等部门和有关市、县人民政府编制,经有关省、自治区、直辖市人民政府审核,报国务院批准。

省、自治区、直辖市内跨县江河、湖泊的流域水污染防治规划,根据国家确定的重要江河、湖泊的流域水污染防治规划和本地实际情况,由省、自治区、直辖市人民政府环境保护主管部门会同同级水行政等部门编制,报省、自治区、直辖市人民政府批准,并报国务院备案。

经批准的水污染防治规划是防治水污染的基本依据,规划的修订须经原批准机关批准。

县级以上地方人民政府应当根据依法批准的江河、湖泊的流域水污染防治规划,组织制定本行政区域的水污染防治规划。

第十六条 国务院有关部门和县级以上地方人民政府开发、利用和调节、调度水资源时,应当统筹兼顾,维持江河的合理流量和湖泊、水库以及地下水体的合理水位,维护水体的生态功能。

第三章 水污染防治的监督管理

第十七条 新建、改建、扩建直接或者间接向水体排放污染物的建一设项目和其他水上设施,应当依法进行环境影响评价。

建设单位在江河、湖泊新建、改建、扩建排污口的,应当取得水行政主管部门或者流域管理机构同意;涉及通航、渔业水域的,环境保护主管部门在审批环境影响评价文件时,应当征求交通、渔业主管部门的意见。

建设项目的水污染防治设施，应当与主体工程同时设计、同时施工、同时投入使用。水污染防治设施应当经过环境保护主管部门验收，验收不合格的，该建设项目不得投入生产或者使用。

第十八条 国家对重点水污染物排放实施总量控制制度。

省、自治区、直辖市人民政府应当按照国务院的规定削减和控制本行政区域的重点水污染物排放总量，并将重点水污染物排放总量控制指标分解落实到市、县人民政府。市、县人民政府根据本行政区域重点水污染物排放总量控制指标的要求，将重点水污染物排放总量控制指标分解落实到排污单位。具体办法和实施步骤由国务院规定。

省、自治区、直辖市人民政府可以根据本行政区域水环境质量状况和水污染防治工作的需要，确定本行政区域实施总量削减和控制的重点水污染物。

对超过重点水污染物排放总量控制指标的地区，有关人民政府环境保护主管部门应当暂停审批新增重点水污染物排放总量的建设项目的环境影响评价文件。

第十九条 国务院环境保护主管部门对未按照要求完成重点水污染物排放总量控制指标的省、自治区、直辖市予以公布。省、自治区、直辖市人民政府环境保护主管部门对未按照要求完成重点水污染物排放总量控制指标的市、县予以公布。

县级以上人民政府环境保护主管部门对违反本法规定、严重污染水环境的企业予以公布。

第二十条 国家实行排污许可制度。

直接或者间接向水体排放工业废水和医疗污水以及其他按照规定应当取得排污许可证方可排放的废水、污水的企业事业单位，应当取得排污许可证；城镇污水集中处理设施的运营单位，也应当取得排污许可证。排污许可的具体办法和实施步骤由国务院规定。

禁止企业事业单位无排污许可证或者违反排污许可证的规定向水体排放前款规定的废水、污水。

第二十一条 直接或者间接向水体排放污染物的企业事业单位和个体工商户，应当按照国务院环境保护主管部门的规定，向县级以上地方人民政府环境保护主管部门申报登记拥有的水污染物排放设施、处理设施和在正常作业条件下排放水污染物的种类、数量和浓度，并提供防治水污染方面的有关技术资料。

企业事业单位和个体工商户排放水污染物的种类、数量和浓度有重大改变的，应当及时申报登记；其水污染物处理设施应当保持正常使用；拆除或者闲置水污染物处理设施的，应当事先报县级以上地方人民政府环境保护主管部门批准。

第二十二条 向水体排放污染物的企业事业单位和个体工商户，应当按照法律、行政法规和国务院环境保护主管部门的规定设置排污口；在江河、湖泊设置排污口的，还应当遵守国务院水行政主管部门规定。

禁止私设暗管或者采取其他规避监管的方式排放水污染物。

第二十三条 重点排污单位应当安装水污染物排放自动监测设备，与环境保护主管部门的监控设备联网，并保证监测设备正常运行。排放工业废水的企业，应当对其所排放的工业废水进行监测，并保存原始监测记录。具体办法由国务院环境保护主管部门规定。

应当安装水污染物排放自动监测设备的重点排污单位名录，由设区的市级以上地方人民政府环境保护主管部门根据本行政区域的环境容量、重点水污染物排放总量控制指标的要求以及排污单位排放水污染物的种类、数量和浓度等因素，商同级有关部门确定。

第二十四条 直接向水体排放污染物的企业事业单位和个体工商户，应当按照排放水污染物的种类、数量和排污费征收标准缴纳排污费。

排污费应当用于污染的防治，不得挪作他用。

第二十五条 国家建立水环境质量监测和水污染物排放监测制度。国务院环境保护主管部门负责制定水环境监测规范，统一发布国家水环境状况信息，会同国务院水行政等部门组织监测网络。

第二十六条 国家确定的重要江河、湖泊流域的水资源保护工作机构负责监测其所在流域的省界水体的水环境质量状况，并将监测结果及时报国务院环境保护主管部门和国务院水行政主管部门；有经国务院批准成立的流域水资源保护领导机构的，应当将监测结果及时报告流域水资源保护领导机构。

第二十七条 环境保护主管部门和其他依照本法规定行使监督管理权的部门，有权对管辖范围内的排污单位进行现场检查，被检查的单位应当如实反映情况，提供必要的资料。检查机关有义务为被检查的单位保守在检查中获取的商业秘密。

第二十八条 跨行政区域的水污染纠纷，由有关地方人民政府协商解决，或者由其共同的上级人民政府协调解决。

第四章 水污染防治措施

第一节 一般规定

第二十九条 禁止向水体排放油类、酸液、碱液或者剧毒废液。

禁止在水体清洗装贮过油类或者有毒污染物的车辆和容器。

第三十条 禁止向水体排放、倾倒放射性固体废物或者含有高放射性和中放射性物质的废水。

向水体排放含低放射性物质的废水，应当符合国家有关放射性污染防治的，规定和标准。

第三十一条 向水体排放含热废水，应当采取措施，保证水体的水温符合水环境质量标准。

第三十二条 含病原体的污水应当经过消毒处理；符合国家有关标准后，方可排放。

第三十三条 禁止向水体排放、倾倒工业废渣、城镇垃圾和其他废弃物。

禁止将含有汞、镉、砷、铬、铅、氰化物、黄磷等的可溶性剧毒废渣向向水体排放、倾倒或者直接埋入地下。

存放可溶性剧毒废渣的场所，应当采取防水、防渗漏、防流失的措施。

第三十四条 禁止在江河、湖泊、运河、渠道、水库最高水位线以下的滩地和岸坡堆放、存贮固体废弃物和其他污染物。

第三十五条 禁止利用渗井、渗坑、裂隙和溶洞排放，倾倒令有责污染物的

其他严重污染水环境的生产项目。

第三十六条 禁止利用无防渗漏措施的沟渠、坑塘等输送或者存贮含有毒污染物的废水、含病原体的污水和其他废弃物。

第三十七条 多层地下水的含水层水质差异大的，应当分层开采；对已受污染的潜水和承压水，不得混合开采。

第三十八条 兴建地下工程设施或者进行地下勘探、采矿等活动，应当采取防护性措施，防止地下水污染。

第三十九条 人工回灌补给地下水，不得恶化地下水质。

第二节 工业水污染防治

第四十条 国务院有关部门和县级以上地方人民政府应当合理规划工业布局，要求造成水污染的企业进行技术改造，采取综合防治措施，提高水的重复利用率，减少废水和污染物排放量。

第四十一条 国家对严重污染水环境的落后工艺和设备实行淘汰制度。

国务院经济综合宏观调控部门会同国务院有关部门，公布限期禁止采用的严重污染水环境的工艺名录和限期禁止生产、销售、进口、使用的严重污染水环境的设备名录。

生产者、销售者、进口者或者使用者应当在规定的期限内停止生产、销售、进口或者使用列入前款规定的设备名录中的设备。工艺的采用者应当在规定的期限内停止采用列入前款规定的工艺名录中的工艺。

依照本条第二款、第三款规定被淘汰的设备，不得转让给他人使用。

第四十二条 国家禁止新建不符合国家产业政策的小型造纸、制革、印染、染料、炼焦、炼硫、炼砷、炼汞、炼油、电镀、农药、石棉、水泥、玻璃、钢铁、火电以及其他严重污染水环境的生产项目。

第四十三条 企业应当采用原材料利用效率高、污染物排放量少的清洁工艺，并加强管理，减少水污染物的产生。

第三节 城镇水污染防治

第四十四条 城镇污水应当集中处理。

县级以上地方人民政府应当通过财政预算和其他渠道筹集资金，统筹安排建设城镇污水集中处理设施及配套管网，提高本行政区域城镇污水的收集率和处理率。

国务院建设主管部门应当会同国务院经济综合宏观调控、环境保护主管部门，根据城乡规划和水污染防治规划，组织编制全国城镇污水处理设施建设规划。县级以上地方人民政府组织建设、经济综合宏观调控、环境保护、水行政等部门编制本行政区域的城镇污水处理设施建设规划。县级以上地方人民政府建设主管部门应当按照城镇污水处理设施建设规划，组织建设城镇污水集中处理设施及配套管网，并加强对城镇污水集中处理设施运营的监督管理。

城镇污水集中处理设施的运营单位按照国家规定向排污者提供污水处理的有偿服务，收取污水处理费用，保证污水集中处理设施的正常运行。向城镇污水集中处理设施排放污水、缴纳污水处理费用的，不再缴纳排污费。收取的污水处理费用应当用于城镇污水集中处理设施的建设和运行，不得挪作他用。

城镇污水集中处理设施的污水处理收费、管理以及使用的具体办法，由国务院规定。

第四十五条 向城镇污水集中处理设施排放水污染物，应当符合国家或者地方规定的水污染物排放标准。

城镇污水集中处理设施的出水水质达到国家或者地方规定的水污染物排放标准的，可以按照国家有关规定免缴排污费。

城镇污水集中处理设施的运营单位，应当对城镇污水集中处理设施的出水水质负责。

环境保护主管部门应当对城镇污水集中处理设施的出水水质和水量进行监督检查。

第四十六条 建设生活垃圾填埋场，应当采取防渗漏等措施，防止造成水污染。

第四节 农业和农村水污染防治

第四十七条 使用农药，应当符合国家有关农药安全使用的规定和标准。

运输、存贮农药和处置过期失效农药，应当加强管理，防止造成水污染。

第四十八条 县级以上地方人民政府农业主管部门和其他有关部门，应当采取措施，指导农业生产者科学、合理地施用化肥和农药，控制化肥和农药的过量使用，防止造成水污染。

第四十九条 国家支持畜禽养殖场、养殖小区建设畜禽粪便、废水的综合利用或者无害化处理设施。

畜禽养殖场、养殖小区应当保证其畜禽粪便、废水的综合利用或者无害化处理设施正常运转，保证污水达标排放，防止污染水环境。

第五十条 从事水产养殖应当保护水域生态环境，科学确定养殖密度，合理投饵和使用药物，防止污染水环境。

第五十一条 向农田灌溉渠道排放工业废水和城镇污水，应当保证其下游最近的灌溉取水点的水质符合农田灌溉水质标准。

利用工业废水和城镇污水进行灌溉，应当防止污染土壤、地下水和农产品。

第五节 船舶水污染防治

第五十二条 船舶排放含油污水、生活污水，应当符合船舶污染物排放标准。从事海洋航运的船舶进入内河和港口的，应当遵守内河的船舶污染物排放标准。

船舶的残油、废油应当回收，禁止排入水体。

禁止向水体倾倒船舶垃圾。

船舶装载运输油类或者有毒货物，应当采取防止溢流和渗漏的措施，防止货物落水造成水污染。

第五十三条 船舶应当按照国家有关规定配置相应的防污设备和器材，并持有合法有效的防止水域环境污染的证书与文书。

船舶进行涉及污染物排放的作业，应当严格遵守操作规程，并在相应的记录簿上如实记载。

第五十四条 港口、码头、装卸站和船舶修造厂应当备有足够的船舶污染物、废弃物的接收设施。从事船舶污染物、废弃物接收作业，或者从事装载油类、污染危害性货物船舱清洗作业的单位，应当具备与其运营规模相适应的接收处理能力。

第五十五条 船舶进行下列活动，应当编制作业方案，采取有效的安全和防污染措施，并报作业地海事管理机构批准：

（一）进行残油、含油污水、污染危害性货物残留物的接收作业，或者进行装载油类、污染危害性货物船舱的清洗作业；

（二）进行散装液体污染危害性货物的过驳作业；

（三）进行船舶水上拆解、打捞或者其他水上、水下船舶施工作业。

在渔港水域进行渔业船舶水上拆解活动，应当报作业地渔业主管部门批准。

第五章　饮用水水源和其他特殊水体保护

第五十六条　国家建立饮用水水源保护区制度。饮用水水源保护区分为一级保护区和二级保护区；必要时，可以在饮用水水源保护区外围划定一定的区域作为准保护区。

饮用水水源保护区的划定，由有关市、县人民政府提出划定方案，报省、自治区、直辖市人民政府批准；跨市、县饮用水水源保护区的划定，由有关市、县人民政府协商提出划定方案，报省、自治区、直辖市人民政府批准；协商不成的，由省、自治区、直辖市人民政府环境保护主管部门会同同级水行政、国土资源、卫生、建设等部门提出划定方案，征求同级有关部门的意见后，报省、自治区、直辖市人民政府批准。

跨省、自治区、直辖市的饮用水水源保护区，由有关省、自治区辖市人民政府协商有关流域管理机构划定；协商不成的，由国务院环境保护主管部门会同同级水行政、国土资源、卫生、建设等部门提出划定方案，征求国务院有关部门的意见后，报国务院批准。

国务院和省、自治区、直辖市人民政府可以根据保护饮用水水源的实际需要，调整饮用水水源保护区的范围，确保饮用水安全。有关地方人民政府应当在饮用水水源保护区的边界设立明确的地理界标和明显的警示标志 。

第五十七条　在饮用水水源保护区内，禁止设置排污口。

第五十八条　禁止在饮用水水源一级保护区内新建、改建、扩建与供水设施和保护水源无关的建设项目；已建成的与供水设施和保护水源无关的建设项目，由县级以上人民政府责令拆除或者关闭。

禁止在饮用水水源一级保护区内从事网箱养殖、旅游、游泳、垂钓或者其他可能污染饮用水水体的活动。

第五十九条　禁止在饮用水水源二级保护区内新建、改建、扩建排放污染物的建设项目；已建成的排放污染物的建设项目，由县级以上人民政府责令拆除或者关闭。

在饮用水水源二级保护区内从事网箱养殖、旅游等活动的，应当按照规定采取措施，防止污染饮用水水体。

第六十条　禁止在饮用水水源准保护区内新建、扩建对水体污染严重的建设项目；改建建设项目，不得增加排污量。

第六十一条　县级以上地方人民政府应当根据保护饮用水水源的实际需要，在准保护区内采取工程措施或者建造湿地、水源涵养林等生态保护措施，防止水污染物直接排入饮用水水体，确保饮用水安全。

第六十二条　饮用水水源受到污染可能威胁供水安全的，环境保护主管部门

应当责令有关企业事业单位采取停止或者减少排放水污染物等措施。

第六十三条 国务院和省、自治区、直辖市人民政府根据水环境保护的需要，可以规定在饮用水水源保护区内，采取禁止或者限制使用含磷洗涤剂、化肥、农药以及限制种植养殖等措施。

第六十四条 县级以上人民政府可以对风景名胜区水体、重要渔业水体和其他具有特殊经济文化价值的水体划定保护区，并采取措施，保证保护区的水质符合规定用途的水环境质量标准。

第六十五条 在风景名胜区水体、重要渔业水体和其他具有特殊经济文化价值的水体的保护区内，不得新建排污口。在保护区附近新建排污口，应当保证保护区水体不受污染。

第六章 水污染事故处置

第六十六条 各级人民政府及其有关部门，可能发生水污染事故的企业事业单位，应当依照《中华人民共和国突发事件应对法》的规定，做好突发水污染事故的应急准备、应急处置和事后恢复等工作。

第六十七条 可能发生水污染事故的企业事业单位，应当制定有关水污染事故的应急方案，做好应急准备，并定期进行演练。

生产、储存危险化学品的企业事业单位，应当采取措施，防止在处理安全生产事故过程中产生的可能严重污染水体的消防废水、废液直接排入水体。

第六十八条 企业事业单位发生事故或者其他突发性事件，造成或者可能造成水污染事故的，应当立即启动本单位的应急方案，采取应急措施，并向事故发生地的县级以上地方人民政府或者环境保护主管部门报告。环境保护主管部门接到报告后，应当及时向本级人民政府报告，并抄送有关部门。

造成渔业污染事故或者渔业船舶造成水污染事故的，应当向事故发生地的渔业主管部门报告，接受调查处理。其他船舶造成水污染事故的，应当向事故发生地的海事管理机构报告，接受调查处理；给渔业造成损害的，海事管理机构应当通知渔业主管部门参与调查处理。

第七章 法律责任

第六十九条 环境保护主管部门或者其他依照本法规定行使监督管理权的部门，不依法作出行政许可或者办理批准文件的，发现违法行为或者接到对违法行为的举报后不予查处的，或者有其他未依照本法规定履行职责的行为的，对直接负责的主管人员和其他直接责任人员依法给予处分。

第七十条 拒绝环境保护主管部门或者其他依照本法规定行使监督管理权的门的监督检查，或者在接受监督检查时弄虚作假的，由县级以上人民政府环境保护主管部门或者其他依照本法规定行使监督管理权的部门责令改正，处一万元以上十万元以下的罚款。

第七十一条 违反本法规定，建设项目的水污染防治设施未建成、未经验收或者验收不合格，主体工程即投入生产或者使用的，由县级以上人民政府环境保护主管部门责令停止生产或者使用，直至验收合格，处五万元以上五十万元以下的罚款。

第七十二条 违反本法规定，有下列行为之一的，由县级以上人民政府环境保护主管部门责令限期改正；逾期不改正的，处一万元以上十万元以下的罚款：

（一）拒报或者谎报国务院环境保护主管部门规定的有关水污染物排放申报登记事项的；

（二）未按照规定安装水污染物排放自动监测设备或者未按照规定与环境保护主管部门的监控设备联网，并保证监测设备正常运行的；

（三）未按照规定对所排放的工业废水进行监测并保存原始监测记录的。

第七十三条 违反本法规定，不正常使用水污染物处理设施，或者未经环境保护主管部门批准拆除、闲置水污染物处理设施的，由县级以上人民政府环境保护主管部门责令限期改正，处应缴纳排污费数额一倍以上三倍以下的罚款。

第七十四条 违反本法规定，排放水污染物超过国家或者地方规定的水污染物排放标准，或者超过重点水污染物排放总量控制指标的，由县级以上人民政府环境保护主管部门按照权限责令限期治理，处应缴纳排污费数额二倍以上五倍以下的罚款。

限期治理期间，由环境保护主管部门责令限制生产、限制排放或者停产整治。限期治理的期限最长不超过一年；逾期未完成治理任务的，报经有批准权的人民政府批准，责令关闭。

第七十五条 在饮用水水源保护区内设置排污口的，由县级以上地方人民政府责令限期拆除，处十万元以上五十万元以下的罚款；逾期不拆除的，强制拆除，所需费用由违法者承担，处五十万元以上一百万元以下的罚款，并可以责令停产整顿。

除前款规定外，违反法律、行政法规和国务院环境保护主管部门的规定设置排污口或者私设暗管的，由县级以上地方人民政府环境保护主管部门责令限期拆除，处二万元以上十万元以下的罚款；逾期不拆除的，强制拆除，所需费用由违法者承担，处十万元以上五十万元以下的罚款；私设暗管或者有其他严重情节的，县级以上地方人民政府环境保护主管部门可以提请县级以上地方人民政府责令停产整顿。

未经水行政主管部门或者流域管理机构同意，在江河、湖泊新建、改建、扩建

排污口的，由县级以上人民政府水行政主管部门或者流域管理机构依据职权，依照前款规定采取措施、给予处罚。

第七十六条 有下列行为之一的，由县级以上地方人民政府环境保护主管部门责令停止违法行为，限期采取治理措施，消除污染，处以罚款；逾期不采取治理措施的，环境保护主管部门可以指定有治理能力的单位代为治理，所需费用由违法者承担：

（一）向水体排放油类、酸液、碱液的；

（二）向水体排放剧毒废液，或者将含有汞、镉、砷、铬、铅、氰化物、黄磷等的可溶性剧毒废渣向水体排放、倾倒或者直接埋入地下的；

（三）在水体清洗装贮过油类、有毒污染物的车辆或者容器的；

（四）向水体排放、倾倒工业废渣、城镇垃圾或者其他废弃物，或者在江河、湖泊、运河、渠道、水库最高水位线以下的滩地、岸坡堆放、存贮固体废弃物或者其他污染物的；

（五）向水体排放、倾倒放射性固体废物或者含有高放射性、中放射性物质的，废水的；

（六）违反国家有关规定或者标准，向水体排放含低放射性物质的废水、热废水或者含病原体的污水的；

（七）利用渗井、渗坑、裂隙或者溶洞排放、倾倒含有毒污染物的废水、含病原体的污水或者其他废弃物的；

（八）利用无防渗漏措施的沟渠、坑塘等输送或者存贮含有毒污染物的废水、含病原体的污水或者其他废弃物的。

有前款第三项、第六项行为之一的，处一万元以上十万元以下的罚款；有前款第一项、第四项、第八项行为之一的，处二万元以上二十万元以下的罚款；有前款第二项、第五项、第七项行为之一的，处五万元以上五十万元以下的罚款。

第七十七条 违反本法规定，生产、销售、进口或者使用列入禁止生产、销售、进口、使用的严重污染水环境的设备名录中的设备，或者采用列入禁止采用的严重污染水环境的工艺名录中的工艺的，由县级以上人民政府经济综合宏观调控部门责令改正，处五万元以上二十万元以下的罚款；情节严重的，由县级以上人民政府经济综合宏观调控部门提出意见，报请本级人民政府责令停业、关闭。

第七十八条 违反本法规定，建设不符合国家产业政策的小型造纸、制革、印染、染料、炼焦、炼硫、炼砷、炼汞、炼油、电镀、农药、石棉、水泥、玻璃、钢铁、火电以及其他严重污染水环境的生产项目的，由所在地的市、县人民政府责令关闭。

第七十九条 船舶未配置相应的防污染设备和器材，或者未持有合法有效的防止水域环境污染的证书与文书的，由海事管理机构、渔业主管部门按照职责分工责令限期改正，处二千元以上二万元以下的罚款；逾期不改正的，责令船舶临时

停航。

船舶进行涉及污染物排放的作业，未遵守操作规程或者未在相应的记录簿上如实记载的，由海事管理机构、渔业主管部门按照职责分工责令改正，处二千元以上二万元以下的罚款。

第八十条 违反本法规定，有下列行为之一的，海事管理机构、渔业主管部门按照职责分工责令停止违法行为，处以罚款；造成水污染的，责令限期采取治理措施，消除污染；逾期不采取治理措施的，海事管理机构、渔业主管部门按照职责分工可以指定有治理能力的单位代为治理，所需费用由船舶承担：

（一）向水体倾倒船舶垃圾或者排放船舶的残油、废油的；

（二）未经作业地海事管理机构批准，船舶进行残油、含油污水、污染危害性货物残留物的接收作业，或者进行装载油类、污染危害性货物船舱的清洗作业，或者进行散装液体污染危害性货物的过驳作业的；

（三）未经作业地海事管理机构批准，进行船舶水上拆解、打捞或者其他水上、水下船舶施工作业的；

（四）未经作业地渔业主管部门批准，在渔港水域进行渔业船舶水上拆解的。

有前款第一项、第二项、第四项行为之一的，处五千元以上五万元以下的罚款；有前款第三项行为的，处一万元以上十万元以下的罚款。

第八十一条 有下列行为之一的，由县级以上地方人民政府环境保护主管部门责令停止违法行为，处十万元以上五十万元以下的罚款；并报经有批准权的人民政府批准，责令拆除或者关闭：

（一）在饮用水水源一级保护区内新建、改建、扩建与供水设施和保护水源无关的建设项目的；

（二）在饮用水水源二级保护区内新建、改建、扩建排放污染物的建设项目的；

（三）在饮用水水源准保护区内新建、扩建对水体污染严重的建设项目，或者改建建设项目增加排污量的。

在饮用水水源一级保护区内从事网箱养殖或者组织进行旅游、垂钓或者其他可能污染饮用水水体的活动的，由县级以上地方人民政府环境保护主管部门责令停止违法行为，处二万元以上十万元以下的罚款。个人在饮用水水源一级保护区内游泳、垂钓或者从事其他可能污染饮用水水体的活动的，由县级以上地方人民政府环境保护主管部门责令停止违法行为，可以处五百元以下的罚款。

第八十二条 企业事业单位有下列行为之一的，县级以上人民政府环境保护主管部门责令改正；情节严重的，处二万元以上十万元以下的罚款：

（一）不按照规定制定水污染事故的应急方案的；

（二）水污染事故发生后，未及时启动水污染事故的应急方案，采取有关应急措施的。

第八十三条 企业事业单位违反本法规定，造成水污染事故的，由县级以上

人民政府环境保护主管部门依照本条第二款的规定处以罚款，责令限期采取治理措施，消除污染；不按要求采取治理措施或者不具备治理能力的，由环境保保护主管部门指定有治理能力的单位代为治理，所需费用由违法者承担；对造成重大或者特大水污染事故的，可以报经有批准权的人民政府批准，责令关闭；对直接负责的主管人员和其他直接责任人员可以处上一年度从本单位取得的收入百分之五十以下的罚款。

对造成一般或者较大水污染事故的，按照水污染事故造成的直接损失的百分之二十计算罚款；对造成重大或者特大水污染事故的，按照水污染事故造成的直接损失的百分之三十计算罚款。

造成渔业污染事故或者渔业船舶造成水污染事故的，由渔业主管部门进行处罚；其他船舶造成水污染事故的，由海事管理机构进行处罚。

第八十四条 当事人对行政处罚决定不服的，可以申请行政复议，也可以在收到通知之日起十五日内向人民法院起诉；期满不申请行政复议或者起诉，又不履行行政处罚决定的，由作出行政处罚决定的机关申请人民法院强制执行。

第八十五条 因水污染受到损害的当事人，有权要求排污方排除危害和赔偿损失。

由于不可抗力造成水污染损害的，排污方不承担赔偿责任；法律另有规定的除外。

水污染损害是由受害人故意造成的，排污方不承担赔偿责任。水污染损害是由受害人重大过失造成的，可以减轻排污方的赔偿责任。

水污染损害是由第三人造成的，排污方承担赔偿责任后，有权向第三人追偿。

第八十六条 因水污染引起的损害赔偿责任和赔偿金额的纠纷，可以根据当事人的请求，由环境保护主管部门或者海事管理机构、渔业主管部门按照职责分工调解处理；调解不成的，当事人可以向人民法院提起诉讼。当事人也可以直接向人民法院提起诉讼。

第八十七条 因水污染引起的损害赔偿诉讼，由排污方就法律规定的免责事由及其行为与损害结果之间不存在因果关系承担举证责任。

第八十八条 因水污染受到损害的当事人人数众多的，可以依法由当事人推选代表人进行共同诉讼。

环境保护主管部门和有关社会团体可以依法支持因水污染受到损害的当事人向人民法院提起诉讼。

国家鼓励法律服务机构和律师为水污染损害诉讼中的受害人提供法律援助。

第八十九条 因水污染引起的损害赔偿责任和赔偿金额的纠纷，当事人可以委托环境监测机构提供监测数据。环境监测机构应当接受委托，如实提供有关监测数据。

第九十条 违反本法规定，构成违反治安管理行为的，依法给予治安管理处

罚;构成犯罪的，依法追究刑事责任。

第八章 附 则

第九十一条 本法中下列用语的含义：

（一）水污染，是指水体因某种物质的介入，而导致其化学、物理、生物或者放射性等方面特性的改变，从而影响水的有效利用，危害人体健康或者破坏生态环境，造成水质恶化的现象。

（二）水污染物，是指直接或者间接向水体排放的，能导致水体污染的物质。

（三）有毒污染物，是指那些直接或者间接被生物摄入体内后，可能导致该生物或者其后代发病、行为反常、遗传异变’、生理机能失常、机体变形或者死亡的污染物。

（四）渔业水体，是指划定的鱼虾类的产卵场、索饵场、越冬场、洄游通道和鱼虾贝藻类的养殖场的水体。

第九十二条 本法自 2008 年 6 月 1 日起施行。

中华人民共和国海关进出境运输工具舱单管理办法

（2008 年 3 月 10 日海关总署署务会议通过，自 2009 年 1 月 1 日起施行）

第一章 总 则

第一条 为了规范海关对进出境运输工具舱单的管理，促进国际贸易便利，保障国际贸易安全，根据《中华人民共和国海关法》（以下简称《海关法》）以及有关法律、行政法规的规定，制定本办法。

第二条 本办法所称进出境运输工具舱单（以下简称舱单）是指反映进出境运输工具所载货物、物品及旅客信息的载体，包括原始舱单、预配舱单、装（乘）载舱单。

进出境运输工具载有货物、物品的，舱单内容应当包括总提（运）单及其项下的分提（运）单信息。

第三条 海关对进出境船舶、航空器、铁路列车以及公路车辆舱单的管理适用本办法。

第四条 进出境运输工具负责人、无船承运业务经营人、货运代理企业、船舶代理企业、邮政企业以及快件经营人等舱单电子数据传输义务人（以下统称“舱单传输人”）应当按照海关备案的范围在规定时限向海关传输舱单电子数据。

海关监管场所经营人、理货部门、出口货物发货人等舱单相关电子数据传输义务人应当在规定时限向海关传输舱单相关电子数据。

对未按照本办法规定传输舱单及相关电子数据的，海关可以暂不予办理运输工具进出境申报手续。

因计算机故障等特殊情况无法向海关传输舱单及相关电子数据的，经海关同意，可以采用纸质形式在规定时限向海关递交有关单证。

第五条 海关以接受原始舱单主要数据传输的时间为进口舱单电子数据传输时间；海关以接受预配舱单主要数据传输的时间为出口舱单电子数据传输的时间。

第六条 舱单传输人、监管场所经营人、理货部门 、出口货物发货人应当向其经营业务所在地直属海关或者经授权的隶属海关备案。

舱单传输人办理备案手续时，应当向海关提交下列文件：

（一）《备案登记表》（附件 1）；

（二）提（运）单和装货单的样本；

（三）企业印章以及相关业务印章的印模；

（四）行政主管部门核发的许可证件或者资格证件的复印件；

（五）海关需要的其他文件。

海关监管场所经营人、理货部门、出口货物发货人办理备案手续时，应当向海关提交上述（一）、（四）、（五）项文件。

提交复印件的，应当同时出示原件供海关验核。

在海关备案的有关内容如果发生改变的，舱单传输人、监管场所经营人、理货部门、出口货物发货人应当持书面申请和有关文件到海关办理备案变更手续。

第七条 舱单传输人可以书面向海关提出为其保守商业秘密的要求，并具体列明需要保密的内容。

海关应当按照国家有关规定承担保密义务，妥善保管舱单传输人及相关义务人提供的涉及商业秘密的资料。

第二章 进境舱单的管理

第八条 原始舱单电子数据传输以前，运输工具负责人应当将运输工具预计抵达境内目的港的时间通知海关。

运输工具抵港以前，运输工具负责人应当将运输工具确切的抵港时间通知海关。

运输．工具抵达设立海关的地点时，运输工具负责人应当向海关进行运输工具抵港申报。

第九条 进境运输工具载有货物、物品的，舱单传输人应当在下列时限向海关传输原始舱单主要数据：

（一）集装箱船舶装船的 24 小时以前，非集装箱船舶抵达境内第一目的港的 24 小时以前；

（二）航程 4 小时以下的，航空器起飞前；航程超过 4 小时的，航空器抵达境内第一目的港的 4 小时以前；

（三）铁路列车抵达境内第一目的站的 2 小时以前；

（四）公路车辆抵达境内第一目的站的 1 小时以前。

舱单传输人应当在进境货物、物品运抵目的港以前向海关传输原始舱单其他数据。

海关接受原始舱单主要数据传输后，收货人、受委托报关企业方可向海关办理货物、物品的申报手续。

第十条 海关发现原始舱单中列有我国禁止进境的货物、物品，可以通知运输工具负责人不得装载进境。

第十一条 进境运输工具载有旅客的，舱单传输人应当在下列时限向海关传输原始舱单电子数据：

（一）船舶抵达境内第一目的港的 2 小时以前；

（二）航程在 1 小时以下的，航空器抵达境内第一目的港的 30 分钟以前；航程在 1 小时至 2 小时的，航空器抵达境内第一目的港的 1 小时以前；航程在 2 小时以上的，航空器抵达境内第一目的港的 2 小时以前；

（三）铁路列车抵达境内第一目的站的 2 小时以前；

（四）公路车辆抵达境内第一目的站的 1 小时以前。

第十二条 海关接受原始舱单主要数据传输后，对决定不准予卸载货物、物品或者下客的，应当以电子数据方式通知舱单传输人，并告知不准予卸载货物、物品或者下客的理由。

海关因故无法以电子数据方式通知的，应当派员实地办理本条第一款规定的相关手续。

第十三条 理货部门或者海关监管场所经营人应当在进境运输工具卸载货物、物品完毕后的 6 小时以内以电子数据方式向海关提交理货报告。

需要二次理货的，经海关同意，可以在进境运输工具卸载货物、物品完毕后的 24 小时以内以电子数据方式向海关提交理货报告。

第十四条 海关应当将原始舱单与理货报告进行核对，对二者不相符的，以电子数据方式通知运输工具负责人。运输工具负责人应当在卸载货物、物品完毕后的 48 小时以内向海关报告不相符的原因。

第十五条 原始舱单中未列名的进境货物、物品，海关可以责令原运输工具负责人直接退运。

第十六条 进境货物、物品需要分拨的，舱单传输人应当以电子数据方式向海关提出分拨货物、物品申请，经海关同意后方可分拨。

分拨货物、物品运抵海关监管场所时，海关监管场所经营人应当以电子数据方式向海关提交分拨货物、物品运抵报告。

在分拨货物、物品拆分完毕后的 2 小时以内，理货部门或者海关监管场所经营人应当以电子数据方式向海关提交分拨货物、物品理货报告。

第十七条 货物、物品需要疏港分流的，海关监管场所经营人应当以电子数据方式向海关提出疏港分流申请，经海关同意后方可疏港分流。

疏港分流完毕后，海关监管场所经营人应当以电子数据方式向海关提交疏港分流货物、物品运抵报告。

第十八条 进口货物、物品和分拨货物、物品提交理货报告后；疏港分流货物、物品提交运抵报告后，海关即可办理货物、物品的查验、放行手续。

第十九条 进境运输工具载有旅客的，运输工具负责人或者海关监管场所经营人应当在进境运输工具下客完毕后 3 小时以内向海关提交进境旅客及其行李物品结关申请，并提供实际下客人数、托运行李物品提取数量以及未运抵行李物品数量。经海关核对无误的，可以办理结关手续；原始舱单与结关申请不相符的，运输工具负责人或者海关监管场所经营人应当在进境运输工具下客完毕后 24 小时以内向海关报告不相符的原因。

运输工具负责人或者海关监管场所经营人应当将无人认领的托运行李物品转交海关处理。

第三章 出境舱单的管理

第二十条 以集装箱运输的货物、物品，出口货物发货人应当在货物、物品装箱以前向海关传输装箱清单电子数据。

第二十一条 出境运输工具预计载有货物、物品的，舱单传输人应当在办理货物、物品申报手续以前向海关传输预配舱单主要数据。

海关接受预配舱单主要数据传输后，舱单传输人应当在下列时限向海关传输预配舱单其他数据：

（一）集装箱船舶装船的 24 小时以前，非集装箱船舶在开始装载货物、物品的 2 小时以前；

（二）航空器在开始装载货物、物品的 4 小时以前；

（三）铁路列车在开始装载货物、物品的 2 小时以前；

（四）公路车辆在开始装载货物、物品的 1 小时以前。

出境运输工具预计载有旅客的，舱单传输人应当在出境旅客开始办理登机（船、车）手续的 1 小时以前向海关传输预配舱单电子数据。

第二十二条 出境货物、物品运抵海关监管场所时，海关监管场所经营人应当以电子数据方式向海关提交运抵报告。

运抵报告提交后，海关即可办理货物、物品的查验、放行手续。

第二十三条 舱单传输人应当在运输工具开始装载货物、物品的 30 分钟以前向海关传输装载舱单电子数据。

装载舱单中所列货物、物品应当已经海关放行。

第二十四条 舱单传输人应当在旅客办理登机（船、车）手续后、运输工具上客以前向海关传输乘载舱单电子数据。

第二十五条 海关接受装（乘）载舱单电子数据传输后，对决定不准予装载货物、物品或者上客的，应当以电子数据方式通知舱单传输人，并告知不准予装载货物、物品或者上客的理由。

海关因故无法以电子数据方式通知的，应当派员实地办理本条第一款规定的相关手续。

第二十六条 运输工具负责人应当在运输工具驶离设立海关的地点的 2 小时以前将驶离时间通知海关。

对临时追加的运输工具，运输工具负责人应当在运输工具驶离设立海关的地点以前将驶离时间通知海关。

第二十七条 运输工具负责人应当在货物、物品装载完毕或者旅客全部登机（船、车）后向海关提交结关申请，经海关办结手续后，出境运输工具方可离境。

第二十八条 出境运输工具驶离装货港的 6 小时以内，海关监管场所经营人或者理货部门应当以电子数据方式向海关提交理货报告。

第二十九条 海关应当将装载舱单与理货报告进行核对，对二者不相符的，以电子数据方式通知运输工具负责人。运输工具负责人应当在装载货物、物品完毕后的 48 小时以内向海关报告不相符的原因。

海关应当将乘载舱单与结关申请进行核对，对二者不相符的，以电子数据方式通知运输工具负责人。运输工具负责人应当在出境运输工具结关完毕后的 24 小时以内向海关报告不相符的原因。

第四章 舱单变更的管理

第三十条 已经传输的舱单电子数据需要变更的，舱单传输人可以在原始舱单和预配舱单规定的传输时限以前直接予以变更，但是货物、物品所有人已经向海关办理货物、物品申报手续的除外。

舱单电子数据传输时间以海关接受舱单电子数据变更的时间为准。

第三十一条 在原始舱单和预配舱单规定的传输时限后，有下列情形之一的，舱单传输人向海关递交舱单变更书面申请，经海关审核同意后，可以进行变更：

（一）货物、物品因不可抗力灭失、短损，造成舱单电子数据不准确的；

（二）装载舱单中所列的出境货物、物品，因装运、配载等原因造成部分或者全部货物、物品退关或者变更运输工具的；

（三）大宗散装货物、集装箱独立箱体内载运的散装货物的溢短装数量在规定范围以内的；

（四）其他客观原因造成传输错误的。

第三十二条 按照本办法第三十七条的规定处理后，需要变更舱单电子数据的，舱单传输人应当按照海关的要求予以变更。

第三十三条 舱单传输人向海关申请变更货物、物品舱单时，应当提交下列文件：

（一）《舱单变更申请表》（见附件 2）；

（二）提（运）单的复印件；

（三）加盖有舱单传输人公章的正确的 , 纸质舱单；

（四）其他能够证明舱单变更合理性的文件。

舱单传输人向海关申请变更旅客舱单时，应当提交上述（一）、（三）、（四）项文件。

提交复印件的，应当同时出示原件供海关验核。

第五章　附　则

第三十四条　本办法下列用语的含义是：

“原始舱单”，是指舱单传输人向海关传输的反映进境运输工具装载货物、物品或者乘载旅客信息的舱单。

“预配舱单”，是指反映出境运输工具预计装载货物、物品或者乘载旅客信息的舱单。

“装（乘）载舱单”，是指反映出境运输工具实际配载货物、物品或者载有旅客信息的舱单。

“提（运）单”，是指用以证明货物、物品运输合同和货物、物品已经由承运人接收或者装载，以及承运人保证据以交付货物、物品的单证。

“总提（运）单”，是指由运输工具负责人、船舶代理企业所签发的提（运）单。

“分提（运）单”，是指在总提（运）单项下，由无船承运业务经营人、货运代理人或者快件经营人等企业所签发的提（运）单。

“运抵报告”，是指进出境货物、物品运抵海关监管场所时，海关监管场所经营人向海关提交的反映货物、物品实际到货情况的记录。

“理货报告”，是指海关监管场所经营人或者理货部门对进出境运输工具所载货物、物品的实际装卸情况予以核对、确认的记录。

“疏港分流”，是指为防止货物、物品积压、阻塞港口，根据港口行政管理部门的决定，将相关货物、物品疏散到其他海关监管场所的行为。

“分拨”，是指海关监管场所经营人将进境货物、物品从一海关监管场所运至另一海关监管场所的行为。

“装箱清单”，是指反映以集装箱运输的出境货物、物品在装箱以前的实际装载信息的单据。

“以上”、“以下”、“以内”，均包括本数在内。

第三十五条　舱单中的提（运）单编号 2 年内不得重复。

自海关接受舱单等电子数据之日起 3 年内，舱单传输人、海关监管场所经营

人、理货部门应当妥善保管纸质舱单、理货报告、运抵报告以及相关账册等资料。

第三十六条 本办法中下列舱单等电子数据的格式，由海关总署另行制定：

（一）原始舱单（包括主要数据和其他数据）；

（二）理货报告；

（三）分拨货物、物品申请；

（四）分拨货物、物品理货报告；

（五）疏港分流申请；

（六）疏港分流货物、物品运抵报告；

（七）装箱清单；

（八）预配舱单（包括主要数据和其他数据）；

（九）运抵报告；

（十）装（乘）载舱单。

第三十七条 违反本办法，构成走私行为、违反海关监管规定行为或者其他违反海关法行为的，由海关依照《海关法》和《中华人民共和国海关行政处罚实施条例》的有关规定予以处理；构成犯罪的，依法追究刑事责任。

第三十八条 本办法由海关总署负责解释。

第三十九条 本办法自 2009 年 1 月 1 日起施行。1999 年 2 月 1 海关总署令第 70 号公布的《中华人民共和国海关舱单电子数据传输管理办法》同时废止。

海域使用管理违法违纪行为处分规定

（2008 年 3 月 27 日监察部、原人事部、财政部、国家海洋局部（局）长办公会议（部务会议）审议通过，自 2008 年 4 月 1 日起施行）

第一条 为了加强海域使用管理，规范海域使用管理活动，提高海域使用管理水平，惩处海域使用管理违法违纪行为，根据《中华人民共和国海域使用管理法》、《中华人民共和国行政监察法》、《中华人民共和国公务员法》、《行政机关公务员处分条例》及其他有关法律、行政法规，制定本规定。

第二条 有海域使用管理违法违纪行为的单位，其负有责任的领导人员和直接责任人员，以及有海域使用管理违法违纪行为的个人，应当承担纪律责任，属于下列人员的（以下统称有关责任人员），由任免机关或者监察机关按照管理权限依法给予处分：

（一）行政机关公务员；

（二）法律、法规授权的具有公共事务管理职能的事业单位中经批准参照《中华人民共和国公务员法》管理的工作人员；

（三）行政机关依法委托的组织中除工勤人员以外的工作人员；

（四）企业、事业单位中由行政机关任命的人员。

法律、行政法规、国务院决定和国务院监察机关、国务院人事部门制定的处分规章对海域使用管理违法违纪行为的处分另有规定的，从其规定。

第三条 有下列行为之一的，对有关责任人员，给予记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分：

（一）拒不执行国家有关海域使用管理的方针政策和海域使用管理法律、法规、规章的；

（二）制定或者实施与国家有关海域使用管理的方针政策和海域使用管理法律、法规、规章相抵触的规定或者措施的。

第四条 违反规定，有下列行为之一的，对有关责任人员，给予记过或者记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分：

（一）干预海域使用审批的；

（二）干预海域使用权招标、拍卖等活动的；

（三）干预海域使用金征收或者减免的；

（四）干预海域使用论证或者评审的；

（五）干预海域使用监督检查或者违法违纪案件查处的；

（六）有其他干预海域使用管理活动行为的。

第五条 有下列行为之一的，对有关责任人员，给予警告或者记过处分；情节较重的，给予记大过或者降级处分；情节严重的，给予撤职处分：

（一）违反法定权限或者法定程序审批项目用海的；

（二）不按照海洋功能区划批准使用海域的；

（三）对含不同用海类型的同一项目用海或者使用相同类型海域的同一项目用海化整为零、分散审批的；

（四）明知海域使用违法案件正在查处，仍颁发涉案海域的海域使用权证书的；

（五）不按照规定的权限、程序、用海项目批准减免海域使用金的；

（六）违反规定办理海域使用权招标、拍卖的。

第六条 有下列行为之一的，对有关责任人员，给予记过或者记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分：

（一）违法修改海洋功能区划确定的海域功能的；

（二）违反海域使用论证资质管理规定，造成不良后果的；

（三）非法阻挠、妨害海域使用权人依法使用海域的。

第七条 在海域使用论证报告评审工作中弄虚作假，造成不良后果的，对有关责任人员，给予记过或者记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分。

第八条 违反规定不收、少收、多收或者缓收海域使用金的，对有关责任人员，给予警告、记过或者记大过处分；情节严重的，给予降级或者撤职处分。

第九条 有下列行为之一的，对有关责任人员，给予记大过处分；情节严重的，给予降级或者撤职处分：

（一）违反规定对法定或者经批准免缴海域使用金的用海项目征收海域使用金的；

（二）颁发《海域使用权证书》，除依法收取海域使用金外，收取管理费或者其他费用的。

第十条 征收海域使用金或者罚款，不使用规定票据的，对有关责任人员，给予降级或者撤职处分；情节严重的，给予开除处分。

第十一条 行政机关截留、挪用海域使用金、罚没款的，对有关责任人员，给予降级处分；情节严重的，给予撤职或者开除处分。

第十二条 行政机关私分或者变相私分海域使用金、罚没款或者其他费用的，对决定私分的责任人员，分别依照下列规定给予处分：

（一）私分或者变相私分不足 5 万元的，给予记过或者记大过处分；

（二）私分或者变相私分 5 万元以上不足 10 万元的，给予降级或者撤职处分；

（三）私分或者变相私分 10 万元以上的，给予开除处分。

第十三条 有下列行为之一的，对有关责任人员，给予记过或者记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分：

（一）利用职务上的便利，侵吞、窃取、骗取或者以其他手段将收缴的罚款、海域使用金或者其他财物据为己有的；

（二）在海域使用管理中，利用职务上的便利，索取他人财物，或者非法收受他人财物为他人谋取利益的。

第十四条 违反规定参与或者从事与海域使用有关的生产经营活动的，对有关责任人员，给予记过或者记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分。

第十五条 海洋行政执法机构及其工作人员有下列行为之一的，对有关责任人员，给予记过或者记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分：

（一）接到违法使用海域行为的举报，不按规定处理，造成不良后果的；

（二）对已查知的正在发生的违法使用海域行为，不及时制止或者不依法进行处理的；

（三）不履行行政执法职责，不按规定进行执法巡查和行政检查，致使严重的违法行为未能发现的。

第十六条 海洋行政执法机构及其工作人员有下列行为之一的，对有关责任人员，给予警告或者记过处分；情节较重的，给予记大过或者降级处分；情节严重的，给予撤职处分：

（一）违反有关案件管辖规定，超越职权范围实施海洋行政处罚的；

（二）在海洋行政处罚中因故意或者重大过失错误认定违法使用海域行为的；

（三）不按照法定条件或者违反法定程序，或者不按照海洋行政处罚种类、幅度实施海洋行政处罚的；

（四）变相罚款或者以其他名目代替罚款的；

（五）违反规定委托海洋行政处罚权的。

第十七条 海域使用论证资质单位及其工作人员有下列行为之一，造成不良后果的，对属于本规定第二条所列人员中的责任人员，给予警告、记过或者记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分：

（一）越级或者超越规定范围承担论证项目的；

（二）在海域使用论证报告中使用虚构或者明显失实的数据资料的；

（三）海域使用论证报告严重失实的；

（四）有其他虚构事实、隐瞒真相行为的。

第十八条 企业、事业单位及其工作人员有下列行为之一的，对属于本规定第二条所列人员中的责任人员，给予警告、记过或者记大过处分；情节较重的，给予降级或者撤职处分；情节严重的，给予开除处分：

（一）未经批准或者骗取批准，非法占用海域的；

（二）海域使用权期满，未办理有关手续仍继续使用海域 ；

（三）骗取减免海域使用金的；

（四）不按期缴纳海域使用金的；

（五）在使用海域期间，未经依法批准，从事海洋基础测绘的；

（六）拒不接受海洋行政主管部门的监督检查、不如实反映情况或者不提供有关资料的。

第十九条 企业、事业单位及其工作人员有下列行为之一的，对属于本规定第二条所列人员中的责任人员，给予警告或者记过处分；情节较重的，给予记大过或者降级处分；情节严重的，给予撤职处分：

（一）擅自改变海域使用用途的；

（二）不按规定转让、出租、抵押海域使用权的；

（三）因单位合并、分立或者与他人合资、合作经营，不按规定变更海域使用权人的；

（四）海域使用权终止，原海域使用权人不按规定拆除用海设施和构筑物的；

（五）拒不支付由海洋行政主管部门委托有关单位拆除用海设施和构筑物所需费用的。

第二十条 受到处分的人员对处分决定不服的，依照《中华人民共和国行政监察法》、《中华人民共和国公务员法》、《行政机关公务员处分条例》等有关规定，可以申请复核或者申诉。

第二十一条 任免机关、监察机关和海洋行政主管部门建立案件移送制度。

任免机关、监察机关查处海域使用管理违法违纪案件，认为应当由海洋行政主管部门给予行政处罚的，应当将有关案件材料移送海洋行政主管部门。海洋行政主管部门应当依法及时查处，并将处理结果书面告知任免机关、监察机关。

海洋行政主管部门查处海域使用管理违法案件，认为应当由任免机关或者监察机关给予处分的，应当及时将有关案件材料移送任免机关或者监察机关。任免机关或者监察机关应当依法及时查处，并将处理结果书面告知海洋行政主管部门。

第二十二条 有海域使用管理违法违纪行为，应当给予党纪处分的，移送党的纪律检查机关处理；涉嫌犯罪的，移送司法机关依法追究刑事责任。

第二十三条 本规定由监察部、人事部、财政部和国家海洋局负责解释。

第二十四条 本规定自 2008 年 4 月 1 日起施行。

最高人民法院关于审理船舶碰撞纠纷案件若干问题的规定

（2008 年 4 月 28 日最高人民法院审判委员会第 1446 次会议通过，自 2008 年 5 月 23 日起施行）

为正确审理船舶碰撞纠纷案件，依照《中华人民共和国民法通则》、《中华人民共和国民事诉讼法》、《中华人民共和国海商法》、《中华人民共和国海事诉讼特别程序法》等法律，制定本规定。

第一条 本规定所称船舶碰撞，是指海商法第一百六十五条所指的船舶碰撞，不包括内河船舶之间的碰撞。

海商法第一百七十条所指的损害事故，适用本规定。

第二条 审理船舶碰撞纠纷案件，依照海商法第八章的规定确定碰撞船舶的赔偿责任。

第三条 因船舶碰撞导致船舶触碰引起的侵权纠纷，依照海商法第八章的规定确定碰撞船舶的赔偿责任。

非因船舶碰撞导致船舶触碰引起的侵权纠纷，依照民法通则的规定确定触碰船舶的赔偿责任，但不影响海商法第八章之外其他规定的适用。

第四条 船舶碰撞产生的赔偿责任由船舶所有人承担，碰撞船舶在光船租赁期间并经依法登记的，由光船承租人承担。

第五条 因船舶碰撞发生的船上人员的人身伤亡属于海商法第一百六十九条第三款规定的第三人的人身伤亡。

第六条 碰撞船舶互有过失造成船载货物损失，船载货物的权利人对承运货物的本船提起违约赔偿之诉，或者对碰撞船舶一方或者双方提起侵权赔偿之诉的，人民法院应当依法予以受理。

第七条 船载货物的权利人因船舶碰撞造成其货物损失向承运货物的本船提起诉讼的，承运船舶可以依照海商法第一百六十九条第二款的规定主张按照过失程度的比例承担赔偿责任。

前款规定不影响承运人和实际承运人援用海商法第四章关于承运人抗辩理由和限制赔偿责任的规定。

第八条 碰撞船舶船载货物权利人或者第三人向碰撞船舶一方或者双方就货

物或其他财产损失提出赔偿请求的，由碰撞船舶方提供证据证明过失程度的比例。无正当理由拒不提供证据的，由碰撞船舶一方承担全部赔偿责任或者由双方承担连带赔偿责任。

前款规定的证据指具有法律效力的判决书、裁定书、调解书和仲裁裁决书。对于碰撞船舶提交的国外的判决书、裁定书、调解书和仲裁裁决书，依照民事诉讼法第二百六十六条和第二百六十七条规定的程序审查。

第九条 因起浮、清除、拆毁由船舶碰撞造成的沉没、遇难、搁浅或被弃船舶及船上货物或者使其无害的费用提出的赔偿请求，责任人不能依照海商法第十一章的规定享受海事赔偿责任限制。

第十条 审理船舶碰撞纠纷案件时，人民法院根据当事人的申请进行证据保全取得的或者向有关部门调查收集的证据，应当在当事人完成举证并出具完成举证说明书后出示。

第十一条 船舶碰撞事故发生后，主管机关依法进行调查取得并经过事故当事人和有关人员确认的碰撞事实调查材料，可以作为人民法院认定案件事实的证据，但有相反证据足以推翻的除外。

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*，以下简称《评论》)是全国性的海洋法领域优秀学术著述的汇辑，着重研究与海洋相关的法律与政策，秉承“海纳百川，有容乃大”的精神，力求吸取国内外该领域的一切先进成果。同时在现有法学学科划分的基础上，打破学科藩篱，将视野拓展到一切关于海洋的法学理论、司法实践以及法律运作实务。本刊对于理论探索与实证究并重，以期推动海洋相关法律科学的发展，为各位专家学者提供学术研究和交流的平台。

《评论》由厦门大学法学院以及厦门大学海洋政策与法律中心（Xiamen University Center for Oceans Policy and Law, XMU-COPL）主办，由（香港）中国评论文化有限公司出版，每年两期。为此，热忱欢迎各位学界同仁及实务界人士不吝赐稿，并立稿约如下：

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《中国海洋法学评论》编辑部编订

On "Historic Rights" under the Law of the Sea

GUO Yuan*

Abstract: "Historic rights" is among the basic topics in the study of international law of the sea. In combination with results from previous juridical studies, the international law of the sea, international law cases and a relevant theoretical framework of political science, this paper analyzes the connotation and substance of "historic rights". By reviewing several important international law cases, it explores contents relevant to "historic rights" contained in such cases and their implications in real life. Grounded in the research propositions described above, this paper furthers its discussion on how to exercise "historic rights" and other relevant issues.

Key Words: "Historic rights"; International law of the sea; Maritime law practice; Political power

The principle of "historic rights" is critical to the acquisition of territory. However, a precise definition of the concept is still absent from our current international law. The application of the principle is based on international customary law. During the evolvement of the international law of the sea, neither the 1958 Convention on the Territorial Sea and the Contiguous Zone, nor the 1982 United Nations Convention on the Law of the Sea (UNCLOS) deals with the issue of "historic rights". It is generally recognized that there are two contradictory views on the principle of historic rights in today's academia: the first argues that they are exclusive with full sovereignty (such as historic waters and historic bays), while the second claims that they are nonexclusive without full sovereignty (such as historic

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fishing rights in the high seas).[1] Yet, what both views have in common is that they both target specific marine and ocean space. Based on the international law of the sea, international law cases and the relevant theory of political science, this paper examines the connotation and nature of "historic rights" as well as other matters related to it, which will contribute to the protection of China's maritime rights and interests.

I. Analysis of the Connotation of "Historic Rights"

The three legal terms, "historic rights", "historic bays" and "historic waters", are not synonymous in the international law and have different connotations and denotations as well as different legal applications. We will first discuss the legal content related to "historic waters" and "historic bays".

The concepts of "historic waters" and "historic bays" have not been clearly defined under international law. As such, they are understood in accordance with customary laws. There seems to be a fairly general agreement that three factors have to be taken into consideration in determining whether a State has acquired a title to some "historic waters": effective exercise of sovereignty, prolonged usage and the toleration of other States.[2] The research paper Juridical Regime of Historic Waters, Including Historic Bays, submitted by the International Law Commission to the UN Secretariat on 9 March 1962, proposed that three conditions should be met for a State to claim historic waters: (1) the exercise of rights over the area by the State claiming the historic right; (2) such exercise of rights must have continued for a considerable time; indeed, it must have developed into a usage; (3) the attitude of foreign States, i.e. the acquiescence of other States.[3] Some scholars assert that the rights over "historic waters" is exclusive and the claimant State may treat them as internal or territorial waters. In light of the practice of the international community, "historic bays" are obviously enclosed in "historic waters".

A bay is a well-marked indentation having a penetration into the land. An indentation shall be regarded as a bay only when its area is as large as, or larger

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1 Zou Keyuan, Historic Right in International Law and in China's Practice, *Ocean Development and International Law*, Vol. 32, No. 2, 2001, p. 160.

2 Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea*, The Hague: Martinus Nijhoff Publishers, 1998, pp. 68~69.

3 Liu Nanlai, *International Law of the Sea*, Beijing: China Ocean Press, 1986, p. 19. (in Chinese)

than that of the semi-circle whose diameter is a line drawn across the mouth of that indentation. In terms of legal status bays may be divided into inland and non-inland bays. Pursuant to the UNCLOS, if the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters. Therefore, the bay shall be regarded as an inland bay. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner only the waters within the baseline shall be considered as internal waters. Such a bay shall be deemed as a non-inland bay. However, the foregoing provisions in the UNCLOS shall not apply to historic bays, which are an exception to the standard of determining the inland bays by breadth of bay mouth.

"Historic bays" refers to the bays, the coasts of which belong to a single State, the bays which the coastal State enjoys historic rights to and have always been recognized as internal seas, even though the mouths of such bays are more than twice the breadth of the territorial sea. The coastal State enjoys full sovereign rights to such bays.[4] The juridical regime of the historic bays has been in place for decades. The *North Atlantic Coast Fisheries Cas*e 1910, where the doctrine of historic bays was initially raised, focused on solving the question: from where one must measure the three nautical miles of every bay on the North Atlantic coast? In this case it is determined that the following two conditions should be satisfied in order to acquire the general recognition of historic bays: (1) the coastal State has exercised sovereignty over such bays as internal waters for a long period of time; (2) other States recognize, expressively or implicitly, such control. However, no unified international law rules have been established concerning the legal status of the bays of which coasts belong to two or more States.

In international practice and treaties, the justification for the concept of "historic bays" made by scholars is that: (1) the control of the bays penetrating into the land of a State is conducive to the State's territorial integrity; (2) bays penetrating into the land of a State have played or will play a more important role in protecting national security and economic interest of a State than the generally wide and

4 Wei Min ed., *Oceans Law*, Beijing: Law Press China, 1987, p. 45. (in Chinese)

straight coast;[5] (3) the coastal State has effectively controlled the bays for a long time, thus creating a close and crucial interest relationship between the coastal State and the bays; and (4) the coastal State's exercise of sovereign rights, which is clear, effective and continuous over a substantial period of time, is acquiesced or not opposed by the community of States.[6]

This theoretical framework shows that historic waters are the waters over which the coastal State has sovereign rights, confirmed by the other States' acquiescence of the coastal State's exercise of such rights deriving its force from history. Such waters include historic bays and internal straits. The latter refers to the straits within the territorial sea baseline of a State which, like the other waters within the baseline, constitute parts of the internal waters of the State. Such a State enjoys the complete and exclusive sovereignty over the internal straits with its juridical regime stipulated by its domestic legislation. The passage of foreign vessels through such straits may be denied by the coastal State and the foreign vessels shall not proceed to such straits without the consent of the coastal State. Internal straits indicate the confirmation of a State's historic right to such waters under the international law.

Analyzing the two concepts of historic waters and bays, we can find that the term of historic waters (enclosing historic bays) is a broader one. The "bays" are only the parts of sea between the two capes that indent into the land and which are surrounded by land on three sides and by ocean on one side. In the UNCLOS they are referred to as having a "well-marked indentation". "Historic waters" nevertheless, may be any waters in the maritime area of a coastal State. Both are considered as internal waters of a coastal State in nature, hence the coastal State has full and exclusive sovereignty over them. Historic bays are among the most important forms of historic waters, and thus are of most relevance to historic right. "Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelago and the water area lying between an archipelago and the neighboring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies."[7]

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5 M. N. Lazarev, translated by Wu Yunqi, Liu Nanlai and Wang Keju, *Modern International Law of the Sea*, Tianjin: Tianjin People's Publishing House, 1981, pp. 84~85. (in Chinese)

6 Leo J. Bouchez, *The Regime of Bays in International Law*, Leyden: Sythoff, 1964, p. 281.

7 Zou Keyuan, Historic Rights in International Law, in Zhong Tianxiang et al eds., *Selection of Domestic and Foreign Essays on the South China Sea*, Haikou: Hainan Research Center, 2001, p. 127. (in Chinese)

The term of "historic waters" has a wider scope than that of historic maritime area. The doctrine of historic waters has its fixed implications and connotations, and certain conditions should be fulfilled to constitute such waters. First, according to decisions made by the International Court of Justice (ICJ) in various cases, "historic waters", in a legal sense and in light of its connotations, are considered to be internal waters due to the presence of historic right. In addition, a relevant research report prepared by the UN Secretariat pointed out that "historic waters" may also constitute "internal waters" or "territorial sea". That is because the nature of "historic waters" depends on the extent to which the relevant State *de facto* exercises sovereignty over such waters.[8] For example, waters should be considered territorial waters if the relevant State permits the innocent passage of foreign ships through such waters. In contrast, the waters shall be internal waters if the State prohibits foreign ships from entering such waters without its prior consent. Second, there are three constituent elements of historical right under customary international law, namely the right exercised over the area by the State claiming it as "historic waters"; the continuity of such exercise of right; and the acquiescence of foreign States.[9] The burden of proof lies upon the State claiming title to "historic waters" if any disputes over such waters have risen in the international community.[10] It is obvious that the substance of historic waters is the historic rights exercised by a State in certain waters (including maritime area and archipelagic waters).

The term "historic rights" denotes the possession by a State, over certain land or maritime areas, of rights that would not normally accrue to it under the general rules of international law, such rights having been acquired by that State through a process of historical consolidation. The international jurist Yehuda Z. Blum observes that "[h]istoric rights are a product of a lengthy process comprising a long series of acts, omissions and patterns of behavior, which, in their entirety, and through their cumulative effect, bring such rights into being and consolidate

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8 UN Secretariat, Judicial Regime of Historic Waters, Including Historic Bays, Doc. A/CN. 4/143 (March 9, 1962).

9 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 2nd ed., revised and enlarged, Manchester: Manchester University Press, 1988, p. 36; Gary Knight and H. Chiu, *The International Law of the Sea: Cases, Documents, and Readings*, Florida: UNIFO Publishers, Inc., 1991, p. 118; L. J. Bouchez, *The Regime of Bays in International Law*, The Hague: Nartinus Nijhoff, 1964, p. 281.

10 UN Secretariat, Memorandum on Historic Bays, Preparatory Doc. No. 1, Doc. A/CNF.13/1 (Sept. 30, 1957), pp. 164~166.

them into rights valid in international law."[11] In international practice, the concept of "historic rights" is generally used as equivalent to "historic title". A State that makes claims on the basis of historic rights is pursuing sovereignty or ownership.

The issue of historic rights is not only relevant to international law but to history and politics as well. It is the argument of this paper that the following key elements are involved therein.

(1) Historical factors.[12] The study of historical basis for a State to claim "historic rights" should, in view of the natural development process of the ownership of the maritime area in history, be accompanied by an analysis and study of the history, figures and events associated with the maritime area under the international law and historical conditions at that time. Furthermore, this analysis should take into consideration the history, figures and events associated with such maritime area as part of the development process of the ownership of the area in history. One should view it as a unified, interrelated and organic whole, thus enabling an understanding of cause and effect but also of the development tendency of the maritime area issue in the context of historical evolution. "The historical basis *per se* ascertained by sufficient, systematic, objective, serious historical research is a basis to claim territorial sovereignty on the one hand, and provides powerful guarantee to juridical studies on the other hand".[13] In other words, "studying history as a highly complicated and contradictory process but a unified one nonetheless that has its own rules."[14] This attitude and process are indicative of the respect for historical facts and a deep understanding of current problems.

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11 Zou Keyuan, Historic Rights in International Law, in Zhong Tianxiang et al eds., *Selection of Domestic and Foreign Essays on the South China Sea*, Haikou: Hainan Research Center, 2001, p. 126. (in Chinese)

12 The English interpretation for the term "historical" is "based on or true to the facts of history", and "history" is defined as (A) an account of past facts and events affecting one or more nations or people, arranged in the order of their occurrence; (B) past facts or events in general, concerning some person, thing, nation. The paper construes "history" as past facts, events and process affecting one or more nations or people and the account of such events and process.

13 Mu Shui, A Remarkable Work of Research on China's South China Sea Coastal Areas and Territorial Seas: A Commentary on Research on China's South China Sea Coastal Areas and Territorial Seas, *China's Borderland History and Geography Studies*, No. 2, 2002. (in Chinese)

14 *Selected Works of Lenin*, Vol. 2, Beijing: People's Publishing House, 1995, p. 586. (in Chinese)

(2) Political factors, namely the concept of "rights"[15]. There are two basic constituent elements of rights: one is interest, the other is due and reserved. The contents of rights are of relevance to conventional and legal rights, etc.[16] Before the 18th and 19th centuries, the occupation of certain maritime area or land by a State or nation was based on customary law, such as preoccupancy and discovery. A due demand or claim to territory should be made on the basis of rights stemming from historical facts in respect of dwelling, production and living. Only through these elements can any "rights" to coastal areas and territorial seas be acquired. In fact, at that time the international community's recognition or acquiescence to a State's jurisdiction over a certain maritime area was a dispensable factor in determining whether a State's act was justified or not. Only the justified marine rights are valid, which provide a State with grounds to protect its marine territory by enforcing potential coercive measures.

(3) The attitude of the international community: the international community's recognition or acquiescence of the coastal State's exercise of historic rights. The content of "historic rights" has run through the doctrine of "historic bays" and "historic waters". B. N. Nechaev, a scholar from the former Soviet Union, holds that "State exercising rights over certain waters for a long time without any objections from the majority of other States to any area of such waters being proclaimed as historic waters" is an element unique to historic waters.[17] U.S. Department of State, in a document entitled "US Position on Historic Bays" on 17 September 1923 states: "in order to meet the international standards to make such a claim, the State must declare that (1) the coastal State's exercise of right over such bays is open, well-known and effective; (2) the exercise of such right is continuous; and (3) the exercise of such right is acquiescent by the foreign States".[18]

II. International Law Practice in Connection with "Historic Rights" and Its Implications

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15 The term "rights" is defined as (A) that which is correct; that which accords with truth, justice, propriety, virtue; (B) that to which one has a moral or legal claim, interest or ownership. The paper holds that it contains the following aspects: one is legitimacy and justice, and the other is qualifications in terms of legal or moral claim or interest.

16 Bei Yue, Thoughts on Obligations and Rights, *Legal Science*, No. 8, 1994. (in Chinese)

17 Pan Shiying, *Spratly Islands, Petropolitics and International Law*, Hong Kong: Hong Kong Economic Herald Press, 1996, p. 48. (in Chinese)

18 Gary Knight, *The Law of the Sea: Cases, Documents and Readings*, Baton Rouge LA: Claitor's Law Books & Publishing Division, 1980, pp. 5~9.

With the growing maritime practice of each country and the rise of cases over maritime boundary delimitation among countries in relation to "historic rights", the tendency to settle such cases based on the principle of equity becomes widely accepted by the international community. Applying this knowledge to particular international cases of our own selection, can undoubtedly facilitate a better understanding of the notion of "historic rights". Furthermore, it will also shed more light on our research.

A. The Anglo French Continental Shelf Arbitration (1977)

This international case is of relevance to historic rights in many concrete aspects. During the years from 1970 to 1974, the French Republic negotiated with the United Kingdom of Great Britain (United Kingdom) in respect to the continental shelf delimitation of the Channel Islands and Atlantic region, of which Channel Islands was one of the focuses both parties disputed over.[19] After such negotiations failed, the two States agreed to submit the case to the Court of Arbitration in 1975.

During the arbitration, the French Republic insisted that "geographically, the specific character of the problem is represented by the French Republic as arising from the mere fact of the British archipelago of the Channel Islands being situated within a rectangular bay of the French coast and only a few nautical miles distant from […] according to the scientific evidence: 'the Channel Islands are, without any possible ambiguity, an integral part of the armorican area and are included, without any possible gap, in the French hercynien shelf'".[20] The Channel Islands were separated from the mainland of the United Kingdom therefore, "the specific character, legally, of the Channel Islands is said to lie first in their close contiguity to the mainland of France […] to be their detachment from the land mass of the United Kingdom, which distinguishes their legal status from that of coastal islands belonging to the State to the coast of which they are adjacent."[21]

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19 The Channel Islands are 150 km away from the mainland of United Kingdom and only less than 30 km away from the French mainland, but the responsibility for the foreign relations and defense of the Channel Islands rests with the United Kingdom. Concerning the question of continental shelf, the government of the United Kingdom is an authority responsible for all foreign relations.

20 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: China Ocean Press, 1989, p. 141. (in Chinese)

21 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: China Ocean Press, 1989, p. 142. (in Chinese)

In contrast, the United Kingdom contended that the Channel Islands "have for several hundred years been direct dependencies of the Crown; they have their own legislative assemblies, fiscal and legal systems, courts of law and systems of local administration, as well as their own coinage and postal service". In this region "it is not just a question of the continental shelf boundary between the United Kingdom and France, but also, as the very terms of the Arbitration Agreement make clear, it is a question of the Channel Islands boundary with France".[22]

The Court, after investigation, pointed out that the Channel Islands "are direct dependencies of the British Crown, and have been so for several hundred years",[23] and responsibility for the foreign relations of the Channel Islands indisputably rested with the United Kingdom. As between the United Kingdom and the French Republic, the Court believed that it must treat the Channel Islands only as islands of the United Kingdom, not as semi-independent States entitled in their own right to their own continental shelf vis-à-vis the French Republic. "The legal framework within which the Court must decide the course of the boundary (or boundaries) in the Channel Islands region is, therefore, that of two opposite States one of which possesses island territories close to the coast of the other State."[24] The Court of Arbitration eventually decided to use two different juridical regimes to settle the issue of the delimitation of the continental shelf between France and the United Kingdom. Specifically, customary law was applied to the Channel Islands region but at the same time it was required that equitable principles should also be respected in the drawing of boundaries when applying the principle of natural prolongation of territory;[25] Article 6 of the Continental Shelf Convention 1958 should be applicable to the Atlantic region, i.e. to draw a median line. The Court pointed out that this distinction was made not based on any legal theory but on historical and geographical elements, etc. It emphasized in Article 191 of the Decisions: "it is clear both from the insertion of the 'special circumstances'

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22 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: China Ocean Press, 1989, p. 147. (in Chinese)

23 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: China Ocean Press, 1989, p. 152. (in Chinese)

24 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: China Ocean Press, 1989, p. 153. (in Chinese)

25 The Court supported the contention of the United Kingdom that natural prolongation is also applicable to islands, holding that the Channel Islands are part of the English Channel. Therefore, when drawing the limits of continental shelves, the region shall be put under the context of the whole maritime zone, where both the historic facts and the international law shall be considered.

provision in Article 6 [of the Continental Shelf Convention] and from the emphasis on 'equitable principles' in customary law that the force of the cardinal principle of 'natural prolongation of territory' is not absolute, it may be subject to qualification in particular situations."[26] The use of "special circumstances" and "particular situations" in only one sentence of the Decisions sufficiently illustrated that "historic rights", being a historic fact which shall be respected in delimitation, should be taken into account in maritime boundary delimitation.

It can be observed from this case that France contended that the Channel Islands should belong to France due to security considerations, as they were closer to its territory but further away from the land mass of the United Kingdom. Geographically, the Channel Islands were adjacent to France, which, however, cannot be served as the legal basis for France's occupation of the Channel Islands. In the *Island of Palmas Case*, the arbitrator Max Huber pointed out clearly that mere proximity was not an adequate claim to land, and the United States cannot hold that the Island of Palmas was ceded to it along with the Philippine Islands just for the reason that the island was close to the Philippines. "In any case, there is no rule establishing *ipso jure* the presumption of sovereignty in favor of a particular State merely by virtue of the contiguity of the State to the territory in question."[27] In the *Case of Western Sahara* 1975, Morocco claimed sovereignty over Western Sahara in light of the geographical consistency between Western Sahara and Morocco. Denying the claim made by Morocco, ICJ stated that no State was entitled to claim sovereignty over the islands which were contiguous to the coast of the State itself but belonged to other States. France's claim for sovereignty over Channel Islands based on the proximity principle was short of legal grounds; while the United Kingdom's claim based on historic rights was well-grounded legally.

B. 1982 Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)

This case is of most relevance to "historic rights". Since the 1960s, the Republic of Tunisia (Tunisia) and the Socialist People's Libyan Arab Jamahiriya (Libya) have explored and exploited the petroleum in the area of the Mediterranean

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26 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: Maritime Press, 1989, p. 155. (in Chinese)

27 Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia*, Singapore, Oxford: Oxford University, 1987, p. 141.

continental shelf appertaining to each State respectively, and have granted certain permits for petroleum exploration. The two States decided to submit their dispute over the continental shelf to the ICJ because conflicts have arisen between the two over the claims to rights within the continental shelf of each State. The ICJ was requested by the two States to render its Judgment in the following matter: what were the principles and rules of international law which may be applied for the delimitation of this continental shelf and, in rendering its decision, to take account of equitable principles and the relevant circumstances which characterized the area, as well as the recent trends admitted at the Third United Nations Conference on the Law of the Sea. The ICJ noted that Tunisia stressed its historic rights in three ways: in the first place, the delimitation must not, at any point, encroach upon the area within which Tunisia possessed well-established historic rights (the principal contention of Tunisia); secondly, the ZV 45° line, advanced as a maritime boundary, was based upon legislation and practice in connection with the exercise of those rights within an area defined by that line; and thirdly, the rights in respect of the fixed fisheries for the capture of migratory fish stocks, were relied on as justification for the drawing of straight baselines for measurement of territorial waters.

ICJ made its decision in 1982 after several trials and made important remarks on the historic rights proclaimed by Tunisia. It found that "the historic rights claimed by Tunisia derive from the long-established interests and activities of its population in exploiting the fisheries of the bed and waters of the Mediterranean off its coasts."[28] The court also claimed that "the question of Tunisia's historic rights may be relevant for the decision in the present case in a number of ways",[29] and "it is only if the method of delimitation which the Court finds to be appropriate is such that it will or may encroach upon the historic rights area that the Court will have to determine the validity and scope of those rights, and their opposability to Libya, in the context of a delimitation of the continental shelf".[30] The Court has found this Judgment has concerned itself with other questions relating to the general legal regime of the continental shelf such as the Tunisian claim to "historic rights" and

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28 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series, Beijing*: China Ocean Press, 1989, p. 269. (in Chinese)

29 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series, Beijing*: China Ocean Press, 1989, p. 272. (in Chinese)

30 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series, Beijing*: China Ocean Press, 1989, p. 272. (in Chinese)

"fishing zones".[31]

In order to illustrate the status and role of historic rights, ICJ described the formation and evolution of historic rights in the Judgment. It pointed out that when the 1958 Conference on the Law of the Sea had occasion to consider the matter, it adopted a resolution entitled "Régime of historic waters", which was annexed to the Final Act, requesting the General Assembly to arrange for a study of the topic. In 1959, the Assembly adopted a resolution requesting the International Law Commission to take up the study of the juridical regime of "historic waters", including historic bays. The International Law Commission has not yet done so. Nor did the draft convention of the Third Conference on the Law of the Sea contain any detailed provisions on the regime of "historic waters": there was neither a definition of the concept nor an elaboration of the juridical regime of "historic waters" or "historic bays". There were, however, references to "historic bays", "historic titles" or "historic reasons" in a way amounting to a reservation to the rules set forth therein.

ICJ emphasized in its Judgment that historic rights must enjoy respect and "be preserved as they have always been by long usage". "It seems clear that the matter continues to be governed by general international law which does not provide for a single regime for 'historic waters' or 'historic bays', but only for a particular regime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'. It is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal regimes in customary international law. The first regime is based on acquisition and occupation, while the second is based on the existence of rights '*ipso facto* and *ab initio*'. No doubt both may sometimes coincide in part or in whole, but such coincidence can only be fortuitous, as in the case of Tunisia where the fishing areas cover the access to its continental shelf, though only as far as they go. While it may be that Tunisia's historic rights and titles are more nearly related to the concept of exclusive economic zone, which may be regarded as part of modern international law, Tunisia has not chosen to base its claims upon that concept."[32]

The reasonableness of Tunisia's certain claims to historic rights gives Tunisia an advantage when negotiating with the interested States. In the view of ICJ, the

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31 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series, Beijing*: China Ocean Press, 1989, p. 287. (in Chinese)

32 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: China Ocean Press, 1989, p. 270. (in Chinese)

delimitation of Tunisia's and Libya's exclusive economic zone would perhaps have been relevant for the historic rights, but not for the purpose of delimiting their continental shelf. As concluded by one expert of international law, "Tunisia could not unilaterally claim the whole area over which her 'historic rights' extended as part of her exclusive economic zone", but "Tunisia's 'historic rights' could operate as an important factor when negotiating delimitation agreements with the interested States".[33]

C. The Rights Canada Claimed in Arctic Waters in 1973

The Arctic region consists of a vast area in the north of the Arctic Circle, which is surrounded by Canada, Denmark, Finland, Iceland, Norway, Sweden, Russia and the United States. Being rich in fishery and mineral resources and possessing an important geographical location, the Arctic has been increasingly valued by various countries. Therefore, Canada, Denmark, Norway, Russia and the United States have made their respective claims to the sovereignty over the Arctic one by one. In 1973, the Canadian Department of Foreign Affairs made a statement declaring that waters of the Arctic Archipelago "are internal waters of Canada, on a historical basis". Though covered by ice at present, the passage in the Arctic waters was a "domestic route" of Canada, thus fell under full Canadian sovereignty. The assertions by Canada have been challenged by many countries. In the sovereignty disputes over the Arctic, Canada and Denmark complained about each other the most. In accordance with relevant treaties, the boundary between Canada and Denmark was drawn as between Greenland and Ellesmere Island in 1973. Hans Island, situated in the north of Greenland and between Denmark's Greenland and Canada's Ellesmere Island, was a small, uninhabited barren knoll covered with ice and snow all year round. Denmark and Canada have always asserted their respective sovereignty over the island and disputed over that continuously, the main reason being that the island is in connection with the opening of routes in the Arctic region and exploration and exploitation of oil resources.[34]

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33 Zou Keyuan, Historic Rights in International Law, in Zhong Tianxiang et al eds., *Selection of Domestic and Foreign Essays on the South China Sea*, Haikou: Hainan Research Center, 2001, p. 133. (in Chinese)

34 Denmark and Canada, Both Their Governments and Their Nationals, Are Contending for Hans Island, an Unhabituated Island in the Arctic, at http://news.xinhuanet.com/world/2005-08/11/content_3338136.htm, 11 August 2005. (in Chinese)

In a letter dated December 1973, the Canadian Department of Foreign Affairs pointed out that "Canada also claims that the waters of the Canadian Arctic Archipelago are internal waters of Canada, on a historical basis, although they have not been declared as such in any treaty or by any legislation."[35] In order to support this contention, Canadian scholars provided the following evidences in order to illustrate Canada's historic title to the Arctic waters: as early as 1880, even before the United Kingdom transferred the land and territory it occupied in North America to Canada, the United Kingdom's influence had actually reached the Canadian Arctic Archipelago waters. After the transfer, Canada immediately engaged in regular exploration of the Arctic region so as to strengthen and consolidate its title to the Arctic Archipelago and its control over the waters therein, which constituted historic rights. After World War I Canada exercised jurisdiction over U.S. ships that proceeded to the Arctic region for supplies, which was not challenged by the United Stated. This is sufficient to prove that Canada has satisfied the two conditions to claim historic rights over the Arctic waters: exercise of jurisdiction over such waters for a considerable time and the acquiescence of the other States. In recent years, Canada kept enlarging its military presence in the Arctic Archipelago to assert its historic rights in this region.[36]

The above-mentioned cases facilitate our understanding of the role and meaning of historic rights. First, historic rights are conducive to a State's claiming of territorial sovereignty, therefore qualifying its government to conduct activities in the relevant sea and land areas, and requiring that its interests be respected and recognized by the international community. In the *Tunisia/Libya Case*, the historic rights claimed by Tunisia derived from the long-established interests and activities of its population in exploiting the fisheries of the sea bed and waters of the Mediterranean off its coasts. In more detail, it refered to the exploitation of the shallow inshore banks for fixed fisheries for the catching of swimming species, and of the deeper banks for the collection of sedentary species, namely sponges. The antiquity of this exploitation, and the continuous exercise both of proprietary rights by the inhabitants of Tunisia over the fixed fisheries, and of rights of surveillance and control, amounting to the exercise of sovereign rights, by the Tunisian authorities, over the fisheries of both kinds, coupled with at least the tacit

35 Donat Pharand, *Canada's Arctic Waters in International Law*, Cambridge: Cambridge University Press, 1988, pp. 107~110.

36 Ni Jita, Canada Dispatched Warships to the Arctic Region as the Neighboring Countries Are Contending for the Region, *Global Times*, 26 August 2005, p. 4. (in Chinese)

toleration and recognition thereof by third States, have resulted in the acquisition by Tunisia of historic rights over a substantial area of sea-bed. In this connection, the ICJ states that "the next important feature, relevant for the delimitation, which the Court must examine is the existence of an area off the coasts of Tunisia over which it claims historic rights deriving from long-established fishing activities."[37] The claimed historic fishing rights over sendentary species were not disputable. Even the contestant State Libya recognized those rights: "[e]vidence of the general recognition of Tunisian proprietary rights and ancillary rights to protection and control over the sedentary species asserted is not the issue. For the fact is that such rights existed."[38] On the other hand, it should be stressed that such historic rights did not exclude foreigners from the exploitation of sponge and octopus fisheries.

Second, historic rights only qualify a sovereign State to effect national interests in certain maritime and land areas, but are not the national interest itself, which should be recognized or tacitly approved by the international community. "A potential conceptual premise for all delimitation disputes is the existence of a region over which each country can claim for rights. If a State claims historic rights to part of a certain area, its historic rights cannot be recognized until another country accepts this assertion. This is an issue concerning estoppel and acquiescence." [39] Canada's assertion of historic rights to the Artic Archipelago waters is challenged by other countries, especially Denmark, which makes it fairly difficult for Canada to pursue its national interests. "The delimitation of sea areas has always had an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its national law. Although it is true that the act of delimitation is necessarily a unilateral act because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."[40] Historic rights, therefore, are just a tool used by States to pursue their interests through political and economic activities. A

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37 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: China Ocean Press, 1989, p. 268. (in Chinese)

38 Zou Keyuan, Historic Rights in International Law, in Zhong Tianxiang et al eds., *Selection of Domestic and Foreign Essays on the South China Sea*, Haikou: Hainan Research Center, 2001, p. 131. (in Chinese)

39 Malcolm D. Evans, translated by Zhong Tianxiang, proofread by Wu Shicun, *Relevant Circumstances and Maritime Delimitation*, Haikou: China South China Sea Institute, December 2005, p. 331. (in Chinese)

40 Xu Sen'an ed., *International Maritime Boundary Delimitation Treaty Series*, Beijing: China Ocean Press, 1989, pp. 263~264 (in Chinese)

State's historic rights does not mean that the State has realized its own interests in its activities. However, if a State does not have historic rights to a certain territory, then the State would never realize its own interest in such territory (other than high seas).

Third, in accordance with modern international law, continuous and effective jurisdiction over an area continuously for a long time without any disputes is an important basis to claim territorial sovereignty. Especially in the case of territorial disputes left settled in history, effective jurisdiction constitutes the legal grounds to support the claims for absolute territorial sovereignty. The way the government of the United Kingdom administrates and exercises sovereignty over the Channel Islands is dependent on the concrete historical and natural conditions at that time. With regards to acquisition of territory the international judicial practice indicates that the fact that nationals of a State live and conduct any economic activities in a certain area is decisive in determining to which State such an area belongs.[41] For instance, in *Minquiers and Ecrehos Case* 1953, the ICJ was of the opinion that the fact that Englishmen had lived on these islands for generations was the evidence that the sovereignty over such islands belongs to the United Kingdom.[42] In the *Rann of Kutch Arbitration (Indo-Pakistan Western Boundary)* 1968, the arbitrator awarded the two pastures which had been inhabited by the Pakistani for more than a century, to Pakistan.

Fourth, concerning the maritime delimitation and territorial delineation, ICJ has considered the historic rights of each party to some extent in the relevant cases or during negotiations between countries, especially when any vital economic interests of the countries concerned are involved. Apart from the cases listed above, in the *Fisheries Jurisdiction Case (United Kingdom V. Iceland)*, the priorities of the coastal States, especially their fishing activities have come into ICJ's notice. In the *Case between the Libyan Arab Jamahiriya and Malta*, ICJ held that the economic dependence of all inhabitants living along the coast was crucial in settling the dispute over the scope of the fishing ground. During the negotiations on the boundaries of the countries concerned, traditional economic interests were central to negotiations, and the final formulation of laws has taken historic rights into account. For instance, the Beibu Bay is a traditional fishing ground where the

41 Huang Delin, On Philippines' Claims over Some Islands of China's Nansha Archipelago, *Legal Review*, No. 6, 2002. (in Chinese)

42 Wang Keju, China has Sovereignty over Spratly Islands – Also on Vietnam's Contradictory Acts on Spratly Islands Issues, *Chinese Journal of Law*, No. 2, 1990. (in Chinese)

fishermen in Guangxi, Guangdong and Hainan Provinces of China operate. China enjoys historic rights in this Bay. The boundary delimitation in Beibu Bay between China and Vietnam directly affects the allocation and utilization of fishery resources as well as the actual interests of the fishermen. Thus, since the very beginning of negotiations, the Chinese government had striven to protect the legitimate rights and interests of Chinese fishermen. The Chinese side proposed clearly that the fishing problems should be duly solved simultaneously with the issue of delimitation, that the Agreement on Fishery Cooperation should be signed and come into force together with the Agreement on Maritime Boundary Delimitation. With regards to the fishing catch, both parties agreed to establish a Common Fishery Zone in an area south of 20˚N for a term of 12 years. The allowable catch would be annually determined by the government authorities of each party, which would then be allocated among the fishing vessels approved by the two parties. The fishery authorities of both countries would jointly enforce the law in this Zone to facilitate the preservation of marine fishery resources. Also, both parties agreed to make transitional arrangements for the existing fishing operations in the north of the Common Fishery Zone (measured from 20˚N). Therefore, each party should take measures to reduce the fishing operations in the waters of the other party year by year and leave the other party's waters within four years from the date of the entry into force of the Fishery Agreement (25 December 2000). The authorities in Vietnam fully understood these considerations and after nearly three years of consultation and negotiation both sides formulated specific measures to implement the Fishery Agreement, following the execution by both parties of the Agreement on Fishery Cooperation in Beibu Bay signed together with the Agreement on Maritime Boundary Delimitation.[43]

III. Thoughts on the Nature and Relevant Contents of Historic Rights

Historic rights provide members of the international community – sovereign States – with the position, qualifications and legal basis to exercise sovereign

43 Wang Yi's Remarks on the Effectiveness of the Agreement on Maritime Boundary Delimitation and Agreement on Fishery Cooperation in Beibu Bay between Vietnam and China, at http://news.xinhuanet.com/world/2004—06/30/content-1557531.htm, 20 December 2008. (in Chinese)

jurisdiction over a piece of land or maritime area, or serve as historical, political and legal conditions in respect to boundary delimitation among countries. In light of the history and status quo of the international maritime delimitation, the nature and the relevant contents of historic rights can be understood as follows:

1. In territorial disputes, the nature of historic rights is the relationship between the territorial interests of a State – subject of power represented by State in the international community – and those of other State or States. Initially, a State's historic rights over any territory do not necessarily involve territorial disputes. Instead, they are related to the State's peaceful and continuous administration and exercise of sovereignty over its territory (land or sea) for a prolonged period of time. The historic rights to such territory can draw much attention from the international community only when they are used in connection with territorial sovereignty disputes. Any contents of historic rights, like fishing and navigation rights, shall be understood and analyzed from the relationship between a State's and other States' interests (the subject of historic rights) to determine their roles. Only by doing so can equality be achieved.

Malcolm D. Evans, an English jurist, argues that: "the claim for the existence of historic rights provides the ICJ another experiment in that the Court may apply them to evidence the equality of its results. In the *Gulf of Maine Case*, the International Court of Arbitration compares the United States' claim in respect of its national activities to 'invoking historic rights'. The Court decides that such activities are not relevant circumstance, which, however, shall be taken into account when accepted into the delimitation results, and it especially mentions that the area where each country traditionally conducts fishing operation shall not be affected by the boundary line proposed."[44] Concerning the status of the Gulf of Fonseca, the Central American Court of Justice pointed out in the *El Salvador v. Nicaragua* Judgment in 1917: the Gulf of Fonseca is "a historic bay possessed of the characteristics of a closed sea. Therefore, except the adjacent three-mile territorial zone over which the three riparian States enjoy exclusive ownership, the waters of the Gulf of Fonseca are common to the three riparian States of El

44 Malcolm D. Evans, translated by Zhong Tianxiang, proofread by Wu Shicun, *Relevant Circumstances and Maritime Delimitation*, Haikou: China South China Sea Institute, December 2005, p. 332. (in Chinese)

Salvador, Honduras and Nicaragua."[45] Wishing to determine the boundary line in the "historic waters" between Sri Lanka and India "in a manner which is fair and equitable to both sides", the Government of the Republic of Sri Lanka and the Government of the Republic of India concluded in 1974 the Agreement between Sri Lanka and India on the Boundary in Historic Waters between the Two Countries and Related Matters after negotiations. Article 4 of this Agreement stipulated that "each country shall have sovereignty and exclusive jurisdiction and control over the waters, the islands, the continental shelf and the subsoil thereof, falling on its own side of the aforesaid boundary."[46] The exercise of historic rights over certain territory by the members of the international community (States) is to seek and pursue their own interests from the balancing of such relationship or the judgment of the international community.

2. Historic rights connote a State's rights and obligations to exercise sovereign jurisdictions over a land or sea area. That is to say, rights and obligations are important manifestations of all historical and current relationships between countries under the international law. From the perspective of pursuing national interests, historic rights are reflected in a sovereign State' exercise of sovereignty and territorial jurisdictions over the area of territory within its traditional and historical boundary or the one recognized by the international community; and historic obligations mean that a sovereign State should perform its duties to the international community in certain sea areas while it exercises territorial jurisdictions and sovereignty thereover. When it comes to the Spratly Islands issues, Mr. Xu Sen'an noted that "we must stress our historic rights when claiming sovereignty over the Spratly Islands. No party has raised any objection to our declaration of historic rights over the islands in the South China Sea, which is equivalent to acquiescence under international law. The States bordering the South China Sea occupied part of the islets and reefs of the Spratly Islands after such acquiescence, which cannot constitute historic rights to date."[47]

As a dialectical unity, historic rights and obligations are contradictory but also unified. First, historic rights and obligations are inseparable. In the international

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45 Zhou Zhonghai, On Historic Title under the Law of the Sea, in Hainan South China Sea Research Center ed., *Selection of Domestic and Foreign Essays on South China Sea (2001),* Haikou: Hainan South China Sea Research Center, 2002, p. 116. (in Chinese)

46 Pan Shiying, *Spratly Islands, Petropolitics and International Law*, Hong Kong: Hong Kong Economic Herald Press, 1996, p. 53. (in Chinese)

47 Bach Long Vi Island is Given to Vietnam, at http://harm.cyol.com/html/67/25386-9350.html, 20 October 2008. (in Chinese)

community, the term of historic rights means that a State exercises sovereign jurisdiction over certain land and sea area, which is implicitly recognized by the international community. Historic rights, therefore, determine a sovereign State's international status to own such land and sea area, and also decide the relationship among countries in respect of territory. Initially discovered by China, the Spratly Islands have been peacefully and continuously occupied, developed and managed by China for thousands of years. The Chinese governments in each dynasty have always exercised jurisdiction over these islands, which has not encountered any opposition from any other States and other State's claim for sovereignty over the same islands. Moreover, numerous biographies of foreigners and official books also expressively recognized China's ownership of the Spratly Islands. Even if the requirements for acquisition of territory under modern international law are invoked, China has obtained the inchoate title (i.e. discovery right) to the Spratly Islands since the Han Dynasty, offering China certain imperfect rights, which has effectively prevented Japan, France, Vietnam, the Philippines, Malaysia and other countries from claiming territorial sovereignty to the Spratly Islands. These islands have become the "prohibited territory" in the eyes of the countries other than China at that time. In addition, China has peacefully exercised effective administrative jurisdictions over these islands continuously for a "reasonable period" thereafter, which satisfies the condition of "preoccupancy".[48] The fact that Chinese government's drawing of the U-shaped line in the South China Sea has not been opposed by other States after its promulgation is sufficient to support that China has historic sovereignty over the islands in the South China Sea. Second, historic rights and obligations are mutually conditional. Historic obligations are the basis of historic rights, and historic rights serve as a precondition for performing historic obligations. In terms of external exchange, historic rights reflect both the rights and obligations of the parties involved. The confirmation of historic rights to any State's territory implies the acknowledgement of historic obligations simultaneously. The historic rights and obligations to territory in any society (people in ancient societies are not clearly aware of this) are unified. That is to say, they exist in the international community in a contradictory but unified manner. In 1883, a Dutch ship was stranded in Pratas Island, where the goods on board were looted. Then the Netherlands ambassador to China addressed a note to the Ministry

48 Guo Yuan, China's Sovereignty over the South China Sea Islands from the Perspective of "Preoccupancy", *Northern Legal Science*, No. 3, 2007. (in Chinese)

of Foreign Affairs in Qing Dynasty, claiming: Pratas Island lies in the sea under the jurisdiction of Guangdong, China. In accordance with the treaty entered into by and between Netherlands and China, the Chinese authorities should protect the Dutch in China. If Dutch vessels while within Chinese waters be plundered by robbers or pirates, it shall be the duty of the Chinese authorities to use every endeavour to capture and punish the said robbers or pirates. If any Dutch vessels be stranded on the coast of China, or be compelled to take refuge in any port within China, the Chinese authorities, on being apprised of the fact, shall immediately adopt measures for its relief and security. "Article 7 of the treaty stipulates that, the Chinese authorities shall protect the Dutch in China ... if Dutch vessels while within Chinese waters be plundered by robbers or pirates, it shall be the duty of the Chinese authorities to use every endeavour to capture and punish the said robbers or pirates. If any Dutch vessels be wrecked or stranded on the coast of China, or be compelled to take refuge in any port within the dominions of the Emperor of China, the Chinese authorities, on being apprised of the fact, shall immediately adopt measures for its relief and security."[49] It shows that Chinese government's historic rights to the Pratas Islands and the adjacent waters are recognized by the international community. Third, historic rights and obligations are equal in quantity, which means that the members of the international community enjoy the historic rights to the same extent of historic obligations they would assume, and vice versa. Historic rights and obligations shall be performed by the government of a State with the recognition of the international community. Both historic rights and obligations eventually target the pursuit of national rights and interest.

3. Based on a particular historical relationship and interest, the realization of historic rights is subject to and supported by the existence of State power. The materialization of historic rights is a manifestation of State power practicing sovereign jurisdiction over certain land and sea area. The acquisition of historic rights by a State, therefore, shall be guaranteed by a State's exercising of authority over certain land and sea area consistently for a considerable period of time in history. Following the Philippines' open encroachment on part of Chinese Spratly Islands, Ferdinand E. Marcos, President of the Philippines, signed the Presidential Decree No. 1596 on 11 June 1978, which incorporated the islets and reefs illegally occupied by the Philippines into the Province of Palawan under the name "Kalayaan

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49 Han Zhenhua ed., *Historical Compilation of the South China Sea Islands*, Beijing: The Oriental Press, 1988, p. 143. (in Chinese)

Island Group". This Presidential Decree put forth the following reasons to support the claim made by the Philippines: "Whereas, much of the above area is part of the continental margin of the Philippine archipelago; Whereas, these areas do not legally belong to any State or nation but by reason of history, indispensable need, and effective occupation and control established in accordance with international law, such areas must now be deemed to belong and subject to the sovereignty of the Philippines; Whereas, while other States have laid claims to some of these areas, their claims have lapsed by abandonment and cannot prevail over that of the Philippines on legal, historical and equitable grounds."[50] "Historic rights" claimed by the Philippines in this statement, according to some foreign analysts, may be based on the fact that certain fishermen and seafarers from the Philippines have set their feet on the Spratly islets and reefs. "Nevertheless, this viewpoint is not supported by any historical evidences, because the Kalayaan Island Group stressed by the Philippines is a private discovery of Tomas Cloma, and no map has defined the territory of Kalayaan Island Group expressively."[51] While Malaysia laid its claim to its continental shelf, it also contended that it had historic rights over some southern islets and reefs in Spratly Islands, declaring these islets and reefs were part of their territory.[52] Malaysia then occupied the Swallow Reef in 1983 and another two in the Spratly group in 1986 in accordance with the doctrine of "effective occupation" under international law. The "historic rights" and "effective occupation" claimed by Malaysia are groundless, which has aroused objections from other States for its proximity of time.

The formation of historic rights shows a State/nation's continuous occupation of a land or sea area in a particular historical stage, whose basic motivation is to materialize its own interests, as "the only tie that connects human with society is natural inevitability, needs and personal interests".[53] The historical occupation of certain land or sea area and the complex relationship existing between one State

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50 Aileen San Pablo-Baviera ed., *The South China Sea Disputes: Philippine Perspectives*, Quezon City: Philippine China Development Resource Center and Philippine Association for Chinese Studies, 1992, p. 55.

51 Bob Catley and Makmur Keliat, *Spratlys: The Disputes in the South China Sea*, Aldershot: Ashgate Publishing Limited, 1997, p. 35.

52 Statement of the Malaysian Foreign Ministry, 1983. 9. 9, quoted in Lo Chi-Kin, *China's Policy towards Territorial Disputes: The Case of the South China Sea Islands*, London: Routledge, 1989, p. 155.

53 *Collected Works of Karl Marx and Friedrich Engels*, Vol. 1, Beijing: People's Publishing House, 1971, p. 439. (in Chinese)

and other States over the sovereignty issue, is inevitably reflected in the different demands for interests by countries. Therefore, various interests such as economic, political, cultural and national interests among States are interwoven. "Historic" and "rights", two keywords in the concept of historic rights, are prerequisites or conditions to gain rights, as rights are based on historical activities, including occupation. This type of rights can only be "rightful" and "legitimate" when it is based on history in that "rightfulness" and "legitimacy" are elements constituting rights.[54] We can define rights as something rightful and obligations as something which should be done. As interest is a basic element of rights, the relationship in respect of interests is one of deep complexity. Only rightful interests can result in historic rights. Therefore, the legal basis of historic rights should be discussed here. In the theory and practice of international law, if historic rights are said to be formed and developed for territory, national sovereignty shall be the core issue during the process of historic rights being materialized.

First, with regards to acquisition of territory, the renowned international jurist Oppenheim argues that "mere discovery was sufficient to establish complete sovereignty to *terra nullius* before the 15th and 16th centuries; while during the 18th and 19th centuries, especially thereafter, the inchoate title stemming from discovery had to be perfected by 'preoccupancy' and 'effective jurisdiction'." [55] Since the 19th century, all acts and activities imposed on certain land or maritime zone are conducted around national sovereignty, with all their activities marked with personal and national properties. The administration and exercise of sovereignty over such land or maritime zone are implemented through State power. Their productive, economic, and cultural activities aim to satisfy their requirements in terms of interests by determining the ownership of land through particular means, which is closely related to the acts of State power.

Second, in recent years, historic rights are realized with the core strength derived from political power/sovereign States. Being historic is the product of national acts performed for a considerable length of time. In the *Fisheries Case (United Kingdom v. Norway)*, the Norwegian government contends: "unless evidenced with long usage, a State cannot acquire a historic title as the continuity of time is essential. The validity of a recognized usage must come into force with

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54 Fan Jinxue, *The Politics of Rights*, Shandong People's Publishing House, 2003, p. 20. (in Chinese)

55 Lanterpacht ed., *Oppenheim's International Law*, Vol. 1, 8th edition, London: Longman, p. 558.

peaceful and uninterrupted application. Such validity cannot be affected absolutely if this requirement is not met. However, just as its meaning clearly indicates, the binding force of a "historic" title derives from history, that is, the passage of time."[56] Since modern times, the content of historic rights over territory has constituted around political power, where the State or nation is the main entity responsible for historic rights. The ruling class is the political organization which holds, affects and seeks historic rights, while the individuals or collective is the one in charge of implementation on behalf of different interests with an aim to impact the formation and evolution of historic rights.

Third, the geoculture reflected in the delimitation of land or maritime boundary is centered on and oriented towards political power. On one hand, the geoculture which comes into being during the practice of historic rights reflects the way a nation/State thinks and the orientation of their culture and values. For instance, Chinese religious belief and cultural marks imprinted on architecture such as Matsu Temple, which come into being during China's development and exploration of the South China Sea islands, reflect people's understanding of the ocean; on the other hand, geoculture is associated with the practice of a State's historic rights that certain geoculture contributes to historic rights in a particular historical stage. In the *Fisheries Case (United Kingdom v. Norway)*, the United Kingdom and Norway had some disputes over the waters along the coast of Norway. Norway contended that it had historic rights to such waters, which, however, were considered to be part of the high seas by the United Kingdom. The two sides finally reach an agreement that a State claiming a historic right shall bear the burden of proof.[57] Political power is not only the constituent and content of geoculture, but also affects and even dominates the evolution process, way and direction of geoculture, which will necessarily impact the formation of a State's historic rights.

The development of historic rights is mainly driven by the development of political power. Political power is a huge power governing the society and certain organizations, whose nature, structure, operative ways, rules and standards will influence the content of historic rights and to which extent the historic rights will be realized, and also the way in which the international community will perceive the historic rights claimed by a State. Generally speaking, when a country is powerful,

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56 Kuen-chen FU, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 330. (in Chinese)

57 Kuen-chen FU, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 329. (in Chinese)

and keep extending its political power to expand its jurisdiction, the content of historic rights which the country has over a land will be richer. Political power plays such a big role in the sphere of historic rights that it can drive, impede and even undermine the development of historic rights. For instance, civilian force, in the global level, plays a great role in the formation and development of a State's marine rights and interests. When the acts of the civilian force are acknowledged and encouraged by the State, such force will promote the nationals of such State to develop and explore the marine areas, and facilitate the realization of historic rights as well as the broadening of their content.

Varied demand for sovereignty over different territories is a manifestation of historic rights which come into being during the exercise of political power. This is in connection with the extension of political power and the interactions with other States. In some land/sea areas, the geographical distance determines to what scope and extent the political power will be exercised. The shorter the distance is, the richer will be the content of historic rights. Not being completely aware of territorial sovereignty, countries in ancient times simply made some provisions on external exchange, navigation, trade, etc. During external exchanges, historic rights over a State's coastal islands or the places under its jurisdiction are formed and consolidated. In the case of waters further away from its mainland, sovereign rights are built through the operation and development of islets and rocks in addition to people's activities in the areas. As early as the Qin and Han Dynasties, the nationals of China have opened the Maritime Silk Road, which connects China with other States through the South China Sea. It is during that time that China discovered, recorded and described the islands in the South China Sea. A statement from *Yiwuzhi (Record of Foreign Matters)*, a book written by Yang Fu, reads: "The Qitou (reef flat) in Zhanghai, with shallow water and numerous submarine reefs, often causes damages to large foreign ships, thus the obvious obstacles shall be cleared there."[58] "Zhanghai" refers to the South China Sea, including the islands therein, in ancient China. "Qitou" refers to the islands, rocks, shoals and banks in the seas in ancient China. "Qitou in Zhanghai" generally means the islands, rocks and banks in the South China Sea. *Hanshu • Dilizhi (Book of Han • Geography)* also states: "The heavens and the earth are square and surrounded with sea water.

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58 Yang Fu, *Yiwuzhi (Record of Foreign Matters)*, as quoted in Tang Zhou (Ming dynasty), *Zhengde Qiongtai Zhi (Local Records of Hainan Province in the Reign of Emperor Zhengde)*, Vol. 9, Shanghai: Shanghai Classics Bookstore, 1964, p. 14. (in Chinese)

The sea waves are gentle and seem to run over the earth's surface. The sea is full but not overflowing. Hence it is named as 'Zhangzhi'."[59] Between 225 A.D and 230 A.D., Kang Tai, a traveller who had been to areas around the South China Sea, says in his book *Funanzhuan (Funan Biography)* that "there are coral-shoals lying in Zhanghai, with corals living on the rocks under the shoals."[60] "Coral-shoals" mentioned above refer to the coral islands and shoals elevated above the water in the South China Sea caused by anthozoans. It can be noted that the records of local annals concerning the South China Sea is directly associated with Paracel and Spratly Islands lying on the southeast of Hainan Island.[61]

After the discovery of the islands in the South China Sea, the ancient people of China have named such islands "Jiu Ru Luo Zhou", "Shitang", "Qianli Shitang", "Qianli Changsha", "Wanli Shitang", "Wanli Changsha" and etc. In the Song Dynasty, the Paracel Islands are named "Jiu Ru Luo Zhou" and the Spratly Islands are called "Shitang". Names such as "Changsha", "Qianli Changsha" and "Wanli Changsha" mentioned in some later Chinese classics refer to Paracel Islands in most cases. And names such as "Shitang", "Qianli Shitang" and "Wanli Shitang" refer to Spratly Islands in most circumstances. These names for Spratly Islands have been adopted by foreigners in history. The *Song Huiyao Jigao (Song Dynasty Manuscript Compendium)* records that, when the envoys from Champa Kingdom and Cambodia describe their voyage to China, they all call Spratly Islands as "Shitang" or "Wanli Shitang".[62] Some of the names given by Chinese fishermen to certain islands in the South China Sea are adopted by illegal surveyors from western countries by using the transliteration or free translation of such names.[63]

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59 *Hanshu • Dilizhi (Book of Han • Geography)*, Vol. 28, Chapter for the Region of Yue. (in Chinese)

60 *Taiping Yu Lan (Taiping Imperial Encyclopaedia)*, Vol. 69 (I), Beijing: Zhonghua Book Company, 1963. (in Chinese)

61 Han Zhenhua ed., *Historical Compilation of the South China Sea Islands*, Beijing: The Oriental Press, 1988, p. 24. (in Chinese)

62 *Song Huiyao Jigao (Song Dynasty Manuscript Compendium)*, Vol. 179, Beijing: Zhonghua Book Company, 1957, pp. 7784, 7763. (in Chinese)

63 For example, *China Sea Dictionary* published by Royal Naval Surveying Service based on assiduous surveying work in 1868 contains many Chinese names of islands and reefs among the Spratly Islands. For instance, in the book, Namyit Island is referred to as NamYit I, Sin Cowe Island as Sin Cown, Taiping Island as Taiping, Thitu Island as Thitu, Subi Reef as Subi, which are transliterated from the names granted by fishermen of Hainan Island such as "Nanyi", "Chenggou", "Huangshan Mazhi", "Tiezhi" and "Chouwei". Zhang Hongzeng, China's Sovereignty over the Paracel Islands and Spratly Islands under International Law, *Red Banner*, No. 4, 1980. (in Chinese)

Ancient documents and the archaeological work in Spratly Islands in modern and contemporary times reveal that the nationals of China have engaged in fishery production in Spratly Islands and the adjacent waters since the Qin and Han Dynasties. Archaeologists have discovered some ancient cultural relics and ruins on these islands and the adjacent sea floor, which are sufficient to attest that the Chinese are the earliest people in history who developed and operated the Spratly Islands.[64]

Special means are used to govern these places, which is directly related to the level of seamanship and people's awareness to exploit the ocean at that time. A State's consistent occupation of the region and its continuous and peaceful exercise of rights ever since qualify such State's possession of stable historic title to such a region. Thus, the maritime zone surrounding the islands and reefs in such regions naturally becomes subject to the development and governance of the nationals of such coastal State. The Chinese government has implemented effective jurisdiction over the islands in the South China Sea ever since their discovery, which is equivalent to "preoccupancy". However, it is impossible for the governments of different dynasties in China to appoint officials to perform specified functions on the Spratly Islands which are far away from the mainland, neither to administrate such islands as systematically as the land territory. The main method the governments have used to administrate the South China Sea islands is sea patrolling.[65] Just as international juridical practices and cases indicate, when it comes to the exercise of territorial sovereignty, the exact ways of jurisdiction are dependent on specific historic and natural conditions. "The extent of jurisdiction for this purpose (territorial sovereignty) shall be based on a case by case principle. For instance, the jurisdiction and governance over a less developed territory are not required to be as sophisticated as those over a civilized and advanced territory."[66]

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64 Pan Shiying, *Spratly Islands, Petropolitics and International Law*, Hong Kong: Hong Kong Economic Herald Press, 1996, p. 519 (in Chinese). In the 1970s, the investigation group from Research Institute for Southeast Asian Studies of Xiamen University, after conducting field work, found wells, thatched cottages, earth temples, stone tablets and other stuffs built by the Chinese in the Ming and Qing dynasties on the Taiping Island, Thitu Island, Spratly Island and other islands constituting part of the Spratly Islands, and also wells dug by Chinese fishermen on Nanshan Island, West York Island, South Reef, Thitu Reef, Itu Aba Island, Storm Island and other islands or reefs.

65 Guo Yuan, China's Sovereignty over the South China Sea Islands from the Perspective of "Preoccupancy", *Northern Legal Science*, No. 3, 2007. (in Chinese)

66 J. G. Starke, translated by Zhao Weitian, *An Introduction to International Law*, Beijing: Law Press China, 1980, p. 142. (in Chinese)

"National power is not always exercised over each inch of its land."[67]

The discussion on the concept of historic rights will be continued. Historic rights will be used by various States to expand their jurisdiction both over maritime areas and land areas. In negotiations over international marine boundary delimitations, historic rights are among the important issues taken into account by the States concerned, ICJ and the relevant arbitration authorities and will affect judgment results to some extent.

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67 Liang Shuying ed., *Cases for International Law Teaching*, Beijing: China University of Political Science and Law Press, 1999, p. 55. (in Chinese)

A Review of the Pedra Branca Dispute

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Abstract: On 23 May 2008, the International Court of Justice (ICJ) awarded sovereignty over Pedra Branca to Singapore in the *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh (Malaysia/Singapore)*. This paper begins by describing the background of the case, the main points of contention and the ICJ's final judgment. The paper then discusses the case's impact on the international community, finding that the ICJ gives more weight to the existence of effective control when deciding territorial sovereignty disputes than other factors. Therefore, China should reinforce its effective control on the sovereignty over its waters so as to protect its maritime rights and interests.

Key Words: Sovereignty over Pedra Branca; Effective control; Claims of sovereignty

Since Singapore's separation from Malaysia in 1965, longstanding issues over water supply, land reclamation, construction of the Singapore–Malaysia bridge and overflight of Singapore military aircraft over the airspace of Malaysia have created friction between the two countries. In 1980, both sides refused to give in to each other on the issue concerning the sovereignty over Pedra Branca until February 2003, when the two countries reached an agreement to submit the issue to the International Court of Justice (ICJ). This is the second time for Malaysia to submit a dispute over sovereignty of islands to the ICJ since 2002. The ICJ awarded the sovereignty over Pulau Sipadan and Pulau Ligitan to Malaysia in the *Case Concerning Sovereignty over Pulau Sipadan and Pulau Ligitan (Indonesia/Malaysia)* in 2002. Whereas, in the case under discussion, the ICJ accepted the arguments of Singapore and awarded Pedra Branca Island to Singapore.

This case shows the effectiveness of third-party dispute settlement mechanisms and sheds light on international legal rules for peaceful territorial dispute resolution.

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It also offers China a new way of approaching claims relating to territorial sovereignty at present. Presenting a brief review on the case, the paper aims to offer China a reference for defending its sovereignty over its waters.

I. Case Background

This case concerns the sovereignty over Pedra Branca Island. Pedra Branca (called Pedra Branca by Singapore and Pulau Batu Puteh by Malaysia) derives its name from the Portuguese term for the whitish guano (bird droppings) deposited on the rock throughout the year. Pedra Branca is first mentioned in Dutch voyager Jan Huyghen van Linschoten's *Itinerario (Itinerary)*, an account of his voyages in the Portuguese East Indies in 1583. The 2,000 m^2 island, located in the eastern Straits of Johor, is 13 kilometers away from the coast of Johor in Malaysia, and more than 60 kilometers away from the eastern coast of Singapore.

Fig. 1 Location of Pedra Branca

(Source: *Sinchew*, at http://www.sinchew-i.com/special/pulaubatuputih/images/sing_ma.gif, 7 July 2008.)

The British occupied Pedra Branca in 1840 and built Horsburgh Lighthouse on the island in 1851. Subsequently, Singapore took over the lighthouse. During this period, the Johor Sultanate or Malaysia failed to raise any objections. In 1980, Malaysia published a map marking Pedra Branca as a part of its national territory.

This claim for sovereignty over Pedra Branca aroused discontent from Singapore. Singapore sent a diplomatic note to Malaysia on 14 February 1980, protesting the Malaysian map that included Pedra Branca in Malaysian territory. This event marks the beginning of the sovereignty dispute over Pedra Branca between the two countries. In order to strengthen its control over the island, Singapore installed a radar system on Pedra Branca in 1989. In the same year, Singapore sent warships to patrol the contested waters to prevent Malaysians from fishing in the vicinity of Pedra Branca. These patrols further intensified the competition for the sovereignty over Pedra Branca between two countries. Singapore built a helipad on the island in 1991 and in 1994, Singapore and Malaysia agreed to bring the dispute over the sovereignty of Pedra Branca before the ICJ. During several meetings between 1995 and 1996, the two countries discussed the details of the ICJ submission. On 14 April 1998, the parties reached a consensus on the content of a special agreement. Both sides agreed that in addition to Pedra Branca, the nearby maritime features called the Middle Rocks and the South Ledge would be also included in the scope of sovereignty dispute. When the ICJ ruled that sovereignty over Pulau Sipadan and Pulau Ligitan belonged to Malaysia in December 2002, the Pedra Branca dispute returned to the fore. On 25 December 2002, Singaporean navy ships expelled a Malaysian Marine Police patrol boat approaching Pedra Branca. On 6 February 2003, Singapore and Malaysia signed a special agreement to submit the island dispute to the ICJ. In November 2007, the ICJ held a hearing, and on 23 May 2008, the ICJ delivered its judgment.[1]

II. Points of Contention and Judgment[2]

Singapore and Malaysia stuck to their arguments and were reluctant to compromise on the issue concerning the sovereignty of the island. Malaysia claimed that Pedra Branca originally belonged to the Johor Sultanate and as the Sultanate's successor State, Malaysia inherited the island's sovereignty and maintained it thereafter. In contrast, Singapore contended that Pedra Branca was first occupied by the United Kingdom legally and Singapore inherited the territorial

1 Pedra Branca Dispute Process Table, at http://sea.nanyang.lycosasia.com/hotarticledisplay.htm?hotnews_rn=1514&article_rn=224694, 7 July 2008. (in Chinese)

2 International Court of Justice, at http://www.icj-cij.org/docket/files/130/14492.pdf, 7 July 2008.

sovereignty over the island from the United Kingdom. Furthermore, it had exercised sovereignty over the island for 150 years. The main contention between the two parties is reflected in the following three aspects:

First, who possessed the original title to Pedra Branca? Malaysia argued that Pedra Branca could not be considered *terra nullius* and it inherited as well as maintained the original title to the island from the Johor Sultanate. Singapore insisted that prior to 1847 Pedra Branca was *terra nullius*, and had never been under the control of any sovereign entity. The United Kingdom occupied this island and lawfully built a lighthouse on it. Sovereignty over the island passed to Singapore after its independence. From 1851 to the present, Singapore and its predecessor the United Kingdom, have exercised sovereignty over Pedra Branca.

Second, whether or not the establishment of a lighthouse by the United Kingdom on Pedra Branca constituted occupation. Malaysia believed that, first of all, the original title to this island belonged to Malaysia. Pedra Branca could not be considered *terra nullius* and therefore the doctrine of occupation does not apply to this case. Second, the British constructed and managed the lighthouse on the island with the permission of the Johor authorities. The British lacked a subjective motive and made no substantive act to occupy Pedra Branca. The requirement to construct a lighthouse on Pedra Branca and the demand to occupy it are completely different; therefore British acts fail to constitute an act of occupation. In response, Singapore argued that the British government had owned Pedra Branca in a *de facto* and *de jure* sense from 1847 to 1851. It can be evidenced by British intent to acquire sovereignty over the island and a series of acts taken by it in this period .

Third, whether or not Singapore's taking over of the lighthouse constituted a valid exercise of sovereignty over the island. Malaysia held that Singapore was only responsible for keeping the Horsburgh Lighthouse after it took over the lighthouse constructed by the British, which did not change Pedra Branca's legal status. In addition, Pedra Branca was marked as Malaysian territory in the Malaysian map published in 1979, but Singapore did not indicate that Pedra Branca was its territory until 1995. Singapore failed to exercise sovereignty effectively over the island. Singapore responded that it occupied Pedra Branca openly, consistently and publicly in the 130 years from 1847 to 1979, during which Malaysia had never raised any protest over the island's sovereignty. Therefore Pedra Branca is owned by Singapore.

According to the aforementioned historical background, the ICJ confirmed that the dispute over sovereignty of Pedra Branca materialized on 14 February

1980, when Singapore rejected a Malaysian map published in 1979 showing Pedra Branca to be within its territorial waters.

Concerning the three questions above, the ICJ first determined that Pedra Branca first belonged to Johor. The Sultan of Johor first discovered and then actually controlled Pedra Branca. This occupation had never been challenged by any other powers in the region and satisfies the condition of a "continuous and peaceful display of territorial sovereignty". Furthermore, the orang laut, who had been fishing in the waters surrounding Pedra Branca for centuries, were subject to the Johor Sultanate. This further demonstrated that Pedra Branca was not *terra nullius* but a part of the Johor Sultanate prior to a certain critical date.

The ICJ then analyzed the sovereignty over Pedra Branca in the colonial period. In 1824, the Johor Sultanate was divided between the empires of the United Kingdom and the Netherlands. The United Kingdom and the Netherlands divided the old Johor Sultanate into two new parts: one under the British sphere of influence and the other under Dutch influence. The ICJ found that the territorial division in the colonial period did not change the status of the sovereignty over Pedra Branca. Judging from the selection of the site for building of the lighthouse and the construction process of the lighthouse by the British, the implementation of laws relating to Horsburgh Lighthouse and straits lighting system by the British and Singapore along with the exercise of fisheries control by Johor in 1860, the ICJ held that the sovereignty of Pedra Branca did not change until 1953.

The ICJ found that Pedra Branca's sovereignty status changed due to actions taken by Singapore and Malaysia after 1953. First, the 12 June 1953 reply from the Acting Secretary of the State of Johor to the Colonial Secretary of Singapore explicitly stated that Johor did not have sovereignty over Pedra Branca. The ICJ held that this correspondence and its interpretation were of central importance for determining the understanding of the two parties about the sovereignty over Pedra Branca. Second, the ICJ found that the subsequent conduct of Singapore and Malaysia showed that the sovereignty over Pedra Branca had been transferred. On one hand, the display of the British and Singaporean ensigns on the island, the installation by Singapore of military communications equipment on the island, the construction of massive projects by Singapore, the patrol of the waters adjacent to the island by Singapore, the investigation of shipwrecks by Singapore in the waters around the island and Singapore's approval or disapproval of Malaysian officials' surveying of the waters surrounding the island as well as other conduct of Singapore in relation to this island, could all be considered as conduct *à titre de*

souverain and declared that the sovereignty over the island belonged to Singapore. On the other hand, Malaysia did not respond in any way to Singapore's numerous manifestations of sovereignty over the island. For example, Malaysia raised no objection to Singapore's right to fly over the island. Moreover, Malaysia failed to respond to the acts furthering the sovereignty taken by Singapore, including the installation of Singaporean military communications equipment, Singapore's proposed land reclamation project over the island, Singapore's publications and maps classifying Pedra Branca as its national territory.

On the basis of historical reasons, the principles and rules of international law, as well as management and other considerations, the ICJ found that the Johor state of Malaysia originally had sovereignty over Pedra Branca but failed to exercise sovereignty over the island for a hundred years. Malaysia's original title was unable to challenge against the subsequent effective control over the island by the Singapore authorities. For these reasons, the ICJ concluded that sovereignty over Pedra Branca belonged to Singapore, settling a 30-year sovereignty dispute. This judgment is final and binding, and neither party may appeal the decision.

III. Review

The Pedra Branca case is the second territorial dispute Malaysia has submitted to the ICJ. This case has far-reaching implications for the international relations of Southeast Asia. The ICJ's judgment has a significant impact on Malaysian – Singaporean relations. The ICJ's decision has a lasting impact on the delimitation of territorial water, access to marine and natural resources in the region, as well as the control of air route. Singapore, where a plane would fly beyond its borders once took off, was surrounded by Malaysia to the north and Indonesia to the south. By virtue of this judgment, Singapore can justifiably break the "siege" set by Malaysia and Indonesia. Singaporean waters and territory extend east toward the South China Sea. Awarding sovereignty over Pedra Branca to Singapore may help Singapore and its ally the United States to control the waterway connecting the South China Sea to the Straits of Malacca, and further strengthen its military position in the region. In addition, the waters surrounding Pedra Branca are rich in marine resources and may contain untapped fossil fuel reserves.

The judgment not only affects Malaysia and Singapore, but also has implications for sovereignty disputes over islands around the world, including disputes over islands between China and other Asian countries. Chinese policy

should be guided by a close following of the developments in international law concerning the rersolution of disputes on sovereognty over islands through the judgment concerning Pedra Branca.

The following conclusions can be drawn from the judgments in the Pedra Branca and Sipadan and Ligitan cases:[3] the key to determining an island's sovereignty is whether the State concerned has exercised sovereignty over the disputed island. Neither the distance from the disputed island, nor the original title to the island is of key concern. Effective control over the territory is the decisive factor in determining territorial sovereignty. This means that in the similar cases in future, the ICJ will put more weight on which party exercises effective control, rather than historical factors or geographical considerations.[4]

Singapore won the sovereignty over Pedra Branca because it had managed effectively the Horsburgh Lighthouse on the island for almost 160 years, and because it demonstrated control of surrounding waters by expelling Malaysian fishermen. These actions were considered conduct *à titre de souverain*. Malaysia's claims on the island were denied because it had failed to respond to Singapore's numerous exercises of sovereignty over Pedra Branca for more than 100 years. Malaysia's long-term indifference and neglect led to its eventual loss of sovereignty over the island.

China's maritime rights and interests are being infringed by its neighboring countries at sea. Japan occupied the Diaoyu Islands, Vietnam, the Philippines and Malaysia also occupied sections of the Spratly Islands. Balancing China's need to build a harmonious ocean while also defending its sovereignty over waters is a serious and pressing issue. This example can teach us a great deal about how to resolve island sovereignty disputes, which is reflected in the following key points:

First, when protecting its sovereignty over waters, the government must attach greater importance to the effective control of the disputed territory and not just rely on historical evidence.

In the judgment made by ICJ, the Court reaffirmed "effective control" as the key determinant to territorial sovereignty. Singapore was successful in claiming

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3 In 2002, the ICJ awarded the sovereignty over Sipadan and Ligitan located in Borneo to Malaysia based on the argument that Malaysia had managed the two islands for a long time, and Indonesia had never protested against it. Case concerning Sovereignty over Paulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia), Summary of the Judgment of 17 December 2002.

4 Zhu Lijiang, The Development and Problems on Solving Territorial Disputes in International Law, *Modern International Relations*, No. 10, 2003, pp. 25~28. (in Chinese)

sovereignty over Pedra Branca because it was able to show that it had exercised the sovereignty over the island for 150 years. In contrast, Malaysia's claims to Pedra Branca were based on the argument that the Johor Sultanate had had the original title to Pedra Branca since ancient times. Malaysia proved that Pedra Branca belonged to the Johor Sultanate over a hundred years ago; however, the colonial authorities in Singapore have controlled Pedra Branca in practice since 1853. Compared to Singapore's actual control, Malaysia's claims of original title to its inherent territory since time immemorial under international law are tenuous. It can be observed from the relevant cases entertained by the ICJ that the longer a country has actually controlled a territory; the greater advantage it will have in resolving the dispute. China must take actions and measures that demonstrate its effective control over the disputed territory. Otherwise, it will be caught in an unwanted situation.[5] For example, in regards to the sovereignty over the Diaoyu Islands, China can present sufficient evidence to prove that they were first discovered, named, developed and managed by China. However, Japan attempts to establish sovereignty over the islands through the international legal principles of "occupation" and "effective control". The Japanese government obtained the "right to manage" the islands from a "lease" by the so-called Japanese citizens. The Japan Self-Defense Force and Japanese Marine Police expelled Chinese vessels and fishermen in the waters surrounding the islands, attempting to further restrict Chinese people from landing on the Diaoyu Islands. These tactics are an attempt to demonstrate that Japan has effective control over the Diaoyu Islands and their surrounding waters.[6]

In its judgment on Pedra Branca, the ICJ considered factors affecting the ownership of sovereignty. The Court emphasized the importance of some consistent evidences: effective occupation, consistent management or control of the territory for a considerable time and other party's failure to respond to such manifestations of control. Historical title was of lesser importance. The facts described above show that when a dispute arises from the legal basis of a territorial sovereignty, it is not enough just to prove that a country has had effective territorial sovereignty at some point, it must also prove that it maintained such territorial sovereignty on the critical

5 Han Zhanyuan, Analysis on Effective Control Principle to Resolve Territorial Disputes, *Journal of Taiyuan Normal University*, No. 3, 2008, pp. 55~57. (in Chinese)

6 Huang Fengzhen, The Truth behind Japanese Government's Leasing of the Diaoyu Islands, at http://www.people.con.cn/GB/guo-ji/14549/1969989.html, 7 July 2008. (in Chinese)

date when the dispute is being resolved.[7] In the settlement of territorial sovereignty disputes on the Diaoyu and Spratly Islands, claiming that these islands have been inherent territories of China since time immemorial and China has original title to them based on the traditional U-shaped line is not of great significance. China must instead enhance its control of the sovereignty over its waters.

Second, China must take multiple concurrent measures to maintain its sovereignty. China should learn to safeguard its own territorial sovereignty by learning from Singapore's strategy for defending Pedra Branca. China must strengthen the control of the disputed territory by taking specific actions.

In this judgment the ICJ held that several acts performed by Singapore constituted sovereignty. The Singaporean navy patrol of the waters surrounding Pedra Branca and Singaporean investigation of shipwrecks in the waters around the island were proof of Singapore's effective control of the island. Furthermore, Singapore required Malaysian officials to obtain permits when they wished to conduct scientific surveys on the waters adjacent to the island. This behavior also constituted a declaration of sovereignty and actual control over the island. China should learn from this example and adopt the strategies Singapore used to protect its sovereignty over Pedra Branca when it attempts to establish its effective control over disputed waters. Like Singapore, China should exercise State functions and reinforce its sovereignty claims by legislative, administrative, judicial and other means. These can provide a reference point for any international tribunal ruling on China's claims in the future. China should formulate laws that develop, protect and control the islands. At the same time China should maintain its effective control over the islands by enhancing its military presence, raising the Chinese national flag on the islands and delimitating the disputed areas. China should also effectively control the surrounding sea areas and enhance regular naval patrols to protect its rights, preventing neighboring countries from further encroaching the islands. This will pave the way for the future dispute resolution.

When claiming its maritime sovereignty and fighting for its maritime rights and interests, in addition to strengthening the administration of disputed waters, China should also make full use of civilian forces for economic development, scientific research, cultural communication and tourism development so as to enhance its sovereignty over the disputed waters. China may strengthen its exercise

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7 Liang Shuying, *A Course on International Law Cases*, Beijing: Intellectual Property Press, 2001, pp. 48~49. (in Chinese)

of sovereignty over the islands by constructing military bases on such islands or organizing tourists to visit the islands. *De facto* control of the islands by China will be constituted. China may also declare its sovereignty by encouraging its citizens to migrate to the islands as a way to strengthen its control and administrative jurisdiction over the islands. China could also encourage civilian forces to investigate the islands resources. Resource exploitation is not only a display of sovereignty but also lays a foundation for future resource development.

We can draw further inspiration from this case. If a State declares sovereignty or controls actually a disputed territory, it is particularly important for other concerned States to protest this declaration and take corresponding actions and measures. Shelving disputes completely may make China increasingly passive. Malaysia has remained silent on Pedra Branca for 130 years. It failed to protest the effective control of Pedra Branca by Singapore, and failed to demonstrate its sovereignty over the island. This is an important reason why Malaysia ultimately lost its original territory. It is surely worth noting that, when other countries violate China's maritime sovereignty, government's "protest" and "statement" are insufficient. China's civilian forces should also take concrete measures to manifest Chinese sovereignty, and break the continuity of effective control over the disputed waters by other countries.

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An Analysis of the Legal Status of the Nine-dotted Line: Focused on Four Doctrines

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Abstract: As the traditional Chinese boundary line in the South China Sea (SCS), the nine-dotted line has been tacitly recognized by the international community, including the countries neighboring the SCS, for more than half a century since its publication in 1948. However, after the entry into force of the United Nations Convention on the Law of the Sea and the escalated disputes over the sovereignty of the Spratly Islands, the neighboring States have begun to challenge the legal status of the "nine-dotted line" in recent years. The legal status of this nine-dotted line has still not been clearly defined in the domestic law of China. And different opinions and explanations remain among Chinese academia on its legal status. Therefore, it is important to define the legal status of the "nine-dotted line", which will contribute to China's clarification of its entitlement, and to the protection and perpetuation of its rights and interests in the SCS.

Key Words: Legal status of the "nine-dotted line"; Historic waters

The Chinese government has always insisted on adopting the nine-dotted line as the traditional Chinese boundary line in the South China Sea (SCS). However, to date, the legal status of this nine-dotted line has still not been clearly defined due to various reasons. On one hand, the Chinese government has not elucidated it officially since the founding of the People's Republic of China; and on the other hand, different opinions and explanations remain among Chinese academia on the legal status of the "nine-dotted line". There are mainly four different postulations regarding the legal status of the "nine-dotted line" namely, the "national boundary line", the "islands attribution line", the "historic title line", and the "historic waters

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line". These four doctrines all hold that the islands within the "nine-dotted line" belong to China, thus are subject to the sovereign jurisdiction of China, but vary in their sovereign claims to waters within the line. This paper attempts to analyze the advantages and disadvantages of the four doctrines concerning the legal status of the "nine-dotted line", and to further indicate that the doctrine of "historic waters line" is the most appropriate one with respect to the legal status of the "nine-dotted line", since it contributes to China's clarification of its entitlement, and to the protection and perpetuation of its rights and interests in the SCS. Nonetheless, this doctrine still requires further enrichment and development.

I. Historical Background of the "Nine-dotted Line"

After gaining victory in the Second Sino-Japanese War, the Chinese government at that time, in accordance with the provision that declares that, "territories taken from China by Japan ... should be returned to the control of the Republic of China," which was postulated by the Cairo Declaration among other treaties, delineated the territorial scope of the SCS upon re-survey and re-examination. In order to specify the territorial scope delineated, the Chinese government officially published the Atlas of Administrative Areas of the Republic of China (Fu Juejin from Territorial Administration Division of Ministry of Interior ed., illustrated by Wang Xiguang et al., Commercial Press, December 1947). That Atlas and the affiliated Location Map of the South China Sea Islands marked out the locations of the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands and indicated that they were the territories of the "Republic of China". Eleven dash lines were delineated around the SCS islands from the land boundary between Vietnam and China facing the Bay of Tonkin to the eastern part of China Taiwan. The southernmost edge of the boundary is roughly at 4° northern latitude, encapsulating the James Shoal within the line. This was the first public statement made by the Chinese government on its claims to the SCS. On 20 May 1949, the Organization Rules for the Office of the Commissioner of Hainan Special Zone, issued by the "Republic of China", incorporated "Hainan Island, the Pratas Islands, the Paracel Islands, the Macclesfield Bank, the Spratly Islands and their affiliated islands" into the Hainan Special Zone; and China exercised administrative

jurisdiction thereover.[1] The Chinese government at the time did not express its position regarding the legal status of this dash line and the waters within it.

Upon the founding of the People's Republic of China, this dash line was basically adopted to delimit the boundary of the SCS. The removal of the two dash lines in the Bay of Tonkin and the adjusting of the other dash lines in 1953 reduced the line to the "nine-dotted line" as it is called today.[2] In essence, this line was then generally accepted as the traditional Chinese boundary line in the SCS. The international community then raised no objection to the "nine-dotted line" since its publication. Afterward, maps published by numerous countries, including the ones bordering the SCS, marked out this same line, and indicated that the areas within it belonged to China. This indicates that this line has been tacitly recognized by the international community for more than half a century.

With regard to the background and the drawing method of the nine dash line, the Taiwanese scholar Kuen-chen FU, author of Legal Status of the South (China) Sea, asserts that this line was drawn in 1947, two years after President Truman of the U.S. declared to establish a fisheries protection zone and continental shelf for the U.S. in 1945. Following Truman's declaration, many countries vied to delimit their jurisdictions to expand their maritime rights and interests; and the Chinese government only made its own claim in response to the dynamics of that global environment. The name and the drawing method of the U-shaped line are not different from those of the Chinese land boundary line. This line is situated at the median line between the SCS islands and the coastline of the neighboring countries. Moreover, this U-shaped line consists of 11 dash lines, (two of which in the Bay of Tonkin were removed in 1953 upon the approval of the Chinese government), showing that it is a "boundary line to be determined" in this sea area just as the land boundary line between China and Myanmar and the one between China and India, which may be officially delimited by China and its neighboring countries in the future.[3]

At the other side of the Taiwan Strait, the Taiwanese administration has always marked out the traditional boundary line in the SCS consisted of 11

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1 Wu Shicun ed., *Collection of Documents Relating to the South China Sea Issues*, Haikou: Hainan Publishing House, 2001, p. 37. (in Chinese)

2 The "nine-dotted line" is also called the "U-shaped line", the "nine-sectioned line", the "maritime boundary line", the "cow tongue line" and many others.

3 Kuen-chen FU, *Legal Status of the South (China) Sea*, Taipei: 123 Information Co., Ltd., 1995, p. 204. (in Chinese)

sections on the maps which were published later, the same manner in which the Atlas of Administrative Areas of the Republic of China did in 1948. The competent authorities on both sides of the Taiwan Strait have always marked out this traditional boundary line on the maps for a long period, however without any illustrations.[4]

With the successive discovery of the SCS areas rich with natural resources since the 1970s, the States bordering the SCS which had never before claimed sovereignty over these sea areas, started to make territorial claims. Indisputably, these territorial claims are in conflict with China's claim of maintaining the "nine-dotted line" as the traditional boundary line. As a result, the question regarding the legal status of the "nine-dotted line" emerged before the Chinese government and among the academia. Legal status of an object pertains to its definition in law and by law. If the theoretical definition of the legal status of the "nine-dotted line" is favorable to China, it will undoubtedly attenuate the territorial claims made by the neighboring States, and provide theoretical basis for the relevant claims made by the Chinese government.

II. Reflection on the Existing Doctrines

Currently, there exist roughly four well-considered doctrines regarding this issue namely, the "national boundary line", "islands attribution line", "historic title line", and the "historic waters line". These four doctrines reflect almost all the basic viewpoints and contentions of scholars with respect to the issue in the academia. This means that the new ideas deduced from these four doctrines, if any, are only variances of the four to some extent. Therefore, if the question concerning the legal status of the "nine-dotted line" cannot be settled without mentioning these four doctrines currently, then an analysis of their advantages and disadvantages will be conducive to our final determination of the legal status of the "nine-dotted line".

The difficulty in solving the issue of the legal status of the "nine-dotted line" lies in the tension between China's rights and interests in the SCS and the relevant provisions of international law of the sea. At the time when the Chinese government claimed the "nine-dotted line", the relevant legal regimes and the existing State practices related to international law of the sea were either non-

4 Zhang Liangfu, *Around the South China Sea – Cruise in the Spratly Islands*, Beijing: China Ocean Press, 2006, p. 197. (in Chinese)

existent or insufficient. The international law of the sea burgeoned after the World War II, especially with the drafting of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which stipulated the important principles for resolving all marine related disputes between States. Naturally, as international law of the sea prevails in today's world affairs, one cannot totally ignore its legal principles and claim any rights and interests that are not allowed under the provisions of the international law of the sea. Meanwhile, one should not be confined by these legal principles so as to jeopardize Chinese rights and interests in the SCS. It is preferable to maintain Chinese rights and interests by making use of the basic regimes and practice under the international law of the sea, provided that such regimes and practices are duly honored. Therefore, the comments on the four doctrines below will be centered on the tension mentioned above.

A. The Doctrine of "National Boundary Line"

Under the doctrine of "national boundary line," this line can be said to be representative of the delimitation of Chinese territorial boundary in the SCS, implying that, the islands, rocks, shoals, sands and sea areas within this line belong to China and are subject to the sovereignty of China.[5] In other words, this doctrine holds that the sea areas within the "nine-dotted line" shall be part of the territorial sea of China, while the areas beyond this line belong to other States or are part of the high seas.

The main reason underpinning this doctrine is that, the "nine-dotted line" is drawn in the same way as the national boundary line. The name and the drawing method of the line are not different from those of the Chinese land boundary lines, and this line is situated at the median line between the SCS islands and the coastline of the neighboring States. Indisputably, territory is conceived as the most basic and vital space where a State exercises its national sovereignty under international law. If the maritime area in the SCS is the territory of China, China's rights and interest in the SCS will be preserved to the fullest extent. The issue, however, lies in the lack of sufficient legal basis with which to uphold the assertion of the "nine-dotted line" as China's national boundary line.

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5 Xu Sen'an, The Connotation of the Dotted Boundary Line in the South China Sea, *Selected Works from the "Seminar on the South China Sea Issue in the 21st Century and Its Prospects"*, 2000, pp. 80~81. (in Chinese)

First, as mentioned above, this line is a dash line, which suffices to prove that it was a "boundary line yet to be determined" in the sea area at the time of drawing, which is identical to the land boundary line between China and Myanmar, and the one between China and India. It is not a solid boundary line that has been determined. As such, we cannot depend on it as a sufficient basis with which to claim the islands and marine areas within the line as the territory of China. Second, since the marking of the "nine-dotted line" on the maps, the Chinese government during the different time periods had never declared, explicitly or implicitly, that the marine areas within the line were the territorial sea of China, nor exercised sovereignty over the territorial waters with regards to this area. Third, the interpretation of the "nine-dotted line" as the "national boundary line" violates the theories and practice under international law of the sea. A fundamental theory and principle of international law of the sea is that, "the land dominates the sea". On the basis of such theory and principle, a coastal State shall be entitled to select a baseline of territorial sea beyond its coastline and draw the outer limit of its territorial sea up to a certain distance measured from such a baseline. Both the Convention on the Territorial Sea and the Contiguous Zone 1958 and the 1982 UNCLOS pose expressive stipulations on this right enjoyable by the coastal States and the methods such States shall adopt to draw the limits of their territorial sea.[6] The idea and practice of drawing the limit of the territorial sea by marking a line on the maps are evidently short of legal basis.

It is essential to note that the doctrine of "national boundary line" perceives the whole area within the "nine-dotted line" as the territorial sea of China, with the intention of maximizing China's interests in the SCS. Nonetheless, given the fact that few theories and practices under international law support this doctrine, it is fairly difficult to give it a theoretical and practical usage.

B. The Doctrine of "Islands Attribution Line (or Islands Boundary Line)"

The doctrine of "islands attribution line (or islands boundary line)" alleges that the islands and the adjacent waters within the line are part of the territory of China and are subject to the jurisdiction and control of China, implying that this

6 Liu Nanlai, The Legal Status of the U-shaped Line under International Law of the Sea, at http://www.nansha.org.cn/study/9.html, 17 January 2008. (in Chinese)

line is used to determine which islands in the SCS belong to China.[7] This doctrine however, has not illuminated the nature of the rights to the "adjacent waters." The reasoning goes, in accordance with the provisions of the UNCLOS and the relevant domestic law of China, China shall have sovereign rights over such waters just as it has sovereign rights over its internal waters, exclusive economic zones and continental shelves respectively.

Liu Nanlai, a professor at the Chinese Academy of Social Sciences upholding this doctrine, maintains that, it can be inferred from the acts of the Chinese governments in different time periods that the "nine-dotted line" is an islands attribution line. Firstly, prior to the publication of the Atlas of Administrative Areas of the Republic of China by the Kuomintang government in February 1948, the Territorial Administration Division of the Ministry of Interior had been in charge of compiling the Location Map of the South China Sea Islands in 1947. The Location Map of the South China Sea Islands is the earliest map that marked the dash line. Judging from its name and the historical background under which the Chinese government recovered the SCS islands, we can see that this map directly aims at marking out the limits and locations of the SCS islands over which China has sovereignty. Additionally, on 14 April 1947, the Ministry of Interior held a discussion with the relevant departments about the "Plan on the Determination and Announcement of the Limits of the Paracel and the Spratly Islands and China's Sovereignty over Them", and made resolutions on matters such as the declaration that "territory in the southernmost part of the SCS shall be the James Shoal". In April the same year, the Ministry of Interior specially issued an official letter (No. 0434) to the Guangdong provincial government concerning the "Determination and Announcement of the Limits of the Paracel and Spratly Islands and China's Sovereignty over Them", in order to request the latter to "handle the matter in accordance therewith". These two actions were taken by the Ministry of Interior for the purpose of determining and announcing the limits of and the sovereignty over the Paracel and Spratly Islands. Secondly, it can be observed from a series of statements made by the Chinese government after the founding of the People's Republic of China that, the Chinese government has consistently treated the "nine-dotted line" as the islands attribution line or the islands boundary line. The Declaration of the Government of the People's Republic of China on the Territorial

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7 Zhao Lihai, *A Study of the Issue of Oceans Law*, Beijing: Beijing University Press, 1996, p. 38. (in Chinese)

Sea in 1958 provided that, the breadth of the territorial sea of China shall be 12 nautical miles, and stated that this provision applied to "all territories of the People's Republic of China, including the mainland and its offshore islands, as well as Taiwan and the various affiliated islands, the Penghu Islands, the Pratas Islands, the Paracel Islands, the Macclesfield Bank, the Spratly Islands and all other islands belonging to China which are separated from the mainland and its offshore islands by the high seas." Apparently, this Declaration viewed the SCS islands as a part of Chinese territory, and declared that they are entitled to 12 nm territorial sea like other Chinese territories; it has also acknowledged that the SCS islands are separated from the mainland of China and its offshore islands by the high seas, excluding the possibility that, the maritime zones between the SCS islands and the mainland of China and its offshore islands together with all the maritime areas within the "nine-dotted line" may be subject to the jurisdiction of China. The Chinese government has reiterated in many different occasions the fact that the SCS islands "are part of Chinese territory, thus the People's Republic of China has indisputable sovereignty over these islands and their adjacent waters." This was to state its basic stance over the SCS issue, in which it, in fact, considered the "nine-dotted line" as the islands attribution line.[8]

The scholars upholding the doctrine of the "islands attribution line", nevertheless, have neglected the historical background where the "nine-dotted line" was drawn and the Declaration of the Government of the People's Republic of China on the Territorial Sea in 1958 was released. As stated, the "nine-dotted line" was drawn under the context of the global ocean enclosure movement triggered by the Truman Declaration of 1945. This maritime boundary line declared by the Chinese government against the historical background will by no means only refer to the islands attribution line. In addition to the indication that China enjoys territorial sovereignty over the islands within the line and the sea area with certain breadth around these islands, the line also suggests that China has sovereign rights over other waters within the line as well as the natural resources of seabed and subsoil thereunder.[9] Moreover, the UNCLOS was not promulgated at the time when the Declaration of the Government of the People's Republic of China on the Territorial Sea in 1958 was released. At that time, international law of the sea

8 Liu Nanlai, The Legal Status of the U-shaped Line under International Law of the Sea, at http://www.nansha.org.cn/study/9.html, 17 January 2008. (in Chinese)

9 Zhao Lihai, *A Study of the Issue of Oceans Law*, Beijing: Beijing University Press, 1996, p. 38. (in Chinese)

recognized the internal waters and the territorial seas as the only areas that are subject to a State's jurisdiction. As such, the Declaration affirms that the Pratas Islands, the Paracel Islands, the Macclesfield Bank and the Spratly Islands are separated from the mainland by the high seas just as in the case of Taiwan Island. After the UNCLOS came into force, there existed no high seas between China Taiwan and China Mainland; and all the waters of the Taiwan Strait become the exclusive economic zone under the jurisdiction of China. In a similar vein, the nature of the waters between the four archipelagos in the SCS and the mainland of China must undergo changes since the UNCLOS accepts the existence of exclusive economic zone waters thus such waters shall no longer be high seas.[10]

The doctrine of "islands attribution line" may have treated the "nine-dotted line" as a technical means to determine the sovereignty over the islands. The scope of the claim to the waters within the line is determined to be centered on the islands pursuant to the provisions of the UNCLOS. Consequently, China will inevitably lose sovereignty over a large part of the waters within the line, which is reflected in the following three aspects:

Firstly, the rights and interest in the submerged rocks and features in the SCS may be lost. In accordance with Article 121 of the UNCLOS, an island is a naturally formed area of land, surrounded by water, which is above water at high tide. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.[11] Therefore, it becomes impossible for China to claim rights to numerous submerged rocks and features within the line.

Secondly, the plight of losing rights to the sea areas lying relatively farther away from the islands is imminent. No State can exercise sovereignty over the waters outside the exclusive economic zones and continental shelves enjoyed by the islands within the "nine-dotted line", which makes the waters remote from the islands become the zones where no States may claim rights.

Thirdly, being deprived of the rights and interests in the waters adjacent to the rocks which cannot sustain human habitation or economic life of their own is anticipated. In accordance with the provisions of the UNCLOS, rocks which cannot

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10 Wang Zhijian, Historic Rights and Historic Waters – An Analysis on the Legal Nature of the U-shaped Line and the Waters within the Line, at http://hhlawaid.blog.hex.un.com/6802909_d. html, 17 January 2008. (in Chinese)

11 *United Nations Convention on the Law of the Sea* (Chinese-English), Beijing: China Ocean Press, 1996, p. 57.

sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf. In this connection, China's sovereignty over these rocks will be limited to the narrow internal waters and territorial sea, without any entitlement to the exclusive economic zones and continental shelves.

The doctrine of "islands attribution line" interprets the "nine-dotted line" as the islands boundary line, which greatly weakens the claims for rights based on the line and also the legal status of this line. If this doctrine is substantiated, in light of the fact that the islands within the "nine-dotted line" are fixed, we are fully able to draw a map encompassing all these islands within the line by employing the necessary technological means. Thus, we only need to stress the sovereignty over the islands marked out on such maps, leading us to the question of why we should just adopt the existing "nine-dotted line" to determine the islands? It can be observed that the doctrine of "islands attribution line" has waived some of China's rights over the areas within the "nine-dotted line". This doctrine may be said to have denied the "nine-dotted line" to some extent, which will necessarily impact China's strategies in the SCS and its economic benefits.

C. Doctrine of "Historic Title Line"

The doctrine of "historic title line" maintains that this line represents the historic title of China, which includes the sovereignty over all the islands, rocks, shoals and sands as well as the sovereign rights over the natural resources of the sea areas and the seabed outside the internal waters within the line. This doctrine also recognizes the freedoms of navigation, overflight or the laying of submarine cables and pipelines in these sea areas by other States. In other words, it contends that the islands, rocks, shoals and sands within the line are part of Chinese territory, and the sea areas beyond the internal waters are the exclusive economic zones and continental shelves of China.[12]

This doctrine resembles the one of "islands attribution line" in that the scope of China's sovereignty in the SCS is fixed to be centered on the islands pursuant to the UNCLOS, and the difference between them is that, the former maintains that the islands, rocks, shoal and sands within the line belong to China, and the sea areas beyond the internal waters are exclusive economic zones and continental shelves

12 Pan Shiying, *Spratly Islands, Petropolitics and International Law*, Hong Kong: Hong Kong Economic Herald Press, 1996, pp. 60~63. (in Chinese)

of China. As such, all the sea areas within the line are subject to the sovereign jurisdiction of China. This doctrine claims by far a larger scope of rights than the one claimed by the doctrine of "islands attribution line". This doctrine, however, also has obvious deficiencies.

First, China must make its claims to exclusive economic zones and continental shelves based on the stipulations of the UNCLOS. According to the UNCLOS, a coastal State is entitled to a maritime area not exceeding 200 nm from the baselines from which the breadth of the territorial sea is measured, and have sovereign rights over the natural resources thereof; a continental shelf is a natural prolongation of the land territory of a coastal State, and may extend to a distance of 200 nm where the outer edge of the continental margin does not extend up to that distance. The scopes of these two maritime zones are measured from the baseline of territorial sea. At present, China has not publicized its baseline from which the breadth of the territorial sea of the Spratly Islands is measured. Even if such a baseline is determined in the future, it will still be challenging to speculate that the boundary determined will completely overlap within the "nine-dotted line".[13] In addition, in international practice, the concept of "historic rights" is generally used as a complement to "historic title". A State that makes claims on the basis of historic rights is generally pursuing sovereignty or title. The rights to exclusive economic zones and continental shelves enjoyed by a coastal State are specific sovereign rights, which are different both in quality and quantity to some extent with the sovereignty and title referred to by historic rights.[14]

Therefore, the doctrine of "historic title line" is slightly contradictory in itself. The rights enjoyed by China over the sea areas within the "nine-dotted line" are distinct, in nature, from its rights to exclusive economic zones and continental shelves. The claim of historic rights is based on the legal and historical aspects of rights, while the claim to exclusive economic zones and continental shelves is legally based on the UNCLOS.[15] If one argues that the SCS waters are within the exclusive economic zones and on the continental shelves of China, then the exclusive economic zones and continental shelves of China in the SCS shall be

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13 Jia Yu, The Legal Status of the Dotted Line in the South China Sea, *China's Borderland History and Geography Studies*, June 2005. (in Chinese)

14 Xu Sen'an, The Connotation of the Dotted Boundary Line in the South China Sea, *Selected Works from the "Seminar on the South China Sea Issue in the 21st Century and Its Prospects"*, 2000, pp. 80~81. (in Chinese)

15 Jia Yu, The Legal Status of the Dotted Line in the South China Sea, *China's Borderland History and Geography Studies*, June 2005. (in Chinese)

decided pursuant to the technical methods provided in the UNCLOS, which will inevitably fail to take fully into account the sea areas determined on the basis of the "nine-dotted line". This means that there is a high possibility for the "nine-dotted line" to exist in name only.

The three doctrines above, in spite of being reasonable in some aspects, have obvious deficiencies as they fluctuate amid the tension between the national interests and the regimes of the international law of the sea. They either claim the rights and interests without support from the relevant legal principles by totally disregarding the existing regimes of the international law of the sea, or are confined by the provisions and regimes specified in the UNCLOS, while ignoring the special status of the "nine-dotted line", which further compromise Chinese rights and interests in the SCS. The author opines that the doctrine of "historic waters line", instead of fluctuating amid the said tension like the three doctrines above, has kept a balance between the national interest and the regimes of the international law of the sea in an appropriate manner, thus easily letting go of the extreme ideas caused by the said tension. The following paragraphs will be the author's focus on the doctrine of "historic waters line" as the most appropriate one.

III. Advantages of the Doctrine of "Historic Waters Line"

The doctrine of "historic waters line" argues that not only should China enjoy historic rights to the islands, rocks, shoals, sands and sea areas within this line, but also the entire sea areas within the line are the historic waters of China.[16]

As a special regime, historic waters are not excluded or denied by the UNCLOS. Being a comprehensive code, the UNCLOS has always adhered to the principle of recognizing and protecting the interests already vested on each State when it provides for a new maritime legal order.[17] As per Article 15 of the UNCLOS, the general way of delimitation does not apply where it is necessary by reason of historic rights or other special circumstances to delimit the territorial seas of the two States in a way which is contrary to the general way. It reveals that the UNCLOS acknowledges the special role of "historic rights" in maritime delimitation. The

16 John K. T. Chao, An Analysis of the Sovereignty Disputes over Spratly Islands under the Current International Law of the Sea, *Selected Works from the "Seminar on the South China Sea Issue in the 21st Century and Its Prospects"*, 2000, p. 20. (in Chinese)

17 Zhao Jianwen, United Nations Convention on the Law of the Sea and the Vested Rights of China in the South China Sea, *Chinese Journal of Law*, No. 2, 2003. (in Chinese)

essence of "historic waters" is the "historic rights" enjoyed by a State over its adjacent waters. It is necessary to illustrate that the historic rights shall not be confused with the doctrine of "historic title line" mentioned above, since the former holds that historic waters are allowed by the UNCLOS, yet without any explicit provisions therein, and the latter maintains that the specific jurisdictions within the historic title line shall depend on the particular provisions in the UNCLOS with regard to the exclusive economic zone and continental shelf.

The existing international legal regimes have not clearly defined the concept of "historic waters". One scholar points out that, "historic waters are the waters over which the coastal [S]tate, contrary to the generally applicable rules of the international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights".[18] "The rule of historic waters, in principle, constitutes an exception, which enables the claimant States to delimit the boundary by applying rules other than the general delimitation rules under the maritime law. The application of such rules shall rest on the special circumstances of different cases."[19] The constituent elements of historic waters are enumerated in Juridical Regime of History Water Including Historic Bays, a study prepared by the United Nations Secretariat in 1962 as follows: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign States towards this exercise of authority.[20]

Historic bays are typical historic waters. It is generally assumed in international practice that "historic bays" refer to the bays whose coasts belong to the same State, whose mouths are wider than the breadth of the territorial sea of the two opposite coasts, and to which the coastal State has claimed and exercised historic rights continuously for a considerable time with recognition from the international community. Such bays shall fall under the category of internal waters.[21] Furthermore, Dr. Kuen-chen FU, a scholar from China Taiwan, insists that there are two more kinds of historic waters: one is the coastal waters, which, in view of the special geographical conditions of the area contiguous to the coast,

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18 Leo J. Bouchez, *The Regime of Bays in International Law*, Leyden: A.W. Sijthoff, 1964, p. 281.

19 D. P. O'Connell., *The International Law of the Sea*, Vol. I, Oxford: Clarendon Press, 1982, p. 417.

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

21 Liang Shuying ed., *International Law*, Beijing: Central Radio and TV University Press Co., Ltd., 2002, p. 116. (in Chinese)

cannot be considered by the coastal State as internal waters, but may be claimed as "historic waters" due to historical factors; the other is the area of the high seas, which a State unconventionally asserts to be subject to its sovereignty as its "historic waters" based on historic interests. The waters within the "nine-dotted line" shall be regarded as the last type of "historic waters" of China.[22]

The waters within the "nine-dotted line" have been fully equipped with the constituent elements of historic waters. First, ample historical evidences prove that the Chinese government and Chinese nationals have developed and managed the SCS islands as well as exercised sovereignty thereover continuously for a substantial period of time. Second, the Ministry of Interior of the Kuomintang government officially issued the Atlas of Administrative Areas of the Republic of China in 1948 to declare to the international community that the "nine-dotted line" was the standard for determining what parts of the SCS islands and their adjacent sea areas are subject to the sovereign jurisdiction of Chinese government. The States bordering the SCS have never raised any objection to it for a considerable amount of time thereafter. Besides, numerous maps published by the foreign States have marked out the "nine-dotted line" and have indicated that the areas within that line belonged to China. It is noteworthy that the exercise of such authority had been tacitly recognized for almost half a century by the international community. Some neighboring States only started to challenge it from 1970s due to the discovery of natural resources within the line, and claim rights to the waters within the line in accordance with the regime of exclusive economic zone and continental shelf provided for in the UNCLOS. These, however, cannot denounce the legal status of the "nine-dotted line" as Chinese "historic waters line". Article 14 of the Exclusive Economic Zone and Continental Shelf Act of the People's Republic of China promulgated in 1998 stated that, "the provisions of this Act shall not affect the historic rights of the People's Republic of China." China's historic rights to the area within the "nine-dotted line" emerged more than half a century ago, which is much earlier than the time when the regimes of modern maritime law, represented by UNCLOS, were established. Hence, the provisions of the UNCLOS with respect to the exclusive economic zone and continental shelf cannot be fully applied in the SCS waters. Actually, the argument that the SCS waters marked by the "nine-dotted line" belong to "historic waters" completely overlaps the claims consistently made

22 Kuen-chen FU, Definition of Historic Waters, *Essays on International Law of the Sea*, Xiamen: Xiamen University Press, 2004, p. 324. (in Chinese)

by China concerning the SCS.

IV. Conclusion

According to the author, the doctrine of "historic waters line" reflects the legality of the "nine-dotted line", and also fully protects China's sovereign rights in the maritime areas within the line. Defining the "nine-dotted line" as the historic waters line will maintain China's rights and interests in the SCS to the fullest extent while preserving some level of flexibility at the same time. The SCS issue is special and fairly complicated. We shall not be confined by the existing legal regimes and experiences, so as to attempt to solve the issue once and for all, by employing the existing regimes only such as those for exclusive economic zone and continental shelf specified in the UNCLOS. Given the fact that the UNCLOS has accepted the special "historic rights", but has not clearly defined their connotations, China may give full play to the wisdoms gained through practice to maximize its interests during the dispute and cooperation with its neighboring States, provided that the stipulations of the UNCLOS are respected. Moreover, claiming the SCS waters as historic waters shall be the basic way for China to settle the SCS issue. Regarding the concrete connotations of historic rights, questions, such as how to maintain the rights enjoyed by both the States that are bordering the "historic waters" within the "nine-dotted line" and other States, and whether to grant such States the permission to enjoy such rights or not, shall be continuously explored in theory and probed further in practice.

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The Concept of Ocean Dumping

CAO Yingzhi* FAN Xiaoting**

Abstract: The twenty-first century has witnessed the increasingly important role played by the oceans in human lives. Yet, wastes are being dumped into oceans deliberately, and the marine environment and resources are seriously contaminated as a result of the oceanic and coastal operational accidents, as well as the natural disasters. Due to various factors, the understanding of the concept of ocean dumping differs from each other, some of which being lopsided, making it imperious to clarify the meaning of ocean dumping. The understanding on ocean dumping has experienced a historical transition from being embryonic, developing and mature stages, as is embodied in the domestic legislations on ocean dumping worldwide. In the United Nations Convention on the Law of the Sea and 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the concept of ocean dumping is updated both in its content and boundary. Currently, China's legislations on ocean dumping are expecting tremendous modifications and therefore, it is of great theoretical and practical value to study the concept of ocean dumping.

Key Words: Ocean dumping; International environment; Legal concept; 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; United Nations Convention on the Law of the Sea

I. Theoretical Analysis of the Concept of Ocean Dumping

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A. How to Understand the Legal Concept of Ocean Dumping

"Concept" is one of the basic elements of legal theory, as well as the basis upon which the specific subjects in disorder are reorganized and catalogued.[1] "Legal concept", on the other hand, as one of the elements of law, refers to the conceptualization of various facts in law, abstraction of their common characters, and the eventual authorized category formed thereafter.[2] The concept of ocean dumping is summarized, conceptualized, and abstracted as a form of legal norms, and is gradually formalized in the long-term management and practice of marine dumping. It is an instrument to study marine dumping management, and a legal term formed as a result of the summarization of relevant objects, statuses, and behaviors.

Therefore, when discussing the concept of ocean dumping, we need to understand that: Firstly, ocean dumping is a professional term. After all, the concept of ocean dumping is expressed through words, and hence it will touch upon certain terminology when being expressed. For instance, the concept of waste-dumping needs to be interpreted as a legal term under international oceans law.[3] Moreover, we should distinguish the legal concept of ocean dumping from its original meaning in daily use.

Secondly, the concept and understanding of ocean dumping may differ on two levels: first, the concept of ocean dumping might differ domestically within one State, affected by the linguistic habits and traditional elements of law; second, since the legislations on preventing ocean dumping are different in different States, the concept of ocean dumping is unavoidably different worldwide, especially between the developing and developed countries.

There are issues of conflict of languages, legal traditions, as well as certain

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1 *Oxford Dictionary of Law* (Chinese-translated version), Beijing: Guangming Daily Press, 1988, p. 533. (in Chinese)

2 Zhang Wenxian ed., *Legal Theory*, Beijing: Law Press, 1997, p. 75. (in Chinese)

3 The concept of ocean dumping is irreplaceable, which also reflects that it is a professional term. On one hand, the concept of ocean dumping cannot be summarized by any other concept, no matter what their connotation or denotation is, while on the other, it is also closely connected with the others. For example, incineration at sea does not equal its concept in the chemical sense, but it takes into account the chemical features of burning when this concept is defined in the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, as well as at the Second Consultative Meeting of Contracting Parties to the London Convention.

political and economic purposes. The ultimate solution to these problems is to universalize the international law and seek common grounds in conflicts, while reserving differences at the same time.[4] Realizing the above two points will further deepen our understanding of the concept of ocean dumping.

B. The Characteristics of the Legal Concept of Ocean Dumping

Legal concept is a major topic in the research on legal logic. We should distinguish the characteristics of the concept of ocean dumping, from the characteristics of ocean dumping and those of the relevant legislations, and also recognize the connections between the three. This is because the concept of ocean dumping is resulted from a long practice and administration of dumping wastes at sea, and falls under the theoretical category which bears the common traits of ocean dumping and is related to the legislations on and the phenomena of ocean dumping. It is only after the existence of the act of marine dumping that the concept of ocean dumping came into being.[5] The concept of ocean dumping is the abstraction of the acts of wastes-dumping at sea, and thus it will naturally bear the characteristics of the legislations on ocean dumping. Specifically speaking, the concept of ocean dumping has the following characters:

Firstly, it reflects upon both subjectivity and objectivity of an act.

The concept of ocean dumping is, by its definition, a vivid, iconic, and rich perceptual cognition obtained by humans through feeling and understanding the outside world, which develops into the rational cognition after we gradually understand its essence through comparison, analysis, composition, abstraction and summarization, and eventually takes form as a concept and is expressed in words.[6] The subjectivity of the concept of ocean dumping means that the content of this concept varies according to different eras, regions, political aims and economic

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4 As pointed out by Wang Liming, "the prevalence of international law is an undeniable fact, and the same is true when it comes to ocean dumping." See Wang Liming, The Profound Meaning of Promoting the Prevalence of International Law, *Journal of Suzhou Vocational University*, No. 1, 1999. (in Chinese)

5 "The act of ocean dumping came before its legal concept." See the Bureau of Theory at the Publicity Department of the Communist Party of China, *The Origins of Theory Rest on Practice, and the Value of Theory Is Reflected though Practice & Theoretical Hot Issues 2007*, Beijing: Xue Xi Publishing House & People's Publishing House, 2007. (in Chinese)

6 Wei Fengrong and Si Guolin, The Characters of Legal Concept, *Contemporary Law Review*, No. 10, 2001, p. 41. (in Chinese)

purposes.[7] The period from the 1954 International Convention for the Prevention of Pollution of the Sea by Oil to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter is the embryonic stage of this concept, which saw unrestricted and unrestrained acts of ocean dumping. This was because any kind of marine dumping, except the oil contamination, was not prohibited, which was favorable to the economic interests of the developed States, such as the U.S. and U.K., which were all maritime powers and had a large need for ocean dumping. This was the case until the promulgation of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, which was the first global convention to govern the marine contamination caused by a wide variety of substances.[8] It is fair to say that this convention stands for the integral interest of the majority of the States in the world. In addition to the subjectivity of the concept of ocean dumping, we should also acknowledge its objectivity, since the latter reflects the understanding of the very nature of the object.[9] The concept of ocean dumping surely expresses our best intentions to cherish and protect the environment, and reflects the rational that those who damage the environment shall get punished.

Secondly, the concept of ocean dumping is fixed, as well as flexible.

The concept of ocean dumping is fixed in the sense that it has fixed connotation and denotation, which shall not be arbitrarily increased or decreased. Since the stability of law is dependent on the certainty of legal concepts.[10] The connotation of the concept of ocean dumping reflects its essential characters, namely to reasonably and scientifically control the act of maritime dumping, so as to draft a plan for ocean dumping and protect the maritime environment as a whole. The denotation of the concept of ocean dumping defines its scope, which differs according to different legislations. For example, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil mainly deals with the oil contamination, while the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes

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7 Jiang Lingyuan and Zhu Tong, Regional Economic Integration and the World Multipolarization, *Qiushi*, No. 14, 2006. (in Chinese)

8 Si Yuzhuo ed., *A Study on International Maritime Legislation Trends and China Countermeasures*, Beijing: Law Press, January 2002, p. 279. (in Chinese)

9 Ye Ruosi and Qian Cuihua, Establishment of a Mechanism to Solve the Juridical Problem in Intellectual Property Trial – From a Perspective of Expert Consultations, at http://www.chinaiprlaw.cn/file/2007112312308.html, 10 September 2008. (in Chinese)

10 Zhu Jiping, The Constructive Function of Law's Uncertainty, *Science of Law: Journal of Northwest University of Political Science and Law*, No. 2, 2006. (in Chinese)

and Other Matter bans outright the dumping of certain materials (as listed in Annex I, commonly known as "black list") and allows for the dumping of certain materials with a special permit (listed in Annexes II and III), which leads to the conclusion that matters not listed in Annexes I, II and III are allowed to be dumped at sea.[11] In comparison, the 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter utilizes a method of "positive list", explicitly enumerating the substances that are allowed to be dumped at sea, and thus prohibiting those that are not listed,[12] which actually expands the denotation of the concept of ocean dumping substantially. However, the objective world is constantly changing, and so is the society. The concept of ocean dumping has manifested its flexibility by modifying or annulling the parts that are no longer adapted to the new situations, such as the transformation from the "black list" to the "positive list". We should dialectically comprehend the certainty and flexibility of the concept of ocean dumping in real life.

Moreover, the concept of ocean dumping also has manifested its authoritative nature in law application and the statutory strictness in its connotation.[13]

C. The Legal Functions of the Concept of Ocean Dumping

It was once stated by a scholar that the maturity of a legal concept, as well as its scientificity and completeness, are substantial to determine the level of civilization of the law.[14] This also applies to the concept of ocean dumping, which can be assessed by the change of its denotation. For instance, the initial scope of ocean dumping did not include land filling in sea reclamation,[15] and was also ambiguous about sea incineration, but its scope has gradually expanded along with the development of practice, reflecting the increasing importance attached to the maritime environment and the progress made by human beings. The functions of

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11 Yang Wenhe ed., *London Convention 20 Years*, Beijing: China Ocean Press, January 1999, pp. 326~328. (in Chinese)

12 Yang Wenhe ed., *London Convention 20 Years*, Beijing: China Ocean Press, January 1999, pp. 345~350. (in Chinese)

13 Shen Zongling ed., *Basic Theory of Law*, Beijing: Peking University Press, 1994, p. 59. (in Chinese)

14 Chen Jinzhao ed., *Jurisprudence*, Beijing: Peking University Press, 2004, p. 91. (in Chinese)

15 This is mainly due to the relative delay of the maritime administration in China. And the regulation of land filling in sea reclamation projects has not been paid close attention to by the State or society until recent years.

the concept of ocean dumping are manifested in the following aspects:

Firstly, the concept of ocean dumping plays an essential role in the implementation of the maritime laws and regulations in China, as well as the research in relevant fields. Only with a well-defined concept of ocean dumping can the legislators produce laws; only with the concept of ocean dumping can the law-enforcers conduct legal analysis and make judicial judgments; and only with the concept of ocean dumping can the jurists describe, evaluate, and improve the laws. Therefore, the concept of ocean dumping has the general functions of a legal concept.[16]

Secondly, the concept of ocean dumping has the function to bear certain values.

"Values are initially recognized by individuals, and then commonly acknowledged by groups and eventually incorporated into certain cultures."[17] The concept of ocean dumping's function to embody certain values can be manifested in two aspects:

Firstly, to increase public awareness for obeying the laws concerning ocean dumping. The protection of maritime environment and the prevention of oceanic contamination depend on improving the level of awareness of law-enforcers and the public on ocean dumping, as well as their understanding of ocean dumping and harmful effect of marine damage. The clarification of the concept of ocean dumping will help the public to better realize its effects and increase the obedience of the law.

Secondly, to ensure the marine environment and make a plan for ocean dumping as a whole so as to forward the purpose of protecting maritime environment. Take the administration of ocean dumping in China for instance, the 1985 Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean and its Implementation Regulations, issued by the oceanic administration on 25 September 1990, have provisions regarding the scope of ocean dumping similar to the 1972 London Convention on the Prevention of Marine Pollution

16 Zhuo Zeyuan ed., *An Introduction to Law*, Beijing: Law Press, 1998, p. 75. (in Chinese)

17 Viewpoints of the jurisprudence expert Prof. Huang Maorong. See Huang Maorong, *Legal Methodology and Modern Civil Law*, Beijing: China University of Political Science and Law Press, 2001, p. 53. (in Chinese)

by Dumping of Wastes and Other Matter.[18] However, as we can see, its scope is quite limited and fails to adapt to the updated requirements of maritime practice, which demands a fresh interpretation of the concept of ocean dumping. The correct comprehension of the concept of ocean dumping will be conducive for the oceanic departments to properly classify the wastes and dumping areas, to establish and optimize the permit mechanism, and to construct a detection system in dumping areas, so as to preserve maritime environment and make a plan for ocean dumping as a whole. When the ocean dumping management results in orderly development, we have good reasons to believe that the protection of marine environment will advance into a new era.[19]

In addition, the concept of ocean dumping also has the function of recognition and expression, as well as to rectify the law and improve the scientificity of the law.

II. The Evolution of the Concept of Ocean Dumping in International Legislation

Ocean dumping has a history of 100 years if counted from the Industrial Revolution in Europe.[20] In fact, if we base our differentiation on different types and scope of ocean dumping, the history of the legislation of ocean dumping can be divided into three stages, *i.e.* embryonic, developing, and mature stages, separated by the Stockholm Declaration of the United Nations Conference on the Human Environment in 1972 and the United Nations Convention on the Law of the Sea 1982 respectively. The concept of ocean dumping evolves in accordance with the development of the relevant legislation. The changes in international legislation relating to ocean dumping are presented in the following form:

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18 Implementation Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean. For detailed provisions, see State Oceanic Administration ed., *Collection of the Maritime Laws and Regulations of the People's Republic of China*, 3rd ed., p. 128. (in Chinese)

19 Cui Shaozhen, *The Administration of Ocean Dumping in China*, Beijing: China Ocean Press, August 1994, p. 53. (in Chinese)

20 Cui Shaozhen, *The Administration of Ocean Dumping in China*, Beijing: China Ocean Press, August 1994, p. 1. (in Chinese)

Stage	Time	Flag Event	Characteristics
Embryonic	Before 1972	International Convention for the Prevention of Pollution of the Sea by Oil 1954, 1969 International Convention Relating to Intervention on the High Seas in Cases of Pollution Casualties and 1969 International Convention on Civil Liability for Oil Pollution Damage	1. Maritime pollution had become an international issue; 2. The main concern of marine environmental protection rested on the prevention of oil pollution; 3. The direct responsibility or absolute responsibility was established, but it did not touch upon the State responsibility;[21] 4. Regional agreements started to be concluded.
Developing	1972–1982	1972 Stockholm Declaration of the United Nations Conference on the Human Environment and 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter	1.The subject matter of ocean dumping management was no longer limited to the prevention of oil pollution; 2. Several principles were established; 3. There was a massive increase in the number of regional agreements, and their contents started to cover comprehensive matters rather than a single matter.
Mature	1982–	1982 United Nations Convention on the Law of the Sea, 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation	1.The scope subject to the management of ocean dumping has been further widened; 2. The international mechanism of marine environment protection has been initially established; 3. The management of ocean dumping has become more normalized and standardized.

(Note: This table is constructed by the author on the basis of the history and

21 State responsibility under international law, also called as the international responsibility of States, refers to the legal responsibility a State shall bear when it violates its international obligation, or the responsibility of a State arising out of its international wrongful acts. See Zhou Hongjun ed., International Law, Beijing: China University of Political Science and Law Press, 1999 (in Chinese). So far, the field of environmental protection has always emphasized the direct responsibility. Even if in the sphere of ocean dumping, once the wrongful act occurs, it is usually the direct responsibility of individuals instead of State responsibility that is pursued. For example, Art.10 of the 1954 International Convention for the Prevention of Pollution of the Sea by Oil prescribes that, "any Contracting Government may furnish to the Contracting Government in the territory of which a ship is registered particulars in writing of evidence that any provision of the Convention has been contravened in respect of that ship. If it is practicable to do so, the competent authorities of the former Government shall notify the master of the ship of the alleged contravention." This article also mainly concentrates on the responsibility of the ship master.

characteristics of international law relating to maritime environment protection and ocean dumping.)

A. The Concept of Ocean Dumping at the Embryonic Stage of the Relevant Legislation

In 1926, the Washington Conference was hosted at the initiative of the U.S., aiming to achieve an international agreement on limiting the discharge of oil at sea. Though unsuccessful, this event serves as a sign of the rising of the consciousness to standardize the international law concerning ocean dumping. Unilateral activities of a single State paled ehen faced with the increasing instances of contamination on international level. Maritime pollution had become an international issue. Finally in 1954, the International Convention for the Prevention of Pollution of the Sea by Oil was signed, thus initiated the embryonic stage of the international legislation on ocean dumping.[22] This stage also witnessed the conclusion of the 1969 International Convention Relating to Intervention on the High Seas in Cases of Pollution Casualties, the 1969 International Convention on Civil Liability for Oil Pollution Damage and etc. Regional covenants signed during this stage included the 1969 Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.[23]

The concept of ocean dumping had not taken shape in this stage. This is due to the fact that in the embryonic stage, the main concern of the international community with respect to maritime environmental protection rested on the

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22 There has been controversy as to whether the International Convention for the Prevention of Pollution of the Sea by Oil signed in 1954 can be recognized as the beginning of the embryonic stage of the international legislation on ocean dumping. For instance, Liu Zehui opines that: "The 1954 International Convention for the Prevention of Pollution of the Sea by Oil is the first agreement on international maritime environmental protection signed by the international community, and is therefore the start of the international rules on maritime environmental protection." See Liu Zehui, The Status Quo of Pollution from Ships and the Preventive Solutions, at http://www.Mush-room.gov.cn/bbs/frame.php?frameon=yes&referrer=http%3A//www.mushroom.gov.cn/bbs/redirect.php%3Ftid%3D25279%26goto%3Dnextoldset, 24 January 2008. (in Chinese)

23 The regional agreements reached in this stage still mostly concentrate on the prevention of oil pollution at sea. Other examples included the 1971 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft signed by Denmark, Finland, Norway, Sweden and other countries, which also contributes to the environmental protection to some degree.

prevention of oil contamination instead of combating other sources of pollution. The conventions concluded and the rules developed during this period have a quite narrow scope, and are not able to break through the limits of traditional international law. For example, when it came to affixing the quantum of responsibility for environmental damage, although the rule of direct or absolute responsibility was established and the principle of strict liability was applied, the State responsibility had not been involved in this regard. Another example concerns the issue of jurisdiction; nearly all the conventions insisted that the jurisdiction should be enjoyed by flag States. All these had laid the grounds for further development of legislation on ocean dumping.

B. The Concept of Ocean Dumping at the Developing Stage of the Relevant Legislation

Commencing with the promulgation of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment[24] and concluding at the 1982 United Nations Convention on the Law of the Sea, the developing stage saw the creation of a large number of international agreements on maritime environmental protection.

The contents of agreements concluded at this stage indicated that the subject matter of ocean dumping management was no longer limited to the prevention of oil contamination, but involved all kinds of sources of pollution, and largely broadened the scope of the concept of ocean dumping. Moreover, agreements belonging to this period started to establish certain rules, and the principles on which these rules

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24 The United Nations Conference on the Human Environment, which took place from 5 June to 15 June 1972 in Stockholm, is one of the most significant events in the history of human's actions on environmental protection. Having the "Precious Planet of Earth" as its subject, the conference carried out thorough discussions on environmental issues, and proposed guidelines and principles for the international and also domestic ocean dumping legislations and policies, unfolding a spectacular outlook of the international community taking specific actions to protect environment. The conference announced 26 declarations, adopted the Declaration on Human Environment, and the basic guidelines and principles for marine environmental protection, demanding the member States to take all possible actions in order to prevent the ocean from being contaminated by various pollutants. The United Nations Environment Programme, which is established under the suggestions of the Stockholm Conference, has been designed to plan, organize, and coordinate the global environmental protection, which dramatically contributes to the legislation work regarding marine environmental protection, especially to the signing of regional agreements on marine environmental protection.

were based had gone beyond the traditional international law, laying groundwork for the further development of new principles. For instance, some strict executive provisions were included in the agreements on ocean dumping, which not only carried stronger binding force, but were also easier to be executed by each country. The provisions concerning the amendment of the agreements became one of the features of the concept of ocean dumping, thus, making the concept of ocean dumping more flexible, and more adaptable to changing circumstances as it was more convenient to revise the agreements. Another instance might be the trend of this stage that the agreements became more comprehensive, and as a result, the concept of ocean dumping became more synthetic instead of being single-faced as it was in the embryonic stage.

C. The Concept of Ocean Dumping at the Mature Stage of the Relevant Legislation

The period from the 1982 United Nations Convention on the Law of the Sea till now is the mature stage of the international legislation on ocean dumping.

Proposed at the third United Nations Conference on the Law of the Sea and discussed for more than 8 years, the United Nations Convention on the Law of the Sea was the paradigm shifting event in the ocean management by the international community. The conclusion of the United Nations Convention on the Law of the Sea marks the initial establishment of the legal system relating to ocean dumping.[25] Thanks to the conclusion of the United Nations Convention on the Law of the Sea, the number of international conventions and regional agreements on marine protection gradually climbed up during this period.

The concept of ocean dumping in this stage had become more mature and normative, manifested by the large amount of amendments to and drafting of

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25 Liu Zehui holds the opinion that "the conclusion of the 1982 United Nations Convention on the Law of the Sea marks the initial establishment of the legal system in the field of marine environmental protection". See Liu Zehui, The Status Quo of Pollution from Ships and the Preventive Solutions, at http://www.Mush-room.gov.cn/bbs/frame.php?frameon=yes&referrer=http%3A//www.mushroom.gov.cn/bbs/redirect.php % 3Ftid % 3D25279 % 26goto%3Dnextoldset, 24 January 2008 (in Chinese). Besides, the prestigious ocean law expert Zhao Lihai also agrees in that "the Convention is a cornerstone in the process of the development of international law, and 'is the most significant reputation the international community has achieved with regard to the codification and gradual promotion of international law...'" See Zhao Lihai, *A Study on Some Issues of Ocean Law*, Beijing: Peking University Press, July 1996, p. 148. (in Chinese)

conventions. For example, the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, which was drafted under the leadership of United Nations Environment Programme, sets down the principles to be obeyed during the transboundary movement of hazardous wastes and their disposal, and also provides relatively comprehensive prescriptions in this respect.[26] In May 1994, the International Maritime Organization adopted the International Management Code for the Safe Operation of Ships and for Pollution Prevention (usually called as ISM Code).[27] The most outstanding feature of the ISM Code is that it enhances the shore-based management, thus establishing the ship-shore management mechanism.[28] Therefore, the concept of ocean dumping develops from a mere control upon objects to a more comprehensive system targeted at personnel quality and management mechanism.

III. The Correct Understanding of the Concept of Ocean Dumping

A. Analysis of the Relevant Articles in Two Conventions Related to the Definition of the Concept of Ocean Dumping

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26 Office of the Environment Protection and Resources Conservation Committee of the National People's Congress of the People's Republic of China, *Selected International Treaties on Environmental and Resources Protection*, Beijing: China Environmental Science Press, December 1993, pp. 84~85. (in Chinese)

27 The International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), which was formulated in May 1994, is aimed to provide an international standard for the safety management and safe operation of ships, and the prevention of pollution. The brand-new management theory and method embodied in ISM Code, as well as the effective results after its application, indicate its capability of being successfully applied to the safety management of domestic companies and ships. The Maritime Safety Administration of China started to establish a research project on the domestication of the ISM Code in 1997. In April 2001, the "Research on the Domestication of the ISM Code" was approved by the expert review of the Science and Education Department of the Ministry of Transport, which in July of the same year issued the "Notice Concerning the Promulgation of Regulations Governing the Safe Operation of Ships and Pollution Prevention of the People's Republic of China (Trial Implementation)" (JiaoHaiFa [2001] No. 383). See Focus on the National Safety Management Code (NSM), at http://www.zzmsa.gov.cn/news_show.php? id=172, 24 January 2008 (in Chinese); Identifying the Wrongdoer of Administrative Illegal Activities in Maritime Safety, at http://www.jsmsa.gov.cn/art/2005/10/20/art_727_1235.html, 24 January 2008 (in Chinese); and Product Quality Control in the Safety Management System of Shipping Companies, at http://www.9lny.cn/html/xingyeyanjiu/20070818/10543/.html, 24 January 2008. (in Chinese)

28 Si Yuzhuo ed., *A Study on International Maritime Legislation Trends and Countermeasures*, Beijing: Law Press, January 2002, p. 280. (in Chinese)

In the late 1950s, the increase in regional environmental pollution, caused by deliberate activities of dumping of wastes at sea, made people begin to explore the concept of ocean dumping. The United Nations Convention on the Law of the Sea and the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter are the two basic sources from which most of the understanding of the concept of ocean dumping is derived. These two conventions not only positively define ocean dumping but also make exclusions. And the definition in the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter is more specific and comprehensive than that in the UNCLOS.

1. Understanding of Article 1 of the United Nations Convention on the Law of the Sea[29]

We can infer from this article that there are two aspects of dumping. First is the deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea, and the other is the deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea.

Second, dumping does not include:

First, the disposal of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or structures.

Second, placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of the United Nations Convention on the Law of the Sea.

2. Understanding of Article 3 of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter

We can infer from this article that, first, two aspects are included in the definition of dumping: any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; and any deliberate

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29 *United Nations Convention on the Law of the Sea (English to Chinese Version)*, Beijing: Law Press, 1996, p. 3. (in Chinese)

disposal at sea of vessels, aircraft, platforms or other manmade structures at sea.[30]

Second, dumping excludes the disposal at sea of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or structures; dumping also precludes the placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of the London Convention.

Third, the London Convention provides exceptions for the disposal of wastes or other matter directly arising from, or related to the exploration, exploitation and associated offshore processing of seabed mineral resources. These circumstances are not covered by the London Convention.

Lastly, according to the London Convention, wastes or other matter refer to material and substance of any kind, form or description.[31]

B. The Correct Understanding of the Concept of Ocean Dumping

On the basis of analyzing and comparing the two Conventions, ocean dumping should be defined as any deliberate disposal or discard of wastes or other matter at sea in any way or methods, which excludes unintentional disposal or discard of wastes or other matter at sea.

1. The Scope of Ocean Dumping

The improvement of awareness of environmental protection renders it possible to broaden the scope of legislation on ocean dumping. The concern of international community on the scope of ocean dumping has been extended to the following

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30 Yang Wenhe ed., *London Convention 20 Years*, Beijing: China Ocean Press, January 1999, p. 310. (in Chinese)

31 The definition of wastes varies in different countries. In April 2007, U.S. issued the amendment to the Definition of Solid Waste (DSW), and certain hazardous secondary materials are excluded from the definition by the Environmental Protection Agency under the Resource Conservation and Recovery Act. This proposal is designed to encourage safe and environmental-friendly recycling and saving of resources, and is also a response to several judicial judgments concerning the definition of solid waste. The definition of waste in American law is different from that under Art. 1(4) of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.

fields:

First – the dumping of wastes at sea. The 1996 Protocol to the 1972 London Convention improves and rectifies the concept of ocean dumping of wastes. Besides, its Annex I provides a positive list detailing the types of wastes or other matters that may be considered for dumping, including: dredged material; sewage sludge; fish waste, or material resulting from industrial fish processing operations; vessels and platforms or other man-made structures at sea; inert and inorganic geological material; organic material of natural origin; bulky items primarily comprising iron, steel, concrete and similarly unharmful materials for which the concern is physical impact, and limited to those circumstances where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping. Annex II requires an assessment of the dumping of wastes at sea.

Second – the dumping activities during the exploration and development of international seabed area. International seabed area refers to the seabed and ocean floor and subsoil thereof, which is beyond the limits of any national jurisdictions. This area accounts for some 65% of the entire sea, and there are enormously abundant mineral resources, which have vast value in exploitation, scientific research and military defence, leading to fierce competition between powerful countries.[32] The United Nations Convention on the Law of the Sea, which was adopted in 1982 and entered into force in 1994, confirms the principle that the international seabed area and the resources thereof are the common heritage of mankind. The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 also came into force in 1996. Until January 2007, 152 countries had ratified the United Nations Convention on the Law of the Sea, and 126 countries had ratified the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, which makes the international seabed resource exploitation enter into the dominion of international law.[33] On the other hand, the major industrialized western States have produced their own domestic laws governing mineral resour-

32 Ocean Experts' Appeal to Promote China's Legislation on International Seabed Exploration and Exploitation as Soon as Possible, at http://www.chinanews.com.cn/cj/news/2007/03-11/888588.shtml, 6 March 2008. (in Chinese)

33 Ocean Experts' Appeal to Promote China's Legislation on International Seabed Exploration and Exploitation as Soon as Possible, at http://www.chinanews.com.cn/cj/news/2007/03-11/888588.shtml, 6 March 2008. (in Chinese)

ces exploitation in international seabed area.[34] By doing so, they benefit from exploiting resources in international seabed area. Henceforth, the scope of ocean dumping management has also expanded into the international seabed area, and consequently, the concept of ocean dumping will necessarily include the disposal at sea of wastes or other matter generated by the mineral exploitation in international seabed areas and related processes at sea.

Third – wastes that are discharged to ocean from atmosphere and land. The 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter does not specifically deal with the disposal of industrial wastes at sea. However, as the deterioration of oceanic environment, international community is more and more concerned about the discharge of wastes to ocean from the atmosphere and land. The 1996 Protocol to the 1972 London Convention lists the industrial wastes that are exempt from absolute prohibition in its Annex I (Wastes or other matter that may be considered for dumping), including dredged material, sewage sludge, fish waste, vessels and platforms, inert and inorganic geological material, organic material of natural origin, bulky items primarily comprising iron, steel, concrete and so on.[35] The 1996 Protocol to the 1972 London Convention broadened the range of ocean dumping management, explicitly indicating that the industrial wastes included in the list are allowed to be dumped at sea.

Fourth – discharge of oil and gas substances such as oil, fuel oil, heavy diesel oil and lubricating oil, and the abandonment and toppling of offshore platforms at the site. The International Convention for the Prevention of Pollution of the Sea by Oil, which was signed on 21 May 1954, is aimed at preventing pollution of the sea by oil discharged from ships. The Convention provides clear definitions of oil, oily mixture, and ships, interpreting oil as oil, fuel oil, heavy diesel oil and

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34 Such as U.S., Germany, U.K., France, Japan, Italy and so on.

35 Yang Wenhe ed., *London Convention 20 Years*, Beijing: China Ocean Press, January 1999, p. 320. (in Chinese)

lubricating oil.[36] The objects to be dumped at sea should include oily substance, either in accordance with the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter or its 1996 Protocol. As the oceanic exploitation is gaining significance increasingly, the discharge of oily substance at sea will necessarily become a main concern of the public. Particularly, the promulgation of the Law of the People's Republic of China on the Administration of the Use of Sea Areas in 2002 brings another issue to our attention, namely the dismantling of marine facilities and structures used in oceanic projects.[37] When an oceanic project is completed, does the in-situ disposal of the residual facilities and structures constitute a kind of ocean dumping? Judging from the practice in ocean administration, the answer should be positive, and such dumping should also be subject to ocean dumping management.

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36 The 1954 International Convention for the Prevention of Pollution of the Sea by Oil is the first international convention with respect to maritime environmental protection. The Convention came into force in 1958. It prescribes that the oil tankers over 150 tons gross tonnage and other ships over 500 tons gross tonnage are prohibited to discharge oil or oily mixture in sea areas within 50 nautical miles from land. The 1962 Amendment to this convention expands the prohibited zone from 50 nautical miles to 100 nautical miles. The Convention was afterwards revised in 1969 and 1971. However, since the flag States, especially States of flag of convenience, have neither strictly abided by the standards set up in the Convention, nor imposed harsh punishment on the ships causing oil pollution, the Convention is not very effective in practice, and the oil contamination at sea is still a serious issue. Besides, the Convention does not deal with the situation of oil pollution resulted from ship accidents.

37 According to Art. 29 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas, where at the expiration of the period for the right to the use of sea areas, the owner fails to apply for its extension or the application for extension is not approved, such right shall be terminated. After the termination of the right to use sea areas, the former owner of the right shall dismantle the marine facilities and structures that may cause pollution to the marine environment or impede the use of the areas for other ocean projects. In fact, the issue of demolition of marine facilities and structures in ocean project has been included into the scope of ocean administration.

Fifth – incineration at sea.[38] Incineration at sea refers to the deliberate combustion of wastes or other matter at sea, on the condition that the combustion occurs on marine incineration facilities. Activities incidental to the normal operation of vessels, platforms, or other man-made structures are excluded from the scope of this definition. The No. 50 Resolution of the Consultative Meeting of Contracting Parties to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter sees the inclusion of incineration at sea into the Convention, which is also the result of several rounds of negotiations and conciliation.

Sixth – land filling in sea reclamation projects. The activities of land filling in sea reclamation projects is a new type of ocean dumping that developed as a result of increasing oceanic exploitation. There are several points which need to be clarified concerning the filling of land in sea reclamation projects: neither the International Convention for the Prevention of Pollution of the Sea by Oil signed in 21 May 1954, the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, nor the revised 1996 Protocol to the 1972 London Convention, included the activities of land filling in sea reclamation projects in the definition and scope of ocean dumping.[39] With the changing ocean management systems around the world and increasingly widening and inclusive content of ocean management, the sea reclamation has been gradually incorporated

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38 Member States disputed over whether to include the issues of incineration at sea into the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. Some developed States, for example, U.S., were unwilling to include this issue in the 1972 London Convention, reckoning that it was too early and premature to set a deadline for the prohibition of sea incineration. But the majority of the Member States reached consensus to cover the issue of sea incineration under the 1972 London Convention, despite the existence of some unsolved problems on whether and how to restrain incineration at sea. For details, see meeting documents of the 2nd Consultative Meeting of Contracting Parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, held on 26 September 1977 in London, the headquarter of the International Maritime Organization, and the 3rd Consultative Meeting of Contracting Parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, held on 9 October 1978 in London.

39 The reason might be that around the time of the conclusion of the Convention, there were relatively few activities of ocean exploitation, and the activities of sea reclamation had not been paid much attention.

into the scope of governing laws.[40] Without proper management, the activities of filling sea areas and reclaiming land will unavoidably inflict huge damage to the environment. Normally, there will be some requirements in the feasibility assessment of the use of sea areas and the environmental effects evaluation of land filling for sea reclamation projects within internal waters. Only a few countries establish rules or conclude international conventions to regulate the activities of reclamation in the sea areas outside the territorial waters, especially on the high seas. Such reclamation activities should be given more importance.

2. The Excluding Scope and Attribution Rule of Ocean Dumping

Ocean dumping does not include the unintentional disposal or discharge at sea of wastes or other matter, for example, dumping of wastes or other matter as a result of marine accidents, wars or other force majeure events. This is consistent with the principle of strict liability in the field of ocean dumping. The principle of strict liability is opposite to the liability based on fault, as it refers to situations where the injurer is obliged to assume liability even if he does not have any intention or negligence of injury.[41] Presently, many States employ the principle of strict liability in the field of environmental damage. The Environment Protection Law of China also applies the principle of strict liability in environmental damage, granting the organizations or individuals who have suffered from marine

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40 Legislations on sea reclamation can be found in Art. 4 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas: "The State exercises strict control over the activities relating to the use of the sea areas that may alter their natural attributes, such as filling sea areas and reclaiming land from them." While in the State Council's Notice on Several Issues about Further Strengthening Ocean Administration (GuoFa [2004] No. 24), it is stated that the government shall strictly control sea reclamation and sea sand exploitation. Currently, the State Oceanic Administration of China is also producing relevant policies to extend reasonable control over sea reclamation.

41 Zhang Mingxin, Legal Theoretical Analysis on the Strict Liability Mechanism in Environmental Civil Liability, *Journal of Xuzhou Normal University (Philosophy and Social Science Edition)*, No. 2, 2003. In fact, majority of States, including China, have applied the strict liability principle in the field of environmental tort. The theoretical basis is that, increasingly, the incidents of environmental pollution are inflicting serious damage to humans and other life forms and leading to a chain of grave social problems, while many activities causing pollution do not arise out of fault, and some are even legal. The traditional principle of fault based liability in civil law fails to provide sufficient and effective remedies with respect to environmental damage, therefore the application of strict liability principle in the environmental tort is required. The inception of the strict liability principle and its wide application, which complements and rectifies the principle of fault based liability, is in consonance with the fact that beginning in the 20th century, the law developed from being individual-centered to society-centered. In modern tort law, the principle of strict liability has already become one of the basic principles of attribution of liability. Together with the principle of fault based liability, it constitutes the foundation of modern tort law.

environmental damage the right to claim compensation from the polluters.[42] Such attribution of responsibility to compensate for any damage to the maritime environment does not depend on whether perpetrator has faulted or such damage has violated the applicable laws or not, but on the objective factual situation of pollution itself. A significant part of China's Marine Environment Protection Law deals with the prevention of pollution of marine environment by ocean dumping. The Implementation Regulations on Control of Dumping of Wastes in the Ocean of the People's Republic of China is established in accordance with the Marine Environment Protection Law of the People's Republic of China, with the latter being the fundamental law to the former. Therefore, it is natural that the principle of strict liability is applied in the Implementation Regulations for determining the compensation arising out of damage caused by ocean dumping. However, there are exceptions to the principle of strict liability. According to the Marine Environment Protection Law of the People's Republic of China,[43] the polluters would not be obliged to make compensation when the pollution is caused by acts of war, natural calamities or other force majeure events, even if the pollution results in large damage.

3. Analysis of the Characteristics of Ocean Dumping

First of all, the scope of ocean dumping has been largely expanded. In other words, all the acts of intentional disposal or discarding of wastes or other matter at sea fall into the sphere of ocean dumping.

Secondly, the wastes produced by the industrial production and household activities can be divided into two categories, namely, one is wastes from land, and the other is wastes from sea operational structures. Wastes are dumped into the sea either directly from the source or through some special instruments (for example, through vessels, aircraft, platforms and other transporting and loading appliances). These two categories are different with each other only in the methods of dumping, while their purposes and consequences are the same. And the essential point is to

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42 For detailed provisions, see Art. 41 and Art. 42 of the Environmental Protection Law of People's Republic of China.

43 Art. 92 of the Marine Environment Protection Law of the People's Republic of China as revised in 1999 provides that: "Compensation liability may be exempted if pollution damage to the marine environment cannot be avoided, despite prompt and reasonable measures taken, when the pollution damage is caused by any of the following circumstances: (1) acts of war; (2) irresistible natural calamities; or (3) negligence or other wrongful acts in the exercise of the functions of departments responsible for the maintenance of beacons or other navigational aids." These are actually exceptions of the principle of strict liability.

make the dumping reasonable and scientific.

Thirdly, we should distinguish between the dumping and non-dumping acts. Non-dumping refers to the disposal at sea of the wastes that are created as a result of the normal operations of the transporting and loading instruments. For instance, if some dredged materials are transported and poured out in the sea by vessels or other instruments for the purpose of disposal, such activities would fall into the category of dumping; whereas the discharge of household garbage and oily sewage from ship cabin generated in the course of navigation or through other regular activities of the ships or other instruments would fall into the category of non-dumping.

IV. The Theoretical and Practical Value of Interpreting the Concept of Ocean Dumping

A. The Theoretical Value of the Concept of Ocean Dumping

1. It Is an Objective Requirement of Improving the Legal Regime of Environmental Protection

The issue of environmental protection is brought about by environmental problems. Tracing this back to the very beginning, there would be no problems of environmental protection should there be no environmental damage in the first place. Environmental protection is carried out in response to dealing with the environmental problems.[44] Environmental protection refers to the measures taken to solve the existing and potential environmental problems, and to properly balance the co-relation between the exploitation and preservation of natural and man-made environments by mankind, as well as that between the survival and development of human society on one hand, and the inherent rule of the nature itself on the other hand. The main contents of environmental protection include the management of environmental pollution, the prevention and restoration of environmental destruction, the preservation of resources, and the protection of biological diversity. In the current legal regime of environmental protection, the management of ocean

44 Xu Xiangmin ed., *Environmental Law*, Beijing: Peking University Press, September 2005, p. 16. (in Chinese)

dumping is a part of the hazardous wastes management,[45] and henceforth, the study on the legislation on ocean dumping management should begin with the management of hazardous wastes, exemplified by the fact that the regulation of wastes under international law begins with defining the wastes.

The evolution of the concept of ocean dumping under international law indicates that it is only after repeated refinement of new legal ideas that the concept of ocean dumping gradually improves. The incompleteness of a legal concept will lead to tremendous damage to a legal regime, and overlooking of certain aspects in a legal concept will cause enormous loss in practice. For instance, the control over the wastes generated directly from land was neglected in the embryonic stage of ocean dumping. Resultantly, London's garbage was poured into the mouth of the river Thames, and the port of Liverpool, the Bristol Channel and the Plymouth Bay in Britain all saw the dumping of dredged wastes,[46] resulting in heavy environmental pollution at the global level, which gravely contaminated the local marine environment.

Appropriate clarification of the concept of ocean dumping will undoubtedly help to improve the legal regime of environmental protection. This is because an appropriate clarification of the concept of ocean dumping will provide concrete objectives, scope and goals of management, especially for some developing countries whose marine management system is still in an unorganized stage. They pursue economic development at the cost of sacrificing the marine environment, not to mention the lack of management of ocean dumping.[47] Even in developed countries, the scope of ocean dumping is not always the same due to the difference in perspectives. Take incineration at sea for example, some developed States, such as U.S., are unwilling to include the issue of incineration at sea in the jurisdiction of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. Therefore, on one hand, it is necessary to form accurate

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45 This has acquired general recognition under international law. See Wang Tieya ed., *International Law*, Beijing: Law Press, August 1995, p. 481 (in Chinese); Zhou Zhonghai, *International Law*, Beijing: China University of Political Science and Law Press, September 2004, pp. 554~559 (in Chinese); and Zhu Xiaoqing ed., *International Law*, Beijing: Social Sciences Academic Press, May 2005, pp. 225~228. (in Chinese)

46 Cui Shaozhen, *The Administration of Ocean Dumping in China*, Beijing: China Ocean Press, August 1994, p. 26. (in Chinese)

47 Wang Pei'er, Liu Yangxiong, Zhang Luoping, Chen Weiqi and Hong Huasheng, Discussion on Legislation on Marine Functional Zoning in China, *Marine Environmental Science*, No. 4, 2006. (in Chinese)

understanding of the concept of ocean dumping, and on the other hand, it is also important to keep a close eye on the new forms of ocean dumping, so as to adapt to the objective needs of the legal regime of environmental protection.

2. It Reflects the Influence of the Theory of Sustainable Development in the Field of International Ocean Dumping

Sustainable development is defined in the report of Our Common Future as the "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[48] According to this interpretation, there are two other basic elements in addition to the general concept of development, one is needs, and the other is limitation. Development is necessary for the satisfaction of certain needs of humankind: needs in the present and in the future, needs of this generation and next one, needs of people from developed States and regions and needs of people from poor areas. Limitation is the restriction on the activities hampering the environment, as well as their level of impact. The exploitation without restraints for now will render the environment completely damaged and exhausted in the future.

From the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter to its 1996 Protocol as revised, the guiding idea has been constantly evolving as the concept of ocean dumping matures. In the begining the focus was on controlling ocean dumping, which was clearly shown in the 1954 International Convention for the Prevention of Pollution of the Sea by Oil and the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. The 1954 Convention was designed to control the pollution of the sea by oil. Its control theory had a profound impact on the theoretical development of environmental protection in the earlier stage. The 1972 London Convention lays down the principle that the Contracting States shall individually and collectively promote the effective control of all the marine pollutants, and pledge themselves to take all practical steps to prevent the pollution of the marine environment caused by the dumping of waste and

48 Sustainable development is a new perspective on development brought up in the 1980s. It was created in response to the requirements of changing times, as well as the social and economic development. After repeated discussion and deliberation, the 15th Governing Council Session of the United Nations Environmental Programme, which took place during May 1989, adopted a Statement on Sustainable Development.

other matter,[49] thus, evidencing that the principle of control is fully embodied in the 1972 London Convention. Nevertheless, the philosophy of ocean dumping management has scaled a higher level as the environmental theory evolved, with the idea of sustainable development percolating in the field of ocean dumping management. This is thoroughly reflected in the revised 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, which is concluded to ensure that further international actions to prevent, reduce and eliminate marine pollution caused by dumping when practicable can and must be taken without delay to protect and preserve the marine environment and to manage human activities in such a manner that the marine ecosystem will continue to sustain the legitimate uses of the sea and will continue to meet the needs of present and future generations.[50] It is fair to say that such a change is consistent with the general trends in the environmental field.

3. It Is Required in Order to Refute the Wrong Understanding of the Concept of Ocean Dumping

The concept of ocean dumping is not accepted by everyone or every country. It is needed that the concept of ocean dumping be understood accurately if we want to rebut the mistaken understanding that exists currently.

It is opined that ocean dumping is all about pouring wasted matter to or at the sea, thereby simply concentrating on the superficial meaning of "dumping". This sort of opinion is mistaken as it ignores the act of discharging wastes from the land, which is a typical mode of ocean dumping.

It is also opined that ocean dumping refers to dumping at the sea, reckoning that it is specifically limited to the disposal or discharge of wastes in the ocean. In fact, wastes from the land account for the largest percentage among the sources of

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49 Art. 1 of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter provides that: "Contracting Parties shall individually and collectively promote the effective control of all sources of pollution of the marine environment, and pledge themselves especially to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."

50 Paragraph 8 of the Preface of the 1996 Protocol to the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter states that: "further international action to prevent, reduce and where practicable eliminate pollution of the sea caused by dumping can and must be taken without delay to protect and preserve the marine environment and to manage human activities in such a manner that the marine ecosystem will continue to sustain the legitimate uses of the sea and will continue to meet the needs of present and future generations."

ocean pollution. It is calculated that roughly 80% of the oceanic contamination is generated by land originated wastes. Therefore, such a viewpoint is incorrect in that it neglects the discharge of wastes or other matter directly from land into the ocean.

Another standpoint considers ocean dumping to be purely related to solid wastes and other similar matter, whereas actually, liquid wastes and other matter also fall within the scope of ocean dumping management.

The definition of ocean dumping has always been a hot issue of debate in the internal discussions among Contracting States of the London Convention respecting the strategic issues of long-term development of the Convention.[51] In order to ultimately eliminate the problem of ocean dumping, the international community should make efforts to reach a correct understanding of ocean dumping.

B. The Practical Value of the Concept of Ocean Dumping

1. A Correct Understanding of the Concept of Ocean Dumping Is Conducive to Establishing the Correct Values of Ocean Dumping

The values of marine environment involve the preservation of the basic balance in the natural system of marine environment, such as the ecological balance, dynamic balance and etc., so as to render the oceans sustainable for the long-term survival and evolution of human beings. As the ocean is casting increasing influence on the world economy, there are more and more new areas where humans can exploit in the ocean, which has been proved economically effective. Ocean exploitation and utilization is probably the way out for human beings to confront the present plight and embrace the future development. Moreover, oceans are playing an increasingly important role in the global climate... Under such circumstances, new values of marine environment come into being. For example, it is the oceans that adjust the worldwide climate and create the natural environment suitable for human to live; biological resources in the oceans are an important food source for human race; oceans are the essential pathway to communicate various continents; they are the new space where humans can survive and develop. The

51 Si Yuzhuo ed., *A Study on International Maritime Legislation Trends and Countermeasures*, Beijing: Law Press, January 2002, p. 276. (in Chinese)

examples are not exhaustive.[52] The introduction of marine values in the field of ocean dumping is to harmonize the ocean dumping management and the global environment protection, and to promote ocean dumping management to develop in a scientific way.

At present, we are still applying the Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean promulgated in the middle 1980s,[53] which has already fallen behind the constantly changing practices of ocean dumping management. As such, we are in desperate need of setting correct value in ocean dumping. Only by doing so can we chalk out feasible developmental strategies of ocean management and the relevant ocean policies, and carry out the legal regime of ocean dumping by applying laws, regulations and systems for business and technology standards, employing administrative, economic, and publicity means, utilizing all kinds of information systems, and establishing effective public supervision.

In order to thoroughly bring the legislations on ocean dumping into force and to improve the effect of maritime environment management, in addition to enhancing the law enforcement of ocean dumping, it is also necessary to pursue the "mass line" tactic in order to obtain massive support from the experts and practitioners in the field of maritime protection. Widespread compliance with the law is the very source of legal power and makes for a solid foundation supporting the legal work in China.[54] The history of establishing and developing the legal regime around ocean dumping is relatively short in China, and the general public is not familiar with the current marine laws and regulations. Though some laws have already been promulgated and implemented, quite a number of people are

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52 A well-known ocean expert, and ex-director of the Department of Sea Area Management in the State Oceanic Administration of People's Republic of China, Lu Shouben, mentions ten new marine values, as well as five conditions to promote these new values in his monograph *The General Theory of Ocean Management*. It is because of the intensification of these marine values that the legislations on ocean dumping develop and improve. See Lu Shouben, *The General Theory of Ocean Management*, Beijing: China Ocean Press, September 1997, pp. 6~14. (in Chinese)

53 The Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean was issued by the State Council on 6 March 1985 and the Implementation Regulations on Control of Dumping of Wastes in the Ocean of the People's Republic of China was adopted by the State Oceanic Administration on 25 September 1990.

54 Cui Min, Cultivating the Awareness of Law-compliance and Establishing the Respect for Law – A Review on the Statement Made by Mr. Dong at the 2nd National Conference on Work of Ideological Publicity, *Journal of Chinese People's Public Security University (Social Sciences Edition)*, No. 1, 2008. (in Chinese)

not aware of the relevant legislations due to the lack of extensive popularization of such laws in various ways. Under such circumstances, it is impossible to get the public to voluntarily obey laws. Therefore, it is extremely important to spread legal knowledge and awareness among the public by organizing collective studies, publicizing legislations and giving instructions to them, so as to effectively improve the awareness on ocean dumping management among the nationals.

2. A Correct Understanding of the Concept of Ocean Dumping Is Essential to the Amending of the Regulations on Control of Dumping of Wastes in the Ocean

Ever since the 1980s, China has acceded to approximately twenty international conventions dealing with the ocean pollution prevention and marine ecological environment protection, including the United Nations Convention on the Law of the Sea.[55] Domestically, there are also several laws and regulations concerning marine environmental protection, such as the 1982 Marine Environment Protection Law of the People's Republic of China, which puts forward explicit measures and legal requirements with respect to the prevention of pollution caused by ocean dumping, and the 1985 Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean and its Implementation Regulations which was adopted on 25 September 1990. In all fairness, sufficient attention has been paid to the legislations of marine environmental protection.

On one hand, the 1985 Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean is in consonance with the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter in the principles that are to be observed and the purposes of the ocean dumping management, the definition of "dumping", the scope of application of the articles, the classification of wastes, the permit and its categories, legal responsibility and etc. It also develops more concrete provisions on the basis of the 1972 London Convention.

On the other hand, the 1996 Protocol has revised the 1972 London Convention to quite an extent. For example, it includes the polluter pays principle, adjusts the scope of application to some degree, provides a list of wastes that may be considered for dumping (namely introduce a "white list" to replace the previous

55 Thousands of Cases of Maritime Illegal Activities Have Escaped Criminal Penalty – China's Legal System of Marine Environmental Protection Is in Urgent Need of Improvement, at http://news.sohu.com/20070911/n252072975.shtml, 14 September 2008. (in Chinese)

"black list"), extends its jurisdiction to the abandonment and toppling of offshore platforms at site, adds an optional provision on legislative immunity, puts the provision on clean production processes which minimize the generation of harmful substances into the articles of technical co-operation and assistance, appends a dispute settlement provision, prescribes about the compliance procedures of the protocol, and inserts new articles of scientific and technical research. In comparison, the 1985 Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean either pays only a little attention to these newly added contents, or does not involve them at all.[56] Therefore, it is necessary that the Regulations on Control of Dumping of Wastes in the Ocean be consistent with the international conventions, and the concept of ocean dumping should reflect the correct understanding of the concept under international conventions as well.

The 1985 Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean was drafted in accordance with the Marine Environment Protection Law of the People's Republic of China, which was adopted at the 24th session of the 5th National People's Congress Standing Committee on 23 August 1982 and entered into force on 1 March 1983. On 25 December 1999, the 13th session of the 9th National People's Congress Standing Committee promulgated the revised version of the Marine Environment Protection Law of the People's Republic of China, which came into force on 1 April 2000. The provisions in the 1985 Regulations of the People's Republic of China on Control of Dumping of Wastes in the Ocean should also be adjusted in accordance with the revised Marine Environment Protection Law of the People's Republic of China. Currently, the amendment to the Regulations on Control of Dumping of Wastes in the Ocean has already begun at the initiative of the State Oceanic Administration, and there have been many discussions concerning the concept of ocean dumping. It is believed that the new Regulations on Control of Dumping of Wastes in the Ocean that is about to be issued will properly solve this key problem.

3. A Correct Understanding of the Concept of Ocean Dumping Is Conducive to the Strengthening of Cooperation and Communication between Relevant Countries and Regions for Marine Dumping Management

International cooperation is a very important principle in modern international

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56 For example, the issue of popularization of clean production processes to reduce wastes is completely beyond the contents of the regulations.

law, as well as a fundamental principle of international environment law.[57] It has a special value to the cause of international environmental protection. This is because the environmental issues are different from economic, political or military issues. States have absolute discretion to control their diplomatic conduct in economic, political or military sphere. However, challenges of global environmental problems such as the marine contamination and air pollution can hardly be tackled by any single State itself, no matter how economically or scientifically advanced the State is. Additionally, the environmental pollution has already become a worldwide environmental crisis, and the time that the entire international community commits to a unified endeavor has already come. Therefore, there is no other way out except to work globally. The Declaration on the Human Environment made an explicit announcement about the basic principles of international environmental cooperation. As is stated in the Declaration on the Human Environment: "A growing class of environmental problems, because they are regional or global in extent, or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest."[58] The Nairobi Declaration reaffirms "its commitment to … the further strengthening and expansion of national efforts and international co-operation in the field of environmental protection", and "urges all Governments and people of the world to discharge their historical responsibility, collectively". Both of the above declarations provide for the principles of strengthening coordination and cooperation among States.

In the early 1970s, large amount of toxic materials was being poured into the oceans, and some coastal countries started to complain about the pollution caused by ocean dumping, which led to the strong demand and overall endeavor of the international community in controlling dumping at sea. In particular, the two international events of ocean dumping (in 1971, a British shipping company planned to pour some quantity of chemical toxins in the southern ocean region

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57 Now the majority of scholars have come into consensus that the principle of international cooperation is a fundamental principle of international environmental law. See Lin Canling ed., *International Environmental Law*, Beijing: People's Publishing House, April 2004, p. 260 (in Chinese); Han Chengdong and Pan Baocun eds., *A Textbook of International Law*, Nanjing: Nanjing University Press, September 1988, p. 441 (in Chinese); Wang Tieya ed., *International Law*, Beijing: Law Press, August 1995, p. 451. (in Chinese)

58 Declaration of the United Nations Conference on the Human Environment, at http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=97&ArticleID=1503&l=fr, 14 September 2008.

of England; in the same year, 650 tons of chlorocarbon waste was loaded in the Rotterdam Port by a Dutch vessel, which prepared to topple them into the northern part of the North Sea, triggering extensive objection among the populations of the coastal States in the North Sea area, as well as Norway and Iceland)[59] motivated the States to realize the necessity to cooperate internationally in the field of ocean dumping management.

As the process of world integration in economy and politics accelerates, the issues of the exportation and cross-border carriage of wastes, especially dangerous wastes, have become more serious globally in recent years. Some developed States have turned third-world countries into their waste disposal stations, transferring pollutants there, and mainly employ transnational maritime transportation of wastes as a mode to do this. The Convention governing this issue is the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, while the London Convention only deals with the exportation and cross-border transportation of wastes which aim to be disposed at sea. It can also be inferred from the previous analysis in this article that the 1996 Protocol to the London Convention also emphasizes the principle of international cooperation, which separately provides in the Articles 12, 13, 14, and 17 to have international cooperation in the area of ocean dumping management.

Due to the characteristics of the dumping of wastes from land-originated sources, along with the reasons such as the conflict of jurisdictions, currently it is still premature to make unified international conventions in this field, and many States or regions have produced regional covenants to prevent, control and reduce the marine pollution caused by ocean dumping from land to sea.[60] The economic development has led to increasing amount of wastes and rapid development of sewage pipelines. The marine pollution generated by the dumping of wastes from land is continuously extending to pelagic areas. Therefore, China should strengthen

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59 Cui Shaozhen, *The Administration of Ocean Dumping in China*, Beijing: China Ocean Press, August 1994, p. 3. (in Chinese)

60 Such as the Convention for the Prevention of Marine Pollution from Land-Based Sources signed in Paris, 1974; the Convention on the Protection of the Marine Environment of the Baltic Sea signed in Helsinki; the Convention for the Protection of the Mediterranean Sea against Pollution signed in Barcelona, 1976; the Convention for the Protection of the Marine Environment and Coastal Area of the South-east Pacific signed in Lima, 1981; and the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region signed in Kingston, 1990. These conventions on maritime protection are all regional ones in overall protection of oceans, which contain prescriptions on ocean dumping.

cooperation with its neighboring countries, protect the marine environment jointly with them, and avoid creating oceanic pollution through dumping of wastes.

Currently, the ocean dumping management in China is still legally based on the Regulations on Control of Dumping of Wastes in the Ocean and its Implementation Regulations, which will continue to provide guide until the promulgation of new regulations or implementation rules. However, these two laws mention nothing about the principle of international cooperation, which is obviously not consistent with the present international trend, and will also constraint China by limiting cooperation. Hence, we should also uphold the principle of international cooperation in the field of ocean dumping, wherein the following aspects should be paid attention to:

Firstly, we should clearly understand the current state of China. China is a developing State. On one hand, we should consistently work on increasing the cooperation in ocean dumping among various States in the world. On the other hand, we should also attach sufficient importance to the relevant principles of the United Nations Conference on Environment and Development,[61] and safeguard China's interest as a developing State. In the meanwhile, we should keep our autonomy and independence, trying not to overly rely on the developed States and to lead a path of indigenous innovation.

Secondly, regarding whether to adopt the principle of international cooperation on the issues of ocean dumping within our internal waters, the author suggests negative so as to preserve the national sovereignty and marine security of China.

Thirdly, we should find appropriate projects for cooperation such as coopera-

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61 This conference was held as the deterioration of global environment continued and the tendency of the developmental issues worsened. Centering on the subject of environment and development, the conference carried out tough negotiations on the fundamental issues of the protection of sovereignty and the right to development of the developing States, as well as the provision of funds and technology by the developed States, ending up with the adoption of the Rio Declaration on Environment and Development, the Agenda 21, and the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of All Types of Forests. The United Nations Framework Convention on Climate Change and the United Nations Convention on Biological Diversity opened for signature during the conference, and the European Union and 153 countries have officially become parties to them. These meeting documents and conventions are beneficial for the preservation of global environment and resources by demanding the developed States to shoulder more obligations and taking into account the special circumstances and interests of the developing States at the same time. The outcome of this conference is positive as an essential step forward in mankind's efforts towards environment protection and sustainable development.

tion in technology of clean production and waste minimization.

Fourthly, the ways of international cooperation include technological collaboration and aids. To be more specific, it includes requiring relevant countries to provide bilateral and multilateral support under the coordination of international organizations, for example, training the scientific and technology personnel in the research, supervision, and execution; the provision of necessary instruments and facilities to strengthen State ability; giving suggestions in carrying out the relevant protocol; the communication of information and cooperation of technology about waste minimization and clean production; the communication of information and cooperation of technology about waste disposal and treatment, as well as its prevention, reduction, and other measures of eliminating pollution caused by dumping when feasible; the provision and transfer of environmentally sound technology and the relevant know-how under the conditions agreed by the countries concerned, including offering concessions and preferences.

Fifthly, regional cooperation should be emphasized. This entails the cooperation between China and Japan, Korea, North Korea and other neighboring countries in Southeast Asia in the field of ocean dumping, and the join hands with international organizations such as the International Seabed Authority and the Organization for Economic Co-operation and Development, aiming for a multi-win effect. As such, China not only plays the role of a responsible major power in purifying the world's environment, but also makes its domestic management of ocean dumping more rational and scientific.

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Research on the International Convention for the Control and Management of Ships' Ballast Water and Sediments

GUAN Song*

Abstract: Along with the rapid development of international trade and shipping technology, harmful aquatic organisms and pathogens contained in ballast water have increasingly become a major threat to the global environment and resource safety, as well as to human health. The International Maritime Organization drafted the first international convention for the management of ballast water and adopted the International Convention for the Control and Management of Ships' Ballast Water and Sediments in 2004. Even though the Convention has not yet taken effect, its specific and step-by-step management measures serve as an important practical guide for every country. In China, due to the sharp increase in imported petroleum, the number of oil tankers entering Chinese ports each day from the Middle East, Africa, and Southeast Asia has also steadily increased. The ballast water in such tankers inevitably contains a large quantity of alien species, and thus it is necessary to manage and control them in a timely and effective manner. This article elaborates on the aforementioned Convention, introduces relevant regulations of the 1982 UN Convention on the Law of the Sea, summarizes the current relevant Chinese legislation, and proposes recommendations for it.

Key Words: Ballast water; Harmful aquatic organisms and pathogens; Exotic species; Biodiversity; International Convention for the Control and Management of Ships' Ballast Water and Sediments

In recent years, the volume of petroleum imports to China has soared, and

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over 90% of these imports need to be transported by means of maritime oil tankers.[1] Major transportation routes include: 1) Middle East: The Persian Gulf – Strait of Hormuz – Malacca Strait (or Makassar Strait) – Taiwan Strait – China; 2) Africa: North Africa – Mediterranean – Strait of Gibraltar – Cape of Good Hope – Malacca Strait– Taiwan Strait – China; West Africa – Cape of Good Hope – Malacca Strait – Taiwan Strait – China; 3) Southeast Asia: Malacca Strait – Taiwan Strait – China.[2] These routes feature long distances that cross oceans and include stops at multiple countries and regions. It is therefore inevitable that there will be large numbers of oil tankers entering Chinese ports every day via the above routes, and certainly the ballast water of the tankers will contain a large quantity of alien species, which will harm the resources, ecological environment, and even public health of the port areas if not be managed and controlled in a timely and effective manner.

I. Context Analysis of the Convention

A. The Issue of Ballast Water

Ballast refers to solid or liquid substances installed in a ship to control list, trim, draught, stability, or stress of the ship. It plays a significant role in reducing hull pressure, improving ship impetus and maneuverability, and especially in guaranteeing marine navigation safety. In the era of wooden ships, stones and sand were usually selected as ballast. During the modernization of the shipping industry in the 19th century, iron and steel ships started to use ballast water.[3] Such a practice had become mainstream by WWII.[4] After all, it is fairly convenient to extract and discharge ballast water from a ship regardless of whether it is berthed at port or is in the course of navigating. The most common application of ballast water is making up for the change in weight that occurs with the loading and unloading of goods. When a ship departs from a port, ballast water is added if the ship is not loaded

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1 Yang Zewei, Anti-terrorism and the Maintenance of Resource Sea Lane Security, *Journal of the East China University of Political Science and Law*, No. 1, 2007, p. 137. (in Chinese)

2 Li Bing, *Research on International Strategic Passageways* (doctoral thesis), Beijing: Party School of the Central Committee of C.P.C., 2005, p. 291. (in Chinese)

3 Jason R. Hamilton, All Together Now: Legal Response to the Introduction of Aquatic Nuisance Species in Washington through Ballast Water, *Washington Law Review*, Vol. 75, 2000, p. 251.

4 Sharonne O'Shea and Allegra Cangelosi, Trojan Horses in Our Harbors: Biological Contamination from Ballast Water Discharge, *Toledo Law Review*, Vol. 27, 1996, p. 381.

or not fully loaded with goods. When it arrives at the destination port, ballast water is discharged to make room for the cargo. In addition, during the ship's navigation, the amount of ballast water can change depending on the weather and other navigation conditions. Extraction and discharge of ballast water often occurs repeatedly during the routine loading and transportation of goods, particularly for ships with deeper draught. With the rapid development of trade globalization, the shipping industry transports nearly 80% of globally traded goods. This percentage is only going to increase,[5] making the amount of ballast water discharged by ships astoundingly large. Statistics show that ballast water discharged each year by ships entering US waters from foreign ports may reach 21 billion gallons.[6]

At first, people thought that ballast water was not only the most convenient but also least harmful, and that the use of unpolluted ballast water would not cause damage to the ocean environment. However, ballast water contains a large quantity of organisms, including fish, bacteria, micro-organisms, plankton, invertebrate organisms, sea grass, deep sea floor organisms, seaweed, and eggs and larva of even more species.[7] Data shows that, due to the discharge of ballast water, at least 5,000 types of organisms are brought into new ecological environments every day.[8] These organisms contained in ballast water, namely non-indigenous or alien species, are often near death after a long journey and can barely survive in their new environment. However, increasingly shorter navigation time due to a substantial increase in ship navigation speed has reduced damage to these organisms and made it easier for them to adapt to their new environment. Moreover, these alien species lack natural enemies in their new environment and will therefore reproduce rapidly, killing many indigenous species and disrupting the food chain. This not only seriously destroys the ecological system of the new environment, but also results in huge local economic loss. Such a phenomenon is referred to as "invasion by alien species." The most famous example may be the invasion of European

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5 David Ciesla, Development in Vessel-Based Pollution: the International Maritime Organization's Ballast Water Convention and the European's Regulation to Phase out Single-Hull Oil Tankers, *Colorado Journal of International Environmental Law and Policy*, 2003, p. 107.

6 Jason R. Hamilton, All Together Now: Legal Response to the Introduction of Aquatic Nuisance Species in Washington through Ballast Water, *Washington Law Review*, Vol. 75, 2000, p. 251.

7 Sarah McGee, Proposals for Ballast Water Regulation: Biosecurity in an Insecure World, *Colorado Journal of International Environmental Law and Policy*, Vol. 13, 2001 Yearbook, 2002, p. 141.

8 Albert G. McCarraher, The Phantom Menace: Invasive Species, *New York University Environmental Law Journal*, Vol. 14, 2006, p. 736.

zebra mussels into the Great Lakes in the mid 1980s. At that time, zebra mussels entering the Great Lakes along with the discharge of ballast water reproduced in large quantities, thereby blocking the water pipes of cities and factories, causing seaweeds to grow abnormally, hindering recreational use of the waters, and threatening local species.[9] The economic loss suffered by the United States was between $3 billion and $5 billion.[10] Today, the threat facing indigenous species due to the unprecedented invasion speed of alien species has become a global issue whose severity is second only to habitat loss.[11]

Additionally, ballast water can carry human and non-human pathogens (for example, when untreated domestic or industrial waste water is used as ballast water).[12] Many researchers believe that the main culprit of the cholerae epidemic in South America in the early 1990s was ballast water from Asian ships. More than 730,000 people got sick and over 6,000 people died in that disaster.[13] Recent research results show that the content of cholera pathogen in the ballast water was even more severe than what had been realized. According to the findings of ballast water sampling conducted on 15 ships that had entered the Chesapeake Bay of the United States, the ballast water of every ship carried Vibrio cholerae 01, while the ballast water of 14 ships also carried Vibrio cholerae 0139, a pathogen that had never been found in the United States before.[14]

Ballast water is essential for the modern shipping industry; however, while it contributes to the development of trade globalization, it has also become an important medium for the invasion of alien species and disease transmission. In

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9 Lisa A. Brautigam, Control of Aquatic Nuisance Species Introductions via Ballast Water in the United States: Is the Exemption of Ballast Water Discharges from Clean Water Act Regulation a Valid Exercise of Authority by the Environmental Protection Agency?, *Ocean and Coastal Law Journal*, Vol. 6, No. 1, 2001, pp. 38~39.

10 Liwen A. Mah, Sailing by Looking in the Rearview Mirror: EPA's Unreasonable Deferral of Ballast-Water Regulation to a Now Ineffective Coast Guard, *Ecology Law Quarterly*, Vol. 31, No. 3, 2004, p. 665.

11 Sandra B. Zellmer, Enjoy the Donut: A Regulatory Response to The White Paper on Preventing Invasion of the Great Lakes by Alien Species, *Toledo Journal of Great Lakes' Law, Science & Policy*, Vol. 2, No. 2, 2000, p. 207.

12 Brent C. Foster, Pollutants without Half-lives: The Role of Federal Environmental Laws in Controlling Ballast Water Discharges of Alien Species, *Environmental Law*, Vol. 30, No. 1, 2000, p. 99.

13 Laura Tangley, Unwelcome Sea Voyagers Marine Stowaways Take Advantage of Increased Global Trade and Travel, *U.S. News & World Report*, 26 October 1998.

14 Brent C. Foster, Pollutants without Half-lives: The Role of Federal Environmental Laws in Controlling Ballast Water Discharges of Alien Species, *Environmental Law*, Vol. 30, No. 1, 2000, p. 99.

order to prevent invasion of alien species and pathogens and safeguard biodiversity and human health, the discharge of ballast water must be managed and controlled. Hence, many port powers (e.g. the United States, Canada, and Australia) and international organizations (e.g. International Maritime Organization) have begun to pass legislation on the issue.

B. Promulgation of the Convention

As early as 1903, scientists acknowledged the phenomenon of alien species invasion, originally due to the widespread appearance of Asian seaweeds in the North Sea. However, it was not until the 1970s, when cholera occurred in Peru, that the World Health Organization confirmed ballast water's potential in transmitting harmful species, and it was only then that scientists started to research this issue in earnest.[15] Even though the 1982 UN Convention on the Law of the Sea reflected an awareness of the danger of alien species invasion,[16] the issue did not arouse much attention among the international community before 1990.[17] In 1990, Canada for the first time reported to the Marine Environment Protection Committee (MEPC) of the International Maritime Organization the damage caused by the invasion of the European zebra mussels in the Great Lakes. As a result, the MEPC adopted Resolution 50(31) in 1991, the Guidelines for Preventing the Introduction of Unwanted Organisms and Pathogens from Ships' Ballast Water and Sediment Discharges (hereinafter "the 1991 MEPC Guidelines") for countries to comply with on a voluntary basis. In 1992, the United Nations Conference on the Environment and Development held in Rio de Janeiro adopted Agenda 21, the blueprint and action plan for sustainable development in the 21st century. It called on countries, via the International Maritime Organization and other organizations, to work together in the "adoption of appropriate rules on ballast water discharge to prevent

15 Cato C. ten Hallers-Tjabbes, Prevention: Marine Biodiversity Threatened by Ballast Water Transported by Ships; Curbing the Threat, at http://www.iucn.org/congress/2004/documents/outputs/biodiversity-loss/preventioncato.pdf, 23 July 2008.

16 Article 196, Paragraph 1 of the 1982 UN Convention on the Law of the Sea: "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."

17 Cato C. ten Hallers-Tjabbes, Prevention: Marine Biodiversity Threatened by Ballast Water Transported by Ships; Curbing the Threat, at http://www.iucn.org/congress/2004/documents/outputs/biodiversity-loss/preventioncato.pdf, 23 July 2008.

the spread of non-indigenous organisms."[18] In November 1993, the International Maritime Organization slightly revised the 1991 MEPC Guidelines and adopted the Resolution A774(18) (hereinafter "the 1993 MEPC Guidelines").[19]

In November 1997, the International Maritime Organization expanded the 1993 MEPC Guidelines and passed the Guidelines for the Control and Management of Ships' Ballast Water to Minimize the Transfer of Harmful Aquatic Organisms and Pathogens. The Guidelines included multiple ballast water management measures, which any country could adopt as domestic legislation. Thus, the rules of each jurisdiction varied, and it became more difficult for the shipping industry to observe the laws of coastal and port States. Meanwhile, the voluntary nature of the Guidelines made it impossible to sufficiently fight against the severe damage caused to the international community by the invasion of alien species. Realizing that it was necessary to establish uniform rules applicable to all ports, in 1999 the MEPC formed the Ballast Water Working Group and began efforts to draft a binding international convention on ballast water management. Thereafter, capitalizing on the opportunity presented by the 2002 World Summit on Sustainable Development, the international community urged the International Maritime Organization to finish drafting the international convention as soon as possible.[20] After five years, the Working Group finally submitted the draft of the International Convention for the Control and Management of Ships' Ballast Water and Sediments (hereinafter "the Ballast Water Convention"). On February 16, 2004, the International Maritime Organization held the International Conference on Ballast Water Management for Ships, which was attended by representatives from 74 member States and one partnership member State, as well as observers from two inter-governmental international organizations and 18 non-governmental international organizations. These representatives and observers unanimously adopted the draft of the Ballast Water Convention. The Convention is currently being circulated for signature in member States of the International Maritime Organization as it waits to take effect. As the first international convention attempting to establish a binding ballast water management system, the Ballast Water Convention is worthy of our attention and research.

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18 Article 30(a)(vi), Part 17 of the Agenda 21.

19 IMO, Guidelines for Preventing the Introduction of Unwanted Organisms and Pathogens from Ships' Ballast Water and Sediment Discharges, Resolution A. 774(18)(1993).

20 Plan of Implementation of the World Summit on Sustainable Development, paragraph 34.

II. Analysis of the Convention

As the first binding international convention dedicated to ballast water, the Ballast Water Convention has established a legal system for ballast water management based on the precautionary principle and the principle of sustainable development.[21]

A. Form of the Convention

At the preliminary development stage of the Ballast Water Convention, the International Maritime Organization considered adding an annex to the International Convention for the Prevention of Pollution from Ships, rather than adopting an independent international convention. This idea was eventually abandoned for three reasons. First, both the conditions for the International Convention for the Prevention of Pollution from Ships to take effective and get revised tended to protect the interests of the flag State. Secondly, instead of port State control, the International Convention for the Prevention of Pollution from Ships focused on the obligations of the flag State. Finally, one of the purposes of ballast water management was to protect biodiversity, which could not be accomplished with traditional pollution prevention and control.[22] Eventually, the International Maritime Organization decided to establish a ballast water management system in the form of an independent convention, which indicated that the authority of the International Maritime Organization had expanded from its traditional authority of ensuring shipping and seamen safety and preventing marine environmental pollution, to protecting biodiversity.

In addition, the Ballast Water Convention carried on the tradition of the conventions by the International Maritime Organization and specified basic obligations and technical requirements of contracting States in the main part of and the Annex to the Convention, respectively. However, the Annex forms an integral part of the Convention. Unless expressly stated otherwise, a reference to the

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21 Albert G. McCarraher, The Phantom Menace: Invasive Species, *New York University Environmental Law Journal*, Vol. 14, 2006, p. 736.

22 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 303.

Convention constitutes a reference to the Annex as well.[23]

B. The Entry into Force of the Convention and Its Revision

The conditions for an International Maritime Organization convention to take effect are generally the number of ratifying countries and the tonnage percentage of the combined merchant fleets of such countries. For example, a minimum of 15 countries' approval is required for the International Convention for the Prevention of Pollution from Ships to take effect, and gross tonnage of merchant fleets of these countries must be no less than 50% of that of the world's merchant ships.[24] This tonnage percentage requirement is also one of the conditions to revise the annex to the International Convention for the Prevention of Pollution from Ships.[25] However, the number of UN member States has increased from 135 in 1973 to the current 191, and hence such a small number of ratifying countries are no longer appropriate. Moreover, such a high tonnage percentage can not balance the interests of the shipping States, coastal States, and port States.[26] Therefore, the Ballast Water Convention increased the number of ratifying countries to 30 while reducing the tonnage percentage to 35%.[27] Among the conditions to amend its annex, the tonnage percentage requirement was removed altogether.[28] This will inevitably reduce the influence of countries implementing the ship open registration system, such as Panama and Liberia, on the Ballast Water Convention. This demonstrates that the International Maritime Organization entrusts port States with the greater role in ballast water management.

C. Application of the Convention

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23 Article 2, Paragraph 2 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

24 Article 15, Paragraph 1 of the International Convention for the Prevention of Pollution from Ships.

25 Article 16(2)(f)(ii-iii) of the International Convention for the Prevention of Pollution from Ships.

26 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 303.

27 Article 18, Paragraph 1 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

28 Article 19 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

The Ballast Water Convention applies not only to ships of a State Party, including all ships flying the flag of a State Party and ships not entitled to fly the flag of a State Party but which operates under the authority of a State Party,[29] but also to some extent applies to ships of non-Parties, for the reason that a State Party can "ensure that no more favorable treatment is given to such ships" only by applying this Convention or stricter standards as the port entry conditions for ships of non-Parties.[30]

The Ballast Water Convention generally applies to all ships mentioned above, with some exceptions, including:1) ships of a Party which only operate in waters under the jurisdiction of that Party, unless the Party determines that the discharge of Ballast Water from such ships would impair or damage their environment, human health, property or resources, or those of adjacent or other States; 2) any warship, naval auxiliary or other ship owned or operated by a State, provided that each Party shall ensure, by the adoption of appropriate measures, that such ships act in a manner consistent, so far as is reasonable and practicable, with this Convention; and 3) ships not designed or constructed to carry Ballast Water, or permanent Ballast Water in sealed tanks on ships, that is not subject to discharge.[31] In addition to the above exceptions explicitly specified in the Convention, a State Party may also exempt certain ships from following specific procedures on the basis of a risk assessment.[32]

The Ballast Water Convention applies to a wide variety of ships, namely "a vessel of any type whatsoever operating in the aquatic environment [which] includes submersibles, floating craft, floating platforms, FSUs and FPSOs."[33] It follows that the scope of application of the Ballast Water Convention will also be extensive.

In addition, the Ballast Water Convention does not prevent a State Party from

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29 Article 3, Paragraph 1 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

30 Article 3, Paragraph 3 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

31 Article 3, Paragraph 2 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

32 Regulation A-4 in Annex to International Convention for the Control and Management of Ships' Ballast Water and Sediments.

33 Article 1, Paragraph 12 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

implementing more stringent management measures.[34] In other words, for a certain aspect of ballast water management, if a State Party's domestic law includes a more stringent management system, then this system applies instead of the Ballast Water Convention.

D. Implementation of the Convention

In order to ensure effective implementation of ballast water management measures, the Ballast Water Convention not only provides for the port State's inspection rights, but also stipulates a State Party's obligation to punish violating ships and take effective measures to prevent such ships from discharging ballast water, thereby intensifying the "rigidity" of the Convention.

1. Rights of Inspection

On the one hand, a State Party may take the initiative to inspect a ship of another Party that has entered its port or near-shore loading and unloading station, for the purpose of determining whether the ship is in compliance with the Convention. Generally speaking, such inspection shall be limited to verifying that there is onboard a valid International Ballast Water Management Certificate, inspecting the Ballast Water Record Book, and/or sampling the ships' ballast water in accordance with the guidelines to be developed by the International Maritime Organization.[35] Entitling a port State to sampling inspection rights rather than merely simple instrument inspection rights will play an important role in promoting the implementation of the Convention.[36] On the other hand, after receiving another Party's request to conduct an investigation and sufficient evidence proving that a certain ship is operating or once operated in violation of the regulations of the Convention, a port State may also inspect such ship which has entered its port or near-shore loading and unloading station.

Furthermore, under certain circumstances, a port State is also entitled to carry out a detailed inspection if a ship does not carry a valid Certificate or there are clear grounds for believing that: the condition of the ship or its equipment does not

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34 Article 2, Paragraph 3 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

35 Article 9, Paragraph 1 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

36 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 297.

correspond substantially with the particulars of the Certificate; or the captain or the crew are not familiar with essential shipboard procedures relating to ballast water management, or have not implemented such procedures.[37] With respect to such circumstances, the Ballast Water Convention also requires that the Party carrying out the inspection shall take such steps as will ensure that the violating ship shall not discharge ballast water until it can do so without presenting a threat of harm to the environment, human health, property or resources.[38]

2. Obligations of Punishment

The Ballast Water Convention requires the flag State and the port State to punish violations of the Convention; this is both a State Party's right and its obligation.[39] With respect to a ship of a State Party having entered waters under its jurisdiction, besides reporting to the flag State for handling, the port State may also impose direct punishment instead of taking no action. The Ballast Water Convention does not entitle a flag State to enforcement privileges like those under the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.[40] As a result, once the punishment procedure of a port State has begun, it cannot be stopped by a request from the flag State. In other words, if the port State decides to punish the violating ship independently, the port State is not obliged to hand over the violating ship, even if the flag State requests it. Moreover, if the port State chooses to transfer the right and obligation of punishment to the flag State, the flag State shall undertake the investigation and punishment procedure as soon as possible and immediately notify the port State and the International Maritime Organization of the results.

As for the specific sanctions, the Ballast Water Convention does not set out any direct provision, but rather follow the State Party's domestic laws, the only requirement being that the sanctions shall be adequate in severity to discourage

37 Article 9, Paragraph 2 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

38 Article 9, Paragraph of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

39 Article 8 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

40 Article 21, Paragraph 12 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

violations of this Convention.[41] In addition, the Ballast Water Convention also provides that the port State may also take steps to warn, detain, or exclude the violating ship or prohibit such ship from discharging any unsecure ballast water.[42]

III. Evaluation and Analysis of the Convention

A. Characteristics of the Convention

1. Enforceability

Compared with the 1993 MEPC Guidelines, the Ballast Water Convention is most distinctly characterized by its enforceability, which is due to the increasingly serious issues related to ballast water. According to the provisions of the Ballast Water Convention, a flag State shall not only require its ships to comply with the Convention, but also take effective measures to ensure that its ships comply with the Convention's requirements. Port States shall also develop domestic laws and policies for the purpose of promoting the objectives of the Convention.[43] Particularly, the core part of the Ballast Water Convention, i.e., the provisions concerning the exchange and disposal of ballast water, are mandatory. As such, these measures will be more influential than the 1993 MEPC guidelines.[44]

2. Certainty

The Ballast Water Convention not only contains declarations and statements, but also provides for specific standards and timetables,[45] so as to prevent a State Party from weakening the application and effects of this Convention through its own interpretation. For instance, this Convention provides for specific ballast water exchange requirements, permitted discharge density, and a timetable for the implementation of ballast water disposal standards. According to the timetable, the State Party will be equipped with the technology and funds to implement ballast

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41 Article 8, Paragraph 3 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

42 Article 10, Paragraphs 2 and 3 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

43 Article 4 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

44 Albert G. McCarraher, The Phantom Menace: Invasive Species, *New York University Environmental Law Journal*, Vol. 14, 2006, p. 736.

45 Regulations B-4, B-5 and D-2 in Annex to the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

water disposal standards. In short, only specific provisions such as these can result in a durable system.[46]

3. Fairness

Taking into account the different political, historical, and economic circumstances of various State Parties, the Ballast Water Convention has different requirements for State Parties in different situations. For example, the Ballast Water Convention sets a timetable of ballast water discharge with a view to reducing the burden of those State Parties that need to update the ballast water systems of a large number of fleets. Such differentiated treatment embodies the fairness of the Ballast Water Convention and can facilitate its effective implementation.

4. Creativity

Nothing in the Ballast Water Convention shall be interpreted as preventing a State Party from taking, individually or jointly with other parties, more stringent measures with respect to the prevention, reduction, or elimination of the transfer of harmful aquatic organisms and pathogens through the control and management of ships' ballast water and sediments, consistent with international law.[47] Among international conventions, such express acknowledgment of a State Party's right to establish more stringent standards is uncommon and unprecedented.[48]

5. Expandability

a. Expansion of Power

In spite of the controversy regarding whether "harmful aquatic organisms or pathogens" constitute pollutants, the Ballast Water Convention has expressly indicated its objective of protecting biodiversity,[49] thereby expanding the functions and powers of the International Maritime Organization. In addition, the Ballast Water Convention quotes the guidelines to be developed by the International Maritime Organization in ten places,[50] meaning that the jurisdiction of the

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46 Albert G. McCarraher, The Phantom Menace: Invasive Species, *New York University Environmental Law Journal*, Vol. 14, 2006, p. 736.

47 Article 2, Paragraph 3 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

48 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 303.

49 Preamble and Article 1, Paragraph 8 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

50 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 295.

International Maritime Organization with respect to the issue of biodiversity protection arising from ballast water can still be further expanded. The jurisdiction of port States has also been reinforced. By providing for the sampling inspection rights and punishment obligations of a port State, the Ballast Water Convention has increased port States' position in regards to ballast water management.

b. Regulation Expansion

As mentioned above, the application scope of the Ballast Water Convention can be expanded to ships of non-Parties, since the Convention requires that State Parties shall "ensure that no more favorable treatment is given to such ships."[51] In other words, with respect to ships of non-Parties, State Parties shall apply either the standards under this Convention or more stringent ones. It follows that it is more likely that State Parties will apply the Ballast Water Convention with respect to ships of non-Parties.

The Ballast Water Convention also requires that a State Party develop in its domestic law a punishment system for violating ships.[52] Once a punishment for ships violating the requirements of the Convention has become a regulation under the domestic law of a State Party, such punishment can be directly applied to any ship entering the waters under the jurisdiction of the said State Party, including ships of non-Parties, thereby essentially making the provisions of the Ballast Water Convention applicable to ships of non-Parties.

B. Deficiency of the Convention

The ballast water exchange and disposal standard proposed under the Ballast Water Convention requires a significant amount of technical and financial support, which is a challenge for many developing countries. As such, the MEPC launched the GloBallast Programme to help some developing counties to get acquainted with the management practices of the Ballast Water Convention and improve their capacity to implement the Convention. It follows that whether or not the Ballast Water Convention can take effect as soon as possible and be universally observed on a global level is not only an issue of time; the real obstacle is technical expertise and financing ability. The prospects for the Convention are therefore worrying.

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51 Article 3, Paragraph 3 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

52 Article 8 of the International Convention for the Control and Management of Ships' Ballast Water and Sediments.

IV. Relevant Regulations under the 1982 UN Convention on the Law of the Sea

Known as the "marine constitution," the 1982 UN Convention on the Law of the Sea (hereinafter "the 1982 Convention") does not provide for ballast water management directly. However, the provisions concerning the "use of technologies or introduction of alien or new species" in Article 196, Part XII (Protection and Preservation of the Marine Environment), 1982 Convention, are closely related to ballast water management. Paragraph 1 of this Article declares: "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." It can be seen that such provision includes two obligations, i.e. to control the pollution resulting from the use of technology and the invasion of alien species. The original intention of the Norwegian representatives when they proposed a draft provision in 1974 was only to control the latter. That is to say, the main purpose of the Norwegian proposal in 1974 was to control damage to the marine ecological balance caused by alien species, rather than to control pollution.[53] Some people are of the opinion that the substantial revisions made to the Norwegian proposal under the 1982 Convention obscure the difference between alien species invasion and pollution.[54] However, the definition of "pollution of the marine environment" under the 1982 Convention, i.e. "introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities," is of fairly extensive

53 Shabtai Rosenne and Alexander Yankov eds., *United States Convention on the Law of the Sea 1982: A Commentary*, *Volume IV*, Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1991, p. 76.

54 Jeremy Firestone and James J. Corbett, Coastal and Port Environments: International Legal and Policy Responses to Reduce Ballast Water Introductions of Potentially Invasive Species, *Ocean Development & International Law*, Vol. 36, Issue 3, 2005, p. 303.

scope, and can encompass the introduction of alien species.[55] Therefore, a State Party's right and obligation to prevent marine pollution stipulated under the 1982 Convention may also be referred to and applied by the State Party to control the introduction of alien species and transmission of pathogens arising from ballast water discharge.

V. Relevant Chinese Legislation

China has not signed the Ballast Water Convention, and no Chinese laws or regulations exist regarding ballast water management. There are only laws and regulations containing provisions related to ballast water management, including:

Frontier Health and Quarantine Law of the People's Republic of China (amended on December 29, 2007), relevant provision being Article 18: "Frontier health and quarantine authorities shall, in accordance with State health standards, exercise health supervision over the sanitary conditions at frontier ports and the sanitary conditions of conveyances on entry or exit at frontier ports. They shall: ... (4) supervise and inspect the disposal of garbage, waste matter, sewage, excrement and ballast water.

Rules for the Implementation of Frontier Health and Quarantine Law of the People's Republic of China (March 6, 1989), relevant provisions being:

Article 78: "The vessel or aircraft contaminated with cholera is required to undergo sanitization as follows: … (6) Human discharges, rubbish, used water, spent material, and the ballast water filled in the cholera prevalent area are not allowed to be discharged or unloaded without disinfection ...

Article 109: "Acts that are subject to administrative sanctions as defined in the Frontier Health and Quarantine Law and these Implementation Rules refer to the following: ... (8) discharge ballast water or remove such controlled substances as rubbish or contaminated matter without prior sanitization by the health and quarantine organ.

Regulations on the Prevention of Environmental Pollution by Shipbreaking (May 18, 1998), relevant provision being Article 13: "Discharge of tank washings, ballast water, and bilge water shall conform to national and local discharge standards. Discharge of untreated tank washings, ballast water, and bilge water

55 Article 1(4) of the 1982 UN Convention on the Law of the Sea.

shall also be subject to approval by competent departments in charge of supervising pollution caused by shipbreaking. Competent departments in charge of supervising pollution caused by shipbreaking, upon receiving an application report from shipbreaking units for the discharge of untreated tank washings, ballast water, and bilge water, shall process the application as soon as possible and conduct examinations and approval in a timely manner."

Regulations of the People's Republic of China on the Control over Prevention of Pollution by Vessels in Sea Waters (December 29, 1983), relevant provisions including:

Article 10: "In order to ensure safe pilotage and berthing and prevent pollution of sea waters, all load-free oil tankers calling at ports must have ballast water no less than one fourth of their loading capacities. The Harbor Superintendent shall investigate those oil tankers that have not retained sufficient ballast water and find out where it has been discharged, and deal with these issues on a case-by-case basis."

Article 20: "Vessels that have received approval to discharge oil-containing water according to Article 19 of the Regulations must do so in compliance with each of the following stipulations:

(1) General Circumstances

…

(b) While in motion, the instant discharge rate must not exceed 60 liters/ nautical mile;

…

(d) The oil and water separation equipment, the filtering system, and the oil discharge monitoring devices on board are in normal working order;

…

(3) In discharging tank washings and ballast water of oil tankers of more than 150 deadweight tons, the following requirements shall also be met, in addition to paragraphs (1)(b) and (1)(d) in this Article:

(a) At least 50 nautical miles from the nearest land;

(b) The total amount of oil discharge on each ballast mission must not exceed one 15,000th of the total oil load for existing oil tankers or one 30,000th of the total oil load for new oil tankers.

Article 25: "Vessels from ports facing illnesses and epidemics must apply for hygienic treatment of their ballast water with local sanitation and quarantine departments."

Measures Concerning the Supervision of Sanitation at Border Ports of the People's Republic of China (February 4, 1982), relevant provision being Article 14: "The sanitation requirements for the disposal of excrement, urine, refuse, and sewage on means of transport are as follows: … (2) Solid waste being transported from plagues-infested areas shall be disposed of by incineration, while the excrement, urine, ballast water, and sewage being transported from cholera-infested areas shall be sterilized if necessary."

Regulations Governing Supervision and Control of Foreign Vessels by the People's Republic of China (September 18, 1979), relevant provision being Article 36: "If any ballast water, tank washings, or bilge water is to be discharged from any vessel, an application shall be made to the Harbor Superintendent Administration for approval. Where a vessel has arrived from a disease-infected port, necessary sanitary treatment should have been made by the health and quarantine authorities. Sewage and tank washings from ships where dangerous cargoes or harmful pollutants have been stowed shall only be discharged at the designated place after having been tested and approved by the relevant sanitation departments."

The above provisions regarding ballast water are few in number and generalized in content, lacking specific management measures and an established system. In addition, the above laws and regulations fall into two main categories, those on environment pollution and those on health quarantine. Existing laws and regulations have not addressed ballast water from the perspective of biological diversity. Moreover, although China is a contracting State to the Convention on Biological Diversity and the Convention on International Trade in Endangered Species, there is no domestic law pertaining to the protection of biological diversity, and the above two international conventions fail to mention the issue of introduction of alien species caused by ballast water. As such, even though China has not joined in the Ballast Water Convention, considering the highly incomplete domestic law of China regarding ballast water management, China should carefully study the Convention and actively learn from its advanced provisions. As an important port State, China will inevitably be affected by the Ballast Water Convention once it takes effect. China should therefore prepare for it in advance.

VI. Conclusion

Preventing, reducing, or eliminating the transfer of harmful aquatic organisms and pathogens through the control and management of ships' ballast water and

sediments will require advanced technology and high costs. At the current stage, the most appropriate method is to control and manage the exchange of ships' ballast water, even though such a method is really only a temporary solution. Coming up with a permanent solution for disposing ships' ballast water is the shipping industry's ultimate goal. Besides establishing specific, explicit, and progressive measures for ballast water management, the Ballast Water Convention has also developed effective legal systems for the implementation of these measures, including cooperation among State Parties and allocation of rights and obligations between a flag State and a port State. To conclude, solutions to the introduction of alien species and transmission of pathogens arising from ballast water will be ship-based in terms of technology and port-based in terms of enforcement. Because China's domestic laws regarding ballast water management are inadequate, whether the Ballast Water Convention takes effect or not, its advanced management measures and concepts deserve to be studied and utilized by China.

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Applying and Improving Maritime Injunctions: A Perspective from Civil Preservation Theory

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Abstract: The maritime injunction is an institutional innovation intending to make up for the inadequacies of civil preservations. Based on civil preservation theory and the realities of maritime litigation, this paper offers perspectives on how to improve maritime injunctions and applying them at this time. In addition, the paper asserts that admiralty courts should pay particular attention to protecting the respondents' rights and interests when entering and enforcing injunctions, and also focus on using their experiences to help improve Chinese civil procedure and civil preservations in general.

Key Words: Maritime injunction; Civil preservations

The Civil Procedure Law of the People's Republic of China only provides procedures for preserving property. In the realities of maritime litigation, preservation applications that fall outside the scope of property preservation often arise, and they cannot be resolved under the existing property preservation or advance enforcement procedures. To fill this gap, the Special Maritime Procedure Law of the People's Republic of China (SMPL), issued in 1999, created a maritime injunction system similar to preservation of behaviors. Under this system, admiralty courts may order a respondent to act or not act based on the petitioner's application.[1] "The maritime

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1 Li Guoguang, A Statement on the Request for Deliberations on the Special Maritime Procedure Law of the People's Republic of China (Draft), in the editorial board of the Annual of Maritime Judgments in China ed., *Special Maritime Procedure Law of the People's Republic of China*, p. 54. (in Chinese)

injunction, as a preservation measure,"[2] has played a crucial role in protecting the legal rights and interests of the parties, preventing the multiplication of damages, and improving other aspects of litigation; but it has also revealed some unsettling problems. Based on theories on civil preservations and the realities of maritime litigation, the paper offers perspectives on improving maritime injunctions and applying them at this time.

I. Improving Maritime Injunctions

"Civil preservations are compulsory measures that a court uses to put restrictions on an obligor's management of its property, or to order the obligor to perform or not perform an act, before the effective date of a final judgment to ensure the smooth execution of the judgment or to avoid irreparable harm." A civil preservation is temporary, urgent, ancillary to another proceeding, and confidential.[3] In light of the nature and characteristics of civil preservations, the author argues that maritime injunctions should be improved in the following four ways.

A. Properly Denominate the Parties in a Maritime Injunction Proceeding: "Plaintiff/Defendant" vs. "Petitioner/Respondent"

Because civil preservations are a part of civil procedure, the legal relationships among the parties to a civil preservation proceeding are also based on civil procedure. The parties' denominations are based on their statuses in procedural and not substantive law. In Chinese judicial practice, the parties to a civil preservation proceeding have always been referred to as "petitioner" and "respondent."

In the sample maritime litigation document issued by the Supreme People's Court, the parties in maritime injunction proceedings – which are "identical in nature and extremely similar in procedure"[4] to civil preservation proceedings – are called "plaintiff" and "defendant." The author could not find the basis for these labels in the explanations in the sample document. However, the author surmises

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2 Zhang Xiaoru, Improving the Chinese Maritime Injunction System, *The People's Judicature*, No. 4, 2006, p. 79. (in Chinese)

3 Li Shichun, *A Study of Procedures for Securing Civil Judgments*, doctoral dissertation, Beijing: China University of Political Science and Law, 2002, p. 18. (in Chinese)

4 Jin Zhengjia ed., *Maritime Litigation Procedure*, Dalian: Dalian Maritime University Press, 2001, p. 220. (in Chinese)

that they may have been lifted from Chapter IV of the SMPL, where "plaintiff" and "defendant" appear several times. From the author's point of view, these labels are inconsistent with the traditional names of the parties in civil preservation proceedings and confuse the parties' relationships in substantive law with those in procedural law. Therefore, the parties should be called "petitioner" and "respondent."

A maritime claimant is a holder of rights rooted in substantive maritime law, and the designations for parties in a maritime injunction proceeding should be based on their statuses in maritime procedural law. In a physical sense, the plaintiffs in maritime law cases are the same as the parties requesting the maritime injunctions, but their statuses and labels in different legal relationships should be distinguished. In Chinese civil procedure, the parties in civil preservation cases have always been referred to as "petitioner" and "respondent." Even in the SMPL itself, the parties in preservation cases involving the arrest of ships and the goods on board are still called "petitioner" and "respondent," and only in maritime injunction and maritime evidence preservation proceedings have the parties been called "plaintiff/defendant." This variation from the norm does not serve any practical purpose, but only destroys the consistency of the legal terms.

B. Improve the Conditions for Entering Maritime Injunctions Based on the Time-Limited Quality of Civil Preservations

A civil preservation refers to the temporary compulsory measure taken before the entry of a substantive judgment to ensure the full execution of the future judgment or to prevent the exacerbation of existing harm. It is characterized by a time limit. One way in which this characteristic manifests itself is in the way the preservation is entered: rather than a rigorous confrontation process, judges decide whether a party may obtain a preservation largely on assumptions or temporary judgments made on the basis of the parties' legal relationships in the litigation. Second, it is also reflected in the fact that a ruling on the rights and obligations of the parties in the form of a civil preservation has no adjudicative force on the underlying dispute. In Germany, Japan, and China Taiwan, civil preservations are divided into "provisional attachments" and "provisional injunctions." A provisional attachment is a true, though temporary, attachment of a debtor's property or rights.

"Provisional" means "temporary."[5]

Article 56 of the SMPL makes "the need to rectify an act committed by the defendant in violation of a law or contract" a pre-condition of a maritime injunction. By extension, the entry of the maritime injunction itself under the SMPL already signifies a determination that the petitioner's claims are valid and that the respondent's acts are "in violation of a law or contract," *i.e.,* the dispute on the rights and obligations between the parties have already been decided. This conflicts not only with the time-limited quality of a civil preservation, but also with the maritime injunction's status as a provisional remedy in maritime litigation.

The function of the maritime injunction is to prevent the occurrence and furtherance of harm. It can only be a provisional remedy and an initial examination of whether the petitioner can state a claim or whether the respondent has a defense. It is an interlocutory and not a final injunction. As a provisional remedy, the maritime injunction does not have the function of finally determining or enforcing rights, and so does not need to decide whether the respondent violated a law or a contract. An injunction can be entered as long as a legal dispute exists between the parties and if the resolution of the dispute will cause large and irreparable harm to one party. However, only a final judgment can determine the parties' respective rights.

C. Enhance the Disclosure Mechanisms Because of the Confidentiality of Civil Preservations

An adversarial, confrontational process generally applies in civil litigation, *i.e.*, the truth is determined by the parties' presentation of evidence, cross-examination, and argument. But in the case of civil preservations, "in emergencies, if the petitioner finds that the respondent's conduct is prejudicial to his rights, the petitioner should immediately take steps to enjoin the conduct in a confidential manner before the respondent becomes aware of the action. Otherwise, the respondent will be alerted and the effectiveness of the injunction will be compromised. This issue is more prominent in the legislation of continental law systems. Civil procedure in Germany, Japan, and China Taiwan all provide that

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5 Chen Jinan, *Civil Procedure,* Vol. 2, Taipei: San Min Book Co., Ltd., p. 362, quoted in Zhou Cui, Provisional Remedies in Civil Procedure, in Chen Guangzhong and Jiang Wei eds., *Symposium on Procedural Law*, Vol. 6, Beijing: Law Press China, 2001, p. 431 (in Chinese).

civil preservations may be entered without notifying the respondent, let alone going through a confrontation procedure with argument."[6] This is the confidentiality characteristic of the civil preservation procedure.

A maritime injunction is also characterized by urgency. It is entered and enforced within 48 hours after the receipt of a petition. At the same time, an injunction is entered based on evidence that have not been fully examined and facts that have not been fully argued. In addition, its execution is not suspended during reconsideration. Therefore, an injunction, once enforced, often brings irreversible consequences for the respondent. To strike a balance between efficiency and fairness, the disclosure requirements in maritime injunction proceedings should be strengthened at the legislative level. This can be achieved in the following two ways:

1. Increase the Petitioner's Responsibility to Disclose Facts

In the Anglo-American interlocutory injunction procedure, which the maritime injunction takes as a point of reference, "a petition for an interlocutory injunction is supported by affidavit evidence." "The petitioner's attorney is required to provide the court with a full and frank disclosure based on affidavits and exhibits. If there are errors or omissions in the presentation of the facts, the court may deny the petition as a sanction or revoke the original injunction. Serious cases may even constitute criminal contempt of court."[7]

Out of self-interest, a petitioner is often selective with the disputed facts when presenting the petition. The case (2001) Guang Hai Fa Qiang Zi No. 3 is an example. The petitioner, a holder of a certificate of the right to use a sea area, asked an admiralty court to enjoin the respondent from any conduct that infringed on his rights to use the sea area. After the court issued the maritime injunction, it found that the respondent also held a certificate of the right to use the sea area. The case involved a property dispute rather than a simple tort. Therefore, the author believes that when the petitioner files for a maritime injunction, it should not only state the facts and grounds for the application, but also disclose the reasons that the other party has refused to perform its obligations. In other words, it has to present the entire picture of the dispute so that the court can rule accordingly. If the petitioner intentionally conceals the facts of the dispute and the facts may affect the issuance

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6 Li Shichun, *A Study of Procedures for Securing Civil Judgments*, doctoral dissertation, Beijing: China University of Political Science and Law, 2002, p. 18. (in Chinese)

7 Yang Liangyi and Yang Daming, *Injunctions*, Beijing: China University of Political Science and Law Press, 2002, pp. 19, 236. (in Chinese)

of an injunction, the injunction should be revoked, and the petitioner should also suffer civil consequences.

2. Establish the Necessary Hearing Procedures

The issuance and enforcement of a maritime injunction have fundamental effects on the parties' rights and obligations. The claimant will be able to directly enforce its claims, while the obligor may suffer enormous damages as a result. Thus, it is crucial to determine the issue in the dispute. The most effective way to do so is a hearing in which both parties participate. Both the preservation system in continental civil law and the injunction system in Anglo-American common law require a hearing before a decision to "maintain the status quo" is made. "In common law countries, confrontation is used in provisional remedy procedures. Judges will only make a ruling on a petition for a civil preservation without a hearing when there is an extreme emergency and the threat of irreparable harm. In that event, a party is required to notify the other party as soon as possible for an adversarial hearing."[8] Article 538 of the Code of Civil Procedure of China Taiwan as revised in 2003 (on provisional injunctions "maintaining the status quo") provides that, before a ruling for maintaining the status quo is issued, "the court shall give the parties an opportunity to be heard, except when the court considers it inappropriate to do so."[9] Article 23(14) of the Japanese Civil Preservation Law provides that, "(provisional injunction maintaining the temporary status) may not be issued without oral argument or a hearing on a date when the debtor is available."[10]

Not only will a hearing help courts fully understand the dispute and decide the scope and amount of the bond, it can also provide respondents with equal judicial protection, help resolve conflicts, and mitigate the respondents' resistance to the maritime injunction and prompt a successful execution. In the case (2007) Guang Hai Fa Qiang Zi No. 5, the shipper filed for a maritime injunction, claiming that the freight forwarder was withholding the shipper's bill of lading due to disputes related to other shipments, and asked the court to order the freight forwarder to release the bill of lading. Due to the complexity of the freight forwarding industry,

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8 Li Shichun, *A Study of Procedures for Securing Civil Judgments*, doctoral dissertation, Beijing: China University of Political Science and Law, 2002, p. 22. (in Chinese)

9 Code of Civil Procedure of China Taiwan, Art. 538(4), at http://ericpan.fyfz.cn/blog/ericpan/index.aspx? blogid=11.6239, 16 January 2008. (in Chinese)

10 Bai Lyuxuan trans. & ed., *New Civil Procedure Law of Japan*, Beijing: Chinese Legal System Press, 2000, p. 272. (in Chinese)

it was difficult to ascertain whether the legal relationship between the parties was one created by a carriage contract or a freight forwarding contract and equally difficult to determine the amount of the bond based on statements from only one party. If the petition was to be dismissed, the conflict between the parties would inevitably escalate. After an examination was conducted with the parties in court, the facts of the dispute were determined, paving the way for the correct issuance of a maritime injunction. In addition, it helped the parties acquire an accurate understanding of their rights and obligations, which created the conditions for the successful enforcement of the injunction.

If an injunction would be difficult to enforce after the respondent becomes aware of it, a provisional injunction may be issued based on one party's presentation of the facts. The respondent can be asked to not alter the status quo within a short period, but a request for reconsideration may be made to quash the injunction.

D. Request Petitioners to Initiate a Related Lawsuit Based on the Ancillary Quality of Civil Preservations

The civil preservation "is a means to ensure the execution of a final judgment. It only makes sense when it is dependent on a stand-alone lawsuit. In other words, the civil preservation procedure is a subordinate and interim measure to the stand-alone lawsuit."[11] The "stand-alone lawsuit" means the judicial proceeding through which the petitioner in a preservation proceeding requests a court to uphold its substantive rights. If the petitioner requests a preservation before filing the action, then the related action should still be filed within a prescribed time. Otherwise, the civil preservation should be quashed. If the plaintiff dismisses the lawsuit in the course of litigation, the injunction will necessarily also terminate. Both the Anglo-American interlocutory injunction and the Germany/Japanese civil preservation require the petitioner to initiate a related lawsuit.

The maritime injunction can only be a provisional remedy that protects a party's rights. Without sufficient evidence and argument, it cannot be a final ruling on the rights and obligations of the parties. It does not adjudicate the underlying claim, and the dispute between the parties still remains. At the time when a petition

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11 Zhou Cui, Provisional Remedies in Civil Procedure, in Chen Guangzhong and Jiang Wei eds., *Symposium on Procedural Law*, Vol. 6, Beijing: Law Press China, 2001, p. 431. (in Chinese)

for a maritime injunction is filed before a lawsuit has begun, there is no judicial proceeding yet between the parties regarding the dispute.

The SMPL does not regulate the relationship between the maritime injunction, a measure for preservation, and the related lawsuit; and is silent on the question of how to initiate a related lawsuit after the issuance of a presuit maritime injunction. It only states that the respondent may file suit with regards to the correctness of the injunction. We know that, depending on their roles in litigation, the parties bear different burdens of proof, litigation costs, and risks. Because the petitioner initiates the maritime injunction proceeding, the petitioner should bear the burden to prove that it has the right to make a maritime claim.

There are two ways to legislate the requirement of initiating a related lawsuit after the presuit injunction:

One is that the law makes the initiation of a lawsuit within a specified period a precondition for the continued existence of the injunction. For instance, the Civil Procedure Law of the People's Republic of China prescribes that a petitioner shall file suit with a competent court within 15 days after the people's court has implemented an injunction, and the people's court shall quash the injunction if the petitioner fails to do so. Macao Civil Procedure Code states that an injunction procedure requires the existence of a case based on the rights to be preserved through the injunction, and the case shall be filed, or filed as a matter affiliated to the case, before the initiation of an action of declaration or an action of enforcement (Article 328). If the petitioner fails to bring the suit to which the injunction attached within thirty days after receiving the order implementing the injunction, the injunction is void (Article 334).[12]

The other way is to give the respondents the right to decide whether to bring the related lawsuit. For example, Article 926 of Germany's Code of Civil Procedure Rules states that, when the choice of law of a related case has not been ascertained, the court that granted the provisional attachment shall, in accordance with the petition and without oral argument, order the party that requested the provisional attachment to bring an action within a specified period. If the order is not followed, the court shall quash the provisional attachment, and the quashing is a final judgment on the issue. Under the guidance of Article 936 in the Code, this

12 Zhao Bingzhi ed., *Macao Civil Procedure Code*, Beijing: China Renmin University Press, pp. 112, 115 (in Chinese).

provision also applies to provisional injunctions.[13] Civil preservations in Japan and China Taiwan also have similar provisions. In British law, if "a plaintiff fails to prosecute, he will face the court's quashing of the granted interlocutory injunction at the defendant's request."[14]

It should be noted that, in some maritime injunction proceedings, some respondents do not object to the petitioners' maritime claims, and they are only using certain advantages they have in the transaction to demand the satisfaction of their claims in other legal relationships. Some simply refuse to perform their statutory or contractual obligations for no reason. Therefore, the second legislative solution can be adopted: if the respondent dispute the petitioner's maritime claims, the petitioner should be required to bring an action within a specified period for the adjudication of its maritime claims. Otherwise, the maritime injunction should be quashed.

II. Issue Maritime Injunctions Judiciously to Protect Respondents' Rights and Interests

The maritime injunction rectifies a flaw in existing procedural law in its lack of timely protection for claimants, but it should not be abused. Procedurally speaking, it does not have the corresponding fact disclosure mechanisms and provisions on time-limited quality to sufficiently protect the respondent's interests. Further, giving judges with too much discretion also makes it more difficult for them to rule correctly. Currently, the following issues in maritime injunction proceedings deserve particular attention.

A. Safeguard the Respondent's Rights Based on the Equality of the Parties

A core principle in civil procedure, the equality of parties is a natural extension of the civil-law principles of equality and voluntariness in litigation. This principle is "embodied by the standardization and equalization of the parties' rights in

13 Xie Huaishi trans., *Civil Procedure Rules of the Federal Republic of Germany*, Beijing: Chinese Legal System Press, 2001, p. 256. (in Chinese)

14 Yang Liangyi and Yang Daming, *Injunctions*, Beijing: China University of Political Science and Law Press, 2002, p. 271. (in Chinese)

litigation."[15] It is fairly challenging for the people's court to make an accurate and comprehensive judgment on the underlying legal dispute at the time it issues the injunction. The respondents must obey the maritime injunction once it is issued, but the consequences of enforcement are rarely reversible. If a maritime injunction is issued erroneously, the loss that the respondent suffered as a result may not be recoverable. Therefore, it is essential to emphasize the equality of the parties as a core principle in the maritime injunction proceeding.

1. Protect the Respondents' Opportunity to Participate in Judicial Proceedings

The current maritime injunction procedure does not have a supporting disclosure mechanism as a guarantee. Courts tend to issue maritime injunctions without full disclosure, and judging the respondents' claims properly and the possible damages they may suffer is a difficult task. The law gives respondents only the right to apply for reconsideration after the injunction is issued, which provides little protection for their rights. Under these circumstances, courts must – before issuing a maritime injunction – have full knowledge of the facts of the dispute between the parties, especially the respondent's possible claims and potential damages to the respondent to ensure a sufficient counter guarantee. To make up this procedural deficiency, admiralty courts usually call both parties for a hearing before a decision in a maritime injunction proceeding. Before legislation is in place to remedy the procedural defects, the hearing requirement should become universal.

2. Determine the Necessary and Counter Guarantee

The enforcement of a maritime injunction immediately puts the petitioner's maritime claims into effect; but prior to a judgment, the validity of these claims has not been finally determined. The enforcement of a maritime injunction may cause direct and indirect harm to the respondent, including liability to a third party. From the author's perspective, the maritime injunction is a legal procedure that maintains the status quo and assumes the validity of both parties' claims in the dispute. The petitioner's claims are satisfied by the enforcement of the injunction, and the respondent's claims are insured by the petitioner's counter guarantee. The amount of the counter guarantee should equal the amount of the respondent's claims. Take the example of when the bearer of a bill of lading petitions the court to compel the carrier to deliver the goods. If the carrier believes that the petitioner

15 Jiang Wei ed., *Civil Procedure*, Beijing: China Renmin University Press, 2005, p. 91 (in Chinese).

is not entitled to take delivery of the goods, the petitioner should post bond based on the actual value of the goods and any legal costs arising from potential claims against the carrier. If the carrier is only claiming to have a lien on the goods before it has received the freight charges, then the petitioner only has to provide a bond in the amount of the freight claimed. Of course, the admiralty court has the final say over the respondent's demand for counter guarantee if the demands are obviously unreasonable.

3. Take Seriously the Respondents' Right to Apply for Reconsideration, and Apply the General Rule of Continuing to Enforce Injunctions During Reconsideration in a Reasonable Manner

In practice, petitions for maritime injunctions mainly involve the performance of contractual obligations such as requests for deliveries of bills of lading and goods. Many maritime injunctions are difficult to reverse or even irreversible after they are enforced: for example, a bill of lading will be negotiated after issuance. When a maritime injunction is issued based on one party's petition and evidence and without a hearing, the two parties' rights in litigation are obviously unequal. Although the SMPL specifies that "the enforcement of an injunction shall not be suspended during reconsideration," enforcement should be suspended, and the reconsideration request should be resolved as soon as possible, if the respondent applies for a reconsideration during enforcement for reasons that may cause the injunction to be cancelled. But the respondent should also be required to not destroy the conditions for enforcing the injunction during reconsideration and make enforcement more difficult.

B. Petitioners Should Base Their Claims on Their Substantive Rights and Stay within the Scope of These Rights

Substantive and procedural rights are theoretical classifications of legal rights, whose division is based on differences in their natures and functions. Substantive rights are rights with respect to certain property or personal interests; procedural rights are rights enjoyed by the parties during the legal process, and they are not intended to fulfill specific tangible or intangible interests.

The first condition that the SMPL requires for the issuance of a maritime injunction is that the claimant must have a specific maritime claim. Although "maritime claim" is not clearly defined, it is undoubtedly a substantive right; in other words, the petitioner's suit must contain an assertion of a substantive right.

As an example, when the ship owner suspects that the charterer has unreasonably altered the ship, the ship owner asks the charterer for an inspection of the ship during the lease period. The charterer refuses, and the ship owner petitions to an admiralty court for a maritime injunction. Should this petition be granted? If the charter party states that the ship owner may go on board to inspect the ship within the lease period, the charterer's refusal constitutes a breach of a contractual obligation, and the ship owner can certainly apply for a maritime injunction. But without a prior agreement on the issue, the petition has no basis in the contract and should not be granted. The charterer, for its part, can exercise its own procedural rights through the maritime evidence preservation procedure.

At the same time, all rights have their limits, and petitioners' maritime injunction petition should not go beyond the scope of their maritime claims. In the example of a petition for a court to order a carrier to issue a bill of lading, the shipper has the right to require the carrier to issue a bill of lading in accordance with the law, but to require the carrier to issue a clean bill of lading would be beyond the scope of the right. Therefore, a petition that asks for a maritime injunction to compel a clean bill of lading should not be granted.

C. The Injunction Should Have the Capacity to Be Enforced Directly

A maritime injunction is a compulsory judicial measure. Therefore, the matter petitioned to be enforced should be capable of being enforced. Not only can a maritime injunction be used to stop a tortious action, but it can also be used to force the other party to a contract to perform its contractual obligations (*i.e.* compel the specific performance of a contract). Article 110 of China's Contract Law provides, "if either party fails to discharge non-pecuniary debt or fails to discharge non-pecuniary debt as contracted, the other party may demand the discharge, except under any of the following circumstances: 1. legally or practically the discharge is impossible; 2. the subject matter of the debt is unsuitable for a compulsory discharge or too expensive for the discharge; or 3. the creditor does not demand the discharge within a reasonable period of time." It can be observed from this provision that not every contractual obligation is capable of having its performance compelled. For example, personal freedom is a basic human right. When a creditor's rights conflicts with a debtor's personal freedom, the creditor's rights cannot be enforced directly, but only through a substitute. The debtor is liable for any costs arising from the enforcement, *i.e.*, the claim becomes a monetary claim.

In disputes over performance contracts, for example, an actor cannot be compelled to continue the performance under a contract, but can only be required to pay damages and the costs for engaging another person to perform instead.

Similarly, a maritime injunction cannot be used where the underlying claim involves an obligation whose compliance cannot be compelled or if compliance will be too expensive.

D. Fully Understand the Conditions for a Situation to Qualify as an "Emergency"

Maritime injunctions directly demand respondents to perform their obligations in civil law, and are forceful government interventions in commercial and social life. Autonomy of will should be the prevalent principle in society, and the government should only intervene when necessary. An emergency is a prerequisite for a maritime injunction. Therefore, a precise understanding of "emergency" is essential to the proper use of maritime injunctions. The SMPL makes "an emergency where the failure to issue a maritime injunction immediately will cause harm or exacerbate existing harm" as one of the three prerequisites for a maritime injunction. The phrase "where failure to issue a maritime injunction immediately will cause harm or exacerbate existing harm" may be considered a explanation of "emergency," but the term "emergency" remains too general. The author believes that the following factors should be considered when deciding whether a situation is an emergency: whether the petitioner's claims are substitutable (*i.e.*, whether the claims can be converted to monetary claims through performance of the contract by a third party); and whether the petitioner's damages, which have increased for the absence of a maritime injunction, can be sufficiently compensated through restitution, including whether the petitioner will have difficulty in collecting evidence and bringing a lawsuit, and whether the petitioner's losses or risks are more serious than the harm to the respondent from the maritime injunction.

E. Grant Injunctions That Compel Specific Performance with Caution

The current maritime injunction system aims to rectify torts and breaches of contract by respondents. A maritime injunction can order a respondent to act or refrain from an act. In practice, many maritime injunction petitions ask respondents to fulfill their contractual obligations. In the author's view, courts should exercise

more caution when ordering respondents to act than when ordering them to refrain from an act. The purpose of maritime injunctions is the prevention or containment of harm. From the perspective of comparative law, this purpose is identical to that of maintaining the status quo in the civil procedural preservation regime of the continental law system. "A decision that maintains the status quo preserves the scope of the parties' rights and not secure nforcement. As soon as a court enters a disposition and the disposition is enforced, a claimant's rights are provisionally realized."[16] A particular act changes the status quo, and the change is not easily reversible. Maritime injunctions that order the performance of an act often require respondents to perform contractual obligations, and these acts have little chance of being reversed after execution. These injunctions have a bigger impact on the parties' rights and obligations than maritime injunctions that prohibit certain acts. Because these injunctions are temporary and have no adjudicative force, much more care should be taken with respect to acts that change the status quo and which are not easily reversible.

One success story of the Chinese economy is the special economic zones for the experimentation of path for development. In a sense, the SMPL can be considered a "special zone" in civil procedural law: certain provisions in civil procedure that need improvement can experimented with through the SMPL. In fact, the provisions of the SMPL with respect to service, the preservation of evidence, and other matters can be instructive in the development of current civil procedure. Admiralty courts should take note of the SMPL's status and mission as a "special zone" of civil procedure, draw timely lessons and identify any problems from their work, and help improve civil procedure in China.

Translator: XIE Hongyue
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16 Zheng Zhongren, Exercise of Patent Rights and Dispositions That Maintain the Status Quo, at http://www.iprcn.com/view-new.asp?idnarne=813, 16 January 2008. (in Chinese)

Operation and Improvement of the Doctrine of Registration of Property Rights to Ships against Third Parties in China

LIU Benrong*

Abstract: With respect to changes in property rights to ships, China's Property Law has borrowed the doctrine of registration of property rights against a third party from the Maritime Law. However, in the specific expression of this doctrine, the Property Law rejects the Maritime Law's and certain other regulations' approach where it first requires registration and then states that "[a property right] shall not be valid against a third party without registration." In addition, the Property Law expressly limits the definition of "third party" to *bona fide* third parties. Although the Property Law's formulation is more faithful to the true essence of the doctrine, it has also generated widespread concern, confusion, and worry among maritime law experts and practitioners. This discomfort reveals not only the long-standing controversy over the understanding of the doctrine, but also how the ideas and practice in Chinese judicial practice in general have strayed from the true meaning of the doctrine. At the same time, it shows a lack of a full and accurate understanding of the doctrine with regards to changes in property rights to ships as well as other property rights to which the doctrine is applicable. Through the empirical analysis of 43 cases, this paper gives an objective, practical, and complete view of the operation and features of the doctrine of registration of property rights to ships against third parties in Chinese judicial practice. Based on the analysis, the paper searches for a true meaning of the doctrine and proposes ways to rectify the potential errors in the typical judgments involving the doctrine in practice.

Key Words: Ships; Property Rights; Doctrine of registration against third par-

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ties; Operation; Improvement

I. The New Expression of the Doctrine of Registration against Third Parties

With regards to changes in property rights to ships, the Property Law of the People's Republic of China (hereinafter "the Property Law") has adopted and preserved the language on the doctrine of registration against a third party from the Maritime Law of the People's Republic of China (hereinafter "the Maritime Law"). The general consensus is that this approach takes into account the characteristics of ships, is consistent with the legislation of most countries, and has proven "reasonable" and "unproblematic" for many years in the application of maritime law in China.[1] But the Property Law phrases the doctrine in a new manner: Article 24 of the Property Law states that "the creation, change, transfer, or extinction of the property right to any vessel, aircraft, motor vehicle and other property shall not be valid against a *bona fide* third party unless registered." Article 9(1) of the Maritime Law states that "the acquisition, transfer, or extinction of the ownership rights of a ship shall be registered at the ship registration authorities; no acquisition, transfer, or extinction of the ownership rights to a ship shall be valid against a third party unless registered." Article 188 and other articles of the Property Law also employ identical language.[2] The new language has two distinct features. First, before "shall not be valid against a third party unless registered," the mandatory requirement of "shall be registered" in the Maritime Law has disappeared. The other feature is that the limitation of "third party" to *bona fide* third parties.[3] Because "third party" in Article 9 of the Maritime Law in practice has been

1 Civil Law Office of the Commission of Legislative Affairs of the NPC Standing Committee ed., *The Interpretations of the Property Law of the People's Republic of China*, Beijing: China Legal Publishing House, 2007, p. 54 (in Chinese); Property Law Research Group of the Supreme People's Court, *Property Law of the People's Republic of China*, Beijing: The People's Court Press, 2007, p. 114. (in Chinese)

2 Further, Property Law Art. 188 provides that, "with respect to the mortgage against property described in Art. 180(1)(4) or 180(1)(6) of this Law or a vessel or aircraft under construction as described in subparagraph (5), the mortgage becomes effective when the mortgage contract becomes effective; but without registration, the mortgage is not valid against a third party." The Maritime Law Art. 13(1) states that "a mortgage against a ship is established when the mortgagee and the mortgagor jointly register the mortgage with the ship registration authorities. No mortgage is valid against a third party unless registered."

3 Property Law Art. 24 also expands the scope of applicability of the doctrine of registration against third parties to include all ships beyond those specified in the Maritime Law.

customarily interpreted as "*bona fide* third party" on a basis of good faith, the provision restricting "third party" to "*bona fide* third parties" in Article 24 of the Property Law did not draw particular attention. But the removal of the mandatory requirement that the ownership of a ship "shall be registered," as provided in the Maritime Law, has triggered widespread concern, especially on the potential difficulties in implementation. A typical view asserts that, "if the provisions of the Property Law are implemented in judicial practice – taking the purchase and sale of ships as an example – the seller and the purchaser would, in accordance with their assessment of their risk for potential civil liability, attempt to use a contract to prove the delivery and transfer or the non-delivery and non-transfer of the ownership of a ship at any time. This practice will certainly make it challenging to identify the liable party and, conversely, make it easy for the responsible party to avoid liability. It is superfluous for the Maritime Law to include the effective-upon-registration doctrine as well as the doctrine of registration against third parties in the same provision. This is because the validity of an ownership right or a mortgage can be confirmed as soon as the registration becomes effective, and the validity of the property right against a third party would not be an issue."[4]

It should be mentioned that the language on the doctrine of registration against third parties in Article 24 of the Property Law is identical to that in the legislation of representative countries on this issue, such as France and Japan,[5] and is almost the same as the language in the maritime codes of Japan, South Korea, and China Taiwan. It also more accurately reflects the essence of the model of asserting the validity of changes in property right against third parties. Its plain language

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4 Guan Zhengyi and Liu Anning, Certain Property Rights Issues in the Application of the Maritime Law (Abstract), at http://www.chi-najudge.cn/topic-560.aspx, 16 July 2008 (in Chinese).

5 The Civil Code of Japan Art. 177 states that "acquisitions of, losses of, and changes to rights to real property are not valid against third parties unless they are registered pursuant to the applicable provisions of the Real Estate Registration Act and other relevant laws." Article 178 further provides: "Transfers of rights to personal property are not valid against third parties unless the personal property is delivered." The Japanese Commercial Code Art. 687 provides that "the transfer of ownership of a ship is not valid against a third party unless it is registered and set forth in the ship's nationality certificate." The Republic of Korea's Commercial Code Art. 743 provides that "the transfer of ownership of a ship is valid when the parties reach an agreement, but the transfer is not valid against a third party unless it has been registered and set forth in the ship's nationality certificate." China Taiwan's Maritime Act (2000) Art. 9 states: "No transfer of the ownership of a ship can be valid against a third party unless the transfer has been registered." Article 36 further provides that "no ship mortgage can be valid against a third party unless registered."

states that changes to property rights (but not in the sense of a creditor's rights) can be effective even when the changes have not been registered; it is only that unregistered property rights and unregistered changes in the property rights are not valid against a *bona fide* third party. As such, registration, as notice to the public, is not a necessary element of changes to property rights but a condition of validity against a third party. Registration and notice are not requirements for the creation, change, and validity of a property right; only that property rights can be divided into two types, *i.e.* unregistered (not effective against a third party) and registered (effective against a third party). By extension, registration is actually optional, not compulsory, which also negates the necessity of the "shall be registered" requirement for changes to property rights to be effective.

However, the plain language of Article 9 of the Maritime Law is generally interpreted in connection with the prior "shall be registered" requirement. In other words, one is inclined to consider the requirement of "shall be registered" as a prerequisite and condition, and use that understanding to interpret the legal consequences of "shall not be valid against a third party unless registered." In this manner, "it shall not be valid against a third party unless registered" can be easily construed as "if it is not registered, it will only be effective between the parties involved, and shall not be valid with respect to a third party." Creditor's rights are *in personam* rights and stem from the relationship between the parties, and only property rights are exclusive and affect individuals or entities other than the parties. As a result, according to the construction described above, one can interpret "effective between the parties" to mean effective as a contractual creditor's right, and consider "not valid against a third party" as ineffective against all third parties, thus depriving property rights of the qualities of exclusiveness and effectiveness with respect to all parties. In fact, this interpretation means that a failure to register makes the property right nonexistent, which is substantially the consequence under the doctrine of registration effectiveness. In reality, after the Maritime Law was issued in 1992, the authoritative reader's guide edited by the Ministry of Transport interpreted Article 9 of the law in the exact manner described above: "What does the phrase 'it shall not be valid against a third party' mean? The ownership of a ship must be registered. If not registered, a contract entered into between the seller and the purchaser will be effective, but the contract cannot be the basis for a claim

against a third party or a defense against a third party's claim."[6]

On one hand, Article 9 of the Maritime Law is almost universally understood as the codification of the doctrine of registration against third parties. On the other hand, because of the "shall be registered" language, one is led to believe that a property right is not effective without registration. This contradiction in the plain language of the Maritime Law has been unsettling to experts and practitioners in the field for a long time, and makes the sentence "it shall not be valid against a third party unless registered"[7] – simple at first glance but arouses many doubts on reflection – even more confusing. Controversy over the understanding of "it shall not be valid against a third party unless registered" and the effects of ship registration have always existed in the field. Although there has never been a consensus, some customary practices have emerged. For instance, a certificate of registration by itself is generally sufficient to determine ownership, and it is customary not to recognize the actual owner's assertion of rights against a third party, etc. The new language of Article 24 of the Property Law exposes the internal inconsistency in Article 9 of the Maritime Law, the long-standing controversies and doubts in the maritime law field over the doctrine, the conflicts between the implementation of the Property Law and the established ideas and approaches in judicial practice, and the people's concern about this state of affairs. Under these circumstances, it is necessary, even urgent, to come to a correct understanding of the doctrine; compile, organize, and review its actual application in China; and rectify our interpretation and judicial practice in line with the new language of the Property Law.

This paper will only focus on the registration of property rights to ships against third parties. According to the Property Law, in addition to property rights to ships, the doctrine is also applicable to the following: changes to the ownership rights of certain special personal property like aircraft and motor vehicles (Article 24), land construction and development rights (Article 129), the creation of an easement (Article 158), the creation of mortgages on personal property other than ships (Articles188 and 189(1)). But because property interests in motor vehicles, easements, and other rights – which all have significant impact on society – are

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6 Ministry of Transport Policy and Regulations Bureau and Ministry of Transport Center for Legal Affairs eds., *Reader's Guide to the Maritime Law of the People's Republic of China*, p. 52. (in Chinese)

7 Wang Tze-Chien, *Civil Law Theory and Case Law* (I) (revised edition), Beijing, China University of Political Science and Law Press, 2005, p. 226. (in Chinese)

relatively new additions to the Property Law, the application of the provisions on the doctrine on ships in the Maritime Law had represented, in effect, the application of the doctrine generally in China to a large extent before the Property Law was issued. Therefore, while the discussion in this paper uses ships as an example, its significance also goes beyond ships.

II. The Operation of the Doctrine of Registration of Property Rights to Ships against Third Parties in China

Through the empirical analysis of specific cases, this paper examines the application of the provisions relating to the doctrine on ships and presents an overall view of the actual application of this doctrine in China and its features. The author searched for cases (judgments) in the Database of Published Cases of the Supreme People's Court and the Database of Judgments of Chinese Courts in the Chinese legal research database, *chinalawinfo.com*,[8] using the following keywords: "it shall not be valid against a third party unless registered," "not valid against a third party," "Article 9 of the Maritime Law," "Article 13 of the Maritime Law," "Article 5 of the Regulations Governing the Registration of Ships ('Article 5 of the Regulations')),"[9] and "Article 6 of the Regulations Governing the Registration of Ships ('Article 6 of the Regulations').[10] After excluding repetitions and unsuitable cases, 43 cases (judgment documents) were selected as samples. The sample cases involve 8 maritime courts in China (there is a total of 10 maritime courts) and one local intermediate court. In addition to cases of first instance, cases of second instance and retrials also account for 35%. These cases mainly span from 2000 to 2007 (the year in the case numbers). As a whole, they are quite representative.

The breakdown of the specifics of these 43 sample cases is as follows. There

8 The case law database in the Chinese legal research database on *chinalawinfo.com* is currently the largest database for case law and judgment documents in China, including all cases in the Bulletins of the Supreme People's Court, the People's Court Cases, and other court cases and judgment documents that can be found on the Internet.

9 This article provides that "the acquisition, transfer, and extinction of ship ownership shall be registered with the ship registration authorities; no acquisition, transfer or extinction of the ship's ownership shall be valid against a third party unless registered."

10 This article provides that "the creation, transfer, and extinction of a ship mortgage or a bareboat charter shall be registered with the ship registration authorities; no creation, transfer, or extinction of the same shall be valid against a third party unless registered."

are three cases from the Dalian Maritime Court, including one retrial;[11] one from the Shanghai Maritime Court;[12] four cases from the Ningbo Maritime Court, including one retrial;[13] one from the Wuhan Maritime Court;[14] two from the Xiamen Maritime Court;[15] 13 cases from the Guangzhou Maritime Court, including two cases of second instance;[16] nine cases from the Beihai Maritime Court, including eight cases of second instance;[17] nine cases from the Haikou Maritime Court, including two cases of second instance and one retrial;[18] and one from the Haikou Intermediate Court.[19] The 43 cases of first instance enumerated above include 12

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11 The three cases taken from this court are sourced from the case commentaries. Their case numbers are unknown.

12 The case number of the one case from this court is (2003) Hu Hai Fa Shang Chu Zi No. 113.

13 The case numbers of the four cases from this court are (2006) Yong Hai Fa Wen Shang Chu Zi No. 23 (Selected Cases of the People's Court), (2002) Yong Hai Fa Wen Chu Zi No. 83, (2006) Yong Hai Fa Shi Chu Zi No. 5, (1997) Yong Hai Shi Chu Zi No. 28. Among them, the case numbered (1997) Yong Hai Shi Chu Zi No. 28 was retried due to an appeal filed after the judgment in the first instance went into effect. The number of the retried case is (2000) Zhe Fa Gao Shen Min Zai Kang Zi No. 8.

14 The case number of the one case from this court is (2002) Wu Hai Fa Shang Chu Zi No. 4.

15 The two cases from this court are both sourced from the case commentaries. Their case numbers are unknown.

16 13 cases are taken from this court. Their case numbers are: (2003) Guang Hai Fa Chu Zi No. 264, (2005) Guang Hai Fa Chu Zi No. 240, (2001) Guang Hai Fa Chu Zi No. 109, (2001) Guang Hai Fa Chu Zi No. 89, (2000) Guang Hai Fa Zhan Zi No. 36, (2001) Guang Hai Fa Zhan Shi Zi No. 61, (2002) Guang Hai Fa Chu Zi No. 134, (2002) Guang Hai Fa Chu Zi Nos. 220–221, (2003) Guang Hai Fa Chu Zi No. 264, (2005) Guang Hai Fa Chu Zi No. 120, (2004) Guang Hai Fa Chu Zi No. 44 and (2003) Guang Hai Fa Chu Zi No. 387. Among them, the cases numbered (2004) Guang Hai Fa Chu Zi No. 44 and (2003) Guang Hai Fa Chu Zi No. 387 went through second trials, and the cases of second instance are numbered (2005) Yue Gao Fa Li Min Zhong No. 530 and (2004) Yue Gao Fa Min Si Zhong No. 96. Another case is a case of fraud in maritime transport: *La Filipina UY Gongco Corporation v. Dexing Shipping Co., Qinglong Shipping Industrial Co. of Hainan and Its Guangzhou Branch* (Bulletins of the Supreme People's Court, case number unknown).

17 Nine cases are taken from this court. One case is numbered Bei Hai (2006) Hai Shi Chu Zi No. 024. The other eight cases of second instance are numbered (2003) Gui Min Si Zhong Zi No. 17, (2004) Gui Min Si Zhong Zi No. 4, (2006) Gui Min Si Zhong Zi No. 17, (2002) Gui Min Si Zhong Zi No. 8, (2006) Gui Min Si Zhong Zi No. 1, (2006) Gui Min Si Zhong Zi No. 14, (2002) Gui Min Si Zhong Zi No. 19 and (2007) Gui Min Si Zhong Zi No. 40.

18 Nine cases are taken from this court. Their case numbers are: (2006) Hai Shang Chu Zi No. 054, (2000) Hai Shang Chu Zi No. 141, (2000) Hai Shang Chu Zi No. 157, (2001) Hai Shang Chu Zi No. 004, (2002) Hai Shang Chu Zi No. 47, (2007) Hai Que Zi No. 5. Among them, the two cases of second instance are numbered (2001) Qiong Jing Zhong Zi No. 28, (2003) Qiong Min Er Zhong Zi No. 46, and the one case of retrial is numbered (2005) Qiong Min Zai Zhong Zi No. 4.

19 The case number of the one case from this court is (2001) Hai Zhong Fa Min Chu Zi No. 101. The dispute was originally about compensation for damage to property but, in reality, it was a suit for compensation for infringement of ownership rights to a ship. Thus, it was subject to the special jurisdiction of the maritime court.

cases of second instance and three retrials. Therefore, a total of 58 cases (judgment documents) were actually analyzed.

The author focuses his analysis principally on (1) the application of Article 9 of the Maritime Law and Article 5 of the Regulations (the registration of ownership rights to ships against third parties), Article 13 of the Maritime Law and Article 6 of the Regulations (the registration of ship mortgages against third parties), and Article 6 of the Regulations (the registration of bareboat charter rights against third parties); (2) the particulars on the disputes and judgments on the effects of registration against third parties; (3) the general trends and main controversies arising from judgments on the effects of registration against third parties; and (4) the characteristics of judgments on the effects of changes in property rights to ships that involve third parties and those that do not involve a third party.

A. The Application of the Pertinent Provisions and the Related Controversies and Judgments

1. Application of Article 9 of the Maritime Law and Article 5 of the Regulations (the Registration of Ownership Rights to Ships against a Third Party) (30 Cases)

a. Applications in Disputes over the Ownership of Ships (6 Cases)

Among these cases, one was filed by an actual co-owner of a ship against the registered owner and the other co-owner for an unauthorized transfer of the ship, where the plaintiff sought to invalidate the transfer. The other 5 cases all include the following fact pattern ("Typical Judgment 1-1"): after the court had seized or auctioned a ship that was under the name of its registered owner or another person, its actual owner or other parties challenged the presumed ownership and request the court to determine ownership or order compensation. The court applied Article 9 of the Maritime Law and Article 5 of the Regulations to determine ownership.

In the final judgments of all five cases, the courts determined that the seized or auctioned ship was the property of the person named in the registration certificate. Where the rights claimed by the actual owner or another person had not been registered, they were not valid against a third party. In one case, after a maritime court had detained the ship under the name of the registered owner due to debts that arose in other cases, the actual owner filed a lawsuit with another maritime court to determine ownership. This other maritime court ruled that, while the ship was under the name of the registered owner, it actually belonged to another true owner.

In its objection to this court's execution order, the court that was detaining the ship said that according to Article 9 of the Maritime Law, this determination in the judgment was "binding only on [the registered owner] and was not valid against a third party."[20]

We can make two observations. First, when applying the specific provisions, courts do not consider the type of third party that is competing against the registration. It makes no difference whether it is a *bona fide* third party or a third party that can compete or not compete with the registration. In reality, the third parties involved in several cases were ordinary creditors of the registered ship owners. Second, some cases reflect a minority view, distinct from the general understanding that the certificate of registration is the fundamental (*i.e.*, only) basis for the determination of ownership.[21]

b. Applications in Tort Cases and Disputes Involving Ship Collisions (5 Cases)

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20 See Judgment numbered (2001) Hai Zhong Fa Min Chu Zi No. 101. The factual findings in this judgment include the following statements: On November 23, 2000, the Guangzhou Maritime Court issued Civil Ruling (1999) Guang Hai Fa Zhi Zi No. 211-26 with regards to the plaintiff's objection to execution. The ruling held that "the owner of the ship Nanyang No. 1, from the time of its purchase to its being detained and auctioned by this court in accordance with law, has been registered in the name of Nanyang Shipping Group Stock Holding Co., Ltd. on the ship's certificate. Nanyang Shipping Group Stock Holding Co., Ltd. is the party against whom the judgment is executed. Article 9 of the Maritime Law of the People's Republic of China provides that the acquisition, transfer, or extinction of the ownership of a ship shall be registered with the ship registration authorities; no acquisition, transfer, or extinction of the ship's ownership shall be valid against a third party unless registered. Therefore, this Court's auction of the ship Nanyang No. 1, as the property of Nanyang Shipping Group Stock Holding Co., Ltd., was legal. The judgment issued by Haikou Maritime Court that in confirmation of rights is only binding on Nanyang Shipping Group Stock Holding Co., Ltd. but not on any third party. Hence, it is proper for this Court to auction the ship Nanyang No. 1 in accordance with the law and allocate creditor's rights based on the creditors' petitions. For these reasons listed above, the plaintiff's objection is overruled."

21 This case is from the Guangzhou Maritime Court and is numbered (2005) Guang Hai Fa Chu Zi No. 240. The judgment characterizes this case as a dispute over the ownership of a ship. The Regulations of the People's Republic of China Governing the Registration of Ships Art. 5 provides that "the acquisition, transfer, or extinction of the ownership of a ship shall be registered with the ship registration authorities; no acquisition, transfer, or extinction of the ship's ownership shall be valid against a third party unless registered." The ship under dispute in this case was a ship that did not have a name, certificate, or registered owner. Therefore, plaintiff Li Xitang could not prove that he had acquired ownership of the ship based on ship registration or that his ownership was valid against a third party. If the plaintiff claimed ownership of the ship, he must offer sufficient proof. The author believes that the understanding in this case is different from that in other cases, since it is consistent with the correct understanding of the doctrine of registration against third parties and did not consider registration as the only basis for determining ownership.

Typical Judgment 1-2: Suits for damages arose from ship collisions that resulted in damage to the ship and oil pollution, or product liability that resulted from shipbuilding and other related activities. The registered ship owner and the actual owner were either the plaintiff or the defendant. The court applied Article 9 of the Maritime Law and Article 5 of the Regulations to determine whether the plaintiff had standing to sue or the defendant had standing to be sued.

In these five cases, the registered owners were different from the actual owners because of a nominee situation or the failure to register the transfer of ownership. Under these circumstances, the courts applied Article 9 of the Maritime Law and Article 5 of the Regulations to determine that the registered owners were the plaintiffs. The actual owners had no standing to sue because "when a third party [was] involved, the identification of ship owner should be based on the registration at the ship registration authorities."

c. Applications in Disputes over the Transfer and Sale of Ships (6 Cases)

Typical Judgment 1-3: the purchaser of the ship initiated a lawsuit against the seller, claiming that the seller was an unregistered owner and is not entitled to dispose of the ship, and requesting the court to invalidate the transfer and allow the return of the ship; or the seller of the ship sued the purchaser for the payment for the ship, and the purchaser defended by alleging that the seller was not the owner and had no right to dispose of the ship, or that "the transfer contract was void in the absence of registration." The courts applied Article 9 of the Maritime Law and Article 5 of the Regulations to decide whether the seller was the owner and whether the seller's disposition was effective.

There is one case on whether "the transfer contract is void unless registered" is a correct statement. The courts of both the first and second instances agree that it should be understood in accordance with Article 9 of the Maritime Law: "the absence of registration does not affect the validity of a contract." Overall, when deciding whether the seller was the owner and had the right to dispose of the ship, the courts did not base their decisions on the registration, but on whether the seller actually owned the ship. In one case, the seller argued that it was the actual owner and the registered owner was only the nominee. However, the court still determined that the registered owner of the ship was the owner per Article 9 of the Maritime Law, reasoning that the seller "failed to provide sufficient evidence to show that it

had ownership rights to the ship and was the owner of the ship."[22] But some cases also show that controversies and ambiguities still remain on this point.[23]

d. Applications in Sailors' Labor and Personal Injury Disputes (6 Cases)

Typical Judgment 1-4: the sailor sued the registered owner or actual owner of the ship for payment for his services, or the relatives of the sailor sued the registered owner or actual owner for compensation for the sailor's death or injury. The courts applied Article 9 of the Maritime Law and Article 5 of the Regulations to determine the responsible person, and in particular whether a nominee registered owner or a registered owner who had already transferred the ship should be held liable.

In the final judgments of all six cases, the courts decided that when the registered owner and the actual owner were distinct due to a nominee situation or a transfer of the ship, this separation in ownership was not a defense against the third party (the plaintiff). The specific liability should be jointly and severally assumed by the registered and actual owners, or by the registered owner with the actual owner assuming complementary liability. However, from the disputes in issue and the differences in the judgments from the courts of the first and second instances, one can see that the disagreements on this issue are particularly striking. Among these cases, two cases are second instance that both modified the original judgments. In one case, the court of first instance held that the nominee registered owner should not be liable because there was no employment relationship between the registered owner and the plaintiff. The court of second instance maintained

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22 See *Zhang Aidang et al. v. Zhang Baoguo et al.*, (2005) Guang Hai Fa Chu Zi No. 120 from the Guangzhou Maritime Court, a dispute over a sales contract for a ship.

23 See *Peng Shaotian v. Cen Guidong*, (2006) Gui Min Si Zhong Zi No. 17, an appeal of a judgment concerning the sales contract for a ship. The judgment in the first instance held that the registered owner of the ship was the owner. The transferee of the ship alleged that it had purchased the ship from the registered owner, but it had not acquired the title to the ship "because the price of the ship had not been paid in full and the registration formalities for ship transfer were incomplete." The judgment in the second instance held that, according to Article 5 of the Regulations, "Chinese law follows the doctrine of registration of the ownership to a ship against third parties. Registration at the ship registration authorities is simply a legal element that makes ownership valid against a third party. In this case, the ship owner named on the Certificate of Ownership Registration for the ship at issue is still Liang Tian (the registered owner). The legal consequence is only that the rights that Peng Shaotian (the transferee) obtained from the purchase of the ship cannot be valid against a third party (*i.e.,* the mortgagee of the ship, Xishan Credit Cooperative). However, one cannot deny Peng Shaotian's right to dispose of the ship involved or further determine that Peng Shaotian did not have the right to sell the ship to the appellee, Cen Guidong. To do so would be contrary to the above-described provisions of the law."

that, according to Article 9 of the Maritime Law, the registered owner should be the owner of the ship. Therefore, the registered owner should be liable, and the actual owner (also the actual operator) was responsible for supplemental compensation.[24] In the other case, the court of first instance held that an unregistered property interest was not valid against a third party, "but the rights of the third party should be rights that could compete with the ownership rights to the ship." Because the plaintiff's claimed rights were a creditor's rights, the effect of the transfer between the two defendants could constitute the basis of a valid defense against the plaintiff. However, the court of second instance reasoned that "if the change of ownership has not been registered, it is not valid against a third party who is a party other than the parties to a contract of the sale of a ship." Therefore, the court reversed the judgment and ruled that the transfer was not valid with respect to the plaintiff.[25] Another case involving a retrial should also be noted. In that case, the court of first instance held that "the legislative intent [of Article 9 of the Maritime Law] is that when disputes arise over the ownership of a ship, the parties may claim rights or assume obligations based on one of the necessary elements, *i.e.*, whether the ship has been registered. The instant dispute focuses on economic compensation for the death of a sailor. Therefore, it is not within the scope of regulation of this article." As a result, only the ship's operator should be liable. After the judgment in the first instance went into effect, the procuratorate filed a protest against the judgment, claiming that Article 9 of the Maritime Law "classifies the transfer of a ship as a civil legal act that cannot be effective until after certain procedures have taken place." Because "the cancellation and modification of the registration related to" the transfer and sale of the ship involved in this case "have not occurred at the ship registration authorities, the ownership of the ship has not been transferred." Therefore, the ship owner and the ship operator should be jointly liable. The retrial of the case resulted in a modified judgment.[26]

e. Applications in Tort Cases for Goods Damaged during Marine or Riparian Transport (7 Cases)

Typical Judgment 1-5: when goods were damaged in accidents and other

24 See *Mai Ridong et al. v. Water Transport Co. of Tanbu Town, Huadu District, Guangzhou City*, (2004) Yue Gao Fa Min Si Zhong Zi No. 96, an appeal of a case involving social insurance premiums for industrial accidents at sea.

25 Si Yuzhuo, *Maritime Law Monograph*, Beijing: China Renmin University Press, 2007, p. 69. (in Chinese)

26 See *Wang Aisu et al. v. Yang Yihe et al.,* (2000) Zhe Fa Gao Shen Min Zai Kang Zi No. 8, a protest of a judgment about a dispute over compensation for personal injury at sea.

events[27] of the cargo-carrying ship, the shipper or the holder of bill of lading filed an action against the contractual carrier (the actual owner or operator of the ship) along with the nominee registered owner or the registered owner who had transferred the ship, contending that all of them were liable for damages. The courts applied Article 9 of the Maritime Law and Article 5 of the Regulations to determine the responsible party, and in particular whether the nominee registered owner or a registered owner who had transferred the ship should be held liable.

The registered owners were held responsible in six of the seven cases. Only in one case did the court of first instance hold that, according to Article 5 of the Regulations, "registration makes [the property interest or the change in property interest] effective against a third party, but is not required for the acquisition, transfer, or extinction of the ownership of a ship to become effective." The registered owner (Maritime Transport Company for Salt Industry) in this case was not the actual owner. In addition, "as this case is not a dispute over the ownership of a ship, ownership should be based on actual ownership." As a result, the actual owner was ordered to bear liability for the damage to the goods. The actual owner appealed. The court in the second instance settled the case by mediation, and the judgment of the first instance was substantially sustained.[28]

2. Applications of Article 13 of the Maritime Law and Article 6 of the Regulations (the Registration of Ship Mortgages against Third Parties) (8 Cases)

Typical Judgment 2-1: a ship mortgagee who did or did not register its mortgage sued the mortgagor for the liabilities secured by the mortgage. The courts applied Article 13 of the Maritime Law and Article 6 of the Regulations to determine the validity of the mortgage.

The courts held that registered mortgages were effective. However, when it came to unregistered mortgage contracts, the judgments varied. In general, the courts did not recognize such contracts. But in one case, the court maintained that, according to Article 13 of the Maritime Law, "the ship mortgage becomes effective from the signing date of the mortgage contract." According to this logic, the plaintiff enjoyed rights under a valid mortgage even though the mortgage had not been registered. However, the final judgment of this case was silent on

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27 Apart from marine accidents such as stranding, there is also an event where the goods on board were stolen.

28 *Xiamen Haoli Clothing Co., Ltd. v. Shishi Dongfang Fishing Co., Ltd.,* a dispute over damage to the goods during their transport at sea.

the plaintiff's rights under the mortgage, but only made a determination on the guarantor's "joint and several liability to the above-described creditors' claims, other than the rights under the ship mortgage."[29]

Typical Judgment 2-2: the nominee registered ship owner mortgaged the ship and registered the mortgage, and the actual owner or the transferee of the ship sued to invalidate the mortgage; or the mortgagor of the registered ship mortgage sued for the underlying liabilities and other rights under the mortgage, and the actual owner or the transferee of the ship intervened in the lawsuit and asserted that the mortgage was invalid. The court determined the validity of the mortgage based on Article 13 of the Maritime Law and Article 6 of the Regulations.

The final judgments of these cases show that the courts all recognized the validity of the mortgage made by the nominee registered owner. However, one can also observe, from the disputes between the parties and the differences in the judgments between the first and the second instances, that the views are quite divergent. Since these lien contests are typical real property right contests, the court in one case determined whether a registered mortgagor was a (*bona fide*) third party within the definition of Article 13 of the Maritime Law and Article 6 of the Regulations on the basis of whether the registered mortgagor was actually a *bona fide* mortgagor, *i.e.*, one who knew or should have known of the actual changes to property rights.[30] This case was the only one in all the sample cases that decided whether the registration was valid against a third party by adding a "*bona fides*" criterion.

3. Application of Article 6 of the Regulations (Registration of Bareboat Charters against Third Parties) (10 Cases)

Of the 10 cases, five involved only a determination on the effect of registration of bareboat charters against third parties. The other 5 cases involved determinations on registrations of bareboat charters against third parties as an additional issue on top of ownership and mortgage registrations. Among the above-described cases involving torts, ship collisions, personal injury at sea, and compensation for goods damaged during marine or riparian transportation, there are cases that separately or simultaneously raised the issue of whether the lessor in a bareboat charter (*i.e.*,

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29 *Guo Binghua v. Qiu Rihe et al.*, (2000) Guang Hai Fa Zhan Zi No. 36, a dispute over a ship supply contract.

30 *Shanghai Pudong Shipping Co. vs. Nanyang Shipping Group Stock Holding Co., Ltd.*, (2001) Qiong Jing Zhong Zi No. 28, a dispute over the sale of a ship. The Bank of China, Hainan Branch is the third party in question.

the ship owner) should be jointly held responsible with the lessee if the bareboat charter had not been registered. In addition, disputes that raised the issue of the effects of registering bareboat charters against third parties mainly involved the provisioning of ships. Typically, the supplier sued both the lessor and the lessee under a joint liability theory. The lessor might assume liability in accordance with the contract or the offer, but the ship's seal was also affixed on the document. The courts decided whether the lessor of an unregistered bareboat charter should be liable by looking to Article 6 of the Regulations.

All the final judgments in tort cases – such as torts, ship collisions, personal injury at sea, and compensation for goods damaged in marine or riparian transportation – are of the opinion that, according to Article 6 of the Regulations, an unregistered bareboat charter is not valid against a third party. Therefore, the lessor is liable. In disputes involving a contract for ship provisions, courts held that Article 6 of the Regulations was not applicable. Therefore, the lessee should assume responsibility in accordance with the contract. But there is still a degree of disagreement on this issue. One retrial involving a dispute over the provision of ship supplies illustrates this lack of consensus. The judgments in the first instance, the second instance, and the retrial stand in sharp contrast to each other with regards to the oil supplier's claim against both the bareboat charter lessor and the lessee under a joint liability theory.[31]

B. Summary

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31 *Tangshan Haida Shipping Co., Ltd. v. Hainan Guosheng Petroleum Co., Ltd.*, (2005) Qiong Min Zai Zhong Zi No. 4., which is the retrial of a dispute over a ship fuel supply contract. The court of first instance held that "the bareboat charter is not within the scope of the case and has no bearing on the question of whether the ship fuel supply contract is valid. Therefore, the fact that the bareboat charter has not been registered does not justify Guosheng's request for Haida to be responsible for the repayments." The court of second instance held that, "according to Article 6 of the Regulations, the lessor is at fault for the lessee's failure to complete the legal formalities of registration. Thus, in this case, the bareboat charter cannot be valid against the creditor's rights claimed by the plaintiff. Registration is a requirement of a bareboat charter. Otherwise, it is not effective against a third party." The court of retrial held that Article 6 of the Regulations "means that the acquisition, transfer, or extinction of ownership, mortgage, bareboat charter rights, and other property rights to a ship shall be registered; otherwise, they are not valid against a third party. This registration system aims to resolve the question of which act among a number of acts, including a bareboat charter, should be legally recognized and have priority. It is not designed to apportion the claims and liabilities created in the operation of the ship. This case does not involve a dispute over bareboat charter rights. Therefore, Article 6 of the Regulations is not applicable."

The study of the different types of cases above shows the following general tendencies in the understanding of the effect of registration of property rights to ships against third parties as well as the application of the relevant laws in practice. First, the certificate of registration is commonly taken as the basis for the determination of the ship owner. Second, when a third party is involved, the registered ship owner is generally recognized as the ship owner; when no third parties are involved, it is accepted that the actual ship owner should have the rights of ownership. Third, when interpreting "not valid against a third party unless registered," the "third party" is commonly construed as a third party "other than the parties involved in the matter," although other interpretations exist. One popular interpretation considers "a third party" to be "a party connected to the property rights to the ship involved in the case." This interpretation is concentrated in the maritime courts of first instance and is almost all reversed on appeal. Fourth, when a third party is involved, the unregistered actual owner of the ship usually cannot assert a claim for damages against a third party as the plaintiff. Generally, the registered ship owner cannot be exempted either from liability when the registration is fraudulent and the ship has been actually transferred. When courts determine the validity of the actual owner's rights or the registered owner's obligations with respect to a third party, the issue with regards to the type of third party in question is usually not considered. Fifth, with respect to bareboat charters, if the bareboat charter has not been registered in accordance with law, the lessor (the registered owner) can usually be exempted from liability in contract cases, but not in tort cases.

In judicial practice, controversies and difficulties are concentrated in (1) the phrase "not valid against a third party unless registered" in Articles 9 and 13 of the Maritime Law and Articles 5 and 6 of the Regulations in cases where the registered owner and the actual owner are distinct, such as when the ship is owned by a nominee or when the transfer of a ship has not been recorded; and (2) the responsibility of the registered ship owner who is not the actual owner or the operator of the ship in disputes arising from personal injury at sea, damage to goods in marine or riparian transportation, torts, and ship collisions.

III. Toward a Correct Understanding and Application of the Doctrine of Property Rights against a Third Party through Registration

A. The Peculiarities of the Doctrine of Property Rights against a Third Party through Registration in China

When defining and interpreting the doctrine in China, many scholars simply consider it a type of intentionalism. They contend that, as soon as the parties have a meeting of the minds with respect to a change to property rights, the change occurs; it is only that the change is not valid against a third party before the public is given a notice of the change.[32] This understanding is distinct from the provisions of China's Property Law.

The way that changes to property rights occur pursuant to the Property Law is based, in principle, on a "creditor's rights formalism" (a system requiring agreement between the parties as well as formal procedures, such as registration or delivery, for a change rights to be effective), with intentionalism as the exception, but this intentionalism is still different from the pure intentionalism in France and Japan. The elements for a change in property rights based on pure intentionalism are an agreement on the creditor's rights plus notice to the public. However, in the Property Law, only the provisions on easements (Article 158) and mortgages on personal property (Articles 188 and 189) require an agreement on the creditor's rights and notice to the public for a change in rights to be effective, while the changes in property rights to vessels, aircraft, motor vehicles, or other special personal property (Article 24) require an agreement on the creditor's rights, notice to the public, plus delivery. If there is only an agreement on the creditor's rights in a change in property rights of special personal property, the effect will remain that of creditor's rights, but no change in property rights will result. Actual delivery is required.

The above understanding of Article 24 of the Property Law is the result of a contextual interpretation of Articles 6 and 23. Some scholars believe that Article 24 is what Article 23 referred to in "otherwise provided"; therefore, changes in property rights to special personal property do not require delivery. This interpretation is in conflict with both contextual interpretation and real life. Since the Property Law clearly defines vessels, aircrafts and motor vehicles as personal property and not special real property, they should be subject to the

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32 Si Yuzhou ed., *Maritime Law* (2nd Edition), Beijing: Law Press China, 2007, p. 35. (in Chinese)

general rules on changes in property rights to personal property in Articles 6 and 23 of the Property Law. In other words, the creation and transfer of property rights to personal property should be effective upon delivery, and a purely creditor's rights-type contract is not a sufficient vehicle for changes in property rights. "The circumstances contemplated by Article 23 when it states 'the law otherwise provides' mostly include the creation of property rights with respect to personal property that do not require delivery, such as mortgages on the personal property."[33]

Clarifying the peculiarities of the effect of registration of property rights to ships and other special types of personal property against third parties is of great significance to judicial practice. For instance, in the example of Typical Judgment 1-1, when the court detains a ship under the name of the registered owner, if a non-party claims actual ownership of the ship based on a contract for transfer, sale, or debt, the court should first examine the circumstances surrounding the possession of the ship at the time of its detention, whether the ship was actually delivered, the validity of the proposed delivery, and other factors to determine the truthfulness of the non-party's claims. Secondly, the court should determine whether the non-party is a third party against whom the registration is valid. The non-party's claim should not be rejected solely on the ground that the transfer of the ship to the non-party cannot be effective against a third party without registration. In reality, a non-party's false claims can usually be detected by attention to whether there was actual delivery in addition to a meeting of the minds on the creditor's rights. With an accurate understanding of the doctrine, it is not difficult to close the legal loopholes that may arise in implementing the Property Law.

B. Unregistered and Registered Property Rights; and Third Parties against Whom Registration Can and Cannot Be Valid

According the new language in Article 24 of the Property Law, a change to property rights to ships and other special types of personal property is effective (though not in the sense of creditor's rights) before registration and notice to the public, but the change cannot be valid against a *bona fide* third party. Then what is a property right that is not valid against a third party before registration and public notice? Some contend that a property right is an exclusive right, and since an

33 Wang Liming, *A Study of Property Law* (revised version), Beijing: China Renmin University Press, 2007, p. 386. (in Chinese)

"effective" property right is not valid against a third party – *i.e.*, the property right is not recognized as effective against all parties – its creation cannot be effective. Proponents of this view believe that this "property right" is not an actual property right, but is meaningless.[34] This view is in line with the traditional understanding of Article 9 of the Maritime Law and with general judicial practice. Hence, if we do not first clarify, in theoretical terms, the nature of an unregistered property right that is invalid against a third party, whether and how it is an exclusive property right, and the meaning of "valid against a third party," then we will be unable to truly understand the effects of registering a property right against a third party and resolve the difficulties in judicial practice.

According to Article 2 of the Property Law, a property right is an exclusive right of direct control enjoyed by its holder over a specific property. However, these exclusive rights of direct control are not all absolute, full, and complete. In reality, these rights are relative and have different levels of effects. The author believes that there are in reality three types of property rights with different effects under the Property Law of China, depending on whether the property right and changes to it have been registered and made public, as well as the different effects of registration and public notice prescribed by the Property Law. The first type includes the unregistered and unannounced property right and the registered and announced property right under the doctrine of validity of a registered property right against a third party, which are illustrated in Articles 24, 129, 158, 188, and 189(1) of the Property Law. The latter is effective against a *bona fide* third party, and the former is not. The second type is the property right whose disposal is not effective prior to public notice via registration and the property right whose disposal is effective through registration. This is provided for in Article 31 of the Property Law. Accordance to this article, where real property is acquired through possession, inheritance, condemnation, enforced execution, court decisions, factual acts, and other non-legal acts, the changes to property rights become effective upon the inheritance or bequest, the effective date of the legal document and the condemnation by the government, or upon the accomplishment of the factual act; however, without registration, the disposal of the property has no effect. This is the difference between a property right whose disposal is not effective before the

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34 Sun Xianzhong, Registration of Rights to Real Property, *Chinese Jurisprudence*, No. 5, 1996, quoted in Wu Qindian, *Intentionalism in Property Rights – A Study of Changes to Property Rights under Current Chinese Law*, Beijing: The People's Court Press, 2007, p. 251 (in Chinese).

change is made public through registration and a property right whose disposal is effective because it has been registered.[35] The third type is the property right that has been made public after registration or which has been made public and where delivery has occurred, pursuant to the requirement of public notice as illustrated by Articles 14 and 23 of the Property Law. Since changes to property right that are invalid against a third party and property rights whose disposals cannot be effective are expressively recognized by the Property Law, then these property rights are also exclusive and grant their holders direct control of the property. It is only that these rights are subject to certain limitations and restrictions. These rights do not resemble creditor's rights, which are relative between the parties and act *in personam*. In the author's view, "not valid against a third party" restricts the exclusiveness of the right, and "without the power of disposal" restricts direct control over the property. But these are restrictions, which are relative, and are not fundamental eliminations of these qualities of a property right.

What kind of limit or restriction is imposed on the exclusiveness of an unregistered property right that is invalid against a third party? There has always been controversy over the question in academia. The following are the major views: (1) the doctrine of relative ineffectiveness, which maintains that although a change to a property right can be effective between the parties to a transaction, the change is completely ineffective against a third party unless registered; (2) the doctrine of incomplete change to the property right, which holds that although a change to a property right has become effective between the parties and with respect to a third party, the change is not complete unless registered, *i.e.,* a change that results in a fully exclusive property right has not occurred; (3) the doctrine of third-party claims, which asserts that a change to the property right is effective between the parties and also against a third party even if not registered. However, if a third party makes a certain claim – for instance, if the third party denies the effectiveness of the change or presents facts that conflict with the property right – then the change is not effective against the third party; and (4) the doctrine of establishment through procedure, which contends that "valid against" originally means "to defend against," which is a procedural issue, a question of whether the court recognizes it rather than whether the property right actually exists. Japanese academia and precedent tend to support the doctrines of the incomplete change to

35 Han Song et al. eds., *Property Law*, Beijing: Law Press China, 2008, p. 31. (in Chinese)

the property right and the doctrine of third-party claims.[36] Many Chinese scholars favor the doctrine of third-party claims.[37] The author also believes that the doctrine of third-party claims is more consistent with the correct understanding of the effects of registration against a third party. According to this doctrine, an issue on the validity of a property right against a third party only arises when a third party claims that a change to the right is ineffective and not as an inevitable result of its being unregistered.

A better understanding of an unregistered property right that is invalid against a third party requires us to further clarify this question: when a third party claims that a change to an unregistered property right is ineffective, which are the third parties that the change can act against?

The above questions are the core questions of the doctrine. This paper's survey of cases has revealed the general views and main disagreements in judicial practice. There are three major theoretical views in the academia of maritime law. The first defines "third party" broadly to mean any party other than the parties involved in the transaction that changes the property rights to the ship. The minutes of the 2001 National Conference of Maritime Court Chief Justices clearly states, "if a change to the property rights to a ship has not been registered, the change cannot be valid against a third party and cannot challenge a third party's claims and defenses or other third parties' maritime claims for creditor's rights." The second view is the doctrine of the *bona fide* third party. The third asserts that the third party against whom an unregistered property right cannot be valid must be "a *bona fide* third party with a dispute related to the ship."[38] But views among scholars of civil law generally maintain that, according to the limits on the "*bona fide* third party" in the property law, third parties that a registered property right can be valid against include ordinary creditors and third parties with bad faith, and "*bona fide* means a third party that does not know or should not have known of the change to the

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36 Wu Qindian, *Intentionalism in Property Rights – A Study of Changes to Property Rights under Current Chinese Law*, Beijing: The People's Court Press, 2007, p. 251. (in Chinese)

37 Huang Songyou ed., *Interpretations and Applications of Provisions of the Property Law*, The People's Court Press, 2007, p. 115 (in Chinese); Wu Qindian, *IntentionalisminProperty Rights – A Study of ChangestoProperty Rights Under Current Chinese Law*, Beijing: The People's Court Press, 2007, p. 251. (in Chinese)

38 Si Yuzhuo, *Maritime Law*, Beijing: China Renmin University Press, 2007, p. 68. (in Chinese)

property rights."[39] And the third party that registration cannot be valid against refers to "a particular *bona fide* third party in a transactional relationship, where the 'particular' third party generally means the third party that acquired the property right in the transaction against which the property right cannot be valid."[40]

To clarify what we mean by "third party" and identify the third parties against whom registration can and cannot make a property right or change in property right valid, it is crucial to determine the relevant theoretical basis and basic principles for the classification. The above-described general views among civil law scholars generally are that the third party against whom registration is not valid is "the party that enjoys property rights to the same subject property, which excludes the debtor's ordinary creditors." The primary reasons are: (1) one basic principle is that property rights are legally exclusive, and they always enjoy priority over the rights that ordinary creditors have against a debtor; (2) from a linguistic perspective, validity "against" a third party depends on the existence of a competition with respect to a property right, *i.e.,* the same type of right; (3) the inclusion of ordinary creditors in the definition of third parties against whom registration cannot be valid will jeopardize the security of transactions.[41] The preceding interpretation on the basis of general civil law is quite persuasive. In fact, the empirical survey in this paper also indicates that the above views have appeared to some extent in judicial decisions. However, the author believes that these views still do not thoroughly explain the essence of the doctrine or find the fundamental principle that distinguishes third parties against whom registration can or cannot be valid.

The author believes that the Property Law's designation of "*bona fide*" third parties has actually provided the answer at a fundamental level; it is just that we have not yet recognized the significance of the "*bona fide*" designation. We tend to use the common definition of "*bona fide*" of "having no knowledge," *i.e.*, the third party does not know and should not have known of the change to property rights and ignore the purpose of the definition. Why does the Property Law state that a property right or change in the property right "shall not be valid against a *bona fide* third party unless registered," and why does the law limit the third parties against

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39 Wang Liming, *A Study of Property Law* (revised version), Beijing: China Renmin University Press, 2007, p. 388. (in Chinese)

40 Wang Yi, The Basic and Structural Principles of the Property Law, a lecture given by Prof. Wang Yi in a series to the Beijing courts on the Property Law of China.

41 Tze-Chien Wang, *Civil Law Theory and Case Law* (I) (revised version), Beijing: China University of Political Science and Law Press, 2005, pp. 228~229. (in Chinese)

whom changes to property rights cannot be valid to *bona fide* third parties? First, it logically shows that unregistered changes to property rights can be effective against a third party acting in bad faith. Second, the limitation protects a *bona fide* third party's interests and is consistent with the public notice principle. Only after giving public notice through registration, *i.e.*, announcing the status and changes in property rights to the public, can the property right and the changes to the rights be exclusive and effective against a third party. With respect to a *bona fide* third party who does not know and should not have known of the change, the change is invalid. For this reason, the limitation of "*bona fide*" is closely related to the effects of public notice through registration, which aims substantially and fundamentally at protecting the third party whose rights and obligations will be affected by public notice through registration. Therefore, the author believes that the basic principle for defining the third parties against whom a registered change to property rights can be or cannot be effective against is that whether the rights and obligations of the third party will be actually or legally affected by the change, public notice through registration, and the circumstances of the notice. It is evident that, in a property rights transaction, a third party's rights and obligations will be directly affected by whether public notice of the changes to the rights has occurred through registration. But in the author's view, even in a non-transactional relationship, a party with special types of claims and special legal interests in the property rights, such as a party holding a maritime lien, will also be affected by the existence or absence of registration.

Keeping in mind the correct interpretation of the doctrine as described above, some current judicial practices should be rectified in the following ways.

(1) In Typical Judgment 1-2, preventing the actual ship owner from asserting claims against a tortfeasor is not in line with the correct understanding of the doctrine. This is because the third party in this case is the tortfeasor, whose rights and obligations will not be legally affected by public notice through registration of property rights and changes made to the rights.

(2) In Typical Judgment 1-1, ordinary creditors are also third parties against whom changes to property rights are not valid unless registered, which is not consistent with the correct understanding of the doctrine. The rights of ordinary creditors are created by legal relationships that are unrelated to changes in property rights, and these rights are not directly affected by the status of registration and public notice of changes to property rights to ships.

(3) In Typical Judgment 2-1, an unregistered ship mortgage is created when

the mortgage contract goes into effect and does not enjoy priority in repayment with respect to any other party. In effect, this view equates the effects of this type of property right to those of a contractual creditor and does not conform to the correct understanding of the doctrine. This is because the ship mortgagee should enjoy priority over ordinary creditors and the bad-faith third parties, as well as any other parties who are not legally affected by public notice of the mortgage through registration. The only exception is the *bona fide* third party.

(4) In Typical Judgments 1-4 and 1-5, we should correct the reasons and logic for judgments and offer guidance with respect to claims in litigation. In this case, unregistered property rights to ships and changes to the rights cannot be valid against a third party because the third party is a special type of party with priority rights to the ship, whose rights will actually be affected by the registration and public notice.

(5) In Typical Judgment 2-2, we should adjust the focus of the inquiry. With regards to the registration against third parties in a transaction of property rights to ships, the focus should be on whether the third party (the registered mortgagee) is *bona fide*, based on whether the party does not know and (rather than "or") should not have known of the change to the property rights to aship.

C. Public Credibility of the Doctrine, and the Separation of the Registered Owner and the Actual Owner

Many argue that the registration of property rights to ships in China should be widely accepted by the public,[42] but is that possible for a registration under the current doctrine? And what kind of public credibility will it have? Obviously, it should be different from the type of public credibility under the doctrine of effectiveness by registration. The credibility under the doctrine of registration effectiveness is complete and absolute, based on the actual review of registration information and the basic concept of effective-by-registration that property rights are effective only when they are registered. The credibility given to the registration system under the law is this: the registered party is legally assumed to be the actual holder of the property right, and when disputes arise between the registered

42 Liu Yaodong and Shen Lin, Changes in Property Rights to Ships in China, *Journal of Dalian Maritime University (Social Science Edition)*, No. 1, 2008, pp. 5~8 (in Chinese); Chu Beiping and Zhou Jin, An Analysis of the System of Property Rights to Ships Established by the Property Law, *People's Jurisprudence*, No. 15, 2007. (in Chinese)

right holder and the actual right holder, the registration governs; and transactions undertaken in reliance on the registered rights are legally protected. But under the doctrine of registration against third parties, property rights do not become effective only when registered. Rather, there are property rights that are valid against a third party and those that are not valid against a third party. Both types have legal force and, objectively speaking, there can be several property rights that contradict each other and can be valid against each other. In addition, registration does not equal a substantive examination. Under these circumstances, the public notice through registration cannot be absolutely and completely relied upon; rather, it should inspire a relative confidence that may act against a third party and have evidentiary value. In a similar vein, not every dispute over rights should be determined by the registration. Each dispute should be decided on a case-by-case basis depending on the situation of the third party in question.

Based on the above interpretation, we should focus on the following issues on the separation of the registered ship owner and the actual ship owner, which is a common phenomenon in judicial practice:

(1) Make a distinction between separation due to an unregistered transfer of the ships and separation arising from a false registration, such a nominee ownership and or anonymous co-ownership. This will affect the determination of whether a third party is *bona fide*.

(2) Registration is not the only proof of ownership and cannot even be, on principle, the basic proof for the determination of ownership. Instead, ownership should be determined on a case-by-case basis for different types of third parties.

(3) Determine whether there is a separation of the registered owner and the actual owner on an objective level, and the actual owner should bear the burden of proof.

The new language on the doctrine of registration against third parties in the Property Law has triggered controversy, confusion, and concern, but it has also brought opportunities. Legal practitioners should take up the opportunity and responsibility and endeavor to improve on our traditional ideas and practices.

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Commentaries on Japanese Draft of the Basic Plan on Ocean Policy

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Abstract: The Draft of the Basic Plan on Ocean Policy issued recently by the Headquarters for Ocean Policy of Japan provided details on six ideal principles as regulated by the Basic Act on Ocean Policy, and proposed twelve practical means for promoting ocean policies. The Basic Plan on Ocean Policy revised after listening to wide opinions will serve as action guides for Japanese marine affairs for the next five years. Thus we must pay close attention to this Plan so that any unpredictable events can be treated accordingly.

Key Words: Basic Act on Ocean Policy; Headquarters for Ocean Policy; Draft of the Basic Plan on Ocean Policy; Specific means

In accordance with Article 16 of the Japanese Basic Act on Ocean Policy enacted on July 20, 2007, the Japanese government should formulate a basic plan for oceans in order to promote and enact ocean policies comprehensively and systematically. Meanwhile, the Headquarters for Ocean Policy, established according to Article 29 of the Basic Act on Ocean Policy, issued the Draft of Basic Plan on Ocean Policy (hereinafter "the Draft") on February 8, 2008. After seeking various opinions and revising, the Draft was submitted to Cabinet and was approved at the Cabinet Meeting on March 18, 2008. The Japanese Basic Plan on Ocean Policy formulated based on the Draft will serve as action guides for Japanese marine affairs and be effective for five years. After five years, the performance of the Plan will be evaluated, and the Draft will be revised and improved. In order to further understand Japanese marine operations and the specific means to carry

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them out, we need to review the relevant contents of the Draft, and expect them to serve as references to the creation of detailed implementation rules by the relevant authorities of China on the basis of its Outline of National Marine Affairs Development Plan.

I. Major Contents

The most recent Draft is composed of four parts: the general remarks; the basic policy of measures with regard to the sea; measures that the government should take comprehensively and systematically with regard to the sea; and other matters necessary to comprehensively and systematically promote measures with regard to the sea.

1. On the general remarks. The Draft pointed out that the ocean sustains many lives on the earth. Japan is an island nation with more than 6,000 islands neighboring the western Pacific. It not only enjoys benefits from the ocean but also utilizes the ocean to transport materials, and ensures food supplies. However, various catastrophes occurred in the oceans are the main causes that threaten the safety of lives and properties of the people on land. Japan is one of the States that face the above difficulties. On the other hand, there remain many areas or fields that are unknown to human beings because the oceans are vast with complicate and intricate problems. To date, knowledge and research on the oceans remain largely insufficient. On the other land, it is essential to understand the principles behind various ocean phenomena so as to urgently solve problems such as global environmental changes. For this reason, the Draft proposed that ocean research and survey must be continued so that human beings can better utilize and develop the oceans.

Fortunately, accompanying the rise of developing States and development of ocean exploration and utilization technology in the 1960s, the competition among States, especially, the developed ones, for resources is getting fiercer and fiercer. The creation and improvement of the legal regimes in respect of the ocean in global community are advancing continually. Especially, the formulation (in 1982) and enactment (in 1994) of the United Nations Convention on the Law of the Sea (UNCLOS), a comprehensive legal system regarding the ocean, have resulted in fundamental changes to the original rules on the high seas that are outside the territorial seas. Each State can reasonably utilize the sea areas under the regulation of the UNCLOS, including the exclusive economic zone (EEZ), the continental

shelf, and international seabed areas, etc. In other words, a new order, aiming to expand the jurisdiction of coastal States, has been formed for international waters.

Confronting with negative impacts of population growth and social economic activities, abnormal climate caused by global warming, increasing natural disasters, decreasing biodiversity and other global problems, human beings should fully recognize their damages to the oceans and aggressively enact effective strategies to deal with them, and the Japanese, in this regard, should lead human beings to safety and peace ahead of others. In response to the above situations, the Draft pointed out that Japan, being surrounded by the seas, must further promote and perfect its ocean policies in order to adapt to the changing environment and face the challenges. For this purpose, Japan formulated the Basic Act on Ocean Policy. To promote the policies as ruled by the said Act, the government was required to develop the Basic Plan on Ocean Policy (including concrete guidelines to enact the plan). This is to enhance the functions of the Headquarters for Ocean Policy, and to accomplish the goal of establishing an ocean-based nation as required by the Basic Act on Ocean Policy.

Finally, to generally promote the ocean policies, the Draft suggests three targets: firstly, challenge to take the initiative in coping with panhuman issues in the sea; secondly, foundation for sustainable use of marine resource and space need to be constructed and improved; thirdly, contribution in the marine-related fields for realizing safe and secure lives of citizens.

2. The second part, i.e., the basic guidelines for implementing the ocean policies. The Draft provides details of the contents of the six ideal concepts envisaged in Articles 2~7 of the Basic Act on Ocean Policy. These include harmonization of development and use of the oceans with marine environmental protection, assurance of maritime safety and security, strengthened awareness of the oceans, healthy development of maritime industries, comprehensive governance of the oceans, and international cooperation on oceanic issues. The contents in detail are given as follows: (1) The harmonization of development and use of the oceans with marine environmental protection. The Draft pointed out that aquaculture and transportation were the two main aspects of early Japanese ocean exploitation. Now it is recognized that there are many oceanic resources that may be broadly used, such as mineral resources, oceanic natural energy (waves, tides), and marine microbial resources. In developing and using ocean resources, one should be concerned about marine environmental protection so that these resources may be used sustainably. The current marine environment is seriously worsening, leading

especially to the deterioration of aquatic resources. On the other hand, awareness of the ocean energy development and utilization as well as the technology for exploitation remains to be improved. When ocean resources are developed and utilized, one should coordinate it with marine environmental protection. Thus, one should try to improve or perfect the development of technology and creation of reasonable plans, etc.

(2) On the assurance of maritime safety and security. Japan is surrounded by waters under its jurisdiction, therefore, the energy and resources necessary for its economic development and living subsistence, including transportation of foods and other materials, depend mainly on the oceans. Meanwhile, the population, assets, and societal capitals, etc., are concentrated mostly along the coastal regions. The Draft therefore proposed that Japan should enact means to maintain maritime safety and security, including navigation safety and other maritime rights and interests, and deal with the threat of natural disasters from the oceans. These are topics important to the well-beings of all citizens.

(3) On the enrichment of marine science knowledge. Many fields about the oceans remain unknown to the mankind. However, oceans are closely related to global problems such as the earth environment, coping with large-scale trench type earthquakes and assurances of safe supplies of energy and resources. In this connection, continuous marine investigation and research have great impacts apparently on the development and exploitation of marine resources. Due to the facts that special devices and facilities are required in marine investigation and research, effective results may not be achieved in a short period of time, and so long-term efforts are necessary. Thus, the Draft pointed out that marine investigation and research are topics of strategy that require continuous efforts. Then the newest results from marine investigation and research must be managed under just one agency to avert the past and present practice of scattering over different agencies. Centralized mode of unique management should be well established so that it becomes more effective and more reasonable. This would serve to promote the development of maritime industry and basic ocean research, and to raise the effectiveness of marine investigation. The Draft then indicated that talented researchers, technicians and research assistants on marine sciences must be well trained in order to raise the level of marine sciences and technology of Japan. This is to change the current status that young professionals in frontier fields are insufficient to support future maritime industry of Japan. Finally, the Draft also mentioned that in youth education, one must increase learning activities

on knowing the oceans and developing careers for youth in marine affairs. Due to the facts that there are many diverse fields involved in the oceans, even great initial investment will not produce good results in a short period. Thus, it is necessary to integrate forces from all involved agencies to clarify the possibility to implement the above thought or proposal and the effectiveness thereof.

(4) On healthy development of maritime industry. Almost all the Japanese trades and near 40% of domestic material transport depend on maritime transportation. About 40% of the supply of animal proteins for citizens is from aquaculture and aquatic products. What support these activities are maritime industries such as maritime transportation, aquaculture, and shipbuilding industry. These industries are the foundations for maintaining Japan economy, healthy development of the society and wellbeing of citizens. Therefore, in order to keep the healthy development of these industries, marine development and exploitation must be adjusted to conform to marine environment protection for national security. In this connection, the Draft pointed out that marine development and exploitation are inseparable from and organically related to marine environment protection. In accordance with Article 5 of the Basic Act on Ocean Policy, maritime industries refer to those engaging in marine development, exploitation and protection, etc. The Draft thus proposed to the Japanese government that in order to be accurately aware of the current status of the maritime industries, the government shall be on top of the prime status of the maritime industries through investigation, data collection and research. The Draft also pointed out two major difficulties facing Japan: firstly, aging of the ships in service; secondly, aging and reduction of personnel in maritime industries. For these difficulties, the Draft suggested the government to carry out emergency plans to strengthen international competitiveness and operation base for maritime industries, including integration of the strength of enterprises, universities and research agencies, and formulation of action plans to achieve specific goals.

(5) On comprehensive governance of the oceans. The Draft pointed out that comprehensive or integrated management must be adopted in marine development and exploitation because maritime problems are tightly connected and inseparable. The Draft, meanwhile, pointed out three positions on managing the sea areas under the jurisdiction of Japan: maintaining a suitable state for sustainable use of the oceans; promoting a feasibility study on marine development and exploitation; and maintaining orders in marine exploitation. For these purposes, the Draft suggested that means should be taken to reduce marine pollution and protect marine

environment. Information on marine resources development and exploitation should be collected, managed and monitored aggressively and handled with unified procedure. The relations among users of the oceans should be coordinated, including the resolution of disputes on maritime delimitation with other States according to international rules. Furthermore, the investigation of continental shelf beyond 200 nautical miles should be advanced by Japan so as to make its submission to the UN Commission on the Limits of the Continental Shelf. The policies and measures for coping with the act damaging Japanese maritime rights and interests under the EEZ regime should be studied. And the development and management of the islands far from the landmass should be promoted.

(6) On the international cooperation on oceanic issues. To achieve the goals of ensuring freedom of navigation and security and safety at the sea and to make sustainable use of marine aquatic resources are topics facing not only Japan but also the other States of the world. Thus, the Draft pointed out that Japan should enhance its leadership on forming, developing and observing the international orders while promoting international collaborations among relevant States. Japan should further strengthen international collaboration on global issues such as climate changes and assurance of biodiversity. In order to secure freedom of navigation and maritime safety and security, the Draft proposed that Japan should prepare and promote relevant regimes with neighboring States so as to ensure the transportation safety in the sea areas near the Malacca Strait, and to control the pirate incidents. Japan must aggressively utilize the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, which aims to fight against pirate incidents, and urge more States to participate in the agreement. For navigation safety at the strait, a new cooperative mechanism should be devised together with the coastal States and the user States. Furthermore, in order to ensure safe transportation of radioactive materials, Japan should enhance the mutual trust between the States which will affect the transportation of these materials. The Draft proposed that the Japanese government should actively participate in the task of developing international conventions by International Maritime Organization and other entities, and should accede to international conventions against marine terrorism and transportation of weapons of mass destruction as soon as possible. Therefore, international collaboration should be actively pursued. Finally, on the problem of development and exploitation of aquatic resources, the Draft proposed to create a cooperation mechanism for reasonable exploitation of the resources within the EEZs of China, Korea and Japan so that the traditional advantage of Japanese

aquaculture may be maintained and the aquatic resources within such EEZs can be properly managed and preserved. In addition, in dealing with the marine catastrophic problems caused by global warming, the Draft stated that Japan should actively employ methods to support regional collaboration work in the Asian Pacific region, timely provide information to States or regions that may suffer from marine natural catastrophes, and actively support recovery work after a catastrophe occurs.

3. The third part, i.e., measures that the government should take comprehensively and systematically with regard to the sea.

(1) Promotion of the development and exploitation of marine resources. Due to the fact that Japan widely depends on and utilizes the oceans, the Draft pointed out that Japan should introduce reasonable management methods in recovering the fisheries environment. On marine energy resources, Japan should further investigate the status of resources, develop marine production technology, and solve marine environmental pollution problems caused by development, so that marine resources may be reasonably developed and utilized. Specifically, one should preserve and manage aquatic resources, including improving methods to preserve and manage such resources and ensuring that these methods are followed, protecting the environment for reproduction and growth of aquatic animals and plants, and strengthening the productivity for fishing grounds. In addition, one should also advance activities for developing marine energy and resources, including the research and development of petroleum, natural gas, mineral resources and those from hydrothermal fluids at sea floor, as well as other resources.

(2) Protection of marine environment. This mainly includes assurance of biodiversity, reduction of marine environment pollution, studies on policies and measures to protect marine environment, and the actual implementation of such policies and measures.

(3) Promotion of activities for developing resources within the EEZs. As Japan considers that the sea areas under the jurisdiction of Japan cover 4.47 million square kilometer, ranking sixth in the world, in which abundant and diverse biological and mineral resources exist, measures should be taken to carry out development activities according to plans. These measures should include resolving disputes with other States over maritime delimitation according to international rules. Additionally, before May 2009, Japan should make its submission for its continental shelf beyond 200 nautical miles to the UN Commission on the Limits of the Continental Shelf. A monitoring and penalty system for EEZ should be created

and improved. And any foreign ships conducting marine science investigations within Japanese waters without prior permission would be prohibited.

(4) Assurance of maritime transportation competitiveness. Due to the reduction of Japan-registered ships and seamen for international transportation and the decrease and aging of seamen for domestic transportation, for the purpose of eliminating instable elements to ensure the safety of Japan's maritime transportation, the Draft proposed that Japan needs to adopt effective strategies accordingly. Among the main transportation lines between Asia and Europe or America, Japan's harbors are relatively low-ranked, which results in the increase of both time and fare for Japan's sea transport. Therefore, tactics should be adopted to raise harbor ranking and their international competitiveness. The Draft then pointed out that maritime transportation safety and quality should be improved because major maritime disasters of sailing vessels occur frequently, causing global environmental problems. Specific approaches include raising competitiveness for Japan's international transportation, increasing Japan-registered vessels and seamen from Japan, training more seamen, refining harbor facilities, and improving the quality of maritime transportation.

(5) Assurance of maritime security. It is very important for Japan to protect its maritime rights and interests, keep marine order, and to ensure maritime security. On maintaining marine order, the Draft provided that the following measures should be adopted. To keep marine order in surrounding seas, Japan needs to construct a system of rules. Such system may prohibit such acts as illegal intrusion of vessels into Japanese waters and their violations of navigation orders. Furthermore, a system for emergency response, including that for increasing patrol vessels and navy ships as well as airplanes, should be established. A plan should be made to jointly handle illegal vessels. Tight collaboration among involved agencies is required, including sharing intelligence obtained from monitoring. Cooperative management of the Malacca Strait with other States should be strengthened. Based on international laws, Japan should employ reasonable means to control and fight against piracy on high seas. Agreement on preventing illegal activities that affect maritime navigation safety should be reached as soon as possible, so as to control the use and transport of weapons of mass destruction. Preventive training activities designed to protect maritime security and prevent proliferation should be actively participated in. Reasonable inspection of vessels should be conducted to prevent proliferation of radioactive materials as well as terrorist attacks against vessels and harbors. Meanwhile, the capability of cargo transportation, loading and unloading

at harbors should be raised.

On the assurance of maritime transportation safety, the Draft pointed out that, in order to prevent piracy incidence, Japan should ensure the readiness of seaways for the increase of traffic and the larger size of vessels at higher speed, auto-identification device should be used flexibly, and transportation safety management system should be evaluated. Furthermore, maritime transportation rules should be revised based on analysis of maritime accidents. Sign and guides for navigation should be studied for improvement. To ensure the safety of a vital sea route – Malacca Strait, Japan should participate in the cooperative schemes of the States located along the strait and those using the strait. Navigation supporting facilities should be further managed and maintained. Also, the precision of typhoon forecasts should be improved. Electronic navigation charts should be upgraded. Finally, to remove the foreign vessels that do not conform to international standards, Japan should cooperate with each State to resolve these problems. In addition, the Draft proposed that Japan should also cooperate with the civilian groups that engage in activities in connection with disaster prevention to ensure maritime transportation safety. Relevant knowledge should be widely disseminated to guide operation in practice and improve handling of acts in violation of laws.

On treating natural disaster problems arising from the ocean, the Draft stated firstly that the natural disaster prevention facilities along the coastline should be examined and replaced with new ones if necessary. Then the work of collecting intelligence on disasters causing casualties should be promoted and the training on disaster prevention and shelter seeking should be offered timely and effectively to residents. Furthermore, the facilities for transport and storage of materials at the disaster-stricken area should be repaired and well maintained. Emergency rescuers for dispatch should be trained. Finally, observation of earthquakes and associated disasters should be conducted with seismic facilities and instruments so that the capability to take precautions against earthquakes could be enhanced.

(6) To advance marine investigation. The Draft suggested that the government should act as follows. Firstly, marine investigation should be conducted actually. That is to say, government at all levels should conduct marine investigation with various methods, utilize the investigation results intelligently, and take measures swiftly, including replacement of vessels and facilities that are no longer appropriate for the investigation tasks. In order to conduct marine investigation effectively, relevant facilities should be studied and developed, and satellites should be utilized flexibly as a tool. All government agencies should cooperate

with each other, including cooperation on revising investigation plans, sharing investigation results, research vessels and instruments on board for observation and measurements. To conduct marine investigation, government agencies should try hard to gain assistance from universities, local public groups and private enterprises as well as other entities. Secondly, basic intelligence on maritime management should be collected and collated. Thirdly, maritime intelligence should be managed in a unified manner. Fourthly, international collaboration should be strengthened, which means that the data and information gained from marine investigation should be shared and exchanged.

(7) On the research and development of marine science and technology. The Draft indicated that Japan should promote marine basic research, strengthen studies on countermeasures to marine problems and prepare for basic requirements for research. The preparation work should include improvement of research vessels and basic facilities for research, and training and protection of marine researchers, technicians as well as supporters. Japan should also strengthen the system for marine science and technology innovation and collaboration.

(8) On revitalizing maritime industries and raising international competitiveness. The Draft stated that Japan should introduce new cutting-edge technology through research and development, and provide personnel training for maritime industries that support Japanese economy and society to maintain and strengthen its international competitiveness. To utilize marine resources and spaces flexibly, new maritime industries should be set up and the trend of marine industries should be known.

(9) On conducting comprehensive management of the coastal zone. First, the Draft pointed out that Japan should manage the coastal zone in a unified manner just like the land area. Such management mainly includes: studies for the treatment of soils flowed into the ocean due to land development; rebuilding of the supply and regulation of marine nutrient salt to provide an environment suitable for the living and breeding of marine lives; reduction of land pollutants that flow into the ocean to avoid exceeding the capacity of the ocean; decrease of dumping of garbage into the ocean; and effective use of coastal parks and green lawns. Secondly, the plan for coast utilization should be adjusted. Thirdly, a system of combined coastal management should be established. Based on the actual condition and characteristics of each coast, measures should be taken to specify the contents of management.

(10) On effective utilization and protection of offshore islands. Japan possesses

many offshore islands that are important basis for setting the sea boundaries. They also serve important functions in assuring maritime traffic safety, developing and utilizing marine resources, and protecting environment, etc. Thus, the Draft proposed that the government should clearly define the roles of such islands in implementing marine policies. These islands should be properly managed and protected.

(11) On strengthening international communication and promoting cooperation with other States. As the international community is detailing and supplementing the provisions of the UNCLOS, the Draft proposed that Japan should actively participate in and strengthen international collaborations on following topics: creating and applying international conventions; maritime activities under international regimes; resolving maritime disputes; marine resources management; marine environmental protection; maritime safety; marine science and technology, etc.

(12) On increasing citizens' understanding of the ocean and promoting training for professionals. The Draft suggested that Japan should employ tactics to raise citizens' awareness of the ocean, promote youngsters' understanding of the ocean, and develop programs to educate marine professionals.

4. The fourth part: other matters necessary to comprehensively and systematically promote measures with regard to the sea. In order to execute marine policies, the Draft suggested that Japanese government should take the following measures. Firstly, marine policies should be implemented effectively. The contents of the specific implementation of the Basic Plan on Ocean Policy should be revised according to opinions of those who are involved. Secondly, in utilizing the ocean, those who are involved should coordinate and cooperate with each other, especially in marine environmental protection, maritime development and utilization, and maritime safety assurance, so that the implementation of marine policies and measures can be advanced. Thirdly, information on marine policies should be released timely, i.e., maritime conditions and status of marine policies should be announced promptly through the internet, and maritime status and policies report should be published annually.

II. Expected Effects

The Draft is the first practical accomplishment of the Headquarters for Ocean Policy since the Basic Act on Ocean Policy was enacted, and it will be released and

implemented after the resolution of the Cabinet. Although the Basic Plan on Ocean Policy reviewed and approved by the Cabinet Meeting (the Plan is effective for 5 years and will be reviewed and revised after 5 years) has no legal binding force, the Plan is prepared by the Headquarters for Ocean Policy composed of ministers from each government agencies, so it is expected that the plan would be implemented and used as action guides for Japan's marine affairs. This author contends that the implementation of the Basic Plan on Ocean Policy revised according to the Draft will bring some negative effects to China on the following aspects:

First, Japan may conduct marine investigation activities near the "median line". China should be well prepared in advance to deal with Japan's possible marine investigation activities carried out near the "median line".

Second, Japan may construct marine structures around the "median line". Due to the fact that negotiations on the East China Sea between China and Japan may not be advanced significantly, Japanese conservative will demand construction of marine structures around the "median line" to develop seabed resources. Thus, we should consider how to stop Japan's construction of marine structures for ocean development and how to deal with it if such construction has been completed.

Third, Japan may further act to protect Diaoyu Islands. Japan considers these islands its own territory. To secure the navigation route safety and the resources surrounding these islands, Japan may further act to protect these islands. Because of this, China should consider how to conduct patrol and other activities around Diaoyu Islands, so as to show its jurisdiction over these islands.

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