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卷首语

感谢众多学者、专家与读友们的大力支持，本期《中国海洋法学评论》所刊出的论文非常丰富。其中比较明显的几项特色是：关注现实问题、重视海洋环境、揉合公法私法。这样的特色也是本刊发行的主要精神宗旨；今后还希望继续获得各界专家、学者们的赐稿、支持或指导。

首先，由于中国与邻国在东海与南海区域面临着重要的海洋资源争端，因此本期《中国海洋法学评论》特别刊出了外交部条法司司长、海洋法专家刘振民先生的大作，阐明了中国对于通过谈判解决国际海洋纠纷的基本立场。这篇文章曾经在2005年3月10日于厦门大学海洋政策与法律中心和美国维吉尼亚大学海洋法律与政策中心、中国南海研究院、中国国家博物馆水下考古研究中心、福建省海洋渔业局，以及冰岛、土耳其、韩国等国家相关海洋研究机构合办的《国际海洋法的新发展与中国》国际会议上公开宣读。

另外，本期还刊登了赵建文教授的大作《论〈联合国海洋法公约〉缔约国关于军舰通过领海问题的解释性声明》，以及中国南海研究院院长吴士存博士有关我国的能源安全和南海争议区油气开发的论文；张新军先生对日本国际法学界大陆架划界问题的文献和观点的介绍；外交部张良福博士有关中国与海洋邻国初步建立新型渔业关系的专文；以及郭文路博士与黄硕琳教授对东海区渔业资源的区域合作管理的研究心得等鸿文。这些文章对于了解当前中国与美国、日本、东盟国家等相关国家在东海及南海地区的争执性质和未来解决的可能性，提供了最深入的观察、分析。

其次，本期还特别关注中国最新的两项重要的海洋立法工程。其中之一是中国正在进行的海岛立法；其二是对于海洋油污染赔偿基金的建立。前者对于有着1万4千多公里岛屿岸线，以及大约8万平方公里海岛面积的中国而言，其重要性不言可喻。后者则是对于日愈严重的海洋油污染损害赔偿纠纷的积极回应，也深具时代意义。

2002年11月23日发生的油轮“塔斯曼海”与货轮“顺凯一号”轮碰撞洩油，造成海域污染事件，已于2004年12月24日和12月30日，由天津海事法院

相继做出了一审判决，判令油轮“塔斯曼海”号船舶所有人及其油污责任保险人连带赔偿原告各项海洋生态、渔业等损失共计人民币 4200 万元。这是中国海洋司法上的第一例。其影响自然非常深远。

为了详细分析上述两项海洋立法工程的法律意义，本期不但刊登了陈海波撰写的《“塔斯曼海”海洋污染损害赔偿系列案评析》一文，并且提供了多位来自中外学术界与实务界的专家们的相关论述，值得读者们深入研读、参考。

当然，对于最近国际社会上积极研讨中的《UNCITRAL 货物运输法草案》，本刊也非常重视，特别刊出了两篇相关的文章。对于海商领域的管辖权冲突问题，欧盟对班轮公会反垄断豁免的审查，水下沉没物的法律地位问题，以及国内外若干重要新法律法规的内容，包括针对非法、不报告、不管制捕鱼活动的规范性宣言，本期的《中国海洋法学评论》也都作出了相关的分析、报道或简介。

所有这些内容都是全体作者与编辑们辛勤工作的成果，希望对本刊读者藉此了解中国与世界的海洋法学新发展，为积极建设一个负责任的海洋中国产生一些正面的作用。当然，读者们的任何阅后建议，更是我们所深切期盼的。

编辑部　谨识

EDITOR'S NOTE

The strong support from scholars, experts and readers helps to create the current Issue, which contains abundant and valuable content. This Issue is featured by its concerns over practical problems, emphasis on marine environment and the combination of public and private laws. Such features are in line with the spirit and purpose of this Journal. We earnestly hope experts and scholars from various circles will contribute articles and give support and instructions to us.

China is facing major maritime resources disputes in the East China Sea and South China Sea. Therefore, this Issue presents an article written by Mr. LIU Zhenmin, the Director-General of the Department of Treaty and Law, Ministry of Foreign Affairs, China, and an expert on the law of the sea, in which he expounds China's basic position on the settlement of international maritime disputes through negotiations. This article was presented on 10 March 2005 in the International Conference on Recent Developments in the Law of the Sea and China, hosted by the Center for Oceans Law and Policy, University of Virginia School of Law and the Center for Oceans Policy and Law, Xiamen University, National Institute for South China Sea Studies of China, Center for Underwater Archaeology Research of the National Museum of China, Fujian Provincial Department of Ocean and Fisheries, and relevant research institutes of Iceland, Turkey, South Korea and other countries.

Besides, the current Issue also covers the following articles: an article by Professor ZHAO Jianwen, titled On the Interpretative Declaration by the State Parties to United Nations Convention on the Law of the Sea on the Issue of Innocent Passage of Warships through the Territorial Sea; an article by Doctor WU Shicun, the President of the National Institute for South China Sea Studies of China, related to the energy security of China and exploitation of oil and gas in the disputed area in the South China Sea; an article by Mr. ZHANG Xinjun, in which he introduces woks and views of Japanese academia of international law on the delimitations of the continental shelf; an article by Doctor ZHANG Liangfu of the Ministry of Foreign Affairs of China focusing on the newly cooperative relations

of China and the maritime neighboring countries, and an article on the regional cooperation and management of fishing resources in the East China Sea, written by Doctor GUO Wenlun and Professor HUANG Shuolin. These articles provide an extensive and thorough exploration of the nature and the possibility of future settlement of the disputes in the East China Sea and South China Sea among China, the United States, Japan, ASEAN countries and other relevant countries.

Additionally, the current Issue also pays particular attention to the two recent vital legislation works of China. One of them is legislation on island which is in progress and the other concerns the establishment of a fund for compensation for oil pollution damage at sea. The significance of the former is self-evident since China is a country with approximately 80,000 km^2 islands and more than 14,000 kilometers coastline along its islands. The latter signifies an active response to the disputes concerning compensation for maritime oil pollution damage, which is of contemporary significance.

The collision between the tanker, Tasman Sea, and the ship Shunkai No. 1 on 23 November 2002 caused oil spills, which resulted in a marine pollution incident. The judgments of the first instance for the case were announced on 24 December and 30 December, 2004, successively by Tianjin Maritime Court. The Court ordered the owner of Tasman Sea, and the insurer for oil pollution liability to jointly pay the compensation at the amount of RMB 42 million, against the losses suffered by the plaintiffs in respect of maritime ecology and fishing industry. This is the first case in the maritime judicial practice of China and will have significant and long-term effect.

In order to explore the legal significance of the two aforementioned maritime legislations in detail, the current Issue not only publishes the article Analysis of the Series of Cases concerning Oil Pollution Damage Provoked by the Collision of the *Tasman Sea* Ship with *Shunkai No. 1* Ship by CHEN Haibo, but also provides relevant discussions by experts from academic and practical circles home and abroad. All of them are worth reading.

The current Issue includes two articles relevant to the UNCITRAL Draft Convention on the Carriage of Goods, a hot topic in the international community. Moreover, it also covers some analyses, reports or introductions with regards to the conflict of jurisdiction in maritime field, the review of the Liner Conferences' antitrust exemption by the European Union, the legal status of sunken objects and several important domestic and foreign legislations, including the 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing.

All the above is a result of hard work of our contributors and editors. We wish that our readers will learn about the recent development of the law of the sea in China and the world through the Journal and make contributions to the building of China into a responsible maritime country. We sincerely welcome any suggestion from our readers.

COLR Editorial

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论《联合国海洋法公约》缔约国关于军舰通过领海问题的解释性声明

赵建文 *

内容摘要: 关于军舰通过领海问题，第三次联合国海洋法会议没有达成协议，《联合国海洋法公约》(以下简称“《公约》”)没有直接规定该事项。该公约生效以来，有些缔约国仍然反对军舰在领海的无害通过权，其中有主张保留针对军舰通过领海采取维护其安全利益的措施的权利的，有要求军舰通过领海进行事先通知或事先许可的;同时，有些缔约国仍然坚持军舰在领海与商船享有同样的无害通过权，其中有认为《公约》允许军舰无害通过领海的，有认为《公约》未授权沿海国要求事先通知或许可的，有认为军舰在领海无条件地与商船享有同样无害通过权的。本文认为，根据《公约》和一般国际法，关于军舰通过领海问题，各国(包括《公约》缔约国) 可以自由处理。《公约》允许军舰无害通过领海，也允许沿海国要求事先通知或许可。通知制比许可制更有利于外国军舰实现在领海的通过，也顾及了沿海国的利益。军舰在通过外国领海之前，应当查明该沿海国的立场。如果沿海国有要求事先通知或许可的法律或规章，军舰所属国应予遵守。这是领海的法律地位和军舰的特殊性质决定的。如果沿海国妨碍执行符合国际法使命的外国军舰的通过或者使这种通过实际上成为不可能，军舰所属国可以采取对等措施以平衡利害关系。

关键词: 军舰　领海　无害通过权　联合国海洋法公约　解释性声明

根据 1982 年《联合国海洋法公约》第 309 条，除该公约本身的条款明示许可外，缔约国不得做出“保留或例外”。这与该公约的一揽子交易的特点相联系，也有利于保证其完整实施。不过，根据该公约第 310 条，一国在签署、批准或加入时，为了使该国国内法律和规章同该公约的规定取得协调等目的，可以做出解释性声明或说明，但不得排除或修改该公约的规定适用于该缔约国的法律效力。在《公约》现有 149 个缔约方(截至 2005 年 11 月 25 日，包括 148 个缔约国和欧洲共同体)中，71 个缔约方在批准、加入或继承《公约》时发表了解释性声明或说明，22 个国家

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的解释性声明或说明直接涉及军舰通过领海问题，此外还有两个国家以双边协议的形式发表了解释性声明。这些解释性声明或说明很有代表性，对其进行研究有助于明确《公约》通过以来有关军舰通过领海问题的国际实践及其发展趋势。

一、《公约》关于外国船舶无害通过领海的规定

《公约》缔约国关于军舰通过领海问题的解释性声明或说明，直接与《公约》的相关规定及其谈判历史相联系，是国际社会关于该问题长期争议的缩影。19 世纪末 20 世纪初，国际法学会关于该问题的决议与国际法协会的决议就不一致。[1] 在 1930 年海牙国际法编纂会议上，美国、比利时、保加利亚、芬兰等国主张外国军舰通过领海须事先得到许可，英国、德国、意大利、日本等国主张军舰享有无害通过权。在 1958 第一次联合国海洋法会议上，美国政府转而主张军舰享有无害通过权，前苏联、东欧国家和一些亚非国家主张须事先得到许可或通知。联合国国际法委员会起草的《领海与毗连区公约草案》第 24 条关于外国军舰通过领海“须先经核准或通知”的规定在会议第一委员会获得通过，但在大会表决时因为没有达到 2/3 多数而未能通过。[2] 许多国家对 1958 年《领海与毗连区公约》的有关条款作了保留。[3] 在第三次联合国海洋法会议上，美英等海上强国主张军舰在领海享有无害通过权，前苏联转而持赞成立场。许多发展中国家坚持外国军舰通过其领海须事先通知或得到其主管机关许可。《公约》关于这个问题的规定是双方折衷妥协的结果。

（一）关于《公约》第 17 条

第三次联合国海洋法会议最初的《非正式单一协商案文》本来包括明确规定军舰也享有无害通过权的内容，由于遇到持续的反对，会议第二委员会决定把这

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1 1894 年国际法学会决议第 5 条指出：“一切船舶毫无区别地享有通过领水的无害通过权，但交战国有权对这种通过加以管理”，但该决议第 9 条则指出：上述规定不包括“军舰和军舰一类的船舶”。1926 年国际法协会在维也纳大会上通过的条款则认为：“一切国家的船舶，包括公有的和私有的船只，都有权自由通过领水，但须受其所通过的领水所属国的条例的限制，但这种条例不得违反本公约的任何规定。”1928 年，国际法学会在斯德哥尔摩大会上通过的规则认为：“军舰的自由通过可以受领土国特别规则的限制。”这说明国际法学术团体之间在军舰通过领海问题上也存在分歧。参见魏敏主编：《海洋法》，北京：法律出版社 1987 年版，第 77 ～ 78 页。

2 陈德恭著：《现代国际海洋法》，北京：中国社会科学出版社 1988 年版，第 52 页。

3 例如，前苏联对 1958 年《领海与毗连区公约》有关条款的保留指出：“苏维埃社会主义共和国联盟政府认为，沿海国有权制定关于准许外国军舰通过其领水的程序。”与该保留相一致，前苏联 1960 年边界法规定，外国军舰通过苏联领水须提前 30 天通过外交途径提出请求。

项内容删去了。[4] 与此同时，要求在公约中明确规定军舰在领海不享有无害通过权、外国军舰通过领海必须事先通知或得到许可的多次努力，也一直没有取得成功。[5]《公约》的规定是这两派力量都能接受的、各有其解释的模糊规定。

《公约》第二部分第 3 节是关于“领海的无害通过”的规定。其中，A 分节规定了“适用于所有船舶的规则”，B 分节规定了“适用于商船和用于商业目的的政府船舶的规则”，C 分节规定了“适用于军舰和其他用于非商业目的的政府船舶的规则”。其中最关键的条款是 A 分节（适用于所有船舶的规则）第 17 条关于“无害通过权”的规定，即：“在本公约的限制下，所有国家，不论为沿海国或内陆国，其船舶均享有无害通过领海的权利。”

《公约》第 3 节的上述结构和第 17 条的规定与 1958 年《领海与毗连区公约》第一部分第 3 节的结构及其第 14 条的规定是基本相同的。对 1958 年公约第 14 条有三种观点：（1）在没有相反规定的情况下，“所有船舶”包括军用船舶；（2）“所有船舶”仅指商船，因为如果军用船舶也享有这种权利，应有明确规定；（3）公约对军舰通过外国领海的问题未作规定，仍然是习惯法的问题。对《公约》相关条款的解释大体上还是这三种观点，因为《公约》的规定同 1958 年公约一样，是含糊不清的、有疑问的。[6]

（二）关于《公约》第 19 条、第 21 条和第 25 条

《公约》第 21 条第 1 款规定，沿海国可依本公约规定和其他国际法规则，对该款所列各项或任何一项制定关于无害通过领海的法律和规章，其中（h）项是：“防止违犯沿海国的海关、财政、移民或卫生的法律和规章”。在 1982 年的第 11 期会议上，包括中国在内的 28 国向全体会议提出了一项正式修正案。[7] 该修正案要求在《公约》草案第 21 条第 1 款（h）项的“移民”之后增加“安全”一词，修正为沿海国可以制定“防止违犯沿海国的海关、财政、移民、安全或卫生的法律或规章”。[8] 提案国此举的目的，主要是为其在国内法中规定外国军舰通过其领海必须事先通知或得到许可的要求在《公约》中增添根据。在大会辩论中，46 个国家支

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4 BudislavVukas, *The Law of the Sea: Selected Writings*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 136~137.

5 董世忠：《我国在第三次联合国海洋法会议上的立场》，载于赵理海主编：《当代海洋法的理论与实践》，北京：法律出版社 1987 年版，第 10~11 页。

6 《奥本海国际法》第 1 卷第 2 分册，北京：中国大百科全书出版社 1998 年版，第 35~36 页。

7 这 28 个共同提案国为：阿尔及利亚、巴林、贝宁、佛得角、中国、刚果、朝鲜民主主义人民共和国、民主也门、吉布提、埃及、几内亚比绍、伊朗、利比亚、马耳他、摩洛哥、阿曼、巴基斯坦、巴布亚新几内亚、菲律宾、罗马尼亚、圣多美和普林西比、塞拉利昂、索马里、苏丹、苏里南、叙利亚、乌拉圭、也门。这 28 国中的“民主也门”和“也门”1990 年 5 月 22 日实现了北、南统一，成立了也门共和国。

8 Third United Nations Conference on the Law of the Sea, Official Records, Vol. XVI, p. 225.

持该修正案，30 国反对，其他与会国未表明态度。在进行表决前，为了实现协商一致的目标，避免分裂，大会主席呼吁不要将该提案付诸表决。随后，大会主席邀请提案国中的中国、罗马尼亚、摩洛哥、塞拉利昂和乌拉圭，同主要反对国美国和前苏联两国共同协商，达成了一项谅解，由大会主席在大会上发表一项声明，说明提出修正案的国家不再坚持付诸表决的理由和提案国对该问题的原则立场。1982 年 4 月 26 日，大会主席发表了如下声明："虽然 L.117 号文件中修正案的共同提案国为了澄清案文而提出了该项修正案，但为了响应主席的呼吁，他们同意不再坚持要求将其付诸表决。但是他们愿意重申，这并不妨碍沿海国按照公约第 19 条和第 25 条的规定，采取措施以保证其安全利益的权利。"[9] 包括中国在内的共同提案国认为主席的声明维护了提案国的利益，不少提案国在通过公约草案后的解释性发言中，都提到会议主席的上述声明并重申关于军舰通过领海需要事先通知或得到许可的原则立场。[10] 但是，美国认为，会议主席的上述声明已经清楚地把沿海国的安全利益限定在《公约》第 19 条和第 25 条的范围之内，据此沿海国不得强加事先通知或事先得到许可的要求。[11]

《公约》第 19 条规定了"无害"通过的一般标准，即："通过只要不损害沿海国的和平、良好秩序或安全，就是无害的"，还规定了"对沿海国的主权、领土完整或政治独立进行任何武力威胁或使用武力，或以任何其他违反《联合国宪章》所体现的国际法原则的方式进行武力威胁或使用武力"等 12 种对沿海国有害的通过行为，沿海国可以对这些行为采取防范措施。《公约》第 25 条的内容是"沿海国的保护权"，规定沿海国可在其领海内采取必要的步骤以防止非无害的通过。这两条都没有承认外国军舰享有无害通过权的明确规定，也没有允许沿海国要求外国军舰通过其领海须事先通知或得到许可的明确规定。

（三）关于《公约》第 30 条、第 31 条和第 32 条

《公约》第二部分第 3 节 C 分节规定了"适用于军舰和其他用于非商业目的的政府船舶的规则"。其中，第 30 条规定了"军舰对沿海国法律和规章的不遵守"："如果任何军舰不遵守沿海国关于通过领海的法律和规章，而且不顾沿海国向其提出遵守法律和规章的任何要求，沿海国可要求该军舰立即离开领海。"第 31 条规定了"船旗国对军舰或其他用于非商业目的的政府船舶所造成的损害的责任"：

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9 Third United Nations Conference on the Law of the Sea, Official Records, Vol. XVI, p. 2, p. 132.

10 沈韦良、徐光建：《第三次海洋法会议和海洋法公约》，载于《中国国际法年刊》1983 年，第 411 页。

11 Budislav Vukas, *The Law of the Sea: Selected Writings*, Leiden; Boston: Martinus Niihoff Publishers, 2004, pp. 136 ~137.

“对于军舰或其他用于非商业目的的政府船舶不遵守沿海国有关通过领海的法律和规章或不遵守本公约的规定或其他国际法规则，而使沿海国遭受的任何损失或损害，船旗国应负国际责任。”第 32 条规定了“军舰和其他用于非商业目的的政府船舶的豁免权”：“A 分节和第 30 及第 31 条所规定的情形除外，本公约规定不影响军舰和其他用于非商业目的的政府船舶的豁免权。”1958 年《领海与毗连区公约》第 23 条与《公约》第 30 条相同。

有人认为，上述条款“暗示”军舰享有无害通过权。其实“上述条款的目的是处理一种情形，即：符合国际法的规定而开始通过的军舰，本应遵守当地的法律和规章而拒绝遵守。军舰享有管辖豁免权而使这个条款成为必要：这个条款所依据的假设并没有排除关于通过‘权’的争议。而且，关于公约文本的上述论点包含这样一个没有保证的假定：有争议背景的问题最终依靠推断来解决。1982 年《海洋法公约》（第17~32 条）与1958 年公约一样，包含着同样的没有解决的含糊状态。”[12] 同样道理，有人以《公约》第二部分第 3 节 A 分节（适用于所有船舶的规则）第 19 条中所列“有害”行为中包括使用武力和武力威胁这样只有军舰才有条件实施的行为为由，也不能必然得出军舰享有无害通过权的结论。因为经过事先通知或得到许可后进入一国领海的外国军舰，也有可能发生上述有害行为。

由上可知，关于军舰通过领海问题，“在第一次和第三次联合国海洋法会议上对该问题均没有达成协议。《领海与毗连区公约》和《联合国海洋法公约》也没有直接处理该事项。主要的海上强国赞成军舰享有无害通过权，但受到许多较小的国家或那些处在战略敏感位置的国家的反对。”[13] “对于沿海国以事先许可或通知为外国军舰无害通过的条件的权利问题，第三次联合国海洋法会议也未能给出清晰的答案。这是几乎势均力敌的两个国家集团相抗衡的结果。一个集团由没有强大海军力量并热切保护其安全的沿海国组成，它们中的许多都是不结盟国家，其赞成的是允许沿海国要求外国军舰通过领海须进行事先通知或得到许可的规定。另一个集团由海上强国及其多数盟国组成，该集团维护军舰的无条件的无害通过权。”[14]

二、反对军舰在领海享有无害通过权的国家的声明

12 Ian Brownlie, *Principles of Public International Law*, 5th edition, Oxford: Clarendon Press/ New York: Oxford University Press, 1998, p. 195.

13 Malcolm D. Evans ed., *International Law*, Oxford/New York: Oxford University Press, 2003, pp. 634~635.

14 Budislav Vukas, *The Law of the Sea: Selected Writings*, Leiden/Boston: Martinus Niihoff Publishers, 2004, p. 136.

（一）苏丹、佛得角、圣多美和普林西比、罗马尼亚的声明：保留针对军舰通过领海问题采取维护其安全利益的措施的权利

1985 年 6 月 23 日苏丹批准《公约》时的声明认为，根据《公约》第 310 条，苏丹政府认为有必要作出声明，以表明苏丹关于《公约》的某些规定的立场：苏丹想要重申的是，第三次联合国海洋法会议主席在 1982 年 4 月 26 日全体会议上的关于沿海国有关无害通过的法律和规章的《公约》第 21 条的声明，即：若干国家撤回其提交的修正案，并不损害沿海国采取所有必要措施的权利，特别是为了保护其安全，根据有关无害通过的含义的第 19 条和有关沿海国保护权的第 25 条采取此类措施的权利。[15]

1987 年 8 月 10 日佛得角批准《公约》的声明指出：《公约》承认沿海国采取措施以保证其安全利益的权利，包括制定有关外国军舰无害通过其领海或群岛水域的法律和规章的权利，这种权利是与第 19 条和第 25 条完全一致的，这实际上也是由第三次海洋法会议主席在 1982 年 4 月 26 日全体会议上的声明中清楚地阐述过的。1992 年 12 月 21 日佛得角第 60/IV/92 号法律第 6 条、第 9 条分别承认外国船舶在其群岛水域、领海的无害通过权，撤销其 126/77 号法令及其他与该法抵触的佛得角法律的规定，但该国并未撤回上述声明。把佛得角的上述声明与其国内法的相应规定一并解释，应当理解为佛得角有条件地承认外国军舰的无害通过权。

在 1987 年 11 月 3 日圣多美和普林西比批准《公约》时的声明指出，圣多美和普林西比民主共和国保留权利，制定有关外国军舰无害通过其领海或群岛水域的法律和规章和采取其他旨在保证其安全的措施。

1996 年 12 月 17 日罗马尼亚在批准《公约》时的声明中重申沿海国采取措施维护其安全利益的权利，包括制定有关外国军舰通过其领海的国内法律和规章的权利。

上述四国的声明都与《公约》第 19、21 和 25 条有关。尽管这些声明没有提到其本国具体的法律和规章，没有列举拟采取或已采取的具体安全措施，但其精神实质是区别对待军舰与商船在领海的通过问题。海上强国在第三次海洋法会议上之所以力阻在《公约》第 21 条中加入允许沿海国就外国船舶的无害通过问题制定有关“安全”事项的法律或规章的内容，就是因为沿海国可能利用其法律或规章

15 本文此处及以下所引用的有关国家关于《联合国海洋法公约》的声明或说明，均来自：United Nations: Multilateral Treaties Deposited with the Secretary-General-Status as at 31 December 2002, Volume II, Part I, Chapters XXI, United Nations Publication, Sales No. E. 03. V. 3, pp. 230~265. 此外，这些声明或说明，下载于 http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partl/chapterXXl/treaty6.asp，2005 年 11 月 25 日。

的规定，限制军舰通过其领海，甚至使军舰的通过成为不可能。即使有些国家在保留对军舰通过其领海采取安全措施的权利的前提下承认外国军舰的“无害通过权”，其实它们承认的已经不是美国等海上强国所主张的无害通过权了。

（二）埃及、马耳他、克罗地亚、芬兰、瑞典、塞尔维亚和黑山、孟加拉的声明：要求军舰通过领海进行事先通知

1983 年 8 月 26 日埃及批准《公约》时的声明在涉及《公约》关于沿海国管制无害通过其领海的船舶的规定时指出，在服从事先通知要求的情况下，军舰无害通过埃及领海是有保证的。

1993 年 5 月 20 日马耳他批准《公约》时声明：同样应当意识到一国军舰在其他国家领海的无害通过权应当和平地行使。有效的和迅速的通讯手段应是容易利用的，而且军舰行使无害通过权做出事先通知是合理的、不与《公约》相矛盾的。有些国家已经要求这种通知。马耳他保留对此制定立法的权利。

1995 年 4 月 5 日克罗地亚共和国在继承《公约》时的声明中指出，根据 1969 年 5 月 29 日《维也纳条约法公约》第 53 条，并不存在这样的一般国际法强制规范：禁止沿海国根据自己的法律和规章要求通过其领海的外国军舰通知其无害通过的打算，并且限制同时无害通过的军舰的数目（《公约》第 17~32 条）。

1996 年 6 月 21 日芬兰批准《公约》时的声明指出，关于领海无害通过的《公约》相关部分，芬兰政府的意图是，关于通过芬兰领海的外国军舰和其他用于非商业目的的政府船舶，将继续适用现行制度，该制度与《公约》是完全一致的。

1996 年 6 月 25 日瑞典批准《公约》时的声明与 1996 年 6 月 21 日芬兰的上述声明的意思相同。1966 年 6 月 3 日《关于外国海军船舶和军用航空器进入瑞典的宣言》第 4 条规定外国军舰进入瑞典领水须事先通知。

2001 年 3 月 12 日塞尔维亚和黑山共和国在继承《公约》的声明中指出，南斯拉夫政府认为，缔约国来自《公约》第 310 条的权利，可以根据其法律和规章，在国际习惯法和《公约》（第 17~32 条）关于无害通过权的规定的基础上，要求通过其领海的外国军舰向各有关沿海国事先通知，并限制同时通过的此类船舶的数目。

2001 年 7 月 27 日孟加拉批准《公约》时的声明与马耳他 1993 年 5 月 20 日批准《公约》时的上述声明的意思相同。

上述七国的声明要求军舰通过其领海进行事先通知，明显地将军舰的通过与商船区别开来。商船通过一国领海无须事先通知。从上述声明的措辞来看，这些国家大都承认军舰在领海的无害通过权，只是要求军舰通过时履行“事先通知”的程序。通常要求通知的事项包括军舰的名称、船舶类型、正式编号、通过的目的、路线和日程。这是有条件地承认军舰的无害通过权，与美国等海上强国所主张的无条件的无害通过权是不同的。

此外，尽管有些国家批准、加入或继承《公约》时没有就军舰通过领海问题发表声明，但其国内立法明确要求外国军舰通过领海需要事先通知。例如，1999 年 4 月 16 日《关于外国军舰和军用飞机和平时期进入丹麦领土的法令》第二部分规定，3 艘以上同一国籍的外国军舰同时通过丹麦领海的特定海域，须通过外交途径事先通知。

（三）伊朗、阿曼、也门、中国、阿尔及利亚的声明：要求军舰通过领海得到事先许可

1982 年 10 月 10 日伊朗共和国签署《公约》时（伊朗尚未批准《公约》）的声明认为，根据习惯国际法、《公约》第 21 条的规定与（关于无害通过的含义的）第 19 条和（关于沿海国保护权的）第 25 条一起理解，承认（暗含的）沿海国采取保护其安全利益的措施的权利，除其他外，包括制定法律和规章，要求意欲无害通过其领海的外国军舰得到事先许可的权利。伊朗 1994 年 11 月颁布实施的《伊朗伊斯兰共和国关于波斯湾和阿曼海海洋区域的法令》的规定与伊朗的上述声明的立场是一致的。

1983 年 7 月 1 日阿曼签署《公约》时发表声明指出：阿曼政府的理解是，《公约》第 19、25、34、38 和 45 条的适用，不排除沿海国在保护其和平与安全利益所必要时而采取此类适当措施的权利。1989 年 8 月 17 日，阿曼批准《公约》时的声明指出：军舰无害通过阿曼领水是有保证的，但须得到事先许可。在遵守在水面航行并展示其本国旗帜的条件下，这同样适用于潜水艇。

1987 年 7 月 21 日也门批准《公约》时声明：也门人民民主共和国将优先实施要求外国军舰或潜水艇或核动力船或装载放射性物质的船舶的进入或过境得到事先许可的现行有效的各项国内法律。

1996 年 5 月 15 日《全国人民代表大会常务委员会关于批准〈联合国海洋法公约〉的决定》声明：“中华人民共和国重申：《联合国海洋法公约》有关领海内无害通过的规定，不妨碍沿海国按其法律规章要求外国军舰通过领海必须事先得到该国许可或通知该国的权利。”中国的上述声明与中国国内法的规定是一致的。

1958 年 9 月 4 日《中华人民共和国政府关于领海的声明》宣布：“一切外国飞机和军用船舶，未经中华人民共和国政府的许可，不得进入中国的领海和领海上空。”1992 年 2 月 25 日《中华人民共和国领海及毗连区法》第 6 条规定：“外国非军用船舶，享有依法无害通过中华人民共和国领海的权利。外国军用船舶进人中华人民共和国领海，须经中华人民共和国政府批准。”中国在第三次联合国海

洋法会议上的立场也一直是这样的。[16] 许多人都指出，中国的立场与中国在帝国主义国家的炮舰外交下的悲惨历史和中国对自己的军事安全的担心有关。[17]

1996 年 6 月 11 日阿尔及利亚在批准《公约》时声明，与《公约》第二部分第 3 节 A 分节和 C 分节的规定相一致，军舰通过阿尔及利亚领海须提前 15 天得到许可，但《公约》规定的不可抗力的情况除外。

上述五国的声明或国内法都坚持军舰通过领海须事先得到许可，都不赞成军舰在领海享有无害通过权。本来意义的无害通过是不需要事先得到许可的。美国等海上强国连事先通知这样的比较宽松的程序性要求都不接受，更不会接受事先得到许可这样的包含着对外国军舰的通过进行严格实质性审查的要求。

此外，安提瓜和巴布达、阿联酋等国在《公约》通过以来新制定或生效的国内

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16 中国代表团在第三次联合国海洋法会议上多次申明自己的立场。例如：1973 年 3 月 29 日，中国代表在海底委员会第二小组委员会会议上发言指出：1958 年《领海与毗连区公约》“第 14 条笼统地规定各国船舶都享有无害通过领海的权利。这就是说，外国军舰也可以被解释为享有同样的权利。显然，这是很多国家所不能接受的。大家知道，许多国家的立法都明文规定，外国军舰通过其领海，必须经事先的核准或通知。这是沿海国家的主权。连国际法委员会原来提出的草案也承认这一点。然而，公约中上述条款的规定，实际上是把沿海国这一合法权利一笔勾销了。”参见北京大学法律系国际法教研室编：《海洋法资料汇编》，北京：人民出版社 1974 年版，第 60 页。1973 年 7 月 14 日，中国代表团向海底委员会第二小组委员会提交了“关于国家管辖范围内海域的工作文件”。在该文件的关于外国船舶通过领海部分，中国代表团建议“外国的非军用船舶可以无害通过领海”，“沿海国依照该国的法律和规章，可以要求外国军用船舶应事先通知该国主管机关或经该国主管机关事先许可，方可通过该国领海。”参见北京大学法律系国际法教研室编：《海洋法资料汇编》，北京：人民出版社 1974 年版，第 74 页。1978 年 4 月 28 日，中国代表团在第三次联合国海洋法会议第二委员会非正式会议上发言指出：“谁都知道军用船舶和一般的商船是性质不同的两种船舶，对于外国的军用船舶要不要给予在本国领海内无害通过的便利，应该由沿海国根据自己的法律和规章来决定。”“现在，《非正式综合协商案文》将一般船舶和军用船舶不加区别的写法是中国代表团完全不能接受的。”参见《中国代表团出席联合国有关会议文件集（1978 年 1–6 月）》，北京：人民出版社 1978 年版，第 131~132 页。1982 年 4 月 30 日，中国代表团副团长在通过《公约》后的全体会议上发言重申：“关于军舰通过领海的制度问题，在 26 日的全体会议上，A/CONF,62/C. 117 号文件的共同提案国，为了响应主席的呼吁，以便会议能够以协商一致方式通过公约草案，同时鉴于主席在会宣布的有关这一问题的解释性声明，才未坚持要求将该修正案提付表决。这并不影响共同提案国的原则立场。在此，我愿再次重申，本公约有关领海内无害通过的规定，不妨碍沿海国有权按照本国法律和规章，要求外国军舰通过领海事先须经该国批准或通知该国。”（《中国代表团出席联合国有关会议文件集（1982 年 1–6 月）》，世界知识出版社 1983 年版，第 91 页）1982 年 12 月 9 日，在第三次海洋法会议最后会议签署公约时，中国代表团在发言中再次声明：“在过去历期会议上，我们曾多次指出，公约有关领海无害通过的条款中对军舰通过领海的制度未作明确的规定，包括中国在内的不少国家曾多次提出修正案。在今年 4 月的会议上，为了响应会议主席的呼吁，以便会议能以协商一致方式通过公约草案，上述共同提案国没有坚持要求将修正案提付表决。但当时会议主席所作的声明已经表明，这并不影响共同提案国要求保障本国安全的原则立场。”参见《各国领海及毗连区法规选编》，北京：法律出版社 1985 年版，第 195 页。

17 Hyun-Soo Kim, The 1992 Chinese Territorial Sea Law in the Light of UN Convention, *International and Comparative Law Quarterly*, Vol. 43, 1994, p. 901.

法中规定了事先许可的要求。安提瓜和巴布达 1982 年《海域法》第 14 条第 2 款、阿拉伯联合酋长国 1993 年关于海域划界的 1993 年第 19 号联邦法律第 5 条第 2 款规定，外国军舰通过其领海必须事先得到许可。阿联酋 1982 年 12 月 10 签署《公约》，但至今未批准。

三、赞成军舰在领海享有无害通过权的国家的声明

（一）阿根廷、荷兰、智利的声明：《公约》允许军舰无害通过领海

1995 年 12 月 1 日阿根廷批准《公约》时声明：关于《公约》中有关领海无害通过的规定，阿根廷共和国政府的意图是将继续对外国军舰通过阿根廷领海适用阿根廷现行有效的制度，因为该制度完全与《公约》规定相一致。此前，阿根廷 1991 年第 23.968 号立法第 3 条第 3 款承认第三国船舶在遵守国际法和阿根廷法律和规章的条件下在阿根廷领海享有无害通过权。

1996 年 6 月 28 日荷兰在批准《公约》时的声明中指出，“《公约》允许所有船舶在领海的无害通过，包括外国军舰、核动力船舶、运载核废料和其他有害废物的船舶，而无须任何的事先同意或通知，但需妥为遵守国际协定为此类船舶确立的采取防范措施的规定。”荷兰的上述声明认为《公约》“允许”军舰无害通过领海，而不是强制性的要求，比较符合《公约》相关规定的原意。

1997 年 8 月 25 日智利批准《公约》时的声明指出：对于那些对外国军舰的无害通过施加限制的国家，智利共和国保留适用相似限制措施的权利。同智利的声明相似，1992 年 6 月 25 日立陶宛领海立法也规定，军舰的无害通过要在互惠的基础上相互对待。立陶宛 2003 年 11 月 12 日加入《公约》。智利的声明和立陶宛的立法都表明，军舰在领海的通过问题，即使是《公约》有此规定，也不是强制性的，而是可以由沿海国在互惠的基础上加以处理的事项。

（二）德国、意大利的声明：《公约》未授权沿海国要求事先通知或许可

1994 年 10 月 14 日德国在加入《公约》时的声明指出：《公约》关于领海的规定，大体上是关于沿海国保护其主权的合理愿望和国际社会行使其通过权的一套和谐的规则。将领海扩展到 12 海里的权利将极大地增加各类船舶（包括军舰、商船和渔船）在领海的无害通过权的重要性。这是国家组成的国际社会的一项基本权利。反映到目前为止的现存国际法的《公约》的任何规定，都不得认为授权沿海国把任

何类别的外国船舶的无害通过权置于需要事先同意或通知的地位。

1995 年 6 月 12 日意大利批准《公约》时的声明指出，与习惯国际法相一致的《公约》的任何规定，都不得认为授权沿海国把任何类别的外国船舶的无害通过权置于需要事先同意或通知的地位。

德国和意大利两国的声明都认为《公约》没有“授权”沿海国要求意欲通过其领海的外国军舰进行事先通知或得到许可。如果说《公约》没有这样的明确授权，还是符合《公约》的。但是，应当同时指出的是，《公约》也没有任何规定授权军舰不顾沿海国的事先通知或许可的要求而强行通过其领海。

德国声明中提到的“《公约》关于领海的规定，大体上是关于沿海国保护其主权的合理愿望和国际社会行使其通过权的一套和谐的规则”是有道理的。如果军舰有权不顾沿海国要求事先通知或许可的规定而强行通过这些国家的领海，必然造成国际关系的不和谐，甚至危及国际和平与安全。商船在领海的无害通过的确是德国所说的“国际社会的基本权利”，但现代国际法还不承认军舰有这样的权利。

（三）美国与前苏联的联合解释、英国的声明：根据《公约》和一般国际法，军舰在领海享有无害通过权而无须事先通知或得到许可

美国未签署《公约》，迄今亦未加入《公约》。1997 年 3 月 12 日俄罗斯批准《公约》时的声明未涉及军舰通过领海问题。但此前美国与前苏联已经达成了关于军舰通过领海问题的协议。

《公约》通过后，前苏联试图改变其在第三次联合国海洋法会议上承认军舰在领海的无害通过权的立场。1982 年 11 月 24 日，苏联最高苏维埃通过的苏联国家边界法规定：“外国军舰……按照苏维埃部长会议规定的方式实行在苏联领水内的无害通过。”1982 年 12 月 10 日，前苏联签署《公约》。1983 年 4 月 18 日，苏联部长会议确认的《外国军舰在苏联领海、内水和港口航行及逗留的规则》第 8 条规定：“外国军舰在苏联领海内，在遵守苏联有关领海制度的现行法规和苏联参加的国际条约的条件下，有无害通过的权利。”根据该规则，为进入或离开苏联内水或港口的通过，一般要经事先许可并适用海道和分道通航制，这实际上是不承认军舰的无害通过权。仅穿过苏联领海但不进入苏联内水或港口的通过，则不需要得到事先许可，但只能沿波罗的海、鄂霍次克海和日本海中通常用于国际航行的路线，并按指定的分道通航制通过，这实际上是只承认有条件的无害通过权。美国认为前苏联的上述立法实际上取消了无害通过权，表示强烈反对，并多次派军舰进入苏联认为外国军舰没有无害通过权的苏联黑海领海航行，以致 1988 年 2

月 12 日发生两国军舰碰撞的“黑海事件”。[18]

1988 年 12 月 27 日，美国总统发布了关于美国领海的公告，宣布“根据国际法，如同体现于 1982 年联合国海洋法公约的适用的规定那样，所有国家的船舶在美国领海享有无害通过权”。

1989 年 9 月 23 日，美国和前苏联签署了《关于领海无害通过的国际法规则的联合解释》。这个“联合解释”的意义并不仅仅在于解决两国间此前的争议并避免此后发生类似冲突。它与《公约》缔约国的解释性声明的意义是相同的，而且有人认为美苏是当时的两个超级大国，它们的解释比其他国家的解释更有分量，对有关军舰通过领海问题的国际法的演变会有更大影响。

该文件正文的内容是：

1. 国际法有关船舶在领海无害通过的规则表述在 1982 年《联合国海洋法公约》（“1982 年公约”）中，特别是在第二部分第 3 节（领海的无害通过）中。

2. 所有船舶，包括军舰，不论其装载货物、装备情况或推进方法，根据国际法都享有无害通过领海的权利，而毋须事先通知或批准。

3. 1982 年公约第 19 条在第 2 款列出了全部非无害通过行为的清单。船舶在通过领海时没有该款所列行为就是无害通过。

4. 沿海国对船舶的特定通过是否无害有疑问时，应将其怀疑的原因通知该船，并应给予该船机会以说明自己的意图或在合理的短时间内改正自己的行为。

5. 行使无害通过权的船舶，应遵守沿海国制定的与体现在 1982 年公约第 21 条、第 22 条、第 23 条和第 25 条中有关无害通过的规则相一致的所有法律和规章。它们包括：船舶在行使无害通过权通过领海时应使用可能为保护航行安全而规定的海道和分道通航制。在未规定海道或分道通航制的区域，船舶仍享有无害通过权。

6. 沿海国的这种法律和规章不得在实际上影响或妨碍 1982 年公约第 24 条规定的无害通过权的行使。

7. 如果军舰有违反此类法律或规章或做出非无害行为，或没有根据请求采取正确行动，正如 1982 年公约第 30 条所规定的，沿海国可以要求其离开领海。在这种情况下，该军舰应立即这样做。

8. 在不损害沿海国和船旗国行使权利的前提下，因船舶通过领海的特定事例可能引起的所有分歧都应通过外交或其他协议的途径来解决。[19]

该文件签署后，前苏联外交部注意到，美国军舰再也没有进入苏联黑海领海。

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18 李红云：《也谈外国军舰在领海的无害通过权》，载于《中外法学》1998 年第 4 期。

19 The Geographer Office of the Geographer Bureau of Intelligence and Research, United States Responses to Excessive National Maritime Claims, Limits in the Seas, No. 112–March 9, 1992, Annex III, at http://www.law.fsu.edu/library/collection/LimitsinSeas/1s112.pdf, 5 October 2005.

这应当解释为，双方都向对方的立场做出了妥协。

在研究上述“联合解释”时还应当注意到，不仅前苏联在军舰通过领海问题上的立场出现过反复，现今俄罗斯有关军舰通过领海的国内法与“联合解释”也有所不同。根据 1998 年 7 月 16 日《关于俄罗斯联邦内水海域、领海和毗连区的联邦法律》第 12 条的规定：“外国船舶、外国军舰和其他政府船舶，根据本法、国际法的一般公认的原则和规则以及俄罗斯为缔约国的条约，享有无害通过领海的权利。”该法第 13 条规定了“外国船舶、外国军舰和其他政府船舶无害通过领海的规章”，其中第 2 款规定：“除根据俄罗斯为缔约国的条约或者在节日或重要日期经俄罗斯联邦政府做出特别决定，不得有三艘以上的同一国籍的外国军舰或其他政府船舶为进入俄罗斯海港同时通过俄罗斯领海。”据此，外国军舰和其他政府船舶在俄罗斯领海享有的无害通过权与商船是有明显区别的。

英国 1997 年 7 月 25 日加入《公约》时的声明接近美国的立场。英国认为：不能接受现有的和将来的与《公约》第 309 和 310 条不一致的任何声明或陈述。《公约》第 309 条禁止任何保留或例外（《公约》其他条款明文许可的除外）。根据《公约》第 310 条，缔约国的声明或陈述不得排除或修改《公约》的规定对有关国家适用时的法律效果。英国认为以下这样的声明或陈述与《公约》第 309 和 310 条不一致，声称要求军舰或其他船舶行使无害通过权或自由航行权之前进行任何形式的通知或请求许可的，或者其他的以《公约》不允许的方式声称限制航行权的声明或陈述。

法国 1982 年 12 月 10 日签署《公约》，1996 年 4 月 11 日批准《公约》。法国在批准《公约》的声明中没有直接涉及军舰无害通过领海问题。但根据 1985 年 2 月 6 日《外国船舶通过法国领水的法令》第 1 条的规定，所有外国船舶在法国领海均享有无害通过权。该法中，像美国总统的上述公告一样，没有军舰和商船的区分。

四、《公约》允许军舰无害通过领海，也允许沿海国要求事先通知或许可

从《公约》缔约国的上述声明来看，在第三次联合国海洋法会议上，军舰通过领海问题未真正达成一致，公约通过以来国际社会在这个问题上的分歧依然存在，缔约国对《公约》关于无害通过条款的解释没有一致的意见。[20] 但从《公约》的谈判历史、《公约》的有关规定、缔约国有关军舰通过领海问题的解释性声明以及有关国家的国内法来看，可以得出以下 3 点结论：

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20 Hŭi-gwŏn Pak, *The Law of the Sea and Northeast Asia: A Challenge for Cooperation*, Boston: Kluwer Law International, 2000, p. 32.

（一）《公约》和一般国际法允许军舰无害通过领海

《公约》没有承认军舰享有无害通过权的明文规定，但允许军舰在领海享有无害通过权。荷兰批准《公约》时的声明准确地指出：《公约》“允许”包括军舰在内的所有船舶在领海的无害通过。国际社会已有相当数量的国家允许外国军舰在领海无害通过。例如，在《公约》通过以来，瓦努阿图、赤道几内亚、塞内加尔、墨西哥、保加利亚、毛里塔尼亚、波兰、伯利兹、巴西、乌克兰等国新制定的相关法律承认军舰在领海的无害通过权。其中保加利亚和巴西过去是持相反立场的。1987 年 7 月 8 日保加利亚人民共和国海域管理法令第 19 条和 1993 年 1 月 4 日巴西关于领海及毗连区、专属经济区和大陆架的第 8617 号法律第 3 条，承认所有船舶在领海的无害通过权。

这样对待外国军舰通过领海问题的国家，有海上强国及其盟国，也有其主权、领土完整和政治独立基本没有外来威胁的国家。这些国家这样做是从其国情出发的，有其政策上的考虑的，并不是因为在《公约》或一般国际法上有这样的法律义务。美国在 1958 年第一次联合国海洋法会议上转向主张军舰在领海享有无害通过权的立场，前苏联在第三次联合国海洋法会议上也发生这种转变，都不是因为国际法发生变化，而是它们各自的政策选择。这就是说，《公约》允许军舰在他国领海的无害通过，仅仅是一项“许可性规则”，还不是“义务性规则”。这种“允许”还没有像商船的无害通过那样构成一般国际法上或《公约》上的权利，所以在一般国际法或《公约》上都没有规定沿海国保证外国军舰的无害通过权的义务。

主张军舰像商船那样享有无害通过领海的权利，与领海作为国家领土的性质不相符合，也没有一般国际法和《公约》的根据。如前所述，智利、立陶宛把军舰通过领海作为可以互惠对待的事项来处理，说明这是可以由沿海国自由处理的事项。在用于国际航行的海峡中，海峡沿岸国中的《公约》缔约国不得要求外国军舰事先通知或得到许可。但在用于国际航行海峡以外的领海海域，沿海国可以这样要求。在用于国际航行的海峡实行过境通行制或特殊的无害通过制，使各国的重大航行利益得到了保证。此类海峡水域以外的领海海域的通过便利与沿海国的安全利益应有适当的平衡。《公约》允许军舰在领海无害通过与沿海国可以自由处理军舰通过其领海问题就体现了这种平衡。

（二）《公约》和一般国际法允许沿海国要求事先通知或得到许可

同样，《公约》也没有承认沿海国要求外国军舰通过其领海须事先通知或得到许可的明文规定，但《公约》和一般国际法允许沿海国这样做。商船和军舰是两类不同性质的船舶，领海是国际领土的组成部分，沿海国对待军舰及其他用于非商

业性目的的政府船舶可以与商船有所区别。要求事先得到许可（许可制）或事先通知（通知制），都与商船的无害通过权不同，都是若干沿海国现行有效的法律或规章的规定。

实行许可制，存在着许可和不许可两种可能性，外国军舰能否通过，取决于沿海国的意志。但是，不能武断地得出结论说，许可制一定会使军舰的通过实际上成为不可能，这要看有关国家的实践情况，也不能认为许可制与《公约》规定不相容。国际海洋法法庭法官 Budislav Vukas（克罗地亚籍，任期 1996 — 2005）认为，从《公约》的条文和谈判的历史来看，在行使无害通过权方面，都没有把军舰与其他种类的船舶区分开来。因此，《公约》生效以后，在缔约国之间，军舰通过领海不应当再要求事先得到许可。[21] 他的上述观点不会使每个沿海国都接受。许可制的存在比《公约》的历史还要长。在《公约》的谈判过程中若干沿海国明确主张许可制。在《公约》中没有禁止许可制的规定。至少《公约》关于领海主权的规定可以作为许可制的一般依据。实行许可制的国家大都是安全利益受到严重外来威胁的国家。

Budislav Vukas 法官同时认为，事先通知的要求，限制同时通过的军舰的数目以及沿海国采取的类似预防措施，并不妨害军舰的无害通过权，因此与《公约》关于所有船舶的无害通过权的规定并不矛盾。所有这些措施的目的都是为了保证这种通过对沿海国无害，而不是借对军舰的这种要求而实际上否认或损害军舰的无害通过权。只要上述措施无歧视地对所有国家的船舶适用，就与《公约》不相矛盾（第 24 条第 1 款）。可以认为，沿海国采取此类措施是《公约》本身的若干条款所允许的。缔约国立法要求无害通过的外国军舰事先通知，或者限制同时通过的军舰的数目，与《公约》第 21 条是一致的。该条允许缔约国制定法律或规章，除其他外，保证航行的安全、管制海上交通（第 1 款第 1 项），保护沿海国的环境、防止、减少和控制对其海域的污染（第 1 款第 6 项）。此外，由于军舰的特定性质和目的，此类措施也能够被认为是允许沿海国在其领海采取的防止非无害通过的“必要步骤”（第 25 条第 1 款）。[22] Budislav Vukas 法官以上关于“事先通知”的要求与《公约》关于无害通过的规定相一致的观点，符合《公约》有关条款的含义及谈判历史。马耳他和孟加拉批准《公约》时关于“一国军舰在其他国家领海的无害通过权应当和平的行使”，“军舰行使无害通过权作出事先通知是合理的、不与《公约》相矛盾”的声明所表达的意思与此相近。克罗地亚共和国在批准《公约》时关于“并不存在禁止沿海国根据自己的法律和规章要求通过其领海的外国军舰通知其无害通过的打算，并且限制同时无害通过的军舰的数目这样的一般国际法

21 Budislav Vukas, *The Law of the Sea: Selected Writings*, Leiden/Boston: Martinus Niihoff Publishers, 2004, p. 140.

22 Budislav Vukas, *The Law of the Sea: Selected Writings*, Leiden/Boston: Martinus Niihoff Publishers, 2004, p. 141.

强制规范”的声明是符合当代国际法的实际状况的。

通知制比许可制更有利于外国军舰实现在领海的通过，也顾及到了沿海国的利益，因而有更多的拥护者。事先通知的要求并不会使军舰的通过成为不可能，只是要求军舰所属国通过一定的途径加以通知。在事关安全利益的问题上，沿海国不能连要求事先通知这样的“知情权”都没有。

（三）外国军舰应尊重沿海国的事先通知或得到许可的要求

就目前的情况看，特别是从缔约国批准、加入或继承《公约》时有关军舰通过领海的解释性声明来看，《公约》允许军舰无害通过领海，但沿海国没有义务允许外国军舰无害通过其领海；《公约》允许沿海国要求事先通知或得到许可，意欲通过外国领海的军舰所属国有义务遵守沿海国的这种要求。

《公约》第 19 条第 1 款明确规定：“通过只要不损害沿海国的和平、良好秩序或安全，就是无害的。这种通过的进行应符合本公约和其他国际法规则。”《公约》关于领海无害通过的规定是以相当模糊的方式处理的，《公约》没有规定的事项或其不明确之处，应当适用一般国际法。《公约》序言确认：“本公约未予规定的事项，应继续以一般国际法的规则和原则为准据”。

在军舰通过领海问题上，目前还没有一致的国际实践，一般国际法规则中还没有承认或否认军舰的无害通过权的规则。然而，根据一般国际法，外国军舰必须遵守沿海国的法律和规章，包括沿海国有关安全问题的法律和规章。

《公约》第 21 条所涉及的“沿海国关于无害通过的法律和规章”能否包括有关“安全”事项的法律和规章，《公约》没有明文的许可性规定，更没有明文的禁止性规定，属于《公约》未规定事项。大会主席的相关声明中提到的国家享有“保护其安全利益的权利”肯定是有习惯国际法的根据的。由于国际关系的错综复杂，军舰在不事先通知或得到许可的情况下通过他国领海，有些沿海国不感到有威胁，不能得出对所有沿海国都不构成潜在的或实际的威胁的结论。一个国家是否受到威胁，通常不应由别国来判断，特别不应由具有庞大舰队的国家来判断。沿海国可以从“保护其安全利益的权利”引伸出要求事先通知或得到许可的法律规定。从《公约》第 19 条和第 25 条都得不出禁止沿海国制定要求通过其领海的外国军舰事先通知或得到许可的法律或规章的结论。

国际海洋法法庭前法官赵理海教授在为《中国大百科全书》撰写的“领海”词条中指出：“1958 年《领海与毗连区公约》和 1982 年《联合国海洋法公约》都没有规定军舰不享有无害通过权，也没有规定外国军舰通过领海应事先通知沿海国或经沿海国核准，而只是规定‘如果任何军舰不遵守沿海国关于通过领海的法律和规章，而且不顾沿海国向其提出遵守法律和规章的任何要求，沿海国可要求该军舰立即离开领海’。”他还指出：“军舰在领海的无害通过权，为许多国际法学

家所反对，因为商船对沿海国不构成威胁，而军舰则构成威胁。当然，即使军舰可以行使无害通过权，它也必须遵守沿海国根据国际法所制定的法律规章，这种法律规章理应可以包括军舰进入领海所必需的程序规则。”[23] 邵津教授在表述有关军舰通过领海问题的习惯国际法规则时指出：“沿海国可以允许外国军舰无害通过领海而不加特别要求，也可以规定须经事先通知或许可，或履行其他要求；意欲实行这种通过的外国军舰应遵守沿海国的法律和规章所规定的要求。”[24]

根据《公约》和一般国际法，是否给予军舰在领海的无害通过权，是各国（包括《公约》缔约国）可以自由处理的事项。军舰在通过外国领海之前，应当查明该国是否允许军舰无害通过，是否要求外国军舰事先通知或得到许可。如果沿海国有要求这种通知或许可的法律或规章，军舰所属国应予遵守。这是领海的法律地位和军舰的特殊性质决定的。如果沿海国妨碍执行符合国际法使命的外国军舰的通过或者使这种通过实际上成为不可能，军舰所属国可以采取对等措施以平衡利害关系。这样的解释或理解，符合《公约》的目的和宗旨，有利于国际和平与安全。

各国在军舰通过领海问题上的分歧，不会在短时间内弥合。分歧的解决，固然要看缔约国今后的解释、国际法院和国际海洋法法庭这样的国际司法机关遇到相关案件时的解释，但最终将取决于产生分歧的根源或条件有无变化。如果国际和平与安全形势不断改善，国家间武装侵略和干涉现象日益减少，军舰通过领海也像商船的通过那样造福人类，各国没有理由不一致地承认军舰在领海的无害通过权。

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23 下载于 http://192.192.96.173:8080/web34m/Content.asp?ID=10227&.Query=，2005 年 11 月 25 日。

24 邵津：《关于外国军舰无害通过领海的一般国际法规则》，载于《中国国际法年刊》1989 年，第 138 页。

The Basic Position of China on the Settlement of Maritime Disputes through Negotiations

LIU Zhenmin *

Distinguished Delegates, Ladies and Gentlemen:

Thank you for inviting me to participate in this Conference. It gives me a great honor to deliver the keynote speech at this luncheon. I'd like to take this opportunity to share with you some elements of the basic position of China on the settlement of maritime disputes through negotiations.

China is a coastal State with a coastline of over 18,000 kilometers, adjacent or opposite to eight neighboring countries surrounding the Yellow Sea, the East China Sea and the South China Sea. The eight countries are Democratic People's Republic of Korea (DPRK), Republic of Korea (ROK), Japan, Viet Nam, the Philippines, Malaysia, Brunei and Indonesia. As you know, China and Japan have disputes on the sovereignty over the Diaoyu Islands. China, Malaysia, the Philippines and Viet Nam have disputes on the sovereignty over the Nansha Islands. Along with the establishment of the new international order for the seas and oceans through the 1982 U.N. Convention on the Law of the Sea (UNCLOS), the overlapping claims over EEZ and continental shelf between China and these eight countries have emerged. Over the past years, while making great efforts to safeguard its maritime rights and interests, the Chinese government has all along committed itself to resolving, with its maritime neighbors, the disputes over the islands as well as on the delimitation of the sea areas. Now I'd like to elaborate on three points:

1. On China's Efforts in Establishing Legal Regime for Sea Areas within Its National Jurisdiction

When the People's Republic of China was founded in 1949, the Chinese

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Government inherited from the former government the territorial sea regime of 3 nautical miles. In 1958, due to the need to safeguard its security in coastal areas and with the encouragement of the first United Nations Conference on the Law of the Sea, the Chinese Government enacted a declaration on its territorial sea, announcing that China shall adopt a territorial sea regime of 12 nautical miles. After the UNCLOS was adopted in 1982, China signed the Convention and promulgated successively a number of laws, including the Law on the Protection of Marine Environment, the Law on Fisheries and the Law on Maritime Safety, starting the process of extending its maritime jurisdiction beyond the territorial sea without indication of specific limits. In 1992, in order to meet the dawn of the entry into force of the UNCLOS, China promulgated the Law on the Territorial Sea and the Contiguous Zone, determining that China shall establish a territorial sea regime of 12 nautical miles and a contiguous zone regime of 12 nautical miles. With the UNCLOS coming into force in 1994, China gave its ratification in 1996 and announced the baselines of part of its territorial sea adjacent to the mainland and those of the territorial sea adjacent to its Xisha Islands. In 1998, China promulgated the Law on the EEZ and the Continental Shelf, establishing the relevant legal regimes. At the same time, in order to fulfill the relevant provisions of the Convention, the Chinese Government has amended a number of laws including the Law on the Protection of Marine Environment and the Law on Fisheries and has promulgated the Law on the Utilization of Sea Areas, the Regulation on the Management of the Foreign-related Marine Scientific Research and the Regulation on the Management of Marine Natural Reserves. The enactment and implementation of these laws and regulations have contributed a lot to the efforts of China in establishing the legal regime for the sea areas within its national jurisdiction in accordance with the UNCLOS. These have also played a very important role in promoting the exploration and exploitation of the seas and the protection of marine environment and its resources.

2. On the Basic Policy of China in Solving the Disputes over the Diaoyu Islands and the Nansha Islands through Negotiations

The Chinese Government has always stood for negotiated settlement of international disputes through peaceful means. In this spirit, China has solved, through bilateral negotiations, questions regarding territory and land boundaries with 12 neighboring countries out of its 14 land neighbors. This position also applies to the Diaoyu Islands and the Nansha Islands.

As for the Diaoyu Islands, the Chinese Government has always maintained

that the Diaoyu Islands and its adjacent islands have been part of the Chinese territory since ancient times. At the same time, the Chinese Government advocates the settlement of disputes with Japan over the Diaoyu Islands through negotiations. Pending the settlement of the dispute, the two sides may shelve the disputes and go in for joint development.

As for the Nansha Islands, the Chinese Government has all along maintained that China has indisputable sovereignty over the Nansha Islands and their adjacent waters. However, China is committed to working with the countries concerned for proper settlement of the disputes through peaceful negotiations in accordance with international law. This was explicitly written into the Joint Statement issued at the China-ASEAN informal summit in 1997. The Chinese Government has also put forward the proposition of "shelving disputes and going in for joint development". China is ready to shelve the disputes and conduct cooperation with the countries concerned pending settlement of the disputes. This is not only what China stands for but also what China does. No matter during the dialogues with ASEAN or in the cooperation between China and Malaysia, the Philippines and Viet Nam respectively, China has always engaged in the promotion of the joint development.

3. On China's Policy and Practice in Solving the Issue of Maritime Delimitation through Negotiations

As for the overlapping claims of the sea areas between China and its eight neighboring countries, the Chinese Government has always maintained that the disputes should be settled through negotiations in accordance with the equitable principle. If the disputes could not be settled for the time being, the parties concerned may shelve the disputes and go in for joint development. In accordance with these principles, China has been carrying out consultations or negotiations on matters concerning the law of the sea or maritime delimitation with its neighboring countries ever since 1996. Some positive progress has been achieved in this regard.

(1) Through negotiations for many rounds, China and Viet Nam signed the Agreement on the Delimitation of the Beibu Gulf and the Agreement on Fisheries Cooperation in Beijing on 25 December 2000. The two agreements entered into force simultaneously on 30 June 2004. The Beibu Gulf is a semi-closed sea surrounded by the coastlines of China and Viet Nam and has a total area of 128,000 square kilometers. While realizing the delimitation of the territorial seas, EEZs and continental shelves in the Beibu Gulf in accordance with the equitable principle, China and Viet Nam also agreed on the joint conservation and management of fishery resources in the Common Fishery Zone within the Beibu Gulf by signing

the Agreement on Fisheries Cooperation. The two parties also agreed to cooperate, through friendly consultations, in the exploitation of any unknown reserves of petroleum and natural gas or other mineral resources which might be deposited as a single structure across the delimitation line.

The significance of the Agreement on the Delimitation of the Beibu Gulf is that it has established the first line of maritime delimitation between China and its neighboring countries. The fact proves that signing of the Agreement is a successful practice for both China and Viet Nam in accommodating themselves to the new order for the law of the sea by equitably solving their maritime delimitations. It is also a manifestation of China's position that it is willing to solve the maritime delimitations with all its neighbors through negotiations. Furthermore, the Agreement provides a good example for China to peacefully settle the maritime disputes in the future.

(2) In order to solve the issues concerning the Yellow Sea and the East China Sea, China has established bilateral consultation mechanisms on issues concerning the law of the sea with Democratic People's Republic of Korea (DPRK), Republic of Korea (ROK) and Japan respectively. Consultations have been held ever since 1996 on issues of maritime delimitation and other related issues on the law of the sea. As the preliminary achievements of the consultations, China and Japan signed the Fisheries Agreement in 1997, which entered into force in 2000. And in 2000, China and Republic of Korea signed the Fisheries Agreement, which entered into force in 2001. These two fisheries agreements are the provisional arrangements between the parties concerned on the fishery issues prior to the maritime delimitation and have played an important part in maintaining the order of fishing activities in the Yellow Sea and the East China Sea. China wishes to solve the issues of maritime delimitation with Democratic People's Republic of Korea, Republic of Korea and Japan respectively through the ongoing negotiations. As for the difficult issues, which could not be resolved during the delimitation negotiation, China proposes to shelve the disputes and goes in for joint development.

(3) On issues concerning the South China Sea, the Chinese Government attaches great importance to dialogues and cooperation with the countries surrounding the South China Sea. China advocates the enhancement of cooperation among the parties concerned in ensuring freedom of navigation in the South China Sea, promoting maritime cooperation and facilitating joint development. For these purposes, China has engaged in the following activities:

Firstly, China has been actively engaged in the Workshop on Managing

Potential Conflicts in the South China Sea (SCS) hosted by Indonesia since1991. The Workshop has been held annually for last 14 years, providing the parties surrounding the South China Sea with an important forum, though informal and non-official, in promoting exchange of views and cooperation and enhancing mutual trust. China has sent experts to participate in the Workshop process and has hosted several meetings of the relevant Working Groups and Expert Groups. China also made financial contributions to the Workshop and has played an important role in ensuring the smooth progress of the Workshop Process.

Secondly, on the cooperation at the regional level, China signed with ASEAN the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002. At a Senior Officials Meeting between China and the ASEAN on the implementation of the DOC held in 2004, it was decided that the Working Group on the implementation of the DOC would be established to study the concrete projects for future cooperation.

Thirdly, on the cooperation at the bilateral level, China has maintained consultations on all issues concerning the South China Sea with Malaysia, the Philippines and Viet Nam respectively. China and the Philippines have carried talks in the framework of a Working Group on Confidence-Building at Sea. China and Viet Nam have carried talks within the Working Group on Maritime Issues. China is also carrying out consultations with the parties concerned on joint development of the resources in South China Sea. China believes that, pending an agreement reached on the settlement of South China Sea disputes through negotiations, "shelving the disputes and going in for joint development" is the best way, for the time being, to deal with the South China Sea disputes and to ensure the stability in the area.

Fourthly, there has been very good news that a Tripartite Agreement on the Joint Seismic Undertaking in the Agreed Area in the South China Sea has been initialed in Hanoi in the evening of the day before yesterday among three oil corporations from China, the Philippines and Viet Nam respectively. This would be the first project aimed at joint development among the parties in the South China Sea region and would set a good example for other cooperative projects.

In conclusion, I would like to reiterate that it is China's consistent policy to peacefully settle the maritime disputes with its neighbors. We hope to continue the dialogues and consultations with all our neighbors and will make every effort to solve the maritime disputes through negotiations. It is our view that each party concerned should adopt a restrained attitude in case a conflict occurs. Pending

the settlement of the disputes, the parties concerned should strive for making appropriate provisional arrangements, shelving the disputes and carrying out cooperation so as to jointly safeguard the peace and stability in areas of the Yellow Sea, the East China Sea and the South China Sea. Let's all work for that purpose.

Thank you all for your patience!

我国的能源安全与南海争议区的油气开发

吴士存 * 任怀锋 **

内容摘要：随着中国经济的持续发展，能源安全问题日益突出。南海油气资源丰富，对南海周边的国家和地区具有重要意义。由于南海存在主权争议区，所以油气开发活动不但敏感，容易引起冲突，而且风险大、成本高，投资合作难度大。所以，必须寻求有效的合作开发模式，不但要避免冲突，还要有利于营造合作氛围。争议区开发模式必须由各方就合作机制与冲突处理机制达成协议，并且要提供必要的政治保证和资金支持。两岸展开油气合作不但具有可行性，而且可以共同维护中华民族在南海的实际利益。

关键词：油气资源　合作模式　冲突

石油被喻为工业的“血液”，它直接关系到国家的经济发展、政治稳定和国家安全。世界能源专家普遍认为，石油仍然是 21 世纪可利用能源中的主要能源。只要没有一种新的燃料出现，用来替代石油，大多数国家为了确保经济和社会的可持续发展，都必将继续面临尽快增加和稳定石油供给、保证石油来源安全等一系列迫切问题。国际社会在石油领域的争夺战在 21 世纪正变得越来越激烈。当这种争夺达到一定程度的时候，便有可能引发政治、军事上的冲突。

我国南海争议区主要集中在南沙。那里油气蕴藏丰富，围绕渔业和油气资源引发的冲突不时出现。随着周边国家和地区的经济发展，对南沙海域油气资源的渴求越来越强烈，某些国家已经在争议区采取单方面开采行为，造成事实上的独占开采状态；并且引入区域外势力联合开采，使南沙争端国际化。面对现实，如何实现争议区油气资源的合作开发，是我国面临的迫切课题。本文从中国能源安全形势出发，讨论南海争议区油气资源开发的合作模式以及冲突，并且从维护中华民族利益出发探讨两岸南海合作。

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一、中国能源安全形势

在全球化条件下，一国的能源安全不仅仅是一个经济问题，同时也是一个政治和军事问题；它不仅与国内供求矛盾及其对外依存度相联系，同时还与该国对世界资源丰富地区的外交和军事影响力相联系。[1] 中国业已加入 WTO，致力于经济全球化和区域一体化，中国的生产与消费参与全球能源配置体系，其安全也融入国际安全体系。既然中国能源安全已成为世界能源安全体系中的一部分，那么中国能源安全也就必然与国际能源安全形势发生互动关系。据美国经济专家们估计，国际油价每提高一倍，美国国内的 GDP 就会下降 2.5% 左右；每桶石油价格上升 10 美元，每年将给美国经济造成 500 亿美元的损失，经济增长将减少约 0.5%。另外，美国对世界能源丰富的地区及由此运输到美国的海上交通线有绝对的政治军事控制力，相比之下，目前中国海军还不能够确保海上能源交通线的安全，过分依赖中东和非洲地区的石油和单一的海上运输路线使得中国石油进口的脆弱性比较明显。

1978 年改革开放以来，随着经济的持续发展中国的能源结构发生了很大的变化。在能源消费中，煤炭的比重已由改革开放初的 70% 以上下降到 2000 年的 56% 左右，石油天然气由初期的 28% 左右上升到 2000 年的 43% 以上，提高了 15 个百分点。能源结构优化进程加快，促进了中国经济持续、稳定的增长。但是，同世界相比，中国人均常规石油可采资源不足。世界人均常规石油可采资源为 53 吨／人，中国仅 10 吨／人，是世界平均水平的 1/5。随着中国国民经济的快速发展，中国石油消费量迅速增长，而石油生产则远不能满足消费增长的需要。1984 年以来，原油产量年均增长 1.7%，但同时期的石油消费年均增长 4.9%，需求增长很快。因此，中国石油安全面临的问题是要保证充足的石油供应和安全的石油来源以确保国内石油消费。

中国是世界第五大产油国，2002 年年产石油 1.67 亿吨，目前，中国石油的采油量和

可采储量之比是 1:12，而与世界石油的采储量之比是 1:45，中国石油的资源储量严重不足。虽然近年来中国在西部地区和海上有了不少油气勘探成果，但在已探明的油气选区中没有大油田。另外，东西部之间没有铺设石油管道，这也制约了中国国内石油的供应。随着中国经济的快速发展，中国的石油消费量将会越来越大。因此，只靠自己生产的石油不能满足需要。中国从 1993 年起就已成为石油净进口国，2002 年，中国进口石油达到 7000 万吨左右。权威部门估算，

1　张文木：《中国能源安全与政策选择》，载于《世界经济与政治》2003 年第 5 期。

到 2005 年，中国的石油产量最高可以上升到 1.8 亿吨左右，即便如此，也还有约 9000 万吨石油的缺口。

中国目前还没有建立起完善的石油储备制度。石油储备制度源于 20 世纪 70 年代。1973 年中东战争期间，阿拉伯国家对西方国家实行石油禁运，引发第一次石油危机。自此之后，各国纷纷实行战略石油储备制度。由于每年石油进口量的不断增加和战略石油储备的缺乏，中国极易受到全球原油价格变化、中东地区战争威胁和脆弱的海上航线的影响。一旦出现国际市场供应中断或价格飙升，中国经济、社会、国防均会受到较大冲击。来自中国财政部的官方统计数字估计，到 2005 年，中国每年将消费 2.6 亿吨石油，其中 48% 需要进口，到 2015 年，中国将不得不进口至少一半的原油需求量。2002 年 9 月国际能源机构在一份报告中预言，到 2030 年，中国的石油净进口将从现在的每天不足 200 万桶增加到每天 980 万桶。国际能源机构在报告中说，过去 10 年中，中国石油消费量的增长至少占世界的 1/4。在未来几年内，中国将成为需求增长最快的消费者。到 2030 年，中国进口石油的比例将从现在的 47% 增加到 82%，这会造成政府财政紧张。所以，普遍认为，中国必须建立战略石油储备，务必减少对进口原油的依赖。20 世纪 90 年代，中国的石油产量平均每年增加 1.7%，而消费量则每年增加 7.3%。

中国能源安全形势表明中国不但要改变原有的能源安全政策，而且要在能源来源多样化为主的政策导向下加速向海洋进军，大力开发海洋油气资源。南海被喻为“第二个波斯湾”，不但拥有丰富的油气资源，而且对我国的国家安全和可持续发展至关重要。争议区油气资源开发已成事实，我国必须从国家主权和能源安全出发，制订具体的开发战略来应对现状。

二、南海争议区油气资源与开发现状

数十年来的勘探显示，南沙海域有 13 个大中型沉积盆地，总面积 61.95 万平方公里，其中在我国断续线内的含油气面积有 41.7 万平方公里，据测算石油蕴藏量约有 235 亿吨，天然气 10 万亿立方米。除石油天然气以外，南海地区的“可燃冰”储藏量也非常丰富。“可燃冰”具有能量密度高、分布广、规模大、埋藏浅等特点，被认为是 21 世纪具有远大商业开发前景的战略资源。专家们认为，在 15–20 年内有可能会得到大规模的开发和利用。我国国家自然科学基金委员会在 20 世纪 90 年代后期批准了一些“可燃冰”基金项目。1996 年，有关科研部门开展了“西太平洋水合物找矿前景与方法调研”，并于 1998 年完成了“

中国海域气体水合物勘探研究调研”。1998–1999 年，我国“863 项目”开展了“海底气体水合物资源探查的关键技术”研究。1999 年广州海洋地质调查局在南海西沙海槽区至少在 130 公里地震剖面上发现了“可燃冰”。2000 年广州海洋

地质调查局在西沙海槽继续进行以“可燃冰”为目标的地震测量。据我国有关部门对南海的初步调查，已大致圈出 8000 平方公里“可燃冰”储藏范围，“可燃冰”总资源量近 800 亿吨石油当量，相当于我国石油总储量的 50% 左右。目前，我国“可燃冰”仍处在初期研究和勘探阶段，尚未涉及钻探、开发勘探和研究。

我国在南沙群岛海域的油气资源勘探活动始于 1987 年，但是勘探工作仅限于地球物理，至今尚未实施钻探。1992 年，中国海洋石油总公司与美国克里斯通公司签订了共同勘探万安滩油气资源的合同。由于越南的阻挠，该项目一直无法实施。时至今日，我国仍然没有在南沙群岛海域开采石油。

20 世纪 70 年代以来，东盟有关国家以本土临近为依托，以吸引外国特别是西方大国实力雄厚的公司为手段，以抢先开发造成既成事实为策略，加紧对南海资源的开发和利用。

越南是东南亚地区最贫穷的国家之一，石油是它摆脱贫困的一个关键因素。自从失去

前苏联的石油援助之后，为了从 30 年内战的破坏中重建经济，越南努力开发陆上和近海石油以及其它能源资源。1992 年开放油气资源开发以来，越南已同 50 多个外国石油公司签订了 33 个联营合同。据有关资料显示，目前，越南在南海大陆架的年采油量达 1100 万吨，石油和天然气出口创汇逐年增加，1998 年出口原油 1210 万吨，1999 年增加到了 1450 万吨，创汇 20 亿美元。据美国能源信息署 2002 年 5 月的最新资料显示，目前越南在南海地区的石油日产量 35.6 万桶，天然气年产量 190 亿立方英尺。越南 2000 年每天出口石油 13.3 万桶，石油成为国家外汇的最大来源，其中大部分出自南海地区。

菲律宾 95% 的石油依赖进口。南海发现石油使得它有望把石油进口比例从 95% 下降到 85%。 1976 年，菲律宾开始与外国公司合作在礼乐滩勘探石油。目前，菲律宾正努力与壳牌公司合作开发位于巴拉望岛西北的马拉帕雅天然气田。据估计，该气田在其 20 年的开采期内将出产 1.2 亿桶凝析油。据美国能源信息署 2002 年 5 月的最新资料显示，菲律宾每天在南海地区开采 9460 桶石油，每年天然气 10 亿立方英尺。菲律宾报纸还透露，为瓜分南海的石油藏量，菲律宾准备把大陆架由目前的 200 海里延伸到 350 海里。为收集有关根据，菲律宾国立大学国际法研究所已要求菲律宾参议院为这一方案提供拨款。

马来西亚在反对区域外势力介入南海争端，不主张南海问题国际化的同时，也在不断捞取经济实惠。近年来，马来西亚除了以建设科研调查设施为名在新占岛礁建造人工设施之外，还加快了在南海的油气开采。目前，马来西亚在我国“断续线”内开采的油田已达 18 个，气田 40 个，很多油气井已深入我国断续线内 100 海里。2000 年，马来西亚的全部石油产量每天只有 69 万桶，2001 年，仅在南海地区其石油产量就达到了 66.8 万桶，占当年全部石油产量的 89.07%。据美国能源信息署 2002 年 5 月的最新资料显示，目前马来西亚在南海地区的石油日产量

是 75 万桶，天然气年产量 14370 亿立方英尺。

印尼是石油输出组织欧佩克成员国，同时也是世界除中东以外最主要的石油产地及输出地之一。能源是印尼的支柱产业，各届政府，从中央到地方都非常重视。能源和矿产资源在印尼的整个经济中占据了重要地位，占全国税收的 25~30%。印尼的液化天然气出口具有非常强的竞争能力，在全世界占主导位置，在亚太地区占三分之一强的市场份额。目前，印尼在南沙争议海域的主要利益是纳土纳大气田的开发。印尼国家石油公司与美国埃克森石油公司联合开发的纳土纳气田位于我国断续线内，可采储量达 1.6 万亿立方米。这个耗资 400 亿美元的巨型项目，仅通往新加坡的输气管线就长达 300 英里，预计于 2004 年建成投产，年产液化天然气 600 万吨。印尼目前主要是担心我国对纳土纳群岛海域提出权利要求，从而影响其天然气开采项目，因此对我国断续线内的部分水域与其专属经济区有重叠表示关注。2001 年印度尼西亚每天产出石油 122 万桶，其中将近 20% 产自南海地区。目前，印度尼西亚每天在南海地区产出 21.5 万桶石油，每年天然气 120 亿立方英尺。

文莱是亚太地区主要的产油国和世界上最大的天然气出口国之一，其勘探开采活动目前主要集中在文莱—沙巴盆地。南海油气开采是文莱国民收入的主要来源。由于文莱目前的油气储量仅够开采 25 年左右，要维持国家现有的财富，迫切需要开发新的近海油田。南通礁位于我国断续线内，占有南通礁就意味着文莱有权开采这个海底大陆架中蕴藏着的石油。文莱在南海地区每天产出石油 19.5 万桶，每年产出天然气 3340 亿立方英尺。[2]

三、合作模式与冲突

争议区具有自身独特的特点，这决定了在其区域内的开发活动不可避免地要发生冲突。冲突的存在决定了主张权益方的行为存在几种情况，一是单方面行为即冲突行为，即主张权益方在争议状态存续下独自采取行动，不顾其他主张权益方的抗议；二是双边合作行为，适用于直接有争议的双方为避免冲突采取合作；三是多边合作行为，适用于多边争议区的开发活动；四是冻结行为，即搁置争议，共同冻结争议区内的开发活动。争议区开发目前有几种模式：1. 超国家管理模式，例如泰国同马来西亚共同开发案；2. 双方政府共同管理模式，例如澳大利亚印尼共同开发案；3. 代理制模式，例如 1965 年卡塔尔阿布扎比协定和 1958 年沙特阿拉伯巴林协定；4. 合资机构共同经营模式，例如 1974 年日本韩国共同开发东海大

2 有关国家在南海地区产出的油气数据，下载于 http://www.eia.doe.gov/emeu/cabs/schinatab.html;BP Statistical Review of World Energy，2002 年 6 月 15 日。

陆架协定。[3]

争议区开发无论采取何种模式，都是基于争议和冲突存在的事实而采取的一种利益安排。合作的实现基于两个政治实体之间的妥协，确认争议存在，既而通过政治谈判缔结协议，就利益划分达成共识。但是，这种暂时性的利益安排极易受到各方面因素的影响。澳大利亚和印尼缔结的《帝汶缺口协议》，就是因为东帝汶的独立而终止。在国家利益至上的地缘政治和经济安全框架中，暂时性的利益安排不具有优先性，它既可以作为安全阀又可能成为

导火索。再者，与双边合作相比，由于利益分割和政治让步交叉重叠，多边开发比双边开发更加难以实现。所以，争议区开发模式必须由各方就合作机制与冲突处理机制达成协议，并且要提供必要的政治保证和资金支持。这样的模式，就是以共同利益为基础，以政治协议为前提和保障，通过合作以避免冲突，进行开发活动，实现利益共享和共同安全。我国提出的“搁置争议，共同开发”主张，就符合这一主旨。

目前，在南海争议区内的油气开发活动主要是单方面行为。因油气资源引发的南海争端由来已久，中国政府出于睦邻友好、营造周边安全环境考虑，为消除南海地区紧张局势，致力于发展与东南亚各国的友好合作关系，主动提出“搁置争议，共同开发”。这一正确主张不仅为南海争端的最终解决提供了有益的思路，而且充分考虑到有关各方的实际利益，展现了中国在南海问题上的务实精神、合作意愿和真诚态度。中国与有关国家业已开展油气、渔业、海洋环保、海洋气象等方面的合作，这将为中国与有关各方寻求争端解决模式、消除歧见以进一步加强合作、共谋发展而营造氛围，积累有益经验。

目前，中国与东盟签署了《南海各方行为宣言》、《非传统安全领域合作宣言》以及《东南亚友好合作条约》，双方政治互信不断加强。另外，中国与东盟以自由贸易区建设为契机，双边经贸发展规模持续扩大。相信，随着越来越多的类似的有利因素的出现和推动，“搁置争议，共同开发”的前景必将更加光明。

大陆与台湾因两岸政治分治导致沟通困难，虽然经贸一直持续发展，但是台海局势的起伏不定为两岸经贸合作投下了阴影。两岸在南海有着共同的利益，应为维护中华民族的权益而走向谅解与合作。尽管存在政治分歧，两岸在南海油气合作上还是迈出了可喜的一步。1997 年，台湾中油公司与大陆中海油公司共同签订位于东沙岛附近的“潮汕凹陷”物理勘探合作合约，这为两岸展开进一步合作打下了基础。

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3 蔡鹏鸿著：《争议海域共同开发的管理模式：比较研究》，上海：上海社会科学院出版社 1998 年版，第 2~3 页。

四、结 语

南海争议区的油气合作有赖于有关各方的政治谅解与合作，反过来也可以发展经济关系为核心，为外交和军事上的合作创造有利氛围。从中国方面来说，《南海各方行为宣言》签署以来，中国信守承诺积极负责，继续倡导新安全观，致力于缔造南海地区共同安全。中国不但有领导人多次访问东南亚，签署一系列政治宣言、协议，利用多个平台不同场合与有关各方保持政治对话与合作态势，而且还采取实质性步骤推动落实《南海各方行为宣言》的后续行动，并通过东盟地区论坛谋求与各方建立信任措施。

虽然合作、发展、共赢成为共识，但是南海地区安全仍然存在一些问题。《南海各方行为宣言》签署以来，仍然发生有关国家以武力恶意驱赶、抓扣他国正常作业渔民的事件，并且依然存在区域内外势力结合以制衡中国的战略态势。这表明有关各方确有必要履行诺言，采取实质性措施共同维护南海地区安全，以营造一个有利的国际环境来促进区域经济和社会的可持续发展。

中国在缔造地区安全方面做出了应有的贡献，胡锦涛主席在第 11 届亚太经合组织领导人非正式会议上首次提出“与邻为善、以邻为伴”的外交方针，呼吁发扬“大家庭”精神，实现共同繁荣。中国国务院总理温家宝 11 月 2 日在博鳌亚洲论坛年会上所作的演讲中提出“和平、安全、合作、繁荣，是中国的亚洲政策目标。一个充满活力、繁荣富强，致力于世界和平与发展、永不称霸的中国，将为亚洲的崛起和振兴做出新的贡献”。这充分说明，在经济全球化和区域一体化的时代潮流面前，通过“睦邻、安邻、富邻”的务实外交，中国正在尽力促进亚洲地区实现更大程度的经济合作、安全合作和政治合作。中国采取的是将国家利益置于国际社会这个大环境之内而非国际社会之外的建设性政策，中国正在以一个负责任的国家的方式行事，这必将对南海争端的解决、实现南海地区永久和平产生深远影响。

日本国际法学界大陆架划界问题的文献和观点初探

张新军 *

内容摘要: 本文作为对日本海洋划界理论实证研究的初步，首先介绍研究对象获取的方法及文献目录。从初步的文献读解中看出，与个案介绍和分析相比，日本学者对大陆架划界问题进行系统性总结的论著并不是很多，敢于挑战的学者也寥寥无几。这从一个侧面多少反映了日本国际法学界主流的实证主义学派在识别和归纳划界规则中的困难。

尽管日本国际法学界的研究结论是否定自然延伸原则并强调中间线——特殊情形作为划界规则，但是其依据在不同的时期是不同的。作为进一步评析的准备，本文将日本学界中的自然延伸否定论的形成分为 3 个阶段并识别各自阶段的理论依据。第一为“自然延伸后退论”（大致到突尼斯—利比亚案前后）。第二是以突尼斯—利比亚案中小田滋法官和埃文森反对意见为代表的，由第三次联合国海洋法大会的 200 海里专属经济区制度的冲击而带来的“自然延伸对抗论”。最后是利比亚—马耳他案及其之后的彻底的“自然延伸否定论”。

关键词: 海洋划界　日本学说　自然延伸原则否定

有关大陆架划界的国际仲裁和诉讼案件，自 1969 年的北海大陆架案以来，出现得相当频繁，成为国际司法和仲裁的一个重要主题。可以推测的原因有两个：一方面，围绕大陆架石油资源，在大陆架划界上涉及到重大的国家利益；另一方面，作为利益调整的权利制度 —— 大陆架划界的国际法规则及大陆架本身的“权原”制度 —— 不明确并缺少权威的法律解释。这使得相关国家在大陆架划界中难以妥协，不得不求助于第三方来解决争议。中日两国在东海大陆架划界问题上产生争端的主要原因也在于此。作为中方来说，了解日本国际法学者在大陆架划界问题上的观点是十分必要的。

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一、对日本国际法学界有关大陆架划界问题的文献收集

本文中的文献收集基本上是依据日本国际法学会的《国际法外交杂志》1969 年以后的每年（一般为当年第 2 期）所发表的前一年日本国际法学会会员的文献目录进行的。[1] 在对日本国际法学界在大陆架划界问题上的研究情况进行了初步研读之后，一个基本印象是：与个案介绍和分析相比，日本学者对大陆架划界问题进行系统性总结的论著并不是很多，敢于挑战的学者也寥寥无几。至于为何造成这种现象，那么从日本国际法学界实证主义学派占据主流这一事实来看，也许作为划界依据的《联合国海洋法公约》第 83 条“公平原则”[2] 的解释超出了实证主义者的理解范畴；另外也许是司法、仲裁判决本身的无规律性使得施瓦曾伯格所说的归纳[3] 成为不可能；或者司法、仲裁判决本身已远离了“法的适用”而沦为单纯解决争议的工具。[4] 但是尽管为数不多，日本学者对大陆架划界问题的论证普遍以第 83 条的公平原则作为起点，在方法上采用的是对国际法院和仲裁裁判判例进行归纳，试图对第 83 条公平原则内在之具体规则及适用基准抽出并加以明确。[5] 从结论上看，日本国际法学界对大陆架划界的主流观点和日本政府在东海大陆架划界（分别和韩国、中国）上的政府立场是一致的：即坚持中间线加特殊情况原则。

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1 参见附页之文献目录。作者感谢日本京都大学法学院的浅田正彦教授，日本龙谷大学法学院的田中则夫教授和日本龙谷大学法学院方昕同学提供的意见和帮助。应该申明的是，文献收集中出现重大遗漏的责任仍归于本文作者。从作者作为日本国际法学会会员对学会在学界地位的了解来看，基本的判断是依据该文献目录的本文所附参考文献能基本囊括日本国际法学界在大陆架划界上的重要作品。但是，这样的文献收集方法仍存在两个方面遗漏的可能：第一，该文献目录仅限国际法会员作品；第二，该文献目录基于会员申报。

2 《联合国海洋法公约》（1982 年 4 月 30 通过，1982 年 12 月 10 日开放签署）第 83 条第 1 款：“海岸相向或相邻国家间大陆架的界限，应在国际法院规约第三十八条所指国际法的基础上以协议划定，以便得到公平解决。”

3 Georg Schwarzenberger, The Inductive Approach to International Law, *Harvard Law Review*, Vol. 60, 1946-1947, p. 562; Georg Schwarzenberger, *A Manual of International Law*, 5th ed., London: London Institute of World Affairs by Stevens, 1967, p.21.

4 如格罗斯法官在缅因案中所言，“结果是公平的”。See Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), *I. C. J. Reports* 1984, p. 383.

5 对于大陆架划界公平原则的实体内容，日本学者们仍然试图通过对判例的解读抽出其中的规律并加以一般化。但日本学者强调分析的材料不得不依靠判例而舍弃两国间的划界协定，这主要是因为协定谈判过程不公开，双方划界合意过程中具体适用了什么样的基准和关联事项外界不得而知。这样在基准的抽出中，协定对研究的帮助是有限的。三好正弘「大陸棚境界画定準則に関する一考察」林久茂・山手治之・香西茂編『海洋法の新秩序』東信堂（1993）162 頁。

另外，值得注意的是日本国际法学界的所谓“海洋法权威”们在主流观点形成中的重要作用。特别是以小田滋教授、杉原高嶺教授和水上千之教授为代表的东北大学系列的学者们所带来的影响。因此，在今天的日本国际法学界的主流意见中，无论是“自然延伸原则对抗论”还是“自然延伸原则否定论”，都是以小田滋法官在国际法院的突尼斯—利比亚案中的反对意见为出发点的。但是，正如前述那样，杉原高嶺教授注重的是个案的剖析并在此基础上对判决提出了不少有见地的批判性意见。但是他似乎无意对划界的一般性规则进行阐述。与此相反，水上千之教授更积极地围绕划界的一般性规则，试图对判例进行归纳和总结。

下文中将围绕中日两国在东海大陆架划界中“自然延伸原则”和“中间线原则”的对立这一主线，以日本学者否定“自然延伸原则”的主张为主要阐述对象。囿于篇幅，本文主要是对日本国际法学界有关大陆架划界的一般性原则上的论点的变化过程进行描述。对其论点的评论和批判以及对中日大陆架划界问题上的观点将另行行文阐述。

二、对日本国际法学界在大陆架划界问题上的观点整理：自然延伸否定论形成的三个过程

结论上，日本学者对自然延伸原则是怀疑和否定的。但是日本学界中的自然延伸否定论的形成实际上可以分为三个过程。第一为“自然延伸后退论”（大致到突尼斯—利比亚案前后）；第二是以突尼斯—利比亚案中小田滋法官和埃文森法官反对意见为代表的，由第三次联合国海洋法大会的 200 海里专属经济区制度的冲击而带来的“自然延伸对抗论”；最后是利比亚—马耳他案及其之后的彻底的“自然延伸否定论”。

（一）“自然延伸后退论”

“自然延伸后退论”的逻辑，根据其判例研读和分析，主要表现在两个方面。首先，“后退论”必然依赖于自然延伸原则的确立。这也是 1969 年北海大陆架案

中明确了的并为日本学者研读所确认的。[6] 其次，“后退论”表现为对早期案例（利比亚—马耳他之前）中自然延伸的消极适用的误读，即忽视了法院对海槽、大陆架地质情况的强调。例如，在英法大陆架仲裁案中，仲裁庭认为自然延伸原则是非绝对的，而是依从于特别的限制，自然延伸原则只是描述了问题而不是解决了问题。[7] 对此古贺教授认为，英法大陆架仲裁案中的判决中习惯法的适用实际上是对“等距离＋特别事项”原则的适用。是这一原则而不是北海大陆架案中依据于大陆架基本（物理）性质确定的自然延伸原则，才是当事国达到“公平”合意应当适用的基本原则。[8] 尾崎教授在评述英法大陆架仲裁案也说：“本案判决是对北海大陆架案中可以说是绝对强调的‘领土自然延伸的原则’明确地给予了消极的评价。根据本判决，该原则无法使大陆架划界问题得到统一的解决。（本案显示）自然延伸原则在划界中虽不能无视，但也不可绝对地对待。”[9]

与此相对照，对于从上述两案例中引伸出“自然延伸原则”后退说，有些学者是谨慎的。松田幹夫认为，在突尼斯—利比亚案中，法院只是没去确认自然延伸的有利之处，因而没有采用反映在《联合国海洋法公约》第 76 条第 1 款上的自然

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6 唯一的例外是高林秀雄教授。尽管他不反对自然延伸原则作为习惯法规则的确立，但对法院确定其为习惯法规则的方法提出质疑。在北海大陆架案中，法院所依据的《大陆架公约》第 1、第 2、第 3 条都没有提到自然延伸。但法院的观点是“以自然延伸为基础的《杜鲁门宣言》具有特殊的地位，是有关大陆架问题实定法的出发点……为《大陆架公约》第 2 条所反映。”（North Sea Continental Shelf Cases. *ICJ Report*, 1969, para. 47）。对此，高林教授认为判决是在《杜鲁门宣言》到《大陆架公约》的延长线上确定了有关大陆架的习惯法规则。但高林教授对法院在这一问题上的习惯法认定方法加以怀疑。法院是以《大陆架公约》第 1、2、3 条不允许被保留，该 3 条是习惯法的法典化的依据。高林教授认为本质上习惯法认定的一般方法，即国家实践加法的信念的方法也应该在习惯法的法典化的评价上适用。法院不应该舍此方法而另以保留允许与否作为习惯法法典化判定的依据。如果用前者作为法典化判定基准的话，高林教授认为，到 1958 年《大陆架公约》通过时为止，各国实际上对该公约第 1、2、3 条的主张并不是广泛一致的。另外，对一、二、三条的法的信念的抽出也是困难的。尽管在结论上，高林教授结合大陆架的本质对北海大陆架案就沿岸国对大陸架的管辖权的地理范围给出了重要的指示，应该得到较高的评价。但从他对方法的质疑上看，应该还是说对自然延伸原则是有所保留的。见，高林秀雄「大陸棚制度と慣習国際法 —— 北海大陸棚事件判決に関連して」『龍谷法学』第二巻二，三，四合併号（1971）18~19 頁，32 頁。

7 Court of Arbitration, The United Kingdom and the French Republic, Decisions in the Case concerning Delimitation of the Continental Shelf, *International Legal Materials*, Vol. 18, 1979, p. 397, para. 91.

8 古賀衛「英仏大陸棚事件」田畑茂二郎等編集『判例国際法』東信堂（2002）168 頁。

9 尾崎重義「英仏大陸棚境界画定事件」波多野里望･筒井若水編著『国際判例研究 —— 領土･国境紛争』東京大学出版会（1979）285 頁。

延伸概念。相反，法院更重视《公约》第83条中“解决的公平性”。[10]芹田教授也认为，自1969年北海大陆架案以来确认的“自然延伸”为基础的公平原则划界传统，到本案告一段落，但这主要是因为法院考虑到利害关系双方的利益并对其进行平等化处理的结果。[11]

（二）“自然延伸对抗论”

“自然延伸对抗论”的主要论题是有关《联合国海洋法公约》第56(1)(a)条、第56(3)条、第57条、第76(1)条及第77(1)条的解释。中村洸教授在其力作《专属经济区和大陆架的关系》一文中，首先试图从第三次联合国海洋法会议上的《联合国海洋法公约》相关条文的起草过程着手，明确两者之间的关系。中村教授的这一条约解释方法，暗示了《条约法公约》第31条规定的条约解释的一般规则在解释专属经济区和大陆架的关系的相关条文时的局限，因此从起草过程着手明确相关条文。[12]中村教授认为，谈判过程中有关自然延伸原则在大陆架制度上的地位的论述，反映在在现行《联合国海洋法公约》第56(1)(a)、第56(3)条、第57条、第76(1)条及第77(1)条的规定上。但是，以这一规定为出发点的现行海洋法中的专属经济区/大陆架制度，对专属经济区内的自然延伸大陆架（不到200海里的延伸）地位没有加以明确，对该问题的规定仍然是不明确的。[13]

对这一不明确的规定，日本学者认为突尼斯—利比亚案中的小田滋、埃文森两法官的反对意见构成了该解释的起点和基础。埃文森单纯从文理解释的角度，对可能有歧义的草案条文，以其中可能的一种解释作为解释而不说明理由，这很难说解决了中村在草案起草过程研究中指出的相关条文不明确性问题。专属经济区和大陆架的关系的解释问题依然存在，不会因强调其中一种而消失。与此相对，小田滋法官的观点主要集中在其反对意见的第107、126、128、129、130、145段，特别是其第126~130段的“大陆架和专属经济区的关系”这一节。[14]他的解释的结论和埃文森法官一致，即肯定专属经济区内大陆架和专属经济区制度融为一体。

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10 松田幹夫「大陸棚に関する事件」波多野里望・尾崎重義編『国際司法裁判所判決と意見Ⅱ』国際書院（1996）171頁。

11 芹田健太郎「チュニジア・リビア大陸棚事件」田畑茂二郎・太寿堂鼎編『ケースブック国際法（新版）』有信堂高文社（1987）156頁。

12 《条约法公约》第三十二条（解释之补充资料）：为证实由适用第三十一条所得之意义起见，或遇依第三十一条作解释而：（甲）意义仍属不明或难解；或（乙）所获结果显属荒谬或不合理时，为确定其意义起见，得使用解释之补充资料，包括条约之准备工作及缔约之情况在内。

13 中村洸「排他的経済水域と大陸棚の関係」山本草二・杉原高嶺編『海洋法の歴史と展望：小田滋先生還暦記念』有斐閣（1986）43~44頁。

14 Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, Judgment, *I. C. J. Reports* 1982, pp. 231~234.

但是，小田滋法官的解释方法上不限于单纯的文理性阐述，它主要用排除法排除两种可能解释中可能导致不合理结果的一种并由此来确定另一种解释。

（三）“自然延伸否定论”

“自然延伸否定论”体现在对国际法院的利比亚—马耳他案的评价上。200 海里内大陆架和专属经济区一元化解释，如果说在突尼斯—利比亚案中对该解释还是反对意见居于少数的话，在利比亚—马耳他案中，该解释则为法院判决所采纳。对于利比亚—马耳他案，日本学者认为有 2 个特征。一为这是国际法院处理的第一个有关对岸关系的案件，二为这是《联合国海洋法公约》通过之后的第一个大陆架划界案。[15] 在对该判决研读上，一般性的认识都是该案以 1982 年《联合国海洋法公约》中大陆架和专属经济区的法的连接为根据，在离岸 200 海里内的情形下，地质学的要素作为权原的基础不再有意义。也就是说自然延伸论在大陆架的“权原”问题上大幅后退，代之距离基准有决定性的意义[16]。例如，杉原教授认为，自然延伸原则的习惯法性虽为本案之前的有关案例确认，但是，法院的判决不是一成不变的，会受到国际法发展的影响。而在 200 海里内，国际法的发展结果是大陆架和专属经济区在法律上结合了，自然延伸在此范围内也失去作为权原的意义。[17] 在近期日本学者对 1969 年北海大陆架案的评述中，都断言随着专属经济区制度的导入，自然延伸原则作为大陆架权利的唯一根据不能成立了。[18]

日本国际法学界有关大陆架划界问题观点演变过程和日本政府在 1970 年到 1977 年与韩国就北纬 30.462 度到北纬 32.570 度的东海大陆架共同开发协定上的立场演变是一致的，也必然会反映在正在进行的中日东海大陆架谈判中。作为对日本在东海大陆架划界立场的实证研究的一部分，本文通过对文献收集和观点演变进行综述，一方面作为本人进一步研究的基础，另一方面抛砖引玉，为国内同行提供分析和批判的素材。

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15 杉原高嶺「リビア・マルタ大陸棚事件」『国際法外交雑誌』第 88 卷 1 號（1989）141 頁。

16 杉原高嶺「リビア・マルタ大陸棚事件」『国際法外交雑誌』第 88 卷 1 號（1989）141~142 頁；深町公信「リビア＝マルタ大陸棚境界画定事件」『国際法判例百選』（2001）87 頁。

17 杉原高嶺「リビア・マルタ大陸棚事件」『国際法外交雑誌』第 88 卷 1 號（1989）144 頁。

18 田中則夫「北海大陸棚事件」田畑茂二郎等編集『判例国際法』東信堂（2002）163 頁；尾崎重義「北海大陸棚事件」波多野里望·尾崎重義編『国際司法裁判所判決と意見Ⅱ』国際書院（1996）50 頁。

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2. 尾崎重義　「英仏大陸棚境界画定事件」波多野里望･筒井若水編著『国際判例研究　領土･国境紛争』東京大学出版会（1979）260~286 頁
3. 芹田健太郎　「英仏大陸棚 事件」田畑茂二郎･太寿堂鼎編『ケースブック国際法（新版)』　有信堂高文社（1987）146~151 頁
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2. 芹田健太郎　「チュニジア・リビア大陸棚 事件」田畑茂二郎･太寿堂鼎編『ケースブック国際法（新版)』有信堂高文社（1987）152~156 頁

3. 古賀衛 「チュニジア・リビア大陸棚 事件」 田畑茂二郎等編集『判例国際法』東信堂（2002）169~172 頁

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1. 東寿太郎 「メイン湾境界画定事件」 波多野里望･尾崎重義編『国際司法裁判所判決と意見Ⅱ』国際書院（1996）221~235 頁
2. 高林秀雄 「メイン湾境界画定事件」 田畑茂二郎･太寿堂鼎編『ケースブック国際法（新版）』 有信堂高文社（1987）157~163 頁
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1. 青木隆 「サンピエール・ミクロン海域画定に冠する仲裁判決について」 慶應義塾大学『法学研究』第 67 第 2 號（平成 6 年 2 月）57~59 頁
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1. 富岡仁　「ヤン・マイエン海域境界画定事件」田畑茂二郎等編集『判例国際法』東信堂（2002）181~185 頁

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中国与海洋邻国初步建立新型渔业关系

张良福 *

内容摘要：中国政府在 1996 年 5 月批准加入《联合国海洋法公约》（以下简称“《公约》”）和 1998 年颁布《中华人民共和国专属经济区和大陆架法》后，就以《公约》作为处理与周边邻国海洋渔业关系的基本法律依据，分别于 1997 年 11 月 11 日签署《中日渔业协定》、2000 年 8 月 3 日签署《中韩渔业协定》、2000 年 12 月 25 日签署《中越北部湾渔业合作协定》。3 个渔业协定的签署和生效实施，标志着中国与海洋邻国建立起以 200 海里专属经济区制度为法律基础、以可持续发展为目标的新型渔业关系。这是中国在遵循和落实《公约》所确立的现代海洋法律制度方面的重要实践，充分说明中国信守国际法，是一个和平、合作、负责任的大国。中国与海洋邻国建立新型渔业关系具有重要的地缘政治影响，是促进和影响东亚地区乃至整个亚太地区和平稳定的积极因素。三个渔业协定对亚洲乃至世界其他国家和地区处理渔业关系具有重要的借鉴和示范意义，对现代国际海洋法的发展也具有积极影响和作用。

关键词：《联合国海洋法公约》 专属经济区 渔业协定 海域划界 东海 黄海 南海 北部湾

中国既是一个陆地国家，又是一个海洋大国。从北至南，中国面临的海域依次是渤海、黄海、东海、台湾以东太平洋的一隅、南海等 5 个海区。大陆海岸线北起鸭绿江口，南到北仑河口，大约长 18400 公里。岛屿海岸线长 14000 公里。[1] 1996 年 5 月中国批准加入《联合国海洋法公约》（以下简称“《公约》”），随后中国以《公约》为依据分别与日本、韩国、越南在 1997 年 11 月 11 日、2000 年 8 月 3 日、2000 年 12 月 25 日签署了《中日渔业协定》、《中韩渔业协定》和《中越北部湾渔业合作协定》。

中日、中韩和中越渔业协定的签署和实施，是中国在遵循和落实《公约》所确立的新的海洋法律制度方面采取的重大行动，标志着中国与海洋邻国初步建立起以《公约》为基础的新型渔业关系；标志着专属经济区制度在中国周边海域的实行，中国的海洋渔业管理制度发生了根本性的转变。

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1 《中国海洋年鉴（1991—1993）》，北京：海洋出版社 1994 年版，第 3 页。

中日、中韩和中越渔业协定的签署和实施，对国际海洋法的发展也具有积极影响和作用，对亚洲乃至世界其他国家和地区处理渔业关系也具有重要的借鉴和示范意义。

一、90 年代中期前中国与邻国海洋渔业关系的基本特征:领海外公海捕鱼自由

历史上，东海和黄海是中国、日本、朝鲜、韩国四国渔民共同利用的海域，尽管自 20 世纪 70 年代起世界范围内出现沿海国扩大海洋权益，要求建立超出领海之外的渔业权利或 200 海里海洋权益的潮流，乃至到 1982 年《公约》正式确立 200 海里专属经济区制度，但一直到 20 世纪 90 年代中期以前，传统国际法中的领海之外的公海捕鱼自由的原则支配着中日朝韩四国在东海和黄海的渔业活动。

中日在东海的渔业合作关系由来已久。20 世纪 50 年代初，日本渔船曾大批进入中国沿海渔场，掠夺水产资源，损坏中国的渔船网具，为此双方发生渔业争端。为和平解决争端，中日两国民间渔业团体于 1955 年开始了第一次中日民间渔业谈判，并签订了《中华人民共和国渔业协会和日本国日中渔业协会关于黄海、东海渔业的协定》。1963 年、1965 年又分别签订了第二次、第三次民间渔业协定。1970 年为补充协定条款，双方渔协代表团签署了会谈公报，同年 12 月又签订了关于灯光围网渔船捕鱼的规定，并将此作为中日民间渔业协定的组成部分。据统计，中、日两国曾 12 次签订《中日民间渔业协定》，以协调两国在东海区的渔业生产，调解两国间的渔业纠纷；1972 年中日邦交正常化后，中日两国政府经过协商谈判于 1975 年 8 月 15 日签订了《中华人民共和国和日本国渔业协定》。但中日之间这些民间和正式的协定，其基本法律依据是领海外公海捕鱼自由的传统国际法原则，尽管在这个时期，国际社会关于 200 海里捕鱼权和专属经济区的法律制度正处在形成过程中，但中日双方都采取了继续适用传统国际海洋法的态度，即“将两国领海外的海域作为协定水域，实行船旗国管辖”。[2]

中、韩两国渔民长期以来共同在黄海和东海从事渔业生产，实行领海外公海捕鱼自由的习惯。在中、韩建交之前，两国间的渔业纠纷都由双方民间组织（即中国东黄海渔业协会和韩国水产业协同组合中央会）协商解决。1992 年中、韩两国建交后，有关渔业问题开始通过两国政府有关部门沟通和处理。

在 20 世纪 70 年代中期以前，中日韩三国在东海和黄海的渔业关系，尤其是以中日渔业协定和 1965 年日韩渔业协定所体现的渔业关系，在法律上是依据领海外公海捕鱼自由的传统国际海洋法；在政治和经济上，主要是限制日本渔民渔船

2 中国农业部副部长齐景发 2000 年 3 月 23 日在新闻发布会上的讲话，下载于 http://221.213.46.35/zcfg/rule_0042.htm，2005 年 11 月 22 日。

到中、韩两国近海海域捕鱼，因为在 20 世纪 70 年代中期以前，日本在渔业捕捞技术和力量上都超过了中韩两国。但自 20 世纪 70 年代中期起，随着中韩两国渔业生产的不断发展，三国渔业生产能力发生了向有利于中韩两国的转变，再加上 200 海里专属经济区制度的兴起，日本越来越重视保护本国的渔业利益，开始主动要求与中韩建立新的渔业关系。但这种努力直到 20 世纪 90 年代才有结果。

北部湾一直是中越两国渔民的共用水域，历史上双方的渔船都有到对方近海生产的习惯。两国渔民在北部湾海域各海区自由捕鱼。1957 年 4 月中越签订《中越北部湾帆船渔业协定》，对双方渔民进入对方海岸外 6 海里内海域捕鱼进行限制；1961 年对该协定进行修改，改为对双方渔民进入对方海岸外 12 海里内海域捕鱼进行限制；1963 年签订新的渔业合作协定，规定双方渔船不得进入对方 12 海里内海域捕鱼。1969 年起，越方不再与中方商谈中方渔船进入越领海内捕鱼事宜。但在 20 世纪 70 年代中期以前，中国渔船的作业范围遍及越南领海外的整个湾内水域。从 20 世纪 70 年代中期至 90 年代中期，由于中越政治关系的恶化，越南开始抓扣和驱赶在北部湾西部及中部海域作业的中国渔船。但从法律关系上来说，两国渔民都是依据领海外公海捕鱼自由的传统国际海洋法，在北部湾海域享有自由捕鱼的权利。

二、中国和周边海洋邻国对 200 海里专属经济区制度的基本态度和立场

中国自 20 世纪 70 年代起，主要是出于支持第三世界发展中国家反对美苏等海洋大国海洋霸权主义的国际政治斗争考虑，一直明确支持广大拉丁美洲国家扩大 200 海里海洋权益的主张，并且与广大发展中国家一道积极参加了第三次联合国海洋法会议和《公约》的制订工作，为 1982 年《公约》的形成作出了重要贡献。中国是 1982 年 12 月 10 日《公约》开放签署时的首批签署国家之一。

但实际上，中国在海洋地理上处于非常不利地位，可利用海洋的条件明显不如朝鲜、日本、韩国、菲律宾、越南、印尼等周边邻国。根据《公约》有关专属经济区和大陆架的规定，中国可管辖海域面积约 300 万平方公里，其中与海洋邻国因主张重叠而产生争议的海域约 150 万平方公里。就中国的渔业利益来说，中国渔民的传统渔场大部分都位于邻国的 200 海里专属经济区制度内。专属经济区制度的确立宣告领海以外海域自由捕鱼的时代结束，对中国的渔业资源和海洋权益产生极为不利的影响，使中国的传统捕捞业面临严峻的挑战。因此，中国尽管在国际政治上积极支持 200 海里专属经济区制度，但在具体实施到中国海域时则非常慎重。直到 1996 年 5 月 15 日中国才批准加入《公约》，1998 年 6 月 26 日才颁布《中华人民共和国专属经济区和大陆架法》。

日本在第三次联合国海洋法会议上一直反对设定 200 海里的专属经济区，

因为在 20 世纪 70 年代中期，日本渔业捕捞量中接近一半是在其他国家 200 海里的海域内捕捞的。为了尽可能地保护它的渔业利益，日本在海底委员会和第三次联合国海洋法会议上提出了大量的旨在否定或削弱 200 海里专属经济区制度的建议。但是到了 20 世纪 70 年代中后期，越来越多的国家宣布建立 200 海里渔业区或专属经济区，日本渔民不断被别国驱赶，这极大地刺激了日本政府。日本政府意识到，如果再不设立渔业水域，不仅由于外国宣布 200 海里渔业区会对日本远洋渔业造成损失，而且外国渔船在本国 200 海里水域作业，也会给本国沿岸渔业带来很大影响。鉴于上述原因，1977 年 5 月 2 日日本公布了《关于渔业水域的临时措施法》（法律第 31 号），声称是为了适应国际社会向新的海洋秩序迅速发展的形势，谋求对水产资源的保护和管理而制定的，宣布建立宽度为 200 海里“渔业水域”。从日本主张的权利性质来看，日本的 200 海里渔业水域更多意义上类似于传统海洋法上的渔区，尚不是当时第三次联合国海洋法会议上讨论的专属经济区概念，可以看作是日本在正式建立 200 海里专属经济区之前采取的一种“临时或过渡措施”。但日本在公布该 200 海里渔业水域临时措施法的同时，宣布其 200 海里渔业水域不扩及到日本海西部和东海，该法的主要内容不适用于同中国和韩国的渔业关系，允许中韩两国渔民继续在日本周围海域捕鱼，直到与这些国家谈判新的渔业协定时为止。日本之所以作出“中韩两国渔民例外”的选择，一方面是为了避免引发同中国、韩国的摩擦；另一方面，也是更重要的，是出于非常现实的利益考虑，因为日本允许中、韩渔民继续在日本周围海域捕鱼的交换条件是，日本渔民也能继续在中国、韩国周围海域捕鱼。

1996 年 6 月日本决定批准《公约》和建立 200 海里专属经济区。为避免引发同中国、韩国的摩擦，日本采取“全面设置，部分适用”的政策，即“全面设置 200 海里经济水域，但同意中、韩两国渔船在这一水域捕鱼”，并决定将“完全依据《公约》的精神，尽快与中国、韩国谈判和签署新的渔业协定”。

韩国是东亚地区第一个扩大海洋管辖权的国家，早在 1952 年就发表了“关于毗连海域主权的总统声明”，韩国把离其海岸约 20~200 海里线内发现的一切生物资源和矿物资源置于其管辖之下，这条线叫“李承晚线”（以宣布者的名字命名）。当时，中日两国都不予以承认，由此引发不少渔业争端，例如，由此引发了长达 14 年的日韩渔业争端，直到 1965 年两国签订渔业协定。该协定是在公海捕鱼自由的原则上签订的。韩国在这个协定中向日本作了较大让步，基本上放弃了 1952 年声明确定的“李承晚线”。日韩渔业协定规定了韩国的 12 海里渔区，同时承认日本渔民可以在 12 海里渔区之外捕鱼。此协定一直有效到 1998 年日韩签署新渔业协定。

韩国参加了第三次联合国海洋法会议，并于 1983 年 3 月 14 日签署了《公约》，但直到 1996 年 8 月，才正式宣布建立 200 海里专属经济区。韩国迟迟不宣布 200 海里专属经济区的根本原因是韩国也是世界上的远洋渔业大国，远洋渔业

的利益远远超过了其保护沿海渔业资源的需要。韩国不宣布专属经济区的另一个原因是，不希望在东北亚这种半闭海的情况下，因宣布专属经济区而刺激周围邻国或导致与周围邻国发生矛盾。事实上，韩国在 1996 年 8 月颁布《专属经济区法令》，是在日本已于 1996 年 6 月颁布了《专属经济区和大陆架法》之后才正式作出决定的。

总之，到 20 世纪 90 年代中期，《公约》已经生效，中国及周边海洋邻国特别是日、韩、越南等国相继批准 1982 年《公约》，并建立与之相配套的海洋权益法律体系。越南 1977 年 5 月 12 日发表《关于越南领海、毗连区、专属经济区和大陆架的声明》，1982 年 11 月 12 日发表《关于越南领海基线的声明》，1994 年 6 月 23 日批准《公约》。日本 1996 年 6 月批准《公约》并正式颁布《专属经济区和大陆架法》。韩国 1996 年 1 月 29 日批准《公约》，1996 年 8 月 8 日颁布《专属经济区法》，宣布建立 200 海里专属经济区。中国 1996 年 5 月 15 日批准加入《公约》。1998 年 6 月 26 日颁布《中华人民共和国专属经济区和大陆架法》。

中、日、韩、越南相继批准 1982 年《公约》并建立与之相配套的海洋权益法律体系，一方面使建立以《公约》为基础的新型渔业关系成为中国与海洋邻国必须履行的国际条约责任和义务，另一方面也为中国与海洋邻国建立新型渔业关系提供了共同的法律基础。

就是在 20 世纪 90 年代国际和国内海洋法律制度变更的背景下，中国与日本、韩国、越南开始谈判和签署以《公约》为基础的新型渔业关系协定。

三、中日、中韩渔业协定和中越北部湾渔业合作协定的主要内容简介

（一）《中日渔业协定》

1994 年 11 月 16 日《公约》正式生效，1996 年中国和日本相继批准《公约》，从而中日双方有责任和义务在东海以专属经济区体制为基础建立和调整新的渔业关系。为此，中日两国从 1995 年开始就大陆架和专属经济区划界等问题进行非正式的磋商。在东海划界问题完成之前，为了维护东海的渔业秩序，两国决定先就渔业安排问题进行磋商。1996 年起，中日海洋及渔业问题磋商进入正式磋商阶段。双方集中讨论划界前在东海的渔业安排。通过 8 次正式磋商及多次团长和工作组会议，于 1997 年 9 月初就签订新的《中华人民共和国和日本国渔业协定》的主要问题达成原则协议，11 月 11 日中国政府总理李鹏访问日本时，中国驻日本大使徐敦信和日本外务大臣小渊惠三在东京签署该协定。

《中日渔业协定》签署后，双方于 1998 年上半年完成了协定生效的各自国内法律手续，并于 1998 年下半年开始就协定生效有关问题进行协商。到 2000 年 2

月 27 日，两国政府代表团最终在北京就存在的主要分歧达成协议，中国农业部部长陈耀邦与日本国农林水产大臣玉泽德一郎签署了会谈纪要，约定新中日渔业协定于 2000 年 6 月 1 日生效。

《中日渔业协定》分为正文 14 条和 2 个附件，以及协定议事录和双方信件，主要内容有：

（1）“暂定措施水域”：在东海大部分海域，北纬 27 度至 30 度 40 分，距两国领海基线 52 海里外，设立“中日渔业协定暂定措施水域”，简称“暂定措施水域”，由双方共同管理。如违反规定，由中、日双方按各自国内法处理本国的渔船。

（2）在东海南部（暂定措施水域以南），即北纬 27 度以南的东海以及东海以南，东京 125 度 30 分以西的海域，维持现有的渔业关系。

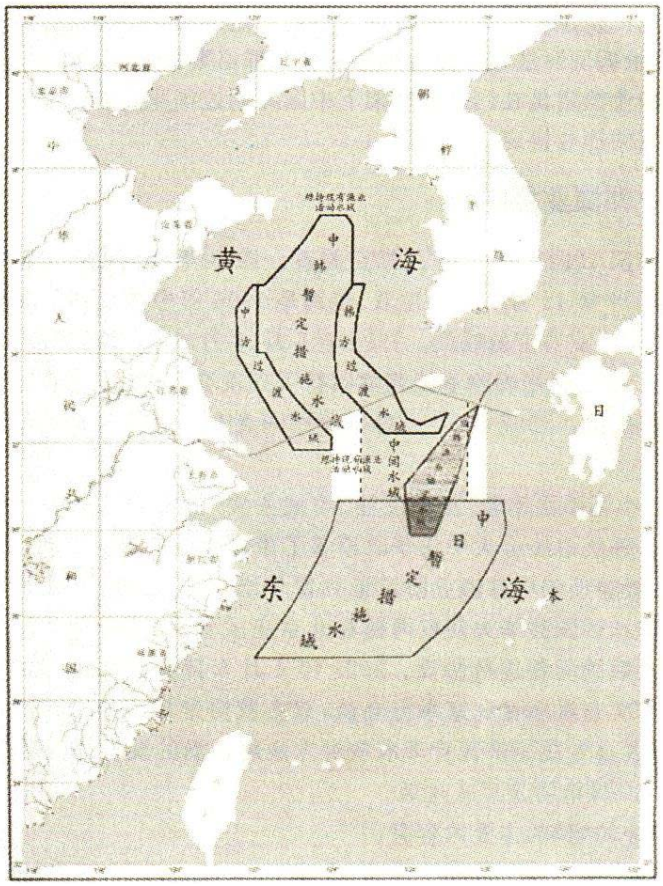

图 1 中日、中韩渔业协定水域图

（3）“中间水域”：在东海北部（暂定措施水域以北），即北纬 30 度 40 分以北水域，由于存在中、日、韩三国海域划界问题，中方主张维持现状。而日方要求实施专属经济区制度，要求到日方一侧水域作业的中国渔船须向日方申领入渔许

可证，接受日方管理。为此，双方自 1998 年下半年起，进行了近 20 次磋商，一直未能达成一致。2000 年 2 月 27 日中国农业部长与日本农林水产省大臣举行部长级会谈，双方最终决定在东京 124 度 45 分至东京 127 度 30 分之间设立互相不需对方许可即可作业的“中间水域”，[3] 基本维持现状，双方渔船无需领取对方许可证即可作业，但应对本国船数加以控制，并交换渔获量资料；在中间水域东侧，日方给予中方 900 个入渔许可证，在该水域西侧中方给予日方 317 个入渔许可证。

（4）实行专属经济区管理的水域。中日双方决定在没有海域划界问题的海域实行专属经济区管理，这一海域在“暂定措施水域”和“中间水域”东西两侧，即靠近两国领海外侧的水域，分别由中、日两国管理。中日双方根据互惠原则及有关法令，准许另一方的国民及渔船在本国专属经济区从事渔业活动。双方为确保另一方的国民及渔船遵守本国有关法令所规定的海洋生物资源的养护措施及其他条件，可根据国际法在本国专属经济区采取必要措施等。

新中日渔业协定是在《公约》框架下中国与周边国家达成的第一个向专属经济区制度过渡的渔业协定。

（二）《中韩渔业协定》

中国和韩国 1992 年建立正式外交关系。1993 年两国进行了首次双边渔业协定磋商。1994 年 11 月《公约》生效、特别是 1996 年中国和韩国都批准《公约》后，两国加快了渔业协定的磋商。1996 年 5 月、8 月、11 月两国进行了三次政府间渔业会谈。1997 年中韩渔业谈判共举行了 5 次会议，双方主要协商划界前黄海的渔业安排问题。1997 年 12 月韩国原则同意在黄海部分水域设置暂定措施水域。

1998 年，中韩两国本着“互谅互让、坦诚务实”的指导原则，经过 7 轮磋商，于 11 月 11 日韩国总统金大中访华时草签了中韩渔业协定。至此，历时 5 年，经近 20 轮工作级会谈的中韩渔业协定谈判宣告结束。[4] 2000 年 8 月 3 日中国外交部长唐家璇和韩国驻华大使权丙铉在北京正式签署《中韩渔业协定》。随后，两国又就一些后续问题进行协商。2001 年 4 月 5 日农业部副部长齐景发与韩国海洋水产部次官洪承在北京举行会谈，双方就协定规定的维持现有渔业活动水域的范围、各自专属经济区管理水域对方渔船入渔的规模等问题达成一致。[5] 2001 年 6 月 30 日该协定正式生效。

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3 《中日就新渔业协定生效问题达成协议》，载于《人民日报》2000 年 2 月 28 日，下载于 http://www.cfm.com.cn/20010804/ca2623.htm，2005 年 11 月 22 日。

4 中华人民共和国外交部政策研究室编：《中国外交（1999 年版）》，北京：世界知识出版社 1999 年版，第 670 页。

5 《〈中韩渔业协定〉生效在即，专属经济区管理将加强》，载于《光明日报》2001 年 4 月 6 日，下载于 http://www.gmw.cn/0lgmrb/2001—04/06/GB/04-18743-0-GMA4-009.htm，2005 年 11 月 22 日。

《中韩渔业协定》的主要内容有：

（1）“暂定措施水域”：设定于北纬 32 度 11 分至北纬 37 度之间的黄海水域，由中韩双方设立的中韩渔业联合委员会决定采取共同的养护措施和量的管理措施。对违反规定者，双方按各自的国内法处理本国渔船。

（2）“过渡水域”：设定于“暂定措施水域”两侧，在两国领海外各设一个（中方一侧面积为 26367 平方公里，韩方一侧为 28926 平方公里），有效期为 4 年。为在过渡水域逐步实施专属经济区制度，双方应采取适当措施，逐步调整并减少在对方一侧过渡水域作业的本国国民及渔船的渔业活动。4 年期满后双方两侧的过渡水域按各自的专属经济区进行管理。

暂定措施水域和过渡水域在性质上没有本质区别，只是期限上的区别。4 年期满后双方两侧的过渡水域按各自的专属经济区进行管理（即从 2005 年 6 月 30 日起，过渡水域已分别纳入中韩两国的专属经济区内）。而暂定措施水域则要在协定期满后双方再作决定。

双方在暂定措施水域和过渡水域，对从事渔业活动的本国国民及渔船采取管理和其他必要措施，不对另一方国民及渔船采取管理及其他措施。一方发现另一方国民及渔船违反中韩渔业联合委员会的决定时，可就事实提醒该国民及渔船注意，并将事实及有关情况通报另一方。另一方应尊重对方的通报，并在采取必要措施后，将结果通知对方。在过渡水域双方还可采取联合监督检查措施，包括联合乘船、勒令停船、登临检查等。换言之，在“暂定措施水域”和“过渡水域”，各自管理各自之渔船和渔民。

（3）“维持现有渔业活动水域”：暂定措施水域北限线所处纬度线以北的部分水域及暂定措施水域和过渡水域以南的部分水域，维持现有渔业活动，不将本国有关渔业的法律、法规适用于缔约另一方的国民及渔船，除非缔约双方另有协议。

（4）“专属经济区管理水域”：中韩双方将各自领海至本国一侧过渡水域之间的海域作为本国的专属经济区管理水域，实行专属经济区制度。中韩双方在考虑各自专属经济区管理水域的海洋生物资源状况、本国捕捞能力、传统渔业活动、相互入渔状况及其他相关因素的情况下，每年决定缔约另一方国民及渔船在本国专属经济区管理水域的可捕鱼种、渔获配额、作业时间、作业区域及其他作业条件，并通报给另一方。中韩任何一方的国民及渔船进入对方专属经济区管理水域从事渔业活动，应遵守对方国家有关法律、法规和《中韩渔业协定》的有关规定。

（三）《中越北部湾渔业合作协定》

1991 年中越两国关系实现正常化。此后，双方都认为有必要尽早解决包括北部湾在内的边界领土问题，成立了包括外交、国防、渔业、测绘、地方政府等部门组成的政府边界谈判代表团，启动了中越北部湾划界谈判史上的第三次划界谈

判。[6] 在北部湾划界谈判中，中方一直坚持中国在北部湾的传统捕鱼权，坚持在一揽子解决划界问题的同时，必须同时解决捕鱼问题，对中国沿岸渔民的传统权益作出适当安排。历经 20 轮磋商，2000 年 12 月 25 日，中国和越南两国外长在北京签署《中越关于两国在北部湾领海、专属经济区和大陆架的划界协定》的同时，中国农业部长和越南水产部长谢光玉签署了《中越北部湾渔业合作协定》。之后从 2001 年 4 月起，双方的渔业主管部门又围绕渔业协定中有关剩余问题经过 3 年、先后 20 轮磋商，最终就所有问题达成协议，并于 2004 年 4 月签署了《中越北部湾渔业合作协定补充议定书》。在完成了各自国内法律手续后，2004 年 6 月 30 日《中越北部湾渔业合作协定》正式生效。

《中越北部湾渔业合作协定》在北部湾内设立了“共同渔区”、“过渡性安排水域”和“小型渔船缓冲区”3 个不同性质的水域。

（1）“共同渔区”：在北部湾封口线以北、北纬 20 度以南、距北部湾划界协定所确定的分界线各自 30.5 海里的两国专属经济区设立共同渔区。面积为 3.3 万多平方公里。有效期为 12 年，期满后再自动延长 3 年，共 15 年。双方在共同渔区内进行长期渔业合作。在共同渔区内，生物资源的养护、管理和利用由中越双方共同制订《北部湾共同渔区渔业资源养护和管理规定》来加以制约；共同渔区实行渔业捕捞许可制度和休渔制度，凡进入共同渔区从事渔业活动的渔船须向本国有关部门提出申请，并在领取捕捞许可证后，方可进入共同渔区从事渔业活动；每年确定在共同渔区内的作业渔船数量；中越双方的监督机关有权对进入共同渔区己方一侧水域的双方渔船和人员进行监督检查。

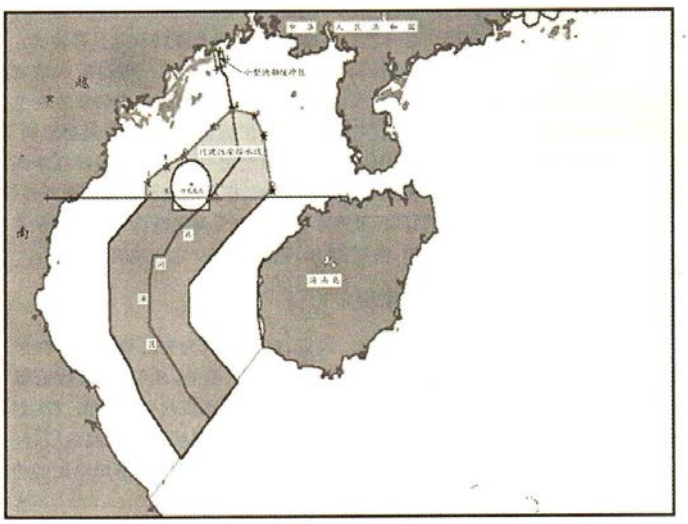

图 2 《中越北部湾渔业合作协定》示意图

6 中越北部湾划界谈判前后历时 27 年，分 3 个阶段：一是 1974 年，二是 1977–1978 年，三是 1992–2000 年。前两次谈判由于双方立场相差甚远，无果而终。

（2）“过渡性安排水域”：中越两国在共同渔区以北（自北纬 20 度起算）设立过渡性安排水域，实行过渡性安排。面积约为 9000 平方公里。在过渡性安排水域内，双方按照北部湾海域划界线对己方一侧水域的渔船进行管理；进入对方过渡性安排水域作业的渔船必须遵守对方的法律、法规，渔船数量必须逐年减少。过渡性安排水域的期限仅为 4 年，过渡期结束后，该安排水域将改变为中越两国各自的专属经济区。

（3）“小型渔船缓冲区”：由于中越两国领海相邻地区的作业渔船主要是小型渔船，这些渔船航海设备差，划界后彼此容易误入对方水域而引起纠纷，为避免这个问题，双方商定在两国领海相邻部分（北仑河口）设立小型渔船缓冲区。面积约为 177 平方公里，为永久性设立，自分界线第一界点起沿分界线向南延伸 10 海里、距分界线各自 3 海里的范围内设立。在小型渔船缓冲区内，一方发现另一方在己方水域从事渔业活动，可予以警告，并采取必要措施令其离开该水域，但应克制：不扣留，不逮捕，不处罚或使用武力。若发生争议，应报告渔委会由其协调解决。

（4）专属经济区管理水域。根据协定，北部湾封口线以北、共同渔区和过渡性安排水域外侧界限以外的水域，由各方按专属经济区制度管辖。其中，过渡性安排水域在 4 年后变为中越两国各自的专属经济区，即在北纬 20 度以北水域，以划定的分界线为界，由两国分别管辖。

四、中日、中韩渔业协定和中越北部湾渔业合作协定确立了以专属经济区制度为基础的新型渔业关系

前面已经提到，中国及其海洋邻国在 20 世纪 90 年代中后期相继批准《公约》并颁布了各自的专属经济区和大陆架法令。这意味着，中国及其海洋邻国在处理相互海洋关系时有了共同的法律基础——《公约》，同时也有了共同的法律责任和义务，即必须、也必然要履行《公约》所确立的新海洋法律制度。中日、中韩渔业协定和中越北部湾渔业合作协定的签署和生效，是中国政府依据《公约》，妥善处理与邻国海洋关系的重要实践。

1. 在上述 3 个渔业协定中，中国与日本、韩国、越南都开宗明义指出，双方以《公约》的有关规定，来处理相互渔业关系，实行专属经济区制度

《中韩渔业协定》开宗明义就规定：中韩两国政府“根据 1982 年 12 月 10 日《公约》的有关规定，为养护和合理利用共同关心的海洋生物资源，维护海上正常作业秩序，加强和发展渔业领域的相互合作，经友好协商，达成协议”，协定的适用水域为中华人民共和国的专属经济区和大韩民国的专属经济区。

《中日渔业协定》也开宗明义规定：中日两国政府“为按照制订于 1982 年 12 月 10 日的《公约》的宗旨建立两国间新的渔业秩序，养护和合理利用共同关心的海洋生物资源，维护海上正常作业秩序，经友好协商，达成协议”，协定的适用水

域为中华人民共和国的专属经济区和日本国的专属经济区。

2.《公约》中有关专属经济区制度的规定在 3 个渔业协定的具体条款中得到了充分的尊重和体现

中日、中韩、中越 3 个渔业协定都确认实行专属经济区制度的原则，确认沿海国对专属经济区生物资源的主权权利和对海洋生物资源的养护、管理和利用的主权权利和责任；与此同时，确立了在专属经济区相互入渔的原则，并通过具体措施予以保障。这完全符合《公约》关于专属经济区制度的规定和其他有关规定。

例如，在《中日渔业协定》和《中韩渔业协定》的第 215 条分别规定：

（1）缔约各方根据互惠原则，按照本协定及本国有关法令，准许缔约另一方的国民及渔船在本国专属经济区从事渔业活动；

（2）向缔约另一方的国民及渔船颁发有关入渔的许可证，并可就颁发许可证收取适当费用；缔约各方的国民及渔船在缔约另一方专属经济区按照本协定及缔约另一方的有关法令从事渔业活动；

（3）缔约各方考虑到本国专属经济区资源状况、本国捕捞能力、传统渔业活动、相互入渔状况及其他相关因素，每年决定在本国专属经济区的缔约另一方国民及渔船的可捕鱼种、渔获配额、作业区域及其他作业条件；

（4）缔约各方应采取必要措施，确保本国国民及渔船在缔约另一方专属经济区从事渔业活动时，遵守本协定的规定以及缔约另一方有关法令所规定的海洋生物资源的养护措施及其他条件；

（5）缔约各方应及时向缔约另一方通报本国有关法令所规定的海洋生物资源的养护措施及其他条件；

（6）缔约各方为确保缔约另一方的国民及渔船遵守本国有关法令所规定的海洋生物资源的养护措施及其他条件，可根据国际法在本国专属经济区采取必要措施。

《中越北部湾渔业合作协定》在规定中越双方共同行使对“共同渔区”资源的利用、养护和管理权利、责任的同时，规定中越各自对在共同渔区从事渔业活动的己方渔船实行捕捞许可制度，对进入共同渔区内己方一侧水域的双方国民和渔船进行监督检查，对违规行为进行处理等。

3. 中日、中韩、中越始终以谅解与合作的精神来处理相互渔业关系

中日、中韩、中越三个渔业协定在对海洋生物资源的养护、管理和利用方面设立了一系列共同合作性质的安排和规定，这是中国和日、韩、越在严格遵循和实践《公约》的宗旨、原则和精神，以及《公约》的具体规定的基础上的积极探索和创新，具有示范作用和意义。

例如，中日、中韩、中越都在协定中承诺在渔业科学研究和海洋生物资源养护方面进行合作，并有包括像“共同渔区制度”、以及在“暂定措施水域”采取共同的养护措施和量的管理措施等的具体措施安排，完全符合《公约》所提倡的“以互

相谅解和合作的精神解决与海洋法有关的一切问题”，以及关于专属经济区制度的具体规定、关于闭海或半闭海、海洋科研、海洋环保等的规定。需要特别指出的是，中日、中韩渔业协定中的“暂定措施水域”安排完全符合《公约》第 74 条关于在达成专属经济区划界协议前“有关各方应基于谅解和合作精神，尽一切努力作出实际性的临时安排”的规定，是中日、中韩以《公约》为指导的创造性实践。

总之，正如中国政府在评介三个渔业协定时所指出的：

《中日渔业协定》“是我国与邻国签署并即将生效的第一个向专属经济区制度过渡的渔业协定”，“是两国根据《公约》的有关规定，在两国海域划界尚未完成之前，对渔业作出的一种过渡性安排”。[7] 中国农业部在向沿海各省、自治区、直辖市及计划单列市人民政府发出的《关于实施中日渔业协定有关问题的通知》中还强调指出：“新中日渔业协定是我国在世界海洋制度发生变革后与周边国家签署的第一个渔业协定，是中日两国关系中的一件大事。协定能否顺利生效和执行，涉及到今后我国与其他周边国家建立和发展双边渔业关系，也影响到中日两国的政治关系。”

“《中韩渔业协定》是继《中日渔业协定》之后，我国与周边国家签署并生效的第二个双边渔业协定。”[8] “中韩渔业协定的签署是中韩渔业关系史上的大事，标志着两国渔业关系进入了一个新的发展阶段，对于保护黄海渔业资源、维护两国渔业利益具有十分重要的意义，也为中韩两国在完成海域划界前维护正常有序的渔业关系提供了保证。”[9]

《中越北部湾渔业合作协定》的签署和生效“标志着在北部湾海域中越两国渔民已结束完全自由捕鱼时代，北部湾渔业生产进入按专属经济区制度的国际惯例进行管理时代”。

“随着中日、中韩、中越双边渔业协会的签署、生效，海洋渔业开始由领海外自由捕捞向专属经济区制度过渡”。[10]

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7 中国农业部副部长齐景发 2000 年 3 月 23 日在新闻发布会上的讲话，下载于 http://www.hgyy.org/old/hydd/zryyxd.htm，2005 年 11 月 16 日。

8 2001 年 6 月 29 日农业部副部长齐景发在《中韩渔业协定》生效暨专属经济区渔政巡航开航仪式上的讲话，下载于 http://www.dayoo.com/content/2001-07/03/content_153772.htm，2005 年 11 月 16 日。

9 中华人民共和国外交部政策研究室编：《中国外交（2001 年版）》，北京：世界知识出版社 2001 年版，第 665 页。

10 《农业部部长杜青林在沿海捕捞渔民转产转业工作会议上的讲话（2002 年 8 月 6 日）》，载于《中国海洋年鉴（2003）》，北京：海洋出版社 2003 年版，第 7 页。

五、中日、中韩渔业协定和中越北部湾渔业合作协定的突出特点剖析

由于在中国周边海域存在复杂的地缘政治环境、岛屿归属和海域划界争端、长期习惯形成的传统渔业关系等因素，中国在与日本、韩国、越南确立以《公约》为基础的新型渔业关系过程中，既以《公约》为基本法律依据，又基于睦邻友好、搁置争议、主权平等、谋求合作的精神，兼顾国际法和现实政治、经济的各种考虑，采取了各种独特的处理方法。

1. 设置“暂定措施水域”，以妥善处理专属经济区主张重叠的问题

中日在东海、中韩在黄海的专属经济区主张存在重叠，尚未划界。在此背景下，中日、中韩渔业协定设置了“暂定措施水域”。在“暂定措施水域”内，由中韩、中日采取共同的养护和管理措施，对违反规定者，双方按各自的国内法处理本国渔船（中日渔业协定第 7 条第 2 款及第 3 款的规定、中韩渔业协定第 7 条第 2 款及第 3 款的规定）。这种“各自保留对对方国民适用本国法律，立法权由渔业联合委员会共同行使，执法权由船旗国行使”的特殊管理方式是中国在与日、韩达成专属经济区划界前所采取的一种临时性措施。在这一水域内双方都可以行使主权权利，且主权权利是完全平等的。

2. 设置不同形式的特殊水域使传统渔业关系逐步过渡到新型渔业关系

在中日、中韩、中越渔业协定签署前，基于领海外捕鱼自由原则，中、日、韩、越四国渔民已形成了完全不同于专属经济区制度的传统渔业关系。为确保使传统渔业关系顺利过渡到新型渔业关系，并基于睦邻友好，中日、中韩、中越渔业协定作出了一系列特殊安排。

例如，中越在北部湾内设立了“过渡性安排水域”。“过渡性安排水域”过渡期为 4 年，过渡期结束后，原过渡性安排水域改变为中越两国各自的专属经济区。此外，中越还在北部湾内设立了“共同渔区”。“共同渔区”有效期为 12 年，期满后自动延长 3 年。到期后视双方的意愿通过谈判可以延长。这种在本属中越两国的专属经济区内建立渔业合作区域、适用与专属经济区制度有所不同的特殊渔业政策的做法，根本目的在于使中越双方的渔民逐步向专属经济区制度过渡。

中韩渔业协定中设置了“过渡水域”，该水域设定于“暂定措施水域”两侧，在两国领海外各设一个，有效期为 4 年。中韩双方同意为在过渡水域逐步实施专属经济区制度，双方应采取适当措施，逐步调整并减少在对方一侧过渡水域作业的本国国民及渔船的渔业活动。4 年期满后双方两侧的过渡水域按各自的专属经济区进行管理（从 2005 年 6 月 30 日起，过渡水域已分别纳入了中韩两国的专属经济区内）。作为界于专属经济区和暂定措施水域之间的缓冲地带，“过渡水域”一直发挥着缓解中韩两国渔民因新的渔业管理制度所造成的直接冲击。

此外，中日、中韩渔业协定中的“暂定措施水域”所涉及的面积都比较大，其

基本目的，不仅是为了妥善处理海域划界争端，也是在于使传统渔业关系逐步过渡到新型渔业关系。

总之，上述特殊水域的设置和不同于专属经济区的管理方式，基本目的在于使传统渔业关系逐步过渡到新型渔业关系，减轻渔业管理体制的变化对中国和邻国所可能造成的经济和社会冲击。

3. 共同养护、管理和可持续利用渔业资源的制度性安排——共同渔区制度

中日、中韩、中越渔业协定高度重视渔业资源养护和合理利用。三个渔业协定在序言部分都明确指出协定的目的之一就是“为养护和合理利用共同关心的海洋生物资源”，协定中又有具体条款予以落实和保障。例如，中日渔业协定第 7 条第 2 款、中韩渔业协定第 7 条第 2 款都规定，缔约双方为养护和合理利用海洋生物资源，应在暂定措施水域采取共同的养护措施和量的管理措施。中日渔业协定第 10 条、中韩渔业协定第 12 条规定，缔约双方为开展养护和合理利用海洋生物资源的科学研究，应加强合作。中日渔业协定第 4 条第 1 款、中韩渔业协定第 4 条第 2 款规定，缔约各方应采取必要措施，确保本国国民及渔船在缔约另一方专属经济区从事渔业活动时，遵守缔约另一方有关法律、法规所规定的海洋生物资源的养护措施及其他条件和本协定的规定。在中越北部湾渔业合作协定中，则更是强调两国要加强合作，采取共同的渔业资源养护和管理措施。除在协定中明文规定外，中越双方还共同制订了《北部湾共同渔区渔业资源养护和管理规定》，以指导共同渔区内生物资源的养护、管理和利用。

3 个渔业协定还规定设立双边渔业联合委员会，以共同处理渔业资源的养护和合理利用等事务。从协定所规定的“渔委会”的职责范围看，几乎囊括了渔业协定落实过程中的所有具体事务及双边渔业关系中的主要问题。因此，可以说，中日、中韩、中越三个双边渔业联合委员会的建立使中国与日、韩、越三国的渔业管理实现了规范化、机制化和制度化。

需要特别指出的是，中日、中韩、中越分别设置了共同渔区性质的安排，以共同养护和合理利用海洋生物资源。

中越双方同意在北部湾封口线以北、北纬 20 度以南、距北部湾划界协定所确定的分界线各自 30.5 海里的两国各自专属经济区设立“共同渔区”，并规定了共同养护和利用区内渔业资源的具体办法。中越北部湾“共同渔区制度”的主要内容包括：

（1）双方本着互利的精神，在共同渔区内进行长期渔业合作。

（2）共同制订和遵守渔业资源养护与管理措施。协定规定，双方根据共同渔区的自然环境条件、生物资源特点、可持续发展的需要和环境保护以及对缔约各方渔业活动的影响，共同制订共同渔区生物资源的养护、管理和可持续利用措施。缔约各方进入共同渔区从事渔业活动的国民和渔船在进行渔业活动时须遵守《北部湾共同渔区渔业资源养护和管理规定》。双方有义务对进入共同渔区从事渔业

活动的渔民进行教育和培训。

（3）实行捕捞许可制度（由船旗国发放许可证）。任何人和渔船进入共同渔区活动，必须取得共同渔区渔业捕捞许可证。中越各自对在共同渔区从事渔业活动的己方渔船实行捕捞许可制度。凡进入共同渔区从事渔业活动的渔船均须向本国政府授权机关提出申请，并在领取捕捞许可证后，方可进入共同渔区从事渔业活动。

（4）共同制定每年作业船数量。缔约双方尊重平等互利的原则，根据在定期联合渔业资源调查结果的基础上所确定的可捕量和对缔约各方渔业活动的影响，以及可持续发展的需要，通过中越北部湾渔业联合委员会每年确定缔约各方在共同渔区内的作业渔船数量。

（5）管理制度上，各方按照北部湾划界线对己方一侧海域进行管理。缔约各方授权机关对进入共同渔区内己方一侧水域的缔约双方国民和渔船进行监督检查，对违规行为进行处理。必要时，双方授权机关可相互配合进行联合监督检查。也就是说，在共同渔区管理制度上，原则上实行专属经济区制度管理，即沿海国管辖。

上述共同渔区制度是《中越北部湾渔业合作协定》的核心内容，是中越双方以《公约》为法律依据，同时根据北部湾的自然地理特点、渔业资源特性和双方渔业现状等情况协商确立的。

中日、中韩设置的“暂定措施水域”可以看作是一种划界前的“共同渔区制度”。《中日渔业协定》和《中韩渔业协定》规定，为确保海洋生物资源的维持不受过度开发的危害，为养护和合理利用海洋生物资源，在暂定措施水域，缔约双方要按照渔业联合委员会（中日、中韩渔业联合委员会）的决定，采取共同的养护措施及量的管理措施。缔约各方对本国国民及渔船进行管理，不对另一方国民及渔船进行管理。由于“暂定措施水域”是划界前的一种安排，因此其管理方式与中越北部湾划界后的“共同渔区制度”略有不同，如中日、中韩不需要对在暂定措施水域作业的渔船颁发特别的捕鱼许可证，目前也没有就各自作业渔船数作出规定，管理上没有所谓己方一侧和对方一侧的区别对待等，而是实行船旗国管辖等。

中越北部湾“共同渔区制度”是中越两国在北部湾划界后采取的一种合作性安排，妥善解决了北部湾划界后渔业资源的养护、管理和可持续利用问题。这种“共同渔区制度”在东亚地区是第一例。中日、中韩在划界前设置“暂定措施水域”，并在暂定措施水域“采取共同的养护措施和量的管理措施”，则是比较妥善地解决了划界前渔业资源的养护、管理和可持续利用问题。这两种类型的“共同渔区制度”值得有关国家处理类似问题时参考和借鉴。

4. 对可能涉及第三国的海域作出了特殊安排，以尊重第三国的利益

东海北部海域是中日韩三国专属经济区主张重叠的地方，中日韩三国没有对此进行划界，也无法通过中日、中韩的双边渔业协定来解决。为妥善处理这一问题，

中国在与日、韩分别谈判和签署渔业协定时，以规定“对该海域的渔业关系基本维持现状”的方式来处理，从而避免双边渔业协定影响到第三方的权益。

为此，中日渔业协定有“中间水域”的安排，即在东海北部（即“暂定措施水域”以北），即北纬 30 度 40 分以北水域，中日双方决定在东经 124 度 45 分至东经 127 度 30 分之间设立互相不须对方许可即可作业的“中间水域”，两侧相互入渔。[11]

中韩渔业协定规定在“暂定措施水域”和“过渡水域”以南的部分水域，设置“维持现有渔业活动水域”。即中韩双方在该海域维持现有渔业活动，不将本国有关渔业的法律、法规适用于另一方的国民及渔船。

在黄海朝韩交界海域，由于朝韩之间对海域分界线存在分歧，为避免涉及朝韩间的分歧，中韩渔业协定在“暂定措施水域”北限线所处纬度线以北的部分水域，设置了“维持现有渔业活动水域”，维持现有渔业活动，不将本国有关渔业的法律、法规适用于缔约另一方的国民及渔船。

5. 搁置岛屿主权归属的争议

中日两国在钓鱼岛归属问题上存在争议，该争议不可能以中日渔业协定的方式来解决。为了既不阻碍中日渔业协定的达成和实施，也不影响两国在钓鱼岛问题上的各自立场，中日两国在渔业协定中所设置的“暂定措施水域”避开了钓鱼岛及其附近海域，规定在东海南部（北纬 27 度以南，东经 125 度 30 分以西）维持现有的渔业关系。

6. 规定渔业协定不影响有关各方在海域划界问题上的各自立场

中日、中韩渔业协定是在中国与日、韩尚未就专属经济区和大陆架进行划界的情况下谈判和签署的，为此，在渔业协定中都明文规定，渔业协定的任何规定都不影响有关各方在海域划界问题的立场。如，中日两国政府代表在签订渔业协定时同意记录如下：“两国政府表示协定第 7 条第 1 款规定的暂定措施水域的设定，不得认为有损两国有关专属经济区和大陆架划界的各自立场”，并且两国政府还表示“将继续坦诚进行两国关于专属经济区和大陆架划界的磋商，并努力达成双方都能接受的协议”。中韩渔业协定第 14 条规定：“本协定各项规定不得认为有损缔约双方各自关于海洋法诸问题的立场”。

此外，中越北部湾渔业合作协定第 2 条也规定：“缔约双方在相互尊重主权、主权权利和管辖权的基础上，在协定水域进行渔业合作。这种渔业合作不影响两国各自的领海主权和两国各自在专属经济区享有的其他权益。”

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11 《中日就新渔业协定生效问题达成协议》，载于《人民日报》2000 年 2 月 28 日，下载于 http://www.cfm.com.cn/20010804/ca2623.htm，2005 年 11 月 22 日。

六、对中国与海洋邻国渔业关系的展望

中日、中韩渔业协定和中越北部湾渔业合作协定的签署和实施，标志着中国海洋渔业管理制度进一步与国际接轨，中国与海洋邻国的渔业关系从此进入了一个新的发展阶段。不断巩固、完善和发展这种基于专属经济区制度管理的新型渔业关系是今后中国处理与海洋邻国渔业关系的主要任务。

1. 北部湾的渔业生产已进入了按专属经济区制度的国际惯例进行管理时代，中越两国渔民在北部湾海域完全自由捕鱼时代已结束，进入依法依约管理的阶段，即中越双方将依据《公约》和《中越北部湾渔业合作协定》对北部湾的渔业资源进行合理养护和利用。

2. 东海、黄海的渔业关系基本进入按专属经济区制度进行管理的时期，但尚需中国与有关国家进一步协商与合作。

中日、中韩渔业关系也进入了依法依约管理的阶段，但中日、中韩渔业协定实质上是向专属经济区制度过渡的一种临时性安排，中国仍需要与日、韩继续探索新型渔业关系。

（1）中日、中韩渔业协定有效期后的问题

中日渔业协定第 14 条规定“本协定有效期为 5 年”，“缔约任何一方，在最初 5 年期满时或在其后，可提前 6 个月以书面形式通知缔约另一方，随时终止本协定”。中韩渔业协定第 16 条规定“本协定有效期为 5 年”，“缔约任何一方在最初 5 年期满时或在其后，可提前 1 年以书面形式通知缔约另一方，随时终止本协定”。中日、中韩渔业协定先后于 2000 年 6 月 1 日和 2001 年 6 月 30 日生效，其有效期均为 5 年，这就意味着，中日、中韩将分别在 2006 年 6 月 1 日、2007 年 6 月 30 日前需要作出有关安排。可以预计，中国与日本、韩国将要处理的主要问题可能包括：双方是否着手对东、黄海的专属经济区进行划界并谈判签署划界后的渔业协定？如若双方仍难以就专属经济区划界达成协议，现有协定是否继续延期执行或作出新的安排？有关国家如何加强对海洋生物资源的养护与管理等。

在这方面，《中越北部湾渔业合作协定》可为中日、中韩提供示范和借鉴。中日、中韩在今后探讨解决有关专属经济区和大陆架划界问题时，渔业问题将是划界谈判时需要考虑的重要因素之一。中越北部湾渔业合作协定与中越两国在北部湾领海、专属经济区和大陆架划界协定同时生效，确立了海域划界问题解决后开展渔业合作的范例，无疑值得中日、中韩在今后的海洋划界谈判时予以借鉴。

（2）东海北部中、日、韩三国交界水域的问题

在这一海域，三国除需要尽快探讨海域划界问题外，在落实有关渔业协定过程中，需要妥善处理的突出问题是“协定重叠水域”和所谓“灰色水域”的问题。

所谓“协定重叠水域”，是指 1998 年 11 月 28 日日韩签署的《日本国和大韩民国渔业协定》，其适用水域在东海北部与《中日渔业协定》的适用水域有部分重

叠。对此，中国政府分别照会了日方和韩方提出交涉，指出，日韩渔业协定“侵犯了中国在东海中、日、韩三国交界水域的专属经济区主权权利”，并申明“中国在该区域的专属经济区权益以及渔业活动不受该协定的限制”。中国外交部发言人还进一步表示，中国政府一贯主张，“在三国交界水域应由三方协商解决海域划界问题，排除任何一方擅自划界的做法是违反国际法的。”[12] 由于《日韩渔业协定》与《中日渔业协定》的适用水域在东海北部有部分水域重叠，中日韩三国各自落实双边渔业协定时有可能会发生争议，需要三国妥善处理。

所谓“灰色水域”的问题，如中日暂定措施水域的北侧、中韩措施暂定水域的南侧的东海部分水域，在协定中规定为“维持现有渔业活动水域”，即仍然类似公海自由捕鱼的现状，可以说是“三不管”地带，中日韩三国渔民在该海域的渔业生产仍然处于无管理状态，发生争议难以避免。

（3）东、黄海的多边渔业合作问题

地理上，东海和黄海水域相连，这两个海域的资源养护、管理和利用问题要一并考虑。尤其是该海域的多数鱼类属于跨界种群或共享种群，在中、日、韩三国或其中两国近海之间进行季节性洄游，要养护与管理好这种流动性的资源，需三国共同参与。

目前中日韩三国以双边（中日、中韩、韩日渔业协定）协定的方式来处理彼此间的渔业关系是远远不能适应现实的需要。不论是依据《公约》关于闭海半闭海及专属经济区制度的有关规定，以及国际粮农组织主持制定的“负责任渔业守则”等，还是考虑到东、黄海渔业资源的实际分布和利用状况，以及资源养护和管理的客观需要，中日韩三国，乃至包括朝鲜在内的四国都应积极开展东、黄海的多边渔业合作，乃至探讨建立多边渔业合作机制。在专属经济区划界问题解决前，中国有必要与有关国家探讨各种临时性质或过渡性质的合作方式。即使中日韩三国在“协定重叠水域”、“灰色水域”问题、乃至专属经济划界问题解决后，东、黄海地区多边渔业合作，特别是渔业资源的养护与管理问题等，也要开展三边或更多边的合作，仅依靠目前的双边合作是不够的。

目前，中日韩三国已开始重视渔业领域的共同合作问题。中韩日三国领导人于 2003 年 10 月 7 日在印度尼西亚巴厘岛签署的《中韩日推进三方合作联合声明》中明确承诺，“三国将通过有效的渔业管理进行双边或三边合作以促进渔业资源的可持续利用和养护。”为落实中韩日三国领导人这一承诺，中韩日三国渔业高级别官员已于 2004 年 10 月 19 日在韩国济州岛举行了首次中韩日渔业高级别磋商会议。

此外，在黄海北部海域，中国与朝鲜尚未签署基于专属经济区制度管理的渔业协定，双方新型渔业关系有待建立。在东海，中国台湾省渔民的捕鱼权问题值

12 《人民日报》1999 年 1 月 23 日第 2 版。

得关注。中国台湾省与日本冲绳之间的专属经济区没有划界。日本单方面实行专属经济区管理，严重侵犯了中国渔民包括台湾省渔民的捕鱼权。海峡两岸应积极探索在一个中国原则框架下解决台湾省渔民的捕鱼权问题。

3. 南海海域的渔业关系仍处于无序竞争状态。中、越、菲、马、文莱、印尼等南海沿海国的渔民在南海捕鱼，基本上沿袭领海外捕鱼自由的传统习惯，甚至日本等非南海沿海国的渔民也在南海自由捕鱼。自 20 世纪 70 年代开始，伴随着南沙群岛领土主权争端的发生，南海海域的渔业关系更加复杂化。对于中国渔民来说，南海是中国渔民的传统渔场，捕鱼范围主要是我国南海传统海疆线内，其法律依据是我国对南海诸岛的领土主权及我国南海传统海疆线。越、菲、马等国近年来大力发展南海渔业生产，主要目的之一是为了宣示所谓的“岛屿主权”。越、菲、马等国虽然都宣布了 200 海里专属经济区制度，但基本上没有在南海严格实行专属经济区制度管理。目前，南海地区渔业纠纷不时发生，突出的是中国渔民渔船经常性地遭到越、菲、马等国的武装追逐、驱赶、炮击，甚至船毁人亡，但这种争端与 200 海里专属经济区制度管理没有直接的联系，主要是有关国家企图借机宣示其所谓的“岛屿领土主权”。

目前，南海地区的渔业生产基本上处于盲目竞争发展的阶段，但南海海域的环境保护问题、渔业资源的养护和管理问题等日益突出。从长远看，在南海地区建立以《公约》为基础的新型渔业关系是迟早的事，南海海域的多边渔业合作问题也迟早会提上南海周边国家的议事日程。目前，当务之急是，南海周边国家应积极探讨在南海地区的岛屿领土主权和海域划界问题解决前开展渔业合作、合理利用和养护渔业资源、减少渔业纠纷等的临时性办法，以实现南海渔业资源的可持续发展，维护南海地区的和平与稳定。

七、几点评论

中日、中韩渔业协定和中越北部湾渔业合作协定的签署和生效实施，是中国政府遵守、落实《公约》而采取的重大步骤，顺应了世界新海洋法律制度发展的客观要求，也是中国与周边海洋邻国渔业关系史上的具有里程碑意义的事件。

1. 中日、中韩渔业协定和中越北部湾渔业合作协定的签署和生效实施，标志着以专属经济区制度为法律基础的新型渔业关系的形成。这是中国与海洋邻国渔业关系史上的具有里程碑意义的事件。从此以后，决定今后中国与海洋邻国渔业关系的主要因素不再是国家间的总体政治、经济关系，而是现代国际海洋法，特别是《公约》所确立的专属经济区制度。也就是说中国与海洋邻国渔业关系，包括渔业合作关系进入了“法治”阶段，这对中国与海洋邻国渔业关系的稳定发展具有特别重要的意义。

2. 中日、中韩渔业协定和中越北部湾渔业合作协定的签署和生效实施，标志

着以可持续发展为目标的新型渔业关系的出现。三个渔业协定设置了一系列共同养护、管理和合理利用渔业资源的具体规定和安排。渔业协定生效实施后，中国与日本、韩国、越南在有关海域的作业船数量、渔获配额、可捕鱼种、作业时间、作业区域及其他作业条件都不同程度地依据渔业资源的状况作出了限制性的调整。可以说，各自不受约束地盲目发展渔业，竞相过度捕捞，缺乏共同养护和管理措施的渔业生产时代开始结束，以可持续发展为目标的新型渔业生产模式开始形成。这不仅是中国与海洋邻国在海域管理上的里程碑性事件，也是整个东亚海域管理上的里程碑性事件。

3. 中国与海洋邻国建立新型渔业关系的地缘政治影响不应忽视和低估。三个渔业协定对于维护各国渔业利益、规范渔业秩序、保护渔业资源、发展渔业合作、建立两国间稳定的渔业关系无疑有着直接的积极影响。与此同时，三个渔业协定对稳定国家间关系、乃至地区和平与稳定也具有特别重要的积极影响和作用，还标志着中国与邻国之间的海域正式开始了从“冲突之海”变为“合作之海”的历史性进程。因此，中国与海洋邻国建立新型渔业关系，是促进和影响东亚地区乃至整个亚太地区和平稳定的积极因素。

4. 中日、中韩渔业协定和中越北部湾渔业合作协定的签署和生效实施充分说明中国是一个严格遵守国际法的负责任的大国。

中日、中韩渔业协定和中越北部湾渔业合作协定的签署和生效实施，是中国政府遵守、落实《公约》而采取的重大步骤，顺应了世界新海洋法律制度发展的客观要求。但中国是一个海洋地理条件不利的国家，以《公约》为代表的新的国际海洋法律制度给中国的海洋渔业带来很大的消极影响。

随着 3 个渔业协定的签署和生效实施，中国海洋渔业开始由领海外自由捕捞向专属经济区制度过渡，中国海洋渔业面临着一系列新的问题和新情况。特别突出的：一是中国海洋捕捞渔船的作业渔场明显缩小，尤其是失去了重要的传统渔场和优质高产作业区，大量捕捞渔民面临转产转业问题，对中国海洋渔业和沿海地区经济发展、乃至社会安定带来严重影响。据中国官方对海洋渔业和沿海经济发展带来严重的影响的初步统计，三个渔业协定生效后，中国约有 3 万多艘渔船需从传统作业渔场撤出，占全中国海洋机动渔船的 11% 以上；每年将损失 160 万吨渔业产量，占全中国海洋捕捞产量的 10% 以上；直接经济损失达 80 多亿元；将有 30 多万渔业劳动力面临转产转业问题，近百万渔业人口的生产、生活受到不同程度的影响；水产品流通、加工、冷藏、运输、渔船网具制造及港口服务等与海洋捕捞业相关的产业受到了连带影响；渔区劳力就业难度增大等。二是由于大批渔船从外海传统渔场退出，对中国近海渔业资源的压力加大，对现有保护近海渔业资

源的制度带来一定的冲击。[13] 例如，仅《中越北部湾渔业协定》生效后，广东、广西、海南三省（区）总计近万艘渔船要进行转产转业。[14]《中韩渔业协定生效》后，中国从韩国方面专属经济区及韩方过渡水域撤回渔轮将达到 3500 艘左右，年产量约减少 30~40 万吨，产值 18~20 亿元。[15]

中国政府高度重视三个渔业协定的实施工作。中国政府在向中国渔民作宣传、解释、教育工作中明确指出："我国是一个讲信誉的大国，执行好我国与周边国家签署的渔业协定，事关国家声誉，事关对外关系的大局。目前，执行好三个渔业协定，管理好渔船，保障海上正常的渔业生产秩序，保护渔业资源，维护国家海洋权益，是我国现阶段专属经济区管理的主要任务。"[16]"从 2002 年起 3 年内，中央财政每年安排 2.7 亿元人民币转产转业基金，主要用于减船转产补助，增加 3000 万元专属经济区渔政执法经费。为保证渔民转产转业和专属经济区渔政执法正常进行，中央财政还将适当加大支持力度，延长支持年限。"[17]

由此可见，中国政府自觉承受着巨大的实际经济利益上的损失，顺应现代国际海洋法的发展趋势，以《公约》为依据来谈判签署新的渔业协定，并以严肃、认真、负责的态度来贯彻落实新的渔业协定。任何一个公正、客观、正直的有识之士都能够从中国积极谈判、签署和落实三个渔业协定这一系列重要实践中看到，中国政府是以严肃、认真、负责的态度对待国际法特别是《公约》，中国是一个奉行睦邻友好、和平、合作、负责任的大国。这对一些国家和政客所鼓吹的"中国威胁论"是一个雄辩有力的驳斥。

众所周知，中国与海洋邻国间除渔业问题外，还存在不少岛屿领土主权争端和海域划界问题。对此，中国政府已声明："对于与周边海岸相邻或相向的国家之间存在专属经济区或大陆架的重叠主张，中国主张根据公认的国际法和《公约》通过和平谈判解决"，[18]"中国政府着眼于和平与发展的大局，主张通过友好协商解决，一时解决不了的，可以搁置争议，加强合作，共同开发。"[19] 从中国政府上述处理中日、中韩、中越渔业关系的实践看，中国政府是言行一致，信守承诺的。可以有理由、有信心地预测，目前中国与一些海洋邻国间的岛屿领土主权争端和海域划界问题将会根据公认的国际法和现代海洋法，包括《公约》所确立的基本原则和

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13 《农业部部长杜青林在沿海捕捞渔民转产转业工作会议上的讲话（2002 年 8 月 6 日）》，载于《中国海洋年鉴（2003）》，北京：海洋出版社 2003 年版，第 7~8 页。

14 《中越北部湾渔业合作协定》，载于《广西日报》2004 年 7 月 1 日，下载于 http://www.gxnews.com.cn/news/20040701/gxzb/163536.htm，2005 年 11 月 22 日。

15 《中国海洋报》2001 年 7 月 6 日第 1 版。

16 《农业部部长杜青林在沿海捕捞渔民转产转业工作会议上的讲话（2002 年 8 月 6 日）》，载于《中国海洋年鉴（2003）》，北京：海洋出版社 2003 年版，第 10 页。

17 《农业部部长杜青林在沿海捕捞渔民转产转业工作会议上的讲话（2002 年 8 月 6 日）》，载于《中国海洋年鉴（2003）》，北京：海洋出版社 2003 年版，第 8 页。

18 吴士存主编：《南海问题文献汇编》，海口：海南出版社 2001 年版，第 182 页。

19 摘自 1998 年 5 月 28 日中国政府发表的《中国海洋事业的发展》白皮书。

法律制度，通过和平谈判，得到妥善解决。这些问题不会成为影响亚太地区和平与稳定的消极因素。

5. 中国与邻国建立以《公约》为基础的新型渔业关系的实践，对世界其他国家处理类似问题提供了有益的示范和借鉴。

中日、中韩渔业协定既是使中日、中韩渔业关系从传统渔业关系向《公约》规定的专属经济区制度过渡的安排，也是中日、中韩两国在相向海域尚未完成专属经济区划界情况下就渔业问题作出的一种临时性安排。这种安排确立了在相互渔业关系上实行专属经济区制度管理的目标、原则、步骤、方法和各种特殊措施等，但这种安排不影响有关专属经济区和大陆架划界的各自立场。可以说，中日、中韩渔业协定确立了海域划界问题解决前妥善处理渔业关系、开展渔业合作的范例。

中越北部湾渔业合作协定则是中越两国在北部湾领海、专属经济区和大陆架划界的同时，就渔业领域实行专属经济区制度管理以及发展长期稳定的渔业合作关系等作出的制度性的、全面的安排，与划界协定同时生效。因此，中越北部湾渔业合作协定确立了海域划界后开展渔业合作的范例。

3. 个渔业协定在如何使传统渔业活动与现代海洋法律制度相结合；如何从传统渔业关系过渡到新型渔业关系，并减少由此而来的经济社会冲击；在海域划界争议前及划界后如何处理渔业关系问题；如何以合作、务实、促进睦邻友好关系等方式处理邻国间的渔业关系等等方面，都作出了一系列的妥善安排。这对亚洲乃至世界其他国家和地区都有示范和借鉴意义。

中国与邻国在谈判、签署、落实渔业协定的过程中，睦邻友好、搁置争议、主权平等、谋求合作的政治意愿和政治决策发挥了十分突出的作用，始终以谅解与合作的精神来处理相互渔业关系，这对世界上其他国家和地区处理类似问题时更是具有借鉴意义。

6. 中日、中韩渔业协定和中越北部湾渔业合作协定是中国与周边海洋邻国贯彻落实《公约》的重要实践，对国际海洋法的发展具有重要的意义。

中国与邻国在谈判和签署渔业协定时，在海域划界与渔业关系问题，传统渔业关系向专属经济区制度管理的过渡问题，海洋生物（渔业）资源的共同养护、管理和合理利用问题，共同渔区制度，涉及第三国利益问题，相互入渔问题，沿岸国和其他国家，特别是邻国在专属经济区的权利、责任和义务的协调与平衡问题等方面的特殊安排，既完全符合《公约》的有关原则和规定，又有不少新的探索和创新，对国际海洋法的发展具有重要的积极意义。

东海区渔业资源区域合作管理研究

郭文路 * 黄硕琳 **

内容摘要：长期以来，东海区一直是中、日、韩三国海洋渔业的传统作业渔场。由于长期的过度捕捞，东海区的主要经济鱼类总体上已严重衰退，需紧急加以养护。东海区多数经济鱼类的洄游经过中、日、韩三国近海，养护与管理好东海区的渔业资源，需三国共同参与，这也顺应了《联合国海洋法公约》的规定。长期以来，中、日、韩三国在东海区的渔业生产与管理中建立了比较密切的合作关系，为三国合作管理东海区渔业资源奠定了良好的基础。目前，由于东海区进行渔业资源的区域合作管理还面临一些困难，因此，可以分近期和远期实施不同的区域合作管理方案，近期实施以控制捕捞努力量为主体的管理方案，远期实施以总可捕量制度为主体的管理方案。

关键词：渔业资源 合作管理 东海区

按照中国渔业区域划分，东海区西接我国大陆，西北面的界限划分与东海的地理位置不同，是以江苏省的岚山头与韩国济州岛连线为界，包括黄海南部约 $9.0\times10^4\ km^2$ 海域；东北面以济州岛经五岛列岛至长崎南端的连线为界；东面隔日本的九州岛、琉球群岛和我国的台湾岛与太平洋为邻；南面以福建的东山岛南端至台湾省的猫鼻头连线为界。东海区属于半封闭海域，面积约 $8.6\times10^5\ km^2$。[1]

东海区的渔业资源比较丰富，主要经济鱼类有带鱼、竹筴鱼、小黄鱼、蓝点马鲛、发光鲷、黄鲷、太平洋褶柔鱼、银鲳、燕尾鲳、蓝圆鲹、鳀鱼、大眼鲷类和天竺鲷类等，此外还有较为丰富的虾、蟹和头足类。[2] 根据 1997—2001 年对我国专属经济区和大陆架海洋生物资源栖息环境开展的专项调查，东海部分主要经济鱼类的生物量如表 1 所示。东海区鱼类多数在中、日、韩三国或其中两国近海之间进行季节性洄游，即多数鱼类属于跨界种群或共享种群。中、日、韩三国对东海区渔业资源的开发利用具有悠久的历史，东海区一直是三国海洋渔业的传统作业渔场。

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1 《中国渔业资源调查和区划》编辑委员会：《中国海洋渔业资源》，杭州：浙江科学技术出版社 1999 年版，第 23~130 页。

2 《专项综合报告》编写组：《我国专属经济区和大陆架勘测专项综合报告》，北京：海洋出版社 2002 版，第 309~315 页。

由于长期的过度捕捞，东海区的主要经济鱼类目前已严重衰退。

20 世纪 60 年代末，由于全球性渔业资源的衰退，世界各国开始重视渔业资源的养护与管理，以谋求渔业资源的可持续开发与利用。1982 年签署的《联合国海洋法公约》（以下简称《公约》）使世界海洋渔业管理体制发生了深刻变化，既赋予了各国开发利用海洋渔业资源的权利，也强调了各国养护和管理海洋渔业资源的责任与义务。之后，各国纷纷采取了一系列措施以加强渔业资源的养护与管理，其中各国间在渔业管理与养护中的合作不断增强，并成为当前国际渔业管理的发展趋势之一。这种合作主要是通过建立区域的、分区域的或全球性的合作管理机制来实现。在此背景下，探讨中、日、韩三国共同养护与管理东海区渔业资源的合作机制具有十分重要的现实意义。

表 1　东海部分经济鱼类声学评估的种类生物量

单位：吨

种（类）	春季	夏季	秋季	冬季
竹筴鱼	236 334.1	134 397.2	315 545.2	370 371.3
带鱼	231 008.5	408 845.4	965 253.9	423 909.6
小黄鱼	106 377.4	105 647.3	218 018.1	61 199.2
蓝点马鲛	205 295.1	2 806.3	12 780.6	26 438.4
太平洋褶柔鱼	208 362.1	143 619.2	595 916.7	136 520.4
枪乌贼类	1 124 712.6	220 336.9	395 652.4	65 192.4
银鲳	105 777.4	105 454.5	400 108.1	18 703.4
燕尾鲳	38 488.0	173.5	204 032.0	5 900.3
鳀鱼	132 003.2	5 815.7	634.9	91 827.6
蓝圆鲹	16 298.1	6 223.2	82 945.7	22.3
发光鲷	141 076.5	156 191.9	224 230.7	176 096.2
黄鲷	92 851.0	24 508.6	30 713.0	73 049.9
大眼鲷类	44 135.3	26 084.5	109 229.9	14 944.2
天竺鲷类	40 633.4	1 939.0	435 614.5	75 741.9
鳄齿鱼	29 468.0	8 312.2	72 995.3	46 678.0

注：评估海区面积为 437204km^2，资料来源于《我国专属经济区和大陆架勘测专项综合报告》，海洋出版社 2002 年版。

一、中、日、韩三国开发利用东海区渔业资源的状况

自古以来东海区就是中、日、韩三国海洋渔业的传统作业渔场。三国在东海区的捕捞作业方式有拖网、围网、刺网、鲸鳇网和钓等，其中拖网、围网和刺网是主要的作业渔具。根据《中国渔业统计年鉴》，1966 年和 1967 年中国在东海区的渔获量曾超过 1.00×10^6 t，之后有所下降，但从 1971 年开始就一直超过 1.00×10^6 t；20 世纪 80 年代以后，中国在东海区的捕捞产量稳步增长，特别是 20 世纪 90 年代，渔获量的增长非常迅速，1999 年达到 6.18×10^6 t。日本对东海区渔业资源的开发利用在 20 世纪 60 年代达到高峰，平均年产量为 3.28×10^5 t；进入 20 世纪 70 年代，日本在东海区的渔业产量逐步下降；20 世纪 80 年代以后，日本在东海区的捕捞产量继续下降，平均年产量仅为 1.43×10^5 t，20 世纪 90 年代以后日本在开发利用东、黄海生物资源方面已由资源开发型转向资源保护型，拖网类作业开始逐步被淘汰。[3] 韩国在 20 世纪 70 年代以前，其在东海区的作业渔场主要分布在韩国西海岸和济州岛西侧，之后逐步向西和西南的我国一侧扩展，20 世纪 70 年代以后开始扩展至中国舟山和吕泗外海，1975 年在东海区的渔获量达到 5.77×10^5 t；80 年代以后，韩国在东海区的捕捞产量也出现稳步增长，1994 年最高，达到 7.03×10^5 t，1995 年下降到 5.21×10^5 t；1995 年以后，其渔获量一直在 4.50×10^5 t 左右徘徊。[4]

1960 － 1999 年中、日、韩三国在东海区的渔获量变化如图 1 所示，从图中可以看出，长期以来，中国在东海区的渔获量大大超过日、韩两国，在东海区的海洋捕捞力量方面占有绝对优势，是开发利用东海区渔业资源的主体。因此，中国对养护和管理东海区渔业资源也应该负有更大责任。

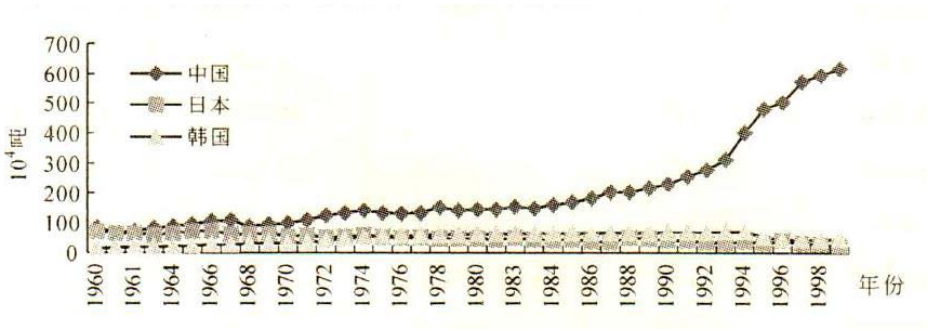

图 1 1960—1999 年中、日、韩三国在东海区渔获量的变化

3 凌兰英、俞连福：《日本对东、黄海渔业资源的利用》，载于《海洋渔业》2002 年第 1 期。

4 Ministry of Maritime Affairs & Fisheries of Korea, Catches by Type Fishing Means and Value of Fish Catches by Type of Fishing area[EB/OL], at http://www.momaf.go.kr/momaf_eng/fisheries, 29 December 2002.

二、东海区渔业资源区域合作管理的必要性

共同开发与合作管理争议海域自然资源是国际社会的一般实践。在岛屿主权或海域管辖权争端未解决的情况下，首先解决资源的开发利用与管理问题，这在国际上也有不少先例，一般实行的是共同开发。[5] 对于岛屿主权存在争端的共同开发模式，主要有两类，一是确定岛屿主权而资源共同开发，如关于斯瓦尔巴群岛，挪威拥有群岛主权，而挪威、瑞典、丹麦、前苏联、英国和美国均有进入该群岛平等开发自然资源的权利；二是搁置主权，共同开发，如伊朗和沙加酋长国关于（现并入阿联酋）阿布•穆萨岛的开发。[6]

20 世纪 60 年代以来，由于全球性渔业资源的衰退，以及各沿海国纷纷扩大海洋或渔业管辖权的实践，国际社会开始越来越重视渔业资源的可持续开发与利用，一些国家之间纷纷通过签定区域性渔业合作管理与共同养护协定（公约）来开展渔业资源合理开发利用、养护与管理方面的合作。[7] 这些合作主要是通过建立区域的、分区域的或全球性的合作管理机制来实现，并已成为国际渔业管理的主要发展趋势之一。截止目前，世界各大洋、各主要海洋区域基本上都成立了全球性的、区域性的或次区域性的渔业合作管理组织。这些组织既有民间的，也有政府间的；既有双边的，也有多边的。

长期以来，由于东海区集中了强大的捕捞能力，对渔业资源的捕捞量超过了其再生能力，导致资源总体上出现严重衰退。普遍认为，东海区渔业已从 20 世纪 50 年代的中等开发变为目前的捕捞严重过度，资源明显衰退，主要表现为：鱼类个体小型化、低龄化和性早熟现象非常明显；渔获物中传统经济鱼类的比例下降，低龄鱼、低质鱼和杂鱼成为了主要的捕捞对象；单位捕捞努力量渔获量下降，渔获物的平均营养级降低。如作为东海区主要经济鱼种的东海带鱼和小黄鱼，从 20 世纪 60、70 年代起，性成熟的体长和渔获个体的平均体长等不断下降，其不同年代渔业生物学的变化趋势如表 2 和表 3 所示。这说明有必要加强对东海区渔业资源的养护与管理，减少对资源的开发力度。中、日、韩三国作为共同开发利用东海区渔业资源的国家，理应承担起养护和管理东海区渔业资源的责任。

东海区为半封闭海域，海区内环境和生物资源具有相当大的独立性和封闭性，与外界交流较少，资源量的多寡完全取决于本海区初级生产力的大小，资源遭

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5 Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwing.*Sharing the Resources of the South China Sea*, Netherlands: Kluwer Law International, 1997, pp. 149~187.

6 蔡鹏鸿著：《争议海域共同开发的管理模式：比较研究》，上海：上海社会科学院出版社 1998 年版，第 63~84 页。

7 黄硕琳：《专属经济区制度对我国海洋渔业的影响》，载于《上海水产大学学报》1996 年第 3 期；乐美龙：《国际海洋渔业管理趋势及其对我国渔业的影响》，载于《中国渔业经济研究》1998 年第 3 期。

到破坏不可能从其他海域得到补充。[8] 这种特点决定了东海区资源状况的好坏完全取决于周边国家和地区的渔业开发与养护。同时，由于东海区多数鱼类的洄游路线经过中、日、韩三国近海，要养护与管理好鱼类这种流动性的资源，需三国共同参与。

对于出现在两个或两个以上沿海国专属经济区的种群，《公约》第 63 条第 1 款规定，共享资源的有关国家“应直接或通过适当的分区域或区域组织，设法就必要措施达成协议，以便在不妨害本部分其他规定情形下，协调并确保这些种群的养护和发展。”对于主权权利有争议海域的资源的处理，《公约》第 74 条和第 83 条要求，相邻或相向沿海国在正式签定划分专属经济区或大陆架的协定之前，“有关各国应基于谅解和合作的精神，尽一切努力作出实际性的临时安排，并在此过渡期间内，不危害或阻碍最后协议的达成。这种安排应不妨碍最后界限的划定”。这种“临时性安排”，资源的合理开发利用与养护应是一项重要内容，也就是合理开发利用与养护有争议海域或重叠地区的自然资源，包括生物资源。关于闭海或半闭海沿岸国的合作，《公约》第 123 条规定：“闭海或半闭海沿岸国在行使和履行本公约所规定的权利和义务时，应相互合作。为此目的，这些国家应尽力直接或通过适当区域组织：（a）协调海洋生物资源的管理、养护、勘探和开发；（b）协调行使和履行其在保护和保全海洋环境方面的权利和义务；（c）协调其科学研究政策，并在适当情形下在该地区进行联合的科学研究方案；（d）在适当情形下，邀请其他有关国家或国际组织与其合作以推行本条的规定。”可见，《公约》为了促进渔业资源的最适度利用，非常重视国际渔业合作管理与共同养护。中、日、韩三国都是《公约》的缔约国，都于 1996 年批准了《公约》，有义务履行《公约》的规定。

表 2　东海带鱼的渔业生物学变化趋势

年代	夏季汛					冬汛			
	小型鱼（%）	中型鱼（%）	大型鱼（%）	平均肛长（mm）	性成熟最小肛长（mm）	小型鱼（%）	中型鱼（%）	大型鱼（%）	平均肛长（mm）
60	16.5	60.2	23.3	252.6	—	12.9	73.5	13.6	249.7
70	10.4	82.6	7.0	238.1	160~170	18.0	76.5	5.5	237.6
80	26.1	68.8	5.1	226.8	—	33.1	62.1	4.8	226.7
90	67.7	28.8	3.5	182.6	140~150	64.8	34.5	0.7	171.3

资料来源于：东海区渔业资源动态监测网（2000 年）。

8 《中国渔业资源调查和区划》编辑委员会：《中国海洋渔业资源》，杭州：浙江科学技术出版社 1990 版，第 23~130 页。

表 3　东海小黄鱼的渔业生物学变化趋势

年代	体长范围（mm）	平均体长（mm）	体重范围（g）	平均体重（g）
70	—	191.89	—	133.36
80	100~270	139.39	10~360	83.96
90	90~250	144.33	10~300	46.95

资料来源于：东海区渔业资源动态监测网（2000 年）

三、东海区渔业资源区域合作管理的可行性

新中国成立至中日恢复邦交，中、日两国曾 12 次签订《中日民间渔业协定》，以协调两国在东海区的渔业生产，调解两国间的渔业纠纷；中日关系正常化后，1975 年中、日两国签订了政府间的渔业协定，就东海区的渔业生产与资源养护进行必要的合作；为顺应《公约》的要求和解决两国间渔业面临的新问题，1997 年两国又签订新的《中日渔业协定》，以养护和合理利用共同关心的海洋渔业资源，并维护两国在各自专属经济区内享有的主权权利，该协定已于 2000 年 6 月 1 日正式生效。根据协定第 7 条的规定，双方在东海设立“暂定措施水域”，实行两国共同管理，由双方设立的中日渔业联合委员会制订有关管理措施，如每年确定两国分别在“暂定措施水域”内的作业方式、捕捞力量（包括船数、船型和功率等）和渔获量。此外，该协定还规定两国渔政部门合作对该水域内的渔业生产活动进行联合指导和监督检查，每年两国互相通报在该水域内的渔获统计。

中、韩两国渔民长期以来共同在东海区从事渔业生产，在应急救助等方面彼此给予必要的照顾。在中、韩建交之前，两国间的渔业纠纷都由双方民间组织（即中国东黄海渔业协会和韩国水产业协同组合中央会）协商解决。1992 年中、韩两国建交后，有关渔业问题开始通过两国政府有关部门沟通和处理。1998 年中、韩两国签署了《中韩渔业协定》，就两国在东、黄海区的渔业生产和渔业资源的养护与管理达成协议，该协定已于 2001 年 6 月 30 日正式生效。该协定规定两国在东、黄海设立“暂定措施水域”和在“暂定措施水域”的左右两侧设立中、韩两国各方的“过渡水域”，双方设立中韩渔业联合委员会协商解决两国在这两种水域内的渔业问题。在“暂定措施水域”内，两国共同协商双方分别入渔的船数、渔获种类和渔获量等；双方应逐步减少进入对方“过渡水域”的船数，各自对进入对方“过渡水域”的渔船发放捕捞许可证，互换渔船名册；在“暂定措施水域”和“过渡水域”内，两国实施联合监督检查，并可联合乘船、勒令停船或登临检查等。

日、韩两国于 1965 年曾签署《日韩渔业协定》，以指导解决两国间的渔业问题。1998 年两国又签订新的《日韩渔业协定》，以解决《公约》生效以后两国间渔业面临的新问题，促进合理利用两国各自专属经济区内的渔业资源，该协定已于 1999

年 1 月 22 日正式生效。

《公约》签署以后，中、日、韩三国都分别采取了一系列措施以加强东、黄海渔业资源的养护和管理。20 世纪 80 年代以后，中国从合理开发和保护周边海域生物资源的角度，逐步采取一系列重大措施，这些措施主要有：（1）调整国家的渔业发展方针，1985 年中国将其渔业发展方针调整为“以养殖为主，养殖、捕捞、加工并举，因地制宜，各有侧重。”“九五”期间，中国再次明确了“加速发展养殖，养护和合理利用近海资源，积极扩大远洋渔业，狠抓加工流通……”的指导思想；（2）健全渔业法规，2000 年修订后重新颁布的《中华人民共和国渔业法》首次规定对近海捕捞实行捕捞限额制度，并进一步明确捕捞许可制度、填写渔捞日志、禁渔期、禁渔区、最低可捕标准限制和最小网目尺寸限制等渔业资源的保护措施；（3）实施机动渔船船数和功率的控制指标；（4）实施伏季休渔和海洋捕捞产量的“零增长”制度；（5）开展人工增殖渔业资源；（6）对一些重要的海洋渔业资源如中国对虾、大黄鱼、带鱼等实施专项保护措施。为顺应国际渔业管理的趋势，80 年代起日本也逐步采取一系列措施，主要有：（1）完善近海渔业资源保护的法律体系，1985 年日本对其《渔业法》进行了修订，此外还颁布了《沿岸渔业振兴法》和《海洋水产资源开发促进法》等，着重强调了渔业资源的合理开发与养护，如规定了探捕、捕鱼活动、渔船许可、捕捞限额、人工放流和海洋工程设施等的限制；（2）为适应世界海洋捕捞由资源开发型转向资源管理型的需要，调整政府主管渔业行政机构；（3）大幅度地削减渔船数量；（4）实施总可捕量制度。同样，20 世纪 80 年代以后韩国也逐步采取了一系列资源养护与管理措施，主要有：（1）颁布《渔业法》、《水产资源保护法》和《渔业法施行令》等；（2）调整其渔业发展方针，突出了对近海渔业资源的养护，并相应调整其海洋与水产部的有关职能；（3）1994 年起实施为期 10 年的渔船削减计划；（4）实施总可捕量制度。

综上所述，中、日、韩三国长期以来共同在东海区从事渔业生产，在有关渔业纠纷的解决和资源的养护等方面相互沟通，已初步建立起双边的渔业合作与交流机制。中、日、韩三国都于 1996 年批准了《公约》，都非常关注已严重衰退的东海区渔业资源，并实施了一系列养护与管理的政策与措施，而且一些养护与管理措施也相似或相同。中、日、韩三国都毗邻东海区，将东海区围成一个半封闭海域，地理上构成一个完整的渔业管理与养护的区域合作范围。[9] 此外，日、韩两国都对日益衰退的东、黄海渔业资源非常忧虑，也都呼吁周边国家进行合作，共同采取一系列的渔业资源养护与管理措施。因此，中、日、韩三国在合理开发利用和保护东海区渔业资源方面开展合作，实施一些共同养护方案是可行的。

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9 Young-Tae Shin and Sung-Gwei Kim, Cooperation in Fisheries in Northeast Asia, *Proceedings of the 1st International Workshop on the Oceanography and Fishery in the East China Sea*, Vol. 1, 1997, pp. 248~254.

四、东海区渔业资源区域合作管理的方案

当前，东海区进行渔业资源的区域合作管理与共同养护，面临的主要困难有：（1）中、日、韩三国在渔业资源的开发和养护上还没有形成统一的认识，采取一致的行动；（2）在东海区渔业资源的调查、评估及种群的洄游分布规律的了解方面，三国渔业科学界都各自做了大量工作，但在渔业资源现状的掌握、渔业统计数据的交流和捕捞努力量的标准化等方面，缺少直接的合作；（3）三国的渔业管理能力存在差异，如对渔船的检查和监督，渔获物的统计等；（4）我国在东海区现有一只庞大的捕捞队伍，如何分流、安置多余的渔船和渔民，将是一个难题，而且大大增加了监督、管理的难度，影响到合作管理与共同养护方案的可操作性。以上这些都将在一定程度上影响到三国合作管理与共同养护方案的顺利实施。

但是，为适应国际渔业管理的发展趋势和考虑到有关国际公约、条约和协定的要求，中、日、韩三国在东海区渔业资源的开发和利用、养护和管理等方面开展合作势在必行。考虑到我国的海洋权益和渔业利益，并考虑到日、韩两国的主张，针对上述困难，本文分近期和远期两个阶段提出东海区渔业区域合作管理与共同养护的方案。

（一）近期阶段

实施以控制捕捞努力量为主体的管理方案。控制捕捞力量是世界各国广泛采取的主要渔业管理措施之一，执行得好有较佳的保护资源的效果。目前东海区周边国家都建立了各自的渔业许可制度，均有一定的渔业监控能力，并且都意识到削减捕捞力量的必要性和紧迫性。因此，现阶段这种方案是可行的，也是迫切需要的。最好是由中、日、韩三国一齐协商，确定各国的渔船数、功率总量、作业海域和作业方式等指标，并根据资源量的状况定期修改。目前，可在中日、中韩渔业协定的框架下进行，在中日和中韩“暂定措施水域”中试行，具体数量由中日和中韩双方协商，可通过根据渔业协定所建立的渔业联合委员会进行，或者由中日、中韩举行双边会谈来确定；决定渔船数量的依据应以各国的渔业现状为主，以免对我国目前的渔业生产和社会稳定造成过大冲击。积累了一定的经验，时机成熟后，再逐步由三国共同参与合作，并根据东海区渔业资源的再生能力决定捕捞力量、作业方式和作业海域。

除了直接限制三国的捕捞力量，还应积极实施间接的渔业管理措施。1974 年的《中日渔业协定》对此作了许多规定，1965 年的《日韩渔业协定》也有类似的规定，中、日、韩可在原来合作的基础上，进一步统一标准，制订一个适用于整个海域的间接管理措施方案。还可以采用各国国内行之有效的资源保护办法，如捕捞许可制度、最低可捕标准限制和网目尺寸限制等。

加强渔业科研的合作和渔业统计数据的交流。现阶段，三国应合作调查东海区

重要渔业资源的洄游分布规律，评估资源量，进行捕捞努力量的标准化工作；在情报交流方面，应建立渔获量、作业海域、作业渔船等资料的互报制度。

通过上述区域合作管理方案的实施，争取在 5~10 年时间内，达到以下目标：将本海区捕捞努力量降到适当的水平，初步使捕捞作业结构合理化；扭转渔业资源衰退的总体局面，一些严重衰退的资源初步得到恢复；形成良好的区域合作氛围与途径。

（二）远期阶段

实施以总可捕量制度为主体的管理方案。总可捕量制度是根据资源的再生能力，并考虑社会、经济等因素确定总可捕量，当实际渔获量超过总可捕量时，即全面禁止捕捞的制度。由于这种方法直接限制渔获量，因此一般认为比投入量控制的方法能更好地保护资源，目前几乎所有的发达国家都采用了总可捕量制度。由于上文所说的困难，东海区目前全面实行总可捕量制度进行区域合作管理，有相当大的难度，但是将来难以避免。目前，已经实施的《中日渔业协定》和《中韩渔业协定》和已经签署的《中越北部湾渔业合作协定》都包含了对渔获量实行量化管理的条款。

实施总可捕量制度，可在前期试行的基础上逐步增加鱼种。前期阶段，可选择个别鱼种试行总可捕量制度，选择的标准为：渔获量大且经济价值高；资源状况恶化，需要进行紧急保护；对资源有相当了解；中、日、韩三国渔船共同捕捞的跨界品种。可考虑的品种有：带鱼、大黄鱼、小黄鱼、鲳鱼、马面鲀、鲐、鲹、马鲛鱼和外海对虾等。从本质上来说，总可捕量制度管理的渔业和以投入控制制度管理的渔业一样，都是竞争性渔业，这种渔业一方面造成渔业效益下降，另一方面容易导致捕捞过度。因此，渔业管理还需辅以其他的措施，前期实施的管理方案还需继续执行和完善，如制订共同的渔业许可制度等。

设立区域合作管理委员会，负责制订三国共同的渔业政策，决定每年试行总可捕量制度的鱼种、渔获量及各国的配额，并制订其他的管理措施。还可在此组织内，设立常设的机构，负责日常工作，向各国提供渔业咨询，收集和分析捕捞努力量和渔获量等渔业统计信息。

设立渔业科研合作机构，形成密切的科研合作机制。从理论上说，总可捕量制度需要以渔业资源的调查、评估等可靠的科学依据为基础，要对资源状况进行定期的监测和调查；而区域合作管理则要求这些工作合作进行，以免在决定总可捕量和评估管理的效果等基本环节上产生分歧。

通过上述远期阶段区域合作管理方案的逐步实施，争取达到以下目标：根据《公约》和《负责任渔业行为守则》等国际公约、决定和协议的精神，初步将本海区海洋渔业变为持续的、稳定的、结构合理的产业；主要经济鱼种基本得到恢复；基本上有共同的渔业政策，形成资源共享，从科研、情报交流到决策、监督都有相应的区域合作机制。上述目标的实现可能要经过巨大的努力和漫长的过程。

论中国海岛立法的必要性

薛桂芳 * 马英杰 ** 胡增祥 ***

内容摘要: 中国海岛众多，应当制定一部海岛法。制定海岛法是国家对其所属海岛行使主权的体现。通过制定海岛法，明确所属海岛的法律性质和地位，全面规定所属海岛的法律问题，这有利于捍卫国家主权和领土完整，有利于维护国家的海防安全，有利于加强海岛管理，有利于合理开发利用海岛资源，实现海岛经济的可持续发展，有利于与《联合国海洋法公约》相衔接，有利于发挥海岛在海域划界中的作用。

关键词: 海岛 立法 必要性

“岛屿是四面环水并在高潮时高于水面的自然形成的陆地区域”。[1] 中国海岛众多，全国岛屿岸线 1.4 万多公里，海岛面积约 8 万平方公里，占全国陆地面积的 8%。[2] 但是，我国仅于 2003 年制定了一项部门规章——《无居民海岛保护与利用管理规定》，[3] 立法位阶较低，适用范围偏窄。为捍卫国家主权和领土完整，合理开发利用海岛资源，实现海岛经济的可持续发展，国家应当制定海岛法。

海岛法是中国特色社会主义法律体系中不可缺少的一部法律，其立法必要性主要表现在以下几个方面：

一、海岛涉及国家主权问题，应当通过法律手段维护海岛主权

主权是指国家具有的独立自主地处理自己的对内和对外事务的最高权利。国

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1 1982 年《联合国海洋法公约》第 121 条。
2 杨文鹤主编：《中国海岛》，北京：海洋出版社 2000 年版，第 15 页。
3 国家海洋局政策法规办公室编：《海岛保护与利用管理文件汇编》，北京：海洋出版社 2003 年版，第 13 页。

家主权包括政治主权、经济主权、领土主权、对外主权、属人主权等。[4] 海岛属于国家领土。海岛资源保护、开发利用和管理，既涉及国家领土主权完整，又涉及国家的国防与安全。国家通过制定海岛法，保护海岛资源，维护海岛权益，是国家对其所属海岛行使主权的体现。

1. 海岛是国家领土不可分割的组成部分，应当通过国家立法确定其法律性质和地位

我国所属海岛不仅数量多、分布广、地位特殊，而且海岛种类齐全，资源丰富，开发潜力大。早在 1958 年，在《中华人民共和国关于领海的声明》中指出：“在基线以内的岛屿，包括东引岛、高登岛、马祖列岛、白犬列岛、乌蚯岛、大小金门岛、大担岛、二担岛、东椗岛在内，都是中国的内海岛屿。”[5] 1992 年《中华人民共和国领海及毗连区法》规定：“中华人民共和国的陆地领土包括中华人民共和国大陆及其沿海岛屿、台湾及其包括钓鱼岛在内的附属各岛、澎湖列岛、东沙群岛、西沙群岛、中沙群岛、南沙群岛以及其他一切属于中华人民共和国的岛屿。”[6] 这说明，海岛是我国领土不可分割的重要组成部分。中国作为世界海洋大国，理应制定一部专门的海岛法，明确所属海岛的法律性质和地位，全面规定所属海岛的法律问题。

2. 周边国家不断侵犯我国海岛，制定海岛法有利于维护国家的主权和领土完整

长期以来，周边某些国家无端挑起对我国南海诸岛、东海的钓鱼岛诸岛等主权归属的争端。[7] 我国在南沙群岛及其海域行使主权的行动中，多次遭到某些周边国家的非法干预和阻拦。与此同时，一些所谓国际知名人士在不同场合，大肆喧嚷要把南沙问题提交到国际会议上讨论，妄图使南沙问题国际化，以达到侵略合法化的目的。如果我国不通过制定可操作的法律制度来管理我国的海岛，对海岛付诸实质性的管理，这将对我国的权利主张产生不利影响。

3. 海岛在国家管辖海域划界中具有举足轻重的作用，制定海岛法有利于维护我国海洋权益

根据《联合国海洋法公约》（以下简称“《公约》”）规定，沿海岛屿是国家划定内水、领海、毗连区、专属经济区和大陆架的重要依据。据推算，一个岛屿或者岩礁的存在，就可以确定 1550 平方公里的领海海域，一个能维持人类居住或者其本身的经济生活的岛屿还可以拥有 43 万平方公里的专属经济区。

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4 张友渔等主编：《中国大百科全书》（法学），北京：中国大百科全书出版社 1984 版，第 814~816 页。

5 王怀安等主编：《中华人民共和国法律全书》，长春：吉林人民出版社 1986 年版，第 1495 页。

6 王怀安等主编：《中华人民共和国法律全书》（增编本），吉林人民出版社 1993 年版，第 34 页。

7 国家海洋局：《钓鱼岛权益大事记》第 4 页。

《公约》规定，在位于环礁上的岛屿或有岸礁环列的岛屿的情形下，测算领海宽度的基线是沿海国官方承认的海图上以适当标记显示的礁石的向海低潮线。[8] 在海岸极为曲折的地方，或者如果紧接海岸有一系列岛屿，测算领海宽度的基线的划定可采用连接各适当点的直线基线法。[9] 沿海国为适应不同的情况，可以交替使用上述方法确定基线。[10] 同时规定，如果低潮高地全部或一部与大陆或岛屿的距离不超过领海的宽度，该高地的低潮线可作为测算领海宽度的基线。[11]

《中华人民共和国领海及毗连区法》规定："中华人民共和国领海基线采用直线基线法划定，由各相邻基点之间的连线组成。"我国全国人大常委会于 1996 年 5 月 15 日批准公约，同时我国政府宣布了大陆领海的部分基点基线和西沙群岛的领海基点基线 77 个，其中大陆基点 49 个，西沙群岛的领海基点 28 个。[12] 在 49 个大陆基点中有 11 个位于大陆外缘，36 个在海岛，2 个在低潮高地。[13]

目前，我国与日本、韩国等国家的海洋边界尚未划定，制定海岛法有利于发挥海岛在海洋划界中的作用。

4. 海岛是我国沿海的前哨阵地，制定海岛法有利于维护国家的海防安全

沿着我国大陆岸线由海岛形成的岛弧或岛链，好似海上的"万里长城"，是天然的海防前哨，是国家安全的重要屏障。没有巩固、稳定的海防，就不可能有整个国家的稳定与发展。当前，美国视我国为"潜在对手"，不断加强在亚太地区的军事存在，并企图插手南海事务，干涉包括南海岛屿的权属争议和资源开发等在内的诸多问题；日本右倾势力抬头，军事实力不断增强，公开侵占我国钓鱼岛。我国海防安全形势非常严峻。如果我国"海上长城"任其蚕食、侵占，就等于外国敌对势力打开了"海上长城"的缺口，这必将直接危及到国家安全。为维护海防安全，我国必须加强对海岛的管理，消除海岛存在的不安定因素，防止各种入侵和渗透，保障国防和军事用岛的安全。

二、制定海岛法，是科学开发利用海岛，促进海岛经济持续发展的需要

新中国成立后，国家一直将海岛视为海防前沿，经济建设投入极少，再加上海岛远离大陆，交通不便，淡水资源短缺，经济和社会发展非常缓慢、落后。改革

8 1982 年《联合国海洋法公约》第 6 条。
9 1982 年《联合国海洋法公约》第 7 条第 1 款。
10 1982 年《联合国海洋法公约》第 14 条。
11 1982 年《联合国海洋法公约》第 13 条第 1 款。
12 国家海洋局：《海域使用管理法律法规文件汇编》，北京：海洋出版社 2003 年版，第 266~270 页。
13 国家海洋局：《全国海岛基本情况》，第 8 页。

开放以后，全国各地都在提倡开放和加大招商引资，但只有海岛不能对外开放，这就进一步拉大了海岛居民与临近大陆沿海居民生活水平的差距。党的十六大以来，国家确定了全民奔小康的战略目标，海岛也需要加快建设步伐。因此，国家应当尽快出台海岛保护和利用的法律，以便使管理部门依法制定海岛区划和开发规划，使开发者依法用岛护岛，为海岛经济的发展营造一个良好的法制环境。

从我国无居民海岛保护、利用情况看，目前普遍存在着保护不足、开发无序、利用无度、破坏严重的现象。例如，石臼坨位于河北省乐亭县西南部渤海湾中，面积 3.422 平方公里，是古滦河三角洲在滦河改道后，经海水侵蚀和再堆积改造而成的蚀余性岛，被称为华北第一大岛。由于石臼坨岛形成时间较长，生态条件比较稳定，因此植被非常茂盛，植被覆盖率达 98%，是鸟类的重要栖息地。目前岛上共发现鸟类 19 目、56 科、408 种，是名副其实的“鸟岛”。每年吸引大批国内外鸟类爱好者、保护者在岛上驻足。目前，石臼坨已经修建了别墅、宾馆和其他人造旅游景观，每逢旅游旺季还有乐亭大鼓、篝火晚会等娱乐演出。石臼坨一天最高接待量已达 1000 人。虽然当地为了保护海岛生态环境，采取了限制上岛游客数量的措施，但对于面积仅有 3.422 平方公里、作为鸟类栖息地的石臼坨来说，人为干扰的影响还是不可轻视的。[14]

再如，七十二泾位于钦州港经济开发区内，它由 100 多个大小岛屿参差错落地散布在 36 km^2 的钦州湾海面上，岛与岛之间被 72 条弯弯曲曲的水道环绕，称为“七十二泾”。在海岛周围的滩涂上，生长着大面积的红树林，因此“七十二泾”融合了“海、水、岛、山、礁、滩”等自然风光，区内山环水绕，水随山转，水水相通，风光旖旎，被誉为“南国蓬莱”。但在一段时间里，景区内存在无证用海、违法用海现象，在岛群红树林区 1~2 公顷大的红树林地被围垦用于养虾。几经破坏，把原来钦州市著名的水路相通的“七十二泾”风景区，减少到不足四十泾，严重影响了景区的自然景观和旅游业的发展。在七十二泾中，松飞岭是面积最大的海岛之一，面积 0.331 km^2，海岛四周海水较深，在低潮时四周平均水深仍有 5 米左右。目前钦州港“七十二泾”旅游发展有限公司正在该岛的南侧修建旅游码头，同时在岛上开山修路和修建人工景观。且不说海岛开发的对与错，仅在松飞岭上修筑道路，就破坏了大面积的海岛植被，与周围美丽的自然风光形成鲜明对比，从远处望去，被开挖的山坡光秃秃地十分刺眼。这种牺牲自然风光，大兴土木的做法与科学发展观完全相悖。[15]

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14 国家海洋局：《海岛保护与利用案例及分析》，第 43 页。
15 国家海洋局：《海岛保护与利用案例及分析》，第 36 页。

三、海岛具有特殊性，制定海岛法有利于从整体上保护海岛环境

1. 地理位置特殊

我国绝大多数海岛属于大陆岛类型，大陆岛数量约占全国海岛总数的 93%。大陆岛是我国大陆地块延伸到海地并露出海面而形成的岛屿。它原为大陆的一部分，后因地壳沉降或海面上升与大陆分离，所以，其地质构造、岩性和地貌等方面与邻近大陆基本相似。大陆岛位于沿海大陆的前沿，与大陆分离，四周环水，地理位置独特。从某种意义上说，海岛开发的核心是大陆岛的开发。它在我国海岛的开发利用中占有极其重要的地位和作用。

2. 具有海洋性气候特色

我国是典型的季风国家，海岛气候主要是受季风控制。冬季盛行偏北风，冷高压气团向南扩散的过程中，冷空气强度不断减弱；夏季盛行偏南风，含有充沛水汽的暖湿气流随之而来，形成全年降水量最多的季节。雨热同季是我国海岛气候的一个明显特征。春秋两季是陆上气候向海上气候转变或海上气候向陆上气候转变的过渡期。沿海岛屿地处海陆过渡带，由于海洋起着调节作用，使海岛气候与内陆有明显的差别。海岛气候冬暖夏凉，具有典型的海洋性气候特色。

但海岛及其周围海域自然灾害较多，主要有台风、大风和风暴潮等。在夏、秋季经常受到台风和风暴潮的侵袭，危害较大。大风大浪几乎每年都会对海岛造成不同程度的危害。

3. 我国海岛的种类齐全，地质构造和地貌各异

我国海岛数量多，分布范围广，类型齐全，包括了世界海岛分类的所有类型。

我国大陆岛的组成物质绝大多数为基岩，基岩岛数量约占我国海岛总数的 93%，分布范围遍及全海域。这类岛屿的面积大，高程较高。基岩岛周围由于岩石与沙滩交替发育，形成良好的生态环境，利于生物多样性的发育生长，岛礁构成的天然鱼礁更成为生物资源的良好养护场所。

沙泥岛是由江河径流入海携带泥沙堆积而成的岛屿，这类海岛一般分布在河口区，地势平坦，面积较小，由于土质肥沃，生态环境良好，常是一些候鸟的栖息地或是海洋鱼类洄游产卵的场所。位于长江口冲积岛的水域，就是被称作“软黄金”的鳗鱼苗的高产区域。沙泥岛约占海岛总数的 6%。

珊瑚岛是由珊瑚碎屑物堆积和凝固并露出海面形成的，它的基底往往是海底火山或岩石基底。珊瑚岛分布在我国的海南、台湾和广东等省。这类岛屿全国约 60 多个，占海岛总数的 1%。珊瑚岛面积小，出露海面的高程较低，附近海域水温适中，生物多样性指数高。南海诸岛水域分布着大量的珊瑚暗沙、暗礁。这些珊瑚暗沙、暗礁离海面较近，面积又大，大风形成的破浪，加上生长旺盛的珊瑚礁生

物群落，吸引许多鱼类，成为面积广大的高产渔区。南海中部的中沙群岛渔区面积达 1 万平方公里，是我国最大的渔场之一。在众多的珊瑚岛礁中形成的半封闭式的泻湖，构成独特的生态环境，是建设海洋牧场的好场所。

但是，我国有不少基岩岛山高坡陡，极易发生滑坡等灾害。同时，由于基岩岛的岩石和砾石是建筑的优良材料，长期以来受到无节制的开采，造成了海岛萎缩、生物资源锐减、海洋灾害加剧的现象。那些位于入海河口的冲积岛，由于径流的减弱，沙量也相应减少，海洋动力条件相对增强，造成岛陆侵蚀，使海岛面积日趋缩小，甚至消亡；珊瑚岛礁因人为采掘频繁、过度，其稳定性受到严重威胁。

4. 独立的地理单元和独特的自然环境

海岛四周被海水包围，远离大陆，每个海岛的成因、形态各不相同，气候、水文、生物、地质、地貌等条件各有差异，都相对成为一个独立的地理单元，形成了相对独特的自然环境。同时，海岛面积狭小，地域结构简单，物种来源受到限制，生物多样性相对较少，因而都具有特殊的生物群落，保存了一批珍稀物种，形成了独特的生态系统。

5. 生态系统脆弱

海岛生态是海岛生物群落与其周围环境长期和谐相处，相依为命构成的有机整体。我国海岛的岛陆土壤以溶盐土为主，但经日积月累的雨水淋溶逐渐脱盐，草本植物生长旺盛。但是，由于不少海岛无人看护、管理，树木遭到砍伐、草本植物被烧荒，植被受到严重破坏，土壤普遍严重流失，丘陵山地的土壤转而形成粗骨土和石质土，且土层薄、肥力极低。

海岛地形地貌简单，生态环境条件严酷，植被建群种类贫乏，优势种相对明显。海岛植被在种类组成上最显著的特点是：各群落的各层片中，往往拥有一定量的滨海或海岛特有优势种和伴生种，这是海岛滨海植物区系较丰富的反映。滨海盐生植被是一种特殊生态环境机制上的植被，遍布海岛滨海潮滩，该类型组成种类简单，多为单种群落，其草本盐生植被耐盐性极强，主要有碱蓬群落等；木本盐生植被，北方常见有柽柳群落，南方则以红树为主。滨海沙生植被由沙生植物和耐沙植物组成，主要分布在沙质海滩，分布范围和面积均较小，沼生和水生植被分布在潮间带及岛陆水域边缘地带的滩涂泥上，主要类型有芦苇群落、大米草群落等。水生植被仅少数岛屿有大面积分布，主要类型有菱群落、浮萍群落等。

由此可见，海岛四周被海水包围，每个海岛都相对地成为一个独立的生态环境地域小单元。其岛陆、岛滩、岛基和环岛浅海分别构成不同类型的生态环境，都具有独特的生物群落，保存了一批珍稀物种，形成了独立的生态系统；又因海岛面积狭小，土地单薄贫瘠，地域结构简单，又与大陆分离，物种来源受到限制，生物系统的生物多样性相对较少，稳定性较差，生态系统十分脆弱，极易遭受损害。

四、制定海岛法是加强海岛管理的需要

从海岛管理情况看，迄今没有明确由哪一个部门负责海岛的综合管理工作。目前有关海岛的不少规定分散在相关法律中，而海岛的地理位置、自然环境、居住条件、利用方式和开发规模等各不相同，如果就事论事，仅孤立的规定某一具体事项由哪一个部门管理，就会不可避免地出现顾此失彼的问题。特别是无居民海岛区域狭小，难以形成具开发规模的土地、林业等单项资源，只有依托海岛周围海域形成的整体资源才具有最大的社会和经济价值，因此必须建立无居民海岛综合管理体制，对海岛工作统筹考虑，这是我国及世界海洋管理发展的大趋势。同时，海岛作为国有资源，国家应当对海岛建立国家资源性资产的物权管理制度，实施海岛权属的统一管理。通过制定海岛法，进一步明确海岛的主管部门及其职责，从海岛的整体上具体规定各项管理制度是完全必要的。

五、国际上重视海岛的持续发展，一些沿海国家制定了专门的海岛法，中国海岛立法势在必行

1992 年联合国环境与发展会议通过的《联合国可持续发展 21 世纪议程》，在关于“小岛屿的可持续发展”中要求，“各国本身致力于解决发展中国家的可持续发展问题，为此必须：（1）采纳和执行一些计划和方案以支持可持续发展，并利用其海洋和沿海资源，包括满足基本的人类需要，维持生物多样性和增进岛屿人民的生活质量。（2）采纳一些措施，这些措施将使小岛屿发展中国家能够有效地、创造性和持续地应付环境变化，缓和影响和减少对海洋和沿海资源所造成的威胁”，并在 1994 年通过了《小岛屿发展中国家可持续发展行动纲领》，要求各国采取切实的行动措施，加强对岛屿资源开发的管理，努力提高岛屿基础设施的能力，扩大岛屿信息的交流，为岛屿的可持续发展提供根本的保障。

在上述原则引导下，沿海各国开展了多种模式的海岛管理活动。韩国制定了《国家岛屿发展规划》和《岛屿开发促进法》；日本制定了《日本孤岛振兴法》和《日本孤岛振兴法实行令》；美国、加拿大、英国、荷兰、法国、瑞典、澳大利亚等国家也相继制定了有关海岛开发与保护的管理法规。[16]

从我国海岛立法现状看，一是现行的海岛专门规定局限于无居民海岛，调整范围偏窄，立法位阶较低；二是涉及海岛的很多规定分散在其他相关法律中，导致实施不便，管理制度不够全面、系统，要求也不够具体，为改变这种无法可依的状况，需要制定一部综合性的海岛法。

16　国家海洋局：《国外海岛立法汇编》，第 26~53 页。

无居民海岛立法中的几个问题

徐祥民 * 周 晨 ** 李懋宁 ***

内容摘要: 本文以保护生态环境资源为视角，结合现有的法律法规，对无居民海岛的法律定位与特征、立法的基本原则以及若干重要问题进行了学理上的探讨，并对无居民海岛立法提出了一些思路和具体主张。

关键词: 无居民海岛 海岛 立法 环境资源法 生态

我国拥有面积在 500 平方米以上的岛屿 6500 多个，其中有居民的海岛仅为 433 个，其余均为无居民海岛。[1] 加强对无居民海岛的管理，对于保护海洋生态环境和资源、维护国家海洋权益具有十分重要的意义。因而，通过立法加强无居民海岛的保护和管理工作非常必要，对立法中的一些问题也需要认真研究。

一、无居民海岛的法律定位与特征

根据《无居民海岛保护与利用管理规定》第 34 条，无居民海岛是指在我国管辖海域内不作为常住户口居住地的岛屿、岩礁和低潮高地等。《联合国海洋法公约》第 121 条规定，岛屿是四面环水并在高潮时高于水面的自然形成的陆地区域。一般来说，陆域面积大于 500 平方米的称之为岛，小于 500 平方米的称之为礁。[2]

无居民海岛具有生态、法律和经济三重价值。其生态价值构成了无居民海岛的首要价值。大部分无居民海岛远离大陆，被海水分隔，每一个海岛都是一个相对独立而又完整的生态环境地域系统，属于整个海洋生态系统的一部分。从生态价值来说，无居民海岛是海鸟、海洋动物的栖息地、繁衍地，生长着多种植物，对海浪和洋流的变化也产生影响，形成了独特的生态系统；从海洋权益来说，无居民

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1 以上数据来自于国家海洋局：《关于加强无居民海岛及其周围海域管理工作的若干意见》（国海发 [2001]29 号）。
2 广义上的岛屿包括岛屿、岩礁和低潮高地，在某些情况下岩礁和低潮高地也可以作为领海基点从而影响领海、专属经济区和大陆架的测算，意义同样重大。

海岛可以作为领海基点从而影响领海、专属经济区和大陆架的测算，而且其本身就是国土资源的重要组成部分；从经济价值来说，无居民海岛是连接内陆和海洋的“岛桥’，也是开发海洋的后勤服务基地，兼具陆海资源优势——港址资源优势、土地资源优势、景观资源优势、养殖资源优势和矿物油气资源五大优势。[3] 但是，无居民海岛作为特殊的海洋资源和环境的复合区域，应当从整体上来把握它的价值。在这三种价值中，如果割裂了任何一部分，都会损害无居民海岛的总体价值，尤其是无居民海岛的生态价值——生态恶化会直接导致无法开发利用，经济价值下降，同时也会影响到海洋权益。所以，我们需要重新审视无居民海岛的法律定位，即无居民海岛是多元价值和资源的复合体，也就是说无居民海岛本身就是重要的有限的资源。

与陆地相比，无居民海岛就开发利用而言具有其特殊性：（1）生态系统脆弱。由于无居民海岛面积普遍狭小，造成了海岛地域结构简单，生态系统脆弱。生物的多样性指数小，稳定性差，开发的形式和规模局限性很大，如果开发不当，极有可能破坏良好的生态系统。（2）经济结构单一。多数无居民海岛是小而分散的地理单元，一般蕴藏的资源比较单一，在单一资源支撑下的经济结构也比较单一。如果过度开发某一资源，不但经济效益不高，而且还会引起生态环境的恶化。（3）基础设施落后。无居民海岛与大陆之间被海水分隔，缺乏交通、能源、自来水等公共基础设施。[4] 因此，无居民海岛上各生物和非生物单元相互依存所形成的独特的海岛资源不能为现行各类管理制度覆盖，在制度设计上不能简单套用陆上法律模式，应当立足于保护生态环境资源，使无居民海岛开发利用活动严格遵循生态规律，充分考虑到海岛环境的承载能力，处理好开发利用与生态平衡的关系。

二、无居民海岛立法的基本原则

对于无居民海岛的保护与开发利用关系问题，体现在无居民海岛立法的基本原则上主要有两种立场鲜明的观点：一是主张保护为主、严格限制利用；二是主张保护为主、适度利用。虽然两种观点都提到了“保护为主”，但在是否开发利用无

3 韩立民、王爱香：《保护海岛资源、科学开发和利用海岛》，载于《海洋开发与管理》2004 年第 6 期。

4 韩立民、王爱香：《保护海岛资源、科学开发和利用海岛》，载于《海洋开发与管理》2004 年第 6 期。

居民海岛的态度上是截然不同的。[5] 目前，从地方立法的角度来看，这种差异更加明显——有的地方提出把无居民海岛作为招商引资的新增长点，有的地方则对无居民海岛严格保护，这与各地无居民海岛的具体情况有直接的关系。对此，我们需要摆脱片面追求经济增长的狂热，从生态环境效益、经济效益和社会效益相结合的角度，冷静下来进一步思考。

无居民海岛纳入人们关注视线的时间还很短，我们对于无居民海岛以及整个海洋生态系统的认识还不够全面深刻，有很多问题还有待解决，如无居民海岛的生态链条及修复问题、环境资源状况、地质和航道条件、气候状况、矿产资源、其与周围海域的相互影响等问题。[6] 无居民海岛属于有限资源，其地质条件和海洋气候状况相对陆地更容易发生变化，如果在条件不成熟的情况下贸然允许开发利用，出让海岛使用权数十年，这期间无居民海岛的变化难以预料，开发项目对海岛及周边海域的生态影响或许更长时间才能凸现，风险系数大，其结果很可能得不偿失，让人们追悔莫及。

无居民海岛的开发利用项目，像中国目前大多数投资项目一样，是不考虑环境和生态成本的。投资者主要关注的是投入和回报的问题，至于环境代价往往要由全社会“埋单”，项目经营数十年赚得钵满盆溢后留下的很可能是烂摊子。政府所收取的海岛使用金相对于治理环境、恢复生态的高昂费用很可能是杯水车薪，老百姓不仅很难从无居民海岛的开发项目中得到实惠，反而往往会承担更多的环境负担。从这个角度讲，为了少数人的利益而可能危害公益、加重公众负担的行为有悖于法律正义。

因此，对于无居民海岛的开发利用应慎之又慎，无居民海岛的保护显得异常重要，留给子孙后代条件更加成熟时开发也未尝不可。另外，对于领海基点、军事等特殊用途的无居民海岛，以及具有特殊保护价值[7]的无居民海岛，应予特别关注，完全禁止开发利用活动。无居民海岛的保护与利用开发必须着眼于未来，从国家

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5 《厦门市无居民海岛保护与利用管理办法》第 4 条规定：“无居民海岛管理实行统一规划、综合管理和保护为主、严格限制利用的原则。”《宁波市无居民海岛管理条例》第 6 条规定：“无居民海岛管理应当遵循统一规划、保护为主、适度利用的原则。”厦门拥有 500 平方米以上无居民海岛 17 个，基本分布在厦门岛市区附近，在人们的可视范围内，被称为“厦门的盆景”；而宁波拥有 531 个，并且大部分距离市区和海岸较远。具体情况的差异决定了两地保护、开发、利用无居民海岛的态度，厦门立足保护而宁波侧重开发、利用，这也在一定程度上反映了地方立法鲜明的地方特色。

6 2005 年 6 月 25 日，我们考察了宁波市象山县旦门岛“金沙湾海岛狩猎旅游度假村”。这是一个较成熟的无居民海岛旅游开发项目，该项目投资人对旦门岛的前期调查花费了整整两年时间，先后数十次雇船出海上岛实地调查不同季节、不同时段的海潮、气候、动植物、航道、水源等情况，才初步掌握了海岛的基本情况。尽管这个项目已经开始营业且取得了不错的经济效益，但是这个项目对于海岛及周围海域的生态影响还需要一段时间才能显现出来。

7 一些无居民海岛上存在着罕见的自然景观、宝贵的历史遗迹，如青岛海域的长门岩岛上长满了珍贵的耐冬（山茶花），这在高纬度地区是一个奇迹。

的根本利益出发，坚持“立足保护、严格条件使用”这一基本原则。只有这样才能使无居民海岛的生态环境不会受到破坏，保证资源的可持续利用。

三、无居民海岛利用开发的规划前置制度

无居民海岛保护与利用规划是科学管岛的基础，是无居民海岛保护与利用最重要的、基础性的依据。无居民海岛保护与利用规划通常包括无居民海岛的资源与环境特征、土地利用规划、配套基础设施规划、海岛岸线使用方案、海岛功能定位、资源与环境保护和整治方案及生态景观规划等主要内容。

编制、实施无居民海岛保护与利用规划的目的在于掌握无居民海岛具体的客观自然属性、社会功能价值及适合的利用、开发方向，为科学、合理地开发与保护无居民海岛制定依据。每个海岛的地理环境、自然资源、社会功能价值各不相同，如果无法准确掌握海岛的状况，也将无法开展管理活动，同时也会导致开发利用的盲目性。制定无居民海岛保护与利用规划，就是为无居民海岛的保护与开发利用提供客观的标准和依据。此外，无居民海岛保护与利用规划也为海洋行政管理部门提供了审批用岛申请的依据，从而规范无居民海岛的行政审批行为，杜绝不合理的开发利用活动。[8]

鉴于无居民海岛脆弱的生态特征，开发利用无居民海岛应当慎行，之前必须进行技术性很强的保护与利用规划，将一部分不适合开发利用而需特别保护的岛屿规划为暂不利用海岛并加强监督管理，对于可利用、开发的海岛应当明确其功能定位从而发挥导向作用，使开发利用活动既遵循海洋生态规律又能准确进行市场定位，达到生态环境效益、社会效益和经济效益的统一。在无居民海岛保护与利用规划出台之前，应当暂停一切利用、开发无居民海岛的活动。在无居民海岛保护与利用规划制定过程中，对于具备合法手续的已建和在建项目，尽可能将其纳入保护与利用规划，补办相关手续，并根据规划对项目进行相应调整，但与规划相冲突的项目要坚决叫停。[9]

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8 厦门、宁波两地在无居民海岛立法中，都坚持规划前置原则。厦门市海洋与渔业局自2003年以来，组织有关研究机构和专家，利用高科技手段，在逐个海岛实地勘察的基础上，编制了《厦门市无居民海岛保护与利用规划》及《图集》，并获市政府批准，目前正在对每个海岛编制详细规划。宁波市无居民海岛保护与利用规划正在酝酿过程中。

9 厦门市在着手立法的同时就已经启动了无居民海岛保护与利用规划的制定工作，同时根据规划前置原则由市政府颁布文件暂停了一切利用、开发活动，在规划完成后开展了专项检查和执法行动。

四、无居民海岛利用、开发的期限和善后处理

对于无居民海岛使用权的出让期限，有的法规规定无居民海岛利用期限最长不得超过 50 年，也有法规根据无居民海岛的用途加以区分，但期限也有 40 年。[10] 我们认为，对无居民海岛使用权出让的期限规定过长不利于保护无居民海岛，也增加了开发利用方的风险。

无居民海岛位于海上，而整个海洋生态系统相对于陆地更容易变化，尤其是近些年海水水位上涨、东南亚海啸以及厄尔尼诺现象频繁发生等情况更加剧了无居民海岛生态系统的不稳定因素。在这种情况下，如果把无居民海岛使用权出让期限规定过长，无异于押上长期赌注，万一无居民海岛遭遇地震、台风、海啸等严重自然灾害导致海岛地质条件发生根本变化，或者开发利用的方案存在严重的生态隐患破坏海岛生态链条，恐怕我们要追悔莫及。所以，我们主张尽量不介入无居民海岛的生态系统，假使进行开发利用活动也尽量把期限控制在 25 年以内，气象观测以及其他公益事业用岛 40 年，修建大型永久性设施的用岛 50 年。

那么到期后怎么办呢？现有无居民海岛的学术资料和立法材料，都没有涉及到无居民海岛利用、开发后的善后处理问题。而这个问题，恰恰是无居民海岛立法中十分重要且必须解决的。无居民海岛的利用、开发活动要善始善终，之前郁郁葱葱、鸟语花香的海岛决不能因为人为因素的介入，若干年后就变得满目疮痍、毫无生气，让子孙后代望岛兴叹。

为了避免这个问题，首先要从源头上把关。不开发利用无居民海岛则已，要开发利用就要选择高水平、高起点、高投入的项目，项目的投资方必须是知名企业集团，具备雄厚经济实力和高级资质，有海岛开发经验，注重长期投资，信誉良好，而且要缴纳海岛生态环境保证金。与其把海岛交给当地农民晒海带，或让温州商人炒作，还不如把海岛封闭起来维护生态环境，哪怕束之高阁待价而沽也比低水平开发得不偿失要划算。

其次，可以考虑建立无居民海岛使用权出让后的年检制度，每年由海洋行政管理部门实地全面检查无居民海岛生态环境是否受破坏，是否按照申报材料的用途用岛。检查严重不合格的，收回海岛使用权，部分不合格的，限期整改，两种情况都要并处罚金。

最后，无居民海岛使用权出让期限届满，要对整个海岛进行一次彻底清查，评估开发利用活动对海岛生态环境的影响，决定海岛生态环境保证金是否足额退还。对于生态环境效益、社会效益和经济效益俱佳的项目可以再批准延长使用期限；

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10 《无居民海岛保护与利用管理规定》第 15 条规定，无居民海岛利用期限最长不得超过 50 年。《宁波市无居民海岛管理条例》第 12 条规定，旅游、娱乐项目的无居民海岛使用权最高期限为 40 年，其他项目为 50 年。

对于情况不好的项目，扣缴海岛生态环境保证金用作生态恢复，不再批准延长使用期限;严重破坏海岛的，不仅追究经济责任，还要承担行政和刑事责任。

由于无居民海岛不作为公民户籍所在地和法人注册登记地，海岛上的基础设施不宜办理产权，在开发利用之初就应当明确其仅具有使用权，期限届满后一并收回，政府根据其经济贡献给予适当经济补偿，或者可以采取譬如 BOT 等灵活多样的方式。海岛是国有资源，属于全社会，不能允许个别人在岛上建起别墅据为己有世代相传，从而使当“岛主”的美梦成真。无居民海岛收回以后，根据具体情况，可以封闭保护，也可以开辟为公共场所，或者继续通过招标、拍卖、挂牌出让等方式出让使用权。

“塔斯曼海”轮船舶碰撞海洋油污损害赔偿系列案评析

陈海波 *

内容摘要：“塔斯曼海”轮系列案是中国第一例依据《1992 CLC》公约对海洋油污损害民事责任做出判决的案件，也是经修订的《海洋环境保护法》开始实施以来，中国海洋行政主管部门首次对油污损害海洋生态环境进行民事索赔的案件。法院在船舶扣押与释放、对共同争议合并审理等方面正确地解释了国际公约、国内立法的有关规定和立法宗旨。该案对于有关实体争议的法律适用有的值得肯定，有的值得进一步思考。该案也涉及船舶碰撞对方当事人的法律责任等问题，有待研究与解决。

关键词：“塔斯曼海”轮系列案　《1992 CLC》公约　船舶扣押与释放　主体资格　损害　赔偿范围

一、引　言

2004 年 12 月 24 日和 12 月 30 日，天津海事法院（以下除特别指明外，均简称“法院”）对于天津市海洋局（以下简称“海洋局”）、天津市渔政渔港监督管理处（以下简称“渔政处”）、约 1500 名天津渔民和养殖户等 10 组诉讼原告分别诉被告英费尼特航运有限公司、伦敦汽船船东互保协会“塔斯曼海”轮（下文如无特别指明，均简称“塔轮”）船舶碰撞油污损害赔偿系列案（以下如无特别指明，均统称“塔轮”系列案），相继做出一审判决，判令“塔轮”船舶所有人英费尼特航运有限公司及其油污责任保险人伦敦汽船船东互保协会（以下如无特别指明，简称为“两被告”或“被告”）连带赔偿原告海洋生态损失、渔业资源损失、滩涂贝类损失、网具损失、海洋捕捞停产损失等共计约人民币 4200 万元。

尽管该案当事人提起了上诉，上诉法院至今尚未做出二审判决，但是该系列案是《1992 年国际油污损害民事责任公约》（以下简称“《1992 CLC》”）对中国大

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陆生效后，[1] 第一例根据该公约审理海洋油污损害民事责任并做出判决的案件。此案也是经修订的《中华人民共和国海洋环境保护法》（以下简称“《海环法》”）自2000 年 4 月 1 日开始实施以来，中国海洋行政主管部门首次对油污损害海洋生态环境进行民事索赔的案件。该系列案的涉案标的达 1.7 亿元人民币，也是中国涉案标的最大的民事索赔案。因此，“塔轮”系列案从多个方面开创了中国海洋环境保护、中国海事审判的先河，引起了国内外专业机构、人士以及新闻媒体的高度重视。[2]

除被冠以多个“第一”外，“塔轮”系列案在法律适用和程序安排等方面有许多值得关注之处，着实值得我们认真研究。本文将首先对“塔轮”油污事件以及“塔轮”系列案的一审审判情况作简要介绍，继而对法律诉讼过程中较为突出的程序处理、该系列案件的有关法律适用问题进行分析，最后就该案有所涉及但尚未解决的问题，提出几点余论。

二、“塔斯曼海”海洋污染事件简介及系列案件一审审判简介

2002 年 11 月 23 日约 0408 时，英费尼特航运有限公司所属马耳他籍油轮“塔斯曼海”与大连旅顺顺达船务有限公司所属货轮“顺凯一号”轮（以下简称“顺轮”），在天津大沽口东部海域约 23 海里处（北纬 38°50.5'，东经 118°26.6'）发生碰撞，“塔轮”右舷第 3 舱破损，所载 205.924 吨文莱轻质原油入海，造成附近海域污染。

同年 11 月 28 日，海洋局向天津海事法院提出申请，要求诉前扣押“塔轮”，并责令被申请人提供 1500 万美元的担保。随后，渔政处、渔民协会等也分别向法院提出扣押该轮的申请。法院根据成诉原告的共同申请，依法扣押了“塔轮”。2002 年 12 月 20 日，中国再保险公司代表伦敦汽船船东互保协会为被申请人英费尼特航运有限公司向法院提供了 300 万美元的信用担保后，法院依法解除了对“塔轮”的扣押。次日凌晨 2 点，“塔轮”驶离天津港。

2002 年 12 月 26 日，海洋局向该法院起诉两被告，请求法院依法判令两被告赔偿损失、承担有关费用。2003 年 10 月，海洋局依法提出变更诉讼请求的要求，提高了索赔数额，请求法院依法判令两被告连带赔偿原告海洋环境容量损失 3600

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1 中国大陆、中国香港、中国澳门是《1992 CLC》的单独参加国和地区。此外，中国香港还参加了《1992 年设立国际油污损害赔偿基金国际公约》（《1992 FUND》）。

2 张晓敏、徐霄：《油船泄漏之后——海洋污染涉外索赔第一案审判纪实》，载于《人民法院报》，下载于 http://rmfyb.chinacourt.org/public/detail.Php?id=80993，2005 年 11 月 1 日；陈杰：《天津：污染海洋生态环境涉外索赔第一案》，下载于 http://www.people.com.cn/GB/shehui/1061/3090473.html，2005 年 11 月 1 日。

万元、海洋生态服务功能损失 738.17 万元、海洋沉积物恢复费用 2614 万元、潮滩生物环境恢复费用 1306 万元、浮游植物恢复费用 60.84 万元、游泳动物恢复费用 938.09 万元、生物治理研究费用和监测评估费等 5798307 元，共计 98369307 元。

2002 年 12 月 31 日，渔政处向该法院起诉，请求法院依法判令两被告连带赔偿原告国家渔业资源损失 1782.8 万元人民币及其相应利息。

2003 年 1 月 10 日，河北省滦南县渔民协会代表 879 户渔民和 15 户养殖户、天津市塘沽区北塘渔民协会代表 433 户渔民、大沽渔民协会代表当地 129 户渔民，分别向该法院提起诉讼，索赔数额共 2100 万元人民币。2003 年 1 月 17 日，天津市汉沽区营城镇蔡家堡村、大神堂村、高家堡村、双桥村、洒金坨村、河治村、火神庙村、土桥子村等 8 个村 271 户渔民和养殖户选出原告代表，分别向该法院提起代表诉讼，索赔数额共 1603.5 万元人民币。

至此，共有 10 组诉讼原告（包括海洋局、渔政处、约 1500 户渔民和养殖户）分别向天津海事法院提出对两被告船舶碰撞油污损害赔偿请求共计 1.7 亿元人民币。

法院于 2004 年 6 月 14 日和 23 日，召开了两次由 10 案原、被告委托代理人参加的审前会议。2004 年 6 月 24 日和 25 日对 10 案的共同争议焦点（关于溢油量、污染面积、油污损害范围和程度等问题的争议焦点）进行了合并审理。此外，法院还在不同时间对 10 案分别进行了多次公开开庭审理，并最终做出一审判决，判令两被告连带赔偿原告海洋生态损失、渔业资源损失、滩涂贝类损失、网具损失、海洋捕捞停产损失等共计约人民币 4200 万元。

其中，针对海洋局的诉讼请求，法院判决被告连带赔偿原告海洋环境容量损失 750.58 万元，调查、监测评估费用及其生物修复研究经费等 2452284 元，以及上述款项的利息，驳回原告的其他诉讼请求。[3] 针对渔政处的诉讼请求，判决被告连带赔偿原告渔业资源损失 1465.42 万元、调查评估费 48 万元，以及上述款项的利息，驳回原告的其他诉讼请求。[4] 针对原告 114 位大沽渔民的诉讼请求，判决被告连带赔偿原告海洋捕捞停产损失共计 571313 元以及相应利息，驳回原告的其他诉讼请求。[5] 针对杨保生、李恩秋、李恩敏、杨士永、刘宝正等 5 位诉讼代表人所代表的 879 位渔民和 15 位养殖户所提出的诉讼请求，判决被告连带赔偿原告滩涂贝类损失、网具损失、海洋捕捞停产损失等共计 15134370 元以及相应利息，驳回原告的其他诉讼请求。[6]

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3 （2003）津海法事初字第 183 号。
4 （2003）津海法事初字第 184 号。
5 （2003）津海法事初字第 185 号。
6 （2003）津海法事初字第 186 号。

三、“塔斯曼海”法律诉讼过程中的程序处理

“塔轮”事故当事人人数众多，所涉赔偿数额巨大，涉及许多技术性问题，因此相关诉讼程序的复杂程度是可想而知的。作者认为，法院对于扣押“塔轮”并凭担保释放船舶、组织召开审前会议并对共同争议焦点进行合并审理的程序与程序安排值得关注。

（一）“塔轮”扣押与解除扣押程序

1.“塔轮”扣押与被请求人复议

如上所述，“塔轮”原油泄漏污染海域后，海洋局于 2002 年 11 月 28 日向天津海事法院提出申请，要求诉前扣押“塔轮”，并责令被申请人提供 1500 万美元的担保。随后，渔政处、渔民协会等也分别向法院提出扣押该轮的申请。法院根据共同申请，依法扣押了“塔轮”。

扣船期间，被申请人“塔轮”船舶所有人于同年 12 月 3 日向法院提出复议申请，请求法院解除对“塔轮”的扣押。其理由是：扣船申请人所属国中国、被申请人所属国马耳他、“塔轮”油污责任保险人伦敦汽船互保协会所属国英国均为《1992 CLC》的缔约国。[7] 被申请人已经按照该公约的规定，提供了油污责任保险及经马耳他政府主管机关签发的证明该责任保险有效的证书（以下如无特别指明，简称“油污保险及证书”），被申请人的油污责任保险是有效的担保，故申请人没有权利为取得担保而扣押船舶。

2. 对于被申请人复议理由的法理分析

对于被申请人的复议理由，作者认为应当从三个方面来具体认定：（1）正确理解《1992 CLC》关于不得扣押船舶（或其他财产，以下略）或者应当释放被扣船舶的要求；（2）取得油污保险及证书应否视为设立油污损害赔偿责任基金；（3）取得油污保险及证书应否视为为解除船舶扣押而提供的担保。

（1）《1992 CLC》中关于不得扣押船舶或者应当释放被扣船舶的要求

《1992 CLC》延用《1969 年国际油污民事责任公约》（以下简称“《1969 CLC》”）、1957 年《船舶所有人责任限制公约》、1976 年《海事赔偿责任限制公约》所采用的原则，将在有管辖权的法院设立责任限制基金（以下简称“责任基金”）

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7 是依据《1969 年国际油污损害民事责任公约》1992 年议定书，对 1969 年《国际油污损害民事责任公约》（《1969 CLC》）第 I 条至第 12 条进行修正的文本。1992 年 11 月 27 日，该 1992 年议定书通过于伦敦，于 1996 年 5 月 30 日生效。1999 年 9 月 6 日中华人民共和国交通部以交国际发〔1999〕465 号文通知该议定书于 2000 年 1 月 5 日对中国（大陆）生效。

作为不得就相关索赔对船舶所有人的其他财产行使任何权利，或者应当释放已经就油污损害提出索赔而扣留的船舶所有人的任何船舶或其他财产，或者退还为使该船舶或其他财产免于扣留而提供的保证金或其他保证的前提条件。这一前提条件体现于《1992 CLC》第 6 条规定：

> ①当船舶所有人在事件发生之后已按第 5 条规定设立一项基金，并有权限制其赔偿责任时，则：a. 对上述事件造成的油污损害提出索赔的任何人，不得就其索赔对船舶所有人的其他财产行使任何权利；b. 各缔约国的法院或其他主管当局，应下令退还由于对该事件造成的油污损害提出索赔而扣留的属于船舶所有人的任何船舶或其他财产，对为避免扣留而提出的保证金或其他保证也同样应予退还。
>
> ②但是上述规定只在索赔人能向管理基金的法院提出索赔，并且该项基金对其索赔确能支付的情况之下，方可适用。

具体而言，可以区分为两种情形：第一，属于溢油船船舶所有人的任何财产（所设立的责任基金这项财产除外）未因本次油污损害被索赔、扣留的情况下，如果船舶所有人依据公约的规定设立了责任基金，则属于该船舶所有人的任何财产（所设基金除外）不得被扣留、被索赔；第二，属于溢油船船舶所有人的任何财产（所设基金除外）已经因本次油污损害被索赔、扣留，或者船舶所有人为使被扣船舶或财产免于扣留而提供了相应的保证金或其他保证的情况下，当船舶所有人依据公约的规定设立责任基金时，扣留该船舶或其他财产的法院或其他主管当局应当释放该船舶或其他财产，船舶所有人为使被扣船舶或财产免于扣留而提供的保证金或其他保证应当退还。这两种情形均以设立油污赔偿责任限制基金为前提条件。

（2）取得油污保险及证书不应被视为设立了责任基金

要明确“塔轮”依据《1992 CLC》的规定取得的油污保险及证书是否构成《1992 CLC》第 6 条所规定的“设立基金”这一问题，首先应当正确理解《1992 CLC》第 5 条第 3 款的规定。

《1992 CLC》第 5 条第 3 款在《1969 CLC》第 5 条第 3 款[8] 的基础上，增加了“如未提起诉讼，则应在按第 9 条可以提起诉讼的任一缔约国法院或其他主管当局设立此种基金”的规定，即：

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8 《1969 CLC》第 5 条第 3 款规定：“为取得本条第 1 款规定的责任限制的权利，船舶所有人应在按第 9 条规定提起诉讼的任一缔约国的法院或其他主管当局设立相当于其责任限制总额的基金。设立该项基金可采取照数存入银行的方法，或是采取按设立基金的缔约国法律可以接受的，经法院或其他主管当局认可的银行担保或其他担保的方法。”

③为了利用本条第 1 款规定的限制其赔偿责任的权利，所有人应在按第 9 条提起诉讼的任一缔约国法院或其他主管当局设立总金额相当于其赔偿责任限额的基金;如未提起诉讼，则应在按第 9 条可以提起诉讼的任一缔约国法院或其他主管当局设立此种基金。设立该基金的方式，可以是交存该金额，也可以是提交根据基金设立地缔约国法律可以接受的，法院或其他当局认为足够的银行担保或其他担保。

所增加的这一句规定很好地补充了原有的规定，强调了船舶所有人应当主动设立责任限制基金这一要求，即在诉讼开始之后，船舶所有人应当在受理该诉讼的法院或其他主管当局设立责任限制基金;在诉讼开始之前，应当在依据公约第 9 条的规定可以起诉的缔约国法院或其他主管当局设立责任限制基金。责任限制基金的设立方式可以有多种形式，但是必须是主动设立的专门的责任限制基金。

《1992 CLC》要求在缔约国登记的载运 2000 吨以上散装油类货物的船舶所有人投保油污责任保险或取得其他财务保证。[9] 这是此类船舶在包括中国在内的《1992 CLC》各缔约国营运的基本条件和强制性要求。[10] 投保或取得的油污责任保险或其他财务保证不是主动设立的“专门的责任限制基金”。

同时，公约第 5 条第 11 款还规定，“保险人或提供财务保证的其他人有权按照本条规定设立基金，其条件和效力与船舶所有人设立的基金相同。”可见，油污责任保险人或提供财务保证的其他人依据公约的规定承保此类油污责任保险或承担财务担保责任，与依据公约的规定设立专门的责任限制基金的性质完全不同。

如果按照被申请人复议申请中的理解，将投保该油污责任保险或取得其他财务保证视为船舶所有人设立了责任限制基金，则所有投保该油污责任保险或取得其他财务保证的船舶都无需在开始此类油污损害赔偿诉讼之前或诉讼中，依据公约第 5 条第 3 款的规定在有关法院或其他主管当局设立责任限制基金。《1992 CLC》也无需增加“如未提起诉讼，则应在按第 9 条可以提起诉讼的任一缔约国法院或其他主管当局设立此种基金”这一规定了。甚至，原有的规定“所有人应在按第 9 条提起诉讼的任一缔约国法院或其他主管当局设立总金额相当于其赔偿责任限额的基金”也应当删除。这一理解显然与公约的制定与修改初衷相悖。由此反证，《1992 CLC》并未将油污责任保险或其他财务保证视为专门设立的责任限制基金，船舶所有人不能以此为由要求法院释放被扣押的“塔轮”。

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9 《1992 CLC》第 7 条第 1 款规定，“在缔约国登记的载运 2000 吨以上散装油类货物的船舶所有人，必须进行保险或取得其他财务保证，例如银行保证或国际赔偿基金出具的证书等保证数额按第 5 条第 1 款中规定的责任限度决定，以便按本公约规定承担其对油污损害应负的责任。”

10 《1992 CLC》第 7 条第 10 款规定，“除非根据本条第 2 款或第 12 款已签发证书，各缔约国不得允许本条适用的悬挂其旗帜的船舶从事营运。”

（3）取得油污保险及证书不应被视为被请求人为释放船舶而提供的担保

程序问题适用法院地法。我国没有参加《1952 年扣船公约》和《1999 年扣船公约》，但是《中华人民共和国海事诉讼特别程序法》（以下简称“《海诉法》”）对于船舶扣押这一海事请求保全程序做出了详细规定。

《海诉法》第 21 条规定，海事请求人可以就“船舶对环境、海岸或者有关利益方造成的损害或者损害威胁、为预防、减少或者消除此种损害而采取的措施、为此种损害而支付的赔偿、为恢复环境而实际采取或者准备采取的合理措施的费用、第三方因此种损害而蒙受或者可能蒙受的损失”等多项海事请求，申请诉前海事请求保全，请求法院扣押被请求人的船舶。海洋局、渔政处、渔民协会等正是依据《海诉法》有关海事请求保全的规定，向法院提出扣船申请的。《海诉法》第 18 条规定，“被请求人提供担保……的，海事法院应当及时解除保全。”因此，我们应当进一步考查“塔轮”的油污保险及证书应否被视为被申请人在海事请求保全程序中提供的担保。

《海诉法》第 73 条和第 76 条规定，海事请求保全中，被请求人可以应请求人的要求，以现金、保证、设置抵押或质押的方式提供担保。请求人要求被请求人提供担保的数额，应当与其债权数额相当，但不得超过被保全财产的价值。但是，被请求人提供担保的方式与数额应当由海事请求人和被请求人协商，协商不成的由海事法院决定。

可见，油污保险及证书不同于海事请求保全中被请求人应请求人的要求提供的担保，主要理由如下：

第一，诉前扣船时，被请求人提供担保的目的在于使被扣船舶得以释放，而投保、取得油污责任保险及证书的目的，一是符合《1992 CLC》的强制性要求，使“塔轮”得以在包括中国在内的《1992 CLC》各缔约国营运；[11] 二是确定其油污责任保险人，使油污受害人届时可以直接向责任保险人诉求油污损害赔偿。[12]

第二，扣押船舶时，被请求人提供担保的数额应当与扣船请求人的海事请求数额相当，但是不得超过被扣“塔轮”的价值。不同债权人就不同的海事请求相继申请扣船时，被请求人应当分别按照请求人的要求提供担保，以释放被扣船舶。因此，每一次提供的担保均应与该次扣船申请所依据的海事请求相对应，并不超

11 《1992 CLC》第 7 条第 1 款规定，“在缔约国登记的载运 2 000 吨以上散装油类货物的船舶所有人，必须进行保险或取得其他财务保证，例如银行保证或国际赔偿基金出具的证书等保证数额按第 5 条第 1 款中规定的责任限度决定，以便按本公约规定承担其对油污损害应负的责任。”该条第 2 款规定，“缔约国的有关当局在确信第 1 款的要求已获得满足之后，应向每艘船舶颁发一份证书，证明保险或其他财务担保根据本公约的规定确属有效。”该条第 10 款规定，“除非根据本条第 2 款或第 12 款已签发证书，各缔约国不得允许本条适用的悬挂其旗帜的船舶从事营运。”

12 《1992 CLC》第 7 条第 8 款规定，“对油污损害的任何索赔，可向承担船舶所有人油污损害责任的保险人或提供财务保证的其他人直接提出。”

过被扣船舶的价值。油污责任保险承保金额的确定方法则完全不同。其数额是依据被保险油轮的吨位确定的责任限额，适用于《1992 CLC》规定的一次油污事故所造成的所有索赔请求，[13] 与扣船请求人的债权数额和船价毫无关联。

第三，被请求人提供担保的方式中，现金、设置抵押或质押等均为可执行担保，而保证通常以银行或保险公司、保赔协会专门担保释放被扣船舶的保证为常用担保方式。油污保险及证书不是可执行担保，也不具有专门性。

作为船旗国，马耳他政府主管机关签发的证明该责任保险有效的证书显然只是一份证明文件，不是责任保险合同本身，也不是责任限制基金，或者为使被扣船舶得以释放而提供的担保。

可见，船舶扣押的被请求人应请求人的申请提供担保，与依据《1992 CLC》的规定投保、取得油污责任保险与证书，两者在性质、目的、内容等方面完全不同，[14] 不能相互取代或涵盖。因此，不能将“塔轮”的油污责任保险与证书视为“塔轮”船舶所有人应海事请求人的要求，为释放被扣“塔轮”而依法提供的担保。

3. 法院对于复议申请的审查

针对被请求人提出的复议申请，天津海事法院于 2002 年 12 月 7 日召开了听证会，由扣船双方当事人充分举证和发表意见。在此基础上，法院认定，申请人申请扣押“塔轮”符合中国民事法律规定。根据《1992 CLC》的规定，[15] 避免扣押或使船舶获释以船舶所有人是否在受案法院设立相当于责任限额的基金为前提条件，由于被申请人未在中国法院设立责任限制基金，所以申请人申请扣押船舶符合中国民事法律规定，也未被《1992 CLC》所禁止。法院应当尊重申请人关于扣押船舶的选择。被申请人提供的证书，是公约规定的载运 2000 吨以上货物的散装油轮在各缔约国从事营运的强制性条件。不符合这一条件，上述船舶就不能在包括中国在内的各缔约国营运，因此该证书不是可以使船舶获释的担保。其次，公约规定，对污染损害的任何索赔可以向油污责任保险人或其他财务保证人直接提出。因此，责任保险人或其他财务保证人是船舶所有人承担赔偿责任的连带保证人。申请人为了使自己的判决在法院所在地得以执行，依《海诉法》申请扣船，并要求提供担保。而被申请人的证书不具备在本院执行生效判决的担保作用。申请人要求对该轮继续扣押，直至提供充分可靠的执行判决的担保方能解除扣押的

13 《1992 CLC》第 7 条第 9 款规定，“按照本条第 1 款规定由保险或由其他财务保证所提供的任何款项，应仅用于根据本公约提出的索赔。”

14 有人提出两者之间的主要不同点有：（1）两者所属的种类不同；（2）两者设立的程序不同；（3）两者的转化执行的时间不同；（4）两者所担保的数额不同；（5）两者担保的方式不同；（6）两者担保的对象不同。见徐富斌：《船舶油污损害赔偿相关法律问题研究》（2005 年 8 月厦门研讨会论文）。

15 《1992 CLC》第 6 条第 1 款。

请求，符合《海诉法》的规定。据此，法院驳回了被申请人的复议申请。[16]

作者认为，天津海事法院的这一认定明确了《1992 CLC》的规定与立法宗旨，对于《1992 CLC》的具体适用无疑具有非常重要的意义。

4. 被扣“塔轮”的释放

海洋局、渔政处、渔民协会等请求人向法院提出了诉前扣押“塔轮”的共同申请，属于一次申请。对此，被请求人只需提供一次担保。这与请求人分别申请扣船的情形不同。后一种情况下，请求人分别要求被申请人提供担保，被申请人应当分别提供与各海事请求数额相应，但是不超过船价的担保。

在本案中，被请求人提出“塔轮”现价为 265 万美元。因此，尽管这些共同请求人的海事请求数额巨大，被请求人应当提供的担保数额将受到船价的限制。经当事人评估、协商，并考虑船龄及市场等因素和当事各方的利益，法院最终将担保数额确定为 300 万美元。

2002 年 12 月 20 日，中国再保险公司代表“塔轮”油污责任保险人为被申请人“塔轮”船舶所有人向法院提供了 300 万美元的信用担保，天津海事法院依法解除了对“塔轮”的扣押。

（二）审前会议以及对共同争议焦点的合并审理

通常情况下的“合并审理”主要体现于《中华人民共和国民事诉讼法》（以下简称“《民诉法》”）第 53 条和第 126 条所规定的两种类型，其特点是将两个或多个诉讼案件整体合并审理。[17] 诉讼实践中，法院通常依据诉讼效率原则，对于同一事由产生的，诉讼标的属于同一种类的案件进行合并审理。例如，将均为船员人身伤亡损害赔偿，或者船员工资支付请求等案件合并审理。

海洋包含了一定的海域，海域内的水体、生物资源与非生物资源、底土等，可以实现不同的使用目的，体现不同的使用价值。因此，海域的所有者及使用者的利益各有不同。例如“塔轮”系列案虽然产生于“塔轮”因船舶碰撞而溢油这一事故，但是有关各方基于不同的利益，提出了各不相同的诉讼请求。海洋局请求的是海洋环境生态污染破坏和生态恢复的索赔；河北省滦南县和天津市汉沽、北塘、大沽渔民请求的是因污染造成的海洋捕捞停产损失、网具损失和滩涂贝类养殖损失；而渔政处请求的是渔业资源损失。各案需要认定的争议问题也多有不同。因此，

16 天津海事法院：《“塔斯曼海”轮船东提起复议，天津海事法院依据 1992 CLC 决定驳回》，下载于 http://www.ccmt.org.cn/hs/news/show.php?cId=2689，2005 年 11 月 1 日。

17 《中华人民共和国民事诉讼法》第 53 条规定，当事人一方或者双方为二人以上，其诉讼标的是共同的，或者诉讼标的是同一种类、人民法院认为可以合并审理并经当事人同意的，为共同诉讼。共同诉讼可以进行合并审理。第 126 条规定，原告增加诉讼请求，被告提出反诉，第三人提出与本案有关的诉讼请求，可以合并审理。

法院不应将这 10 个案件进行案件整体的合并审理。

然而，各案需要认定的争议问题虽然多有不同，但是如下问题是各案的共同争议问题和定案基础：1.“塔轮”本身的情况；2. 污染溢油量；3.“塔轮”溢油的品质；4. 溢油回收量和挥发量；5. 污染面积；6. 消油剂的使用量以及使用后果；7. 污染前的环境质量；8. 污染后的环境整体评估等。这些问题的技术含量非常强，需要由专家或专业机构进行技术鉴定。如果各案分别对这些争议问题进行具体认定，势必降低诉讼效率，增加诉讼成本，并且可能因当事人举证与质证情况的不同，影响上述问题的一致认定，进而影响案件的最终判决结果。

为此，天津海事法院于 2004 年 6 月 14 日和 23 日，组织这 10 个案件的原、被告委托代理人共同召开了审前会议。会上，各方当事人最终确定了上述共同争议焦点，并一致同意对这些共同涉及、技术要求高、实质影响案件判决结果的争议焦点问题进行合并审理。各案除上述共同争议焦点问题之外的其他争议问题，将在个案审理中分别予以调查、认定。法院于 2004 年 6 月 24 － 25 日和 9 月 27 日公开开庭，对上述争议焦点问题进行了合并审理。

由于上述共同争议焦点涉及许多专业技术问题。法院在征得原被告一致同意后，委托具有最高人民法院认可的鉴定资质的山东海事司法鉴定中心，对有关专业技术问题进行鉴定。鉴定人在研读双方当事人提供的证据材料、实地调查、进行科学试验和数值模拟分析、查阅文献、参加庭审旁听双方意见的基础上，于 2004 年 8 月 26 日出具了《“塔斯曼海”轮溢油事故共同争议焦点事实评估鉴定报告》，并于 2004 年 9 月 27 日出庭，就该共同焦点事实鉴定报告中涉及的问题接受 10 个案件原被告委托代理人以及委托的具有专门知识人员的当庭质询，就相关问题作了回答和解释，为法院最终认定此次油污事故所致污染的程度与范围以及各案损害赔偿等事项，奠定了良好的基础。

作者认为，天津海事法院通过组织召开审前会议，由当事人共同确定共同争议焦点，并在当事人一致同意的前提下进行合并审理；经当事人一致同意后，就有关技术问题委托有鉴定资质的鉴定人进行鉴定，出具共同焦点事实鉴定报告，并进行充分的当庭质询。这一做法可以大大减轻当事人的讼累、降低诉讼成本、提高诉讼效率，同时可以保证对各案裁判起重要作用的共同争议事实认定结果的一致性，保证了公正审判，因此这一做法非常值得提倡。此外，《民诉法》并未就案件部分争议的合并审理做出具体规定。作者建议立法或司法解释能够提供具体的法律依据。

四、“塔斯曼海”系列案实体争议的法律适用

“塔轮”为马耳他籍油轮，其发生船舶碰撞，致使原油泄漏污染的地点在中国。

此系列案件的原告均为中国机构、组织和个人，被告分别在马耳他和英国登记注册。根据《中华人民共和国民法通则》（以下简称“《民法通则》”）第 146 条的规定，“塔轮”系列案的实体争议属于当事人国籍和住所地均在不同国家的涉外海事侵权损害赔偿，应当适用侵权行为地法，即中国法。[18] 依据《民法通则》第 142 条的规定，除中国声明保留的条款外，中国缔结或者参加的国际条约同中国民事法律有不同规定的，适用国际条约的规定。[19]

中国是《1992 CLC》的参加国，因此，我们应当一并考查“塔轮”系列案对于《1992 CLC》及有关国内立法的适用情况。此外，还应考查《CMI 油污损害指南》（以下简称“《油污指南》”）和《国际油污赔偿基金索赔手册》（以下简称“《索赔手册》”）的可适用性。

（一）《油污指南》和《索赔手册》的可适用性

国际海事委员会于 1994 年制定了《油污指南》，其目的并不在于改变既有法律制度所确立的索赔权利，而是在对国际公约的理解有争议时，提供有关参考意见。[20]

1992 年国际油污损害赔偿基金（以下简称“FUND 基金”）在总结《1992 年设立国际油污损害赔偿基金国际公约》（以下简称“《1992 FUND》”）操作实践的基础上，发布了《索赔手册》，其目的是为当事人向 FUND 基金索赔时，提供操作指南。[21]《1992 FUND》第 1 条第 2 款规定，该公约中“船舶”、“人”、“所有人”、“油类”、“污染损害”、“预防措施”、“事故”和“组织”等用语与《1992 CLC》第 1 条所规定的相应用语具有相同含义。因此，《索赔手册》关于上述概念的说明，为我们理解《1992 CLC》的有关规定提供了参考。

可见，《油污指南》和《索赔手册》都不是国际公约，其制订目的是为当事人提供实务参考与指南，不以得到世界各国普遍接受为根本宗旨。就我国情况而言，《油污指南》和《索赔手册》均未得到长期反复实践和普遍接受，不应被视为国际惯例，因而不应成为审理“塔轮”系列案的法律依据。天津海事法院关于《油污指南》和《索赔手册》不适用于“塔轮”系列案的认定是正确的。

《油污指南》和《索赔手册》对于油污损害赔偿的有关问题做出了较为详细的说明，因此法院在司法实践中，可以根据具体情况，适当参考《油污指南》和《索

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18 《民法通则》第 146 条第 1 款规定，侵权行为的损害赔偿，适用侵权行为地法律。当事人双方国籍相同或者在同一国家有住所的，也可以适用当事人本国法律或者住所地法律。

19 《中华人民共和国海商法》第 268 条也做出了相同的规定。

20 《油污指南》的引言。

21 《索赔手册》（2004 年 10 月由基金大会通过，于 2005 年 4 月出版）的前言。

赔手册》的有关理解。当然，这些指南只能作为参考，而不能成为法院判定案件的依据。将来修改《中华人民共和国海商法》（以下简称“《海商法》”），增订海洋污染损害赔偿一章时，也可以吸收《油污指南》和《索赔手册》中较为合理、便于操作的内容。

（二）《海商法》的可适用性

《海商法》没有对油污损害赔偿做出专门的立法规定，仅在第 8 章和第 11 章分别对船舶碰撞和海事赔偿责任限制做出了专章规定。

“塔轮”与“顺轮”发生碰撞，除导致海洋环境污染损害外，还造成了其他财产损害。“顺轮”是中国籍沿海货轮，不受《1992 CLC》的调整。如果当事人就此次船舶碰撞造成的财产损害，向“顺轮”提出赔偿请求，应当适用《海商法》关于船舶碰撞的有关规定来确定“顺轮”船舶所有人应当承担的赔偿责任。这些海事请求对于“顺轮”船舶所有人来说，不属于《海商法》第 208 条第 2 项所规定的非限制性海事请求。[22] 因此，“顺轮”船舶所有人可以根据《海商法》及相关规定，确定此次事故所致财产损失的责任限制权利及责任限额。[23]

但是，“塔轮”系列案中，原告仅向两被告提出了船舶碰撞油污损害赔偿请求，没有同时起诉或分别起诉“顺轮”船舶所有人。[24] 因此，《海商法》的上述规定均不予适用。

此外，我国参加了《1992 CLC》。依据《海商法》第 208 条的规定，《海商法》第 11 章关于海事赔偿责任限制的规定不适用于《1992 CLC》规定的油污损害赔偿请求。当事人在“塔轮”系列案中，仅依据《1992 CLC》“谁污染，谁赔偿”的原则，

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22 《海商法》第 208 条第 2 项规定，“本章规定不适用于下列各项：……（二）中华人民共和国参加的国际油污损害民事责任公约规定的油污损害的赔偿请求……”

23 就“顺轮”船舶所有人的责任限额而言，《海商法》第 210 条第 2 款规定，从事沿海作业的船舶，其赔偿限额由国务院交通主管部门制定，报国务院批准后施行。交通部 1993 年制订的《关于不满 300 总吨船舶及沿海运输、沿海作业船舶海事赔偿限额的规定》（1994 年 1 月 1 日起实施）第 4 条规定，从事中华人民共和国港口之间货物运输或者沿海作业的船舶，不满 300 总吨的，其海事赔偿限额依照该规定第 3 条规定的赔偿限额的 50% 计算；300 总吨以上的，其海事赔偿限额依照《海商法》第 210 条第 1 款规定的赔偿限额的 50% 计算。

24 渔政处曾于 2002 年 12 月 11 日向天津海事法院申请诉前扣押“顺轮”，并要求被请求人提供担保。同日，天津海事法院依法作出民事裁定，自即日起扣押停泊在天津港的“顺轮”，同时责令被申请人向该院提供 1 000 万元人民币的担保。“顺轮”船舶所有人的代表表示希望以积极的态度争取与渔政处庭外和解。事后，大连旅顺顺达船务有限公司赔偿渔政处 50 万元人民币。渔政处在其对“塔斯曼海”轮船舶所有人及责任保险人诉求损害赔偿过程中，同意从其总损失额中剔除这 50 万元。

诉请法院确定油污损害赔偿责任，[25] 并未就“塔轮”在船舶碰撞事故中的过错责任诉请法院认定，因此《海商法》关于船舶碰撞的规定也不适用于“塔轮”系列案。

（三）认定原告主体资格的法律适用

法院通过对共同争议焦点的合并审理，认定了“塔轮”原油泄漏造成污染损害这一事实。

《1992 CLC》没有限定油污损害受害人的范围。依据该公约第 1 条第 2 款和第 6 款的规定，任何遭受“污染损害”[26] 的个人或合伙、公营或私营机构（不论是否为法人），包括国家或其任何下属单位，都可以依据公约的规定提出油污损害赔偿请求。[27]

就国内法而言，《民法通则》第 117 条第 2 款规定，损坏国家的、集体的财产或者他人财产的，应当恢复原状或者折价赔偿；第 124 条规定，违反国家保护环境防止污染的规定，污染环境造成他人损害的，应当依法承担民事责任。《海环法》第 90 条第 2 款规定，对破坏海洋生态、海洋水产资源、海洋保护区，给国家造成重大损失的，由依照本法规定行使海洋环境监督管理权的部门代表国家对责任者提出损害赔偿要求。[28] 可见，海洋污染损害的受害人有向对有关海域或有关海域的自然资源及经济性开发活动享有主权的国家，以及合法利用海洋及其环境资源的私人提出损害赔偿请求的权利。遭受“塔轮”油污损害的受害人（包括国家和私人）均有权向责任人提出损害赔偿请求，但是国内法依据会有所不同。

1. 国家有关海洋环境及资源油污损害赔偿主体的确定

国家对有关海域或有关海域的自然资源及经济性开发活动享有主权，因此，有权就海洋污染损害向责任人提出损害赔偿请求。但是在中国，关于谁有权代表

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25 《1992 CLC》第 3 条第 1 款规定，除本条第 2 款和第 3 款规定者外，在事故发生时的船舶所有人，或者，如果该事故系由一系列事件构成，则第一个此种事件发生时的船舶所有人，应对船舶因该事故而造成的任何污染损害负责。

26 依据《1992 CLC》第 1 条第 6 款的规定，“污染损害”指：（1）油类从船上溢出或排放引起的污染在该船之外造成的灭失或损害，不论此种溢出或排放发生于何处；但是，对环境损害（不包括此种损害的利润损失）的赔偿，应限于已实际采取或将要采取的合理恢复措施的费用；（2）预防措施的费用及预防措施造成的进一步灭失或损害。

27 《1992 CLC》第 1 条第 2 款规定，“人”，是指任何个人或合伙、任何公营或私营机构（不论是否为法人），包括国家或其任何下属单位。

28 此外，《中华人民共和国海域使用管理法》第 44 条规定，违反本法第 23 条规定，阻挠、妨害海域使用权人依法使用海域的，海域使用权人可以请求海洋行政主管部门排除妨害，也可以依法向人民法院提起诉讼；造成损失的，可以依法请求损害赔偿。《渔业法》第 36 条第 2 款规定，渔业水域生态环境的监督管理和渔业污染事故的调查处理，依照《海环法》和《中华人民共和国水污染防治法》的有关规定执行。第 47 条规定，造成渔业水域生态环境破坏或者渔业污染事故的，依照《海环法》和《中华人民共和国水污染防治法》的规定追究法律责任。

国家向油污损害责任人提起损害赔偿请求的问题，一直是学术界、司法界、实务界的讨论焦点。

通常认为，根据《海环法》第 90 条第 2 款和第 5 条的规定，在中国，行使海洋环境监督管理权的部门有多个，因此代表国家对责任人提出海洋油污损害赔偿请求的部门也要分门别类，例如负责海洋环境监督管理的国家海洋行政主管部门；负责所辖港区水域内非军事船舶和港区水域外非渔业、非军事船舶污染海洋环境的监督管理的国家海事行政主管部门；负责渔港水域内非军事船舶和渔港水域外渔业船舶污染海洋环境的监督管理，并保护渔业水域生态环境的国家渔业行政主管部门；负责军事船舶污染海洋环境的监督管理的军队环境保护部门等。[29] 这些机关在其行政职责范围内，有权并应当代表国家向有关责任人提出损害赔偿请求。[30] 但是，由于“环境”、“自然资源”等概念的涵义广泛，很难完全厘清各涉海部门的职责范围。因此，实践中往往会产生谁有权代表国家就某一项损害或费用支出向责任人提出赔偿请求的问题。如果有两个或多个涉海部门分别向责任人提出赔偿请求，则会产生这些涉海部门所提出的赔偿请求（特别是有关自然资源损害及其恢复措施的赔偿请求）相互之间是否存在重复索赔的疑问。

“塔轮”系列案中，海洋局经国家海洋局授权，代表国家提起了（2003）津海法事初字第 183 号诉讼；渔政处经农业部授权，代表国家提起了（2003）津海法事初字第 184 号诉讼。鉴于海洋局和渔政处在不同案件中，就同一起油污事故，分别代表中国政府提起损害赔偿请求，被告多次提出渔政处的索赔请求与海洋局、有关渔民和养殖户的索赔请求存在重复。对此，天津海事法院经过审理认定，海

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29 《海环法》第 90 条第 2 款规定，“对破坏海洋生态、海洋水产资源、海洋保护区，给国家造成重大损失的，由依照本法规定行使海洋环境监督管理权的部门代表国家对责任者提出损害赔偿要求。”第 5 条规定，“国务院环境保护行政主管部门作为对全国环境保护工作统一监督管理的部门，对全国海洋环境保护工作实施指导、协调和监督，并负责全国防治陆源污染物和海岸工程建设项目对海洋污染损害的环境保护工作。国家海洋行政主管部门负责海洋环境的监督管理，组织海洋环境的调查、监测、监视、评价和科学研究，负责全国防治海洋工程建设项目和海洋倾倒废弃物对海洋污染损害的环境保护工作。国家海事行政主管部门负责所辖港区水域内非军事船舶和港区水域外非渔业、非军事船舶污染海洋环境的监督管理，并负责污染事故的调查处理；对在中华人民共和国管辖海域航行、停泊和作业的外国籍船舶造成的污染事故登轮检查处理。船舶污染事故给渔业造成损害的，应当吸收渔业行政主管部门参与调查处理。国家渔业行政主管部门负责渔港水域内非军事船舶和渔港水域外渔业船舶污染海洋环境的监督管理，负责保护渔业水域生态环境工作，并调查处理前款规定的污染事故以外的渔业污染事故。军队环境保护部门负责军事船舶污染海洋环境的监督管理及污染事故的调查处理。沿海县级以上地方人民政府行使海洋环境监督管理权的部门的职责，由省、自治区、直辖市人民政府根据本法及国务院有关规定确定。”

30 有观点认为在任何情况下都只有一个部门有权行使监督管理权，也因此只有一个部门有权代表国家索赔。在普通商用油轮发生漏油事件时，“有权代表国家行使损害赔偿请求权”的适格主体通常只有国家海洋行政主管部门，而不是其他部门。参见赵劲松：《船舶油污损害赔偿中若干实务问题探讨》，下载于 http://www.cpiweb.org/showonenews.Isp?news_id ＝ 217, 2005 年 11 月 1 日。

洋局请求的是海洋环境生态污染破坏和生态恢复的索赔；河北省滦南县和天津市汉沽、北塘、大沽渔民请求的是因污染造成的海洋捕捞停产损失、网具损失和滩涂贝类养殖损失；而渔政处请求的是渔业资源损失。因此各方当事人索赔的范围和内容界定明确，彼此独立，不存在重复索赔的问题。[31]

法院尽管最终认定这些索赔请求相互之间没有重复，但是判决书中并未详细阐述判定理由。这也显现出立法不够明确给司法实践带来的困惑。如上所述，在各涉海部门的行政职权，特别是关于代表国家提出海洋污染损害赔偿请求的职权范围不够明确的情况下，由多个涉海部门分别代表国家提出索赔请求，其索赔请求除可能发生重叠外，还可能发生遗漏，从而给国家海洋环境整体恢复留下隐疾。作者认为，我国有必要建立明确、统一、协调、具体的海洋环境污染损害法律机制。在进行相关立法时，可以考虑借鉴美国《1990 年油污法》（OPA90）的有关规定，确定统一代表国家对责任人索赔的机构，并由各有关部门提供相关协助，特别是有关数据的支持。[32] 确定统一代表国家进行索赔的机构并不违反《1992 CLC》公约以及《民法通则》的规定，也符合《海环法》等有关法律规定的立法宗旨。

2. 渔业生产油污损害赔偿主体的确定

原油泄漏，不但会损害国家对海洋环境资源的权利，还会给有关单位和个人带来各种经济损失。“塔轮”系列案中，有 8 宗案件就是由渔民、养殖户、渔民协会起诉的。

根据《中华人民共和国渔业法》（以下简称“《渔业法》”）的规定，养殖与捕捞是两种主要的渔业生产活动。[33]

“塔轮”溢油污染的渔区是涉案渔民的传统捕捞作业区。该渔区受到原油污染，将使这些渔民被迫在一定期间内暂时停止在特定渔区的捕捞生产。我们知道，海洋生物在被渔民捕获之前，渔民对其不享有所有权。渔民停止捕捞时，通常遭受的不是海洋生物财产损害，不能依据《民法通则》第 117 条第 2 款的规定，要求责任人对此恢复原状或折价赔偿。[34] 渔民进行捕捞作业的目的在于捕获海洋生物，取得该海洋生物的所有权，继而通过销售或加工等方式获得相应的经济收益。因此，渔民将因捕捞停产遭受相应的经济损失，可以依据《民法通则》第 124 条的规

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31 （2003）津海法事初字第 184 号判决书。

32 美国《1990 年油污法》将“自然资源”明确列入“环境”范畴，规定依据自然资源归属于国家、州或地方政府或印第安人部落，或者外国政府所有、管理、托管、拥有或控制的情况，由美国受托管理人、州受托管理人、印第安部落受托管理人或外国受托管理人向责任人提起因油污致自然资源（包括相关的土地、鱼类、野生物、生物、空气、水、地下水、饮用水供应和其他该类资源）损害的赔偿请求。见《美国法典》第 1001 条第 20 项和第 1002 条第 2 款第 2 项第 2 目。

33 《渔业法》第 2 条。

34 《民法通则》第 117 条第 2 款规定，损坏国家的、集体的财产或者他人财产的，应当恢复原状或者折价赔偿。

定，要求油污损害责任人依法承担民事责任。[35] 当然，如果用于捕捞作业的生产工具因污染而遭受损害，这些渔民也可以依据《民法通则》第 117 条第 2 款的规定，就这些损害提出恢复原状或折价赔偿请求。

“塔轮”溢油污染的浅滩是有关养殖户进行养殖作业的区域。养殖户进行养殖作业时，要投入大量的资金购买种苗及其他生产资料进行养殖，通过销售这些养殖产品获得经济收入。因此，养殖户对于这些种苗、生产资料、养殖物享有所有权。养殖区域遭受原油污染，造成养殖物死亡、有关生产工具和生产资料损害的，这些养殖户可以依据《民法通则》第 117 条第 2 款和第 124 条的规定，要求油污损害责任人依法承担赔偿责任。

依据《民诉法》的规定，涉案渔民、养殖户人数众多的，可以依法推选代表人进行诉讼。[36] 诉讼代表人参加诉讼，虽然并不否定所代表渔民、养殖户的赔偿主体资格与地位，但是在程序操作上如何体现这一立法精神，法律规定尚不明确、具体。

“塔轮”系列案中，相关程序操作形式不一。有的渔民、养殖户自行起诉，并推举诉讼代表人参加诉讼，有的由相关的渔民协会直接代表渔民起诉，并推举诉讼代表人参加诉讼。值得一提的是，在（2003）津海法事初字第 186 号案件中，渔民协会作为原告，代表有关渔民和养殖户起诉两被告后，又与所代表的渔民、养殖户向法院提出将这些渔民、养殖户列为共同原告的申请。该渔民协会和渔民、养殖户都不可撤销地向法院保证不会对两被告重复主张权利。尽管被告提出了不同意见，但是法院仍然同意渔民协会和所代表的渔民、养殖户作为共同原告参加诉讼，杨保生等 5 人作为诉讼代表人参加诉讼，并最终判定由两被告对这些渔民、养殖户 [37] 的油污损害承担连带赔偿责任。

法院的判决体现了上述立法精神，即尽管有渔民协会作为共同原告进行诉讼，有杨保生等诉讼代表人参加诉讼，但是他们所代表的渔民、养殖户是真正的受害人，其赔偿主体资格与地位不受影响。同时，从“塔轮”各案的不同操作形式和被告提出的不同意见也可以看出，国内立法应当对在当事人人数众多的情况下，

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35 《民法通则》第 124 条规定，违反国家保护环境防止污染的规定，污染环境造成他人损害的，应当依法承担民事责任。

36 《民诉法》第 54 条规定，当事人一方人数众多的共同诉讼，可以由当事人推选代表人进行诉讼。代表人的诉讼行为对其所代表的当事人发生效力，但代表人变更、放弃诉讼请求或者承认对方当事人的诉讼请求，进行和解，必须经被代表的当事人同意。第 55 条规定，诉讼标的是同一种类、当事人一方人数众多在起诉时人数尚未确定的，人民法院可以发出公告，说明案件情况和诉讼请求，通知权利人在一定期间向人民法院登记。向人民法院登记的权利人可以推选代表人进行诉讼；推选不出代表人的，人民法院可以与参加登记的权利人商定代表人。代表人的诉讼行为对其所代表的当事人发生效力，但代表人变更、放弃诉讼请求或者承认对方当事人的诉讼请求，进行和解，必须经被代表的当事人同意。人民法院作出的判决、裁定，对参加登记的全体权利人发生效力。未参加登记的权利人在诉讼时效期间提起诉讼的，适用该判决、裁定。

37 不包括另一原告——渔民协会。见（2003）津海法事初字第 186 号判决书。

如何确定原告和诉讼参加人、如何衔接各有关程序，以体现诉讼基本原则，做出更为具体、更便于操作的规定。

（四）确定损害赔偿范围的法律适用

1. 国内法与国际公约的有关规定

上述《民法通则》第 117 条第 2 款和第 124 条、《海环法》第 90 条等国内法规定确立了油污损害赔偿原则，但是，并未就油污损害赔偿范围做出具体规定。因此，在审理“塔轮”系列案时，《1992 CLC》的相关规定是确定此次油污损害赔偿范围的重要依据。在《1992 CLC》未作明确规定的情况下，应当依据《民法通则》、《海环法》等法律和《1992 CLC》所确立的原则，根据案件的实际情况来具体确定有关损害赔偿范围。由于《1992 CLC》得到了世界各国较为普遍的认可与参加，因此各国关于适用《1992 CLC》第 1 条第 6 款规定的司法实践为我国法院具体适用该规定提供了有力参考。

《1992 CLC》第 1 条第 6 款规定“污染损害”为：（1）油类从船上溢出或排放引起的污染在该船之外造成的灭失或损害，不论此种溢出或排放发生于何处；但是，对环境损害（不包括此种损害的利润损失）的赔偿，应限于已实际采取或将要采取的合理恢复措施的费用；（2）预防措施的费用及预防措施造成的进一步灭失或损害。

“污染损害”的范围主要包括以下五个方面：（1）清污及预防措施的费用支出；（2）财产损害及其后续损害；（3）纯经济损失（包括渔业、旅游业等行业的纯经济损失）以及预防措施所产生的费用支出；（4）环境损害；（5）污染事故发生后的有关研究、调查费用。

在“塔轮”系列案中，当事人对于网具等有关财产的损害、渔业纯经济损失、环境损害、污染事故发生后的有关研究、调查费用，以及渔业资源损害等项目是否属于《1992 CLC》第 1 条第 6 款规定的“污染损害”范围，进行了激烈的辩论。

2. 网具损失与渔业生产经济损失

针对渔民、养殖户的诉讼请求，被告认为索赔的渔业捕捞减产损失与海洋局、渔政处提出的索赔相重复。证据表明不存在原告诉称的渔业捕捞减产损失。按照《1992 CLC》的规定，原告只能索赔净利润损失，从事渔业生产的成本应当在损失计算时予以扣除。

法院认定，捕捞停产损失属于因污染给渔民造成的直接损失，这部分损失与渔政处和海洋局的索赔是性质完全不同的索赔，彼此之间不存在重复索赔问题。该海域因“塔轮”溢油造成严重污染，致使海洋捕捞停产、养殖的滩涂贝类大量死亡、来不及移走的定置网具被污染后无法使用，因此，原告的停产损失、养殖损失和网具损失与溢油污染事故之间因果关系明确，属于《1992 CLC》中的污染损害。

无论依据《1992 CLC》还是中国法，两被告均应给予原告合理赔偿，但是原告负有降低减产损失的义务。可能有多种原因导致在停产损失以外又发生减产损失。油污可能是造成减产损失的因素，但是难以量化，因此不能全部归为油污所致。作者赞同法院的这一认定。

3. 环境生态损害及有关研究、调查费用

针对海洋局的诉讼请求，两被告提出，此次溢油事故未对海洋生态环境造成中、长期影响；原告索赔的环境容量损失和生态服务功能损失不存在，不是《1992 CLC》认可的“污染损害”；即使此次漏油事故造成海洋生态环境损害，原告索赔的环境修复费用在《1992 CLC》下也不能得到赔偿；原告主张的海洋生物恢复费用和评估费用不成立。

天津海事法院经审理认定，[38] 渤海是一个半封闭的内海，海水交换持续时间长，自净能力较弱。尽管涉案污染海域的水质在污染事故发生 4 个月后已恢复到事发前的水平，但是其重要原因是通过海水的物理作用，包括稀释、混合、扩散、淋洗、挥发、沉淀等过程的迁移转化，最终靠增加污染面积实现的。因此，本案涉及的轻质原油入海，不管是否造成多大面积的污染超标，都使渤海湾中增加了轻质原油，客观上造成了渤海湾的环境容量损失。“渤海碧海行动计划”对于本案而言属于已经采取的和将要采取的减少油类污染恢复渤海环境的措施，属于《1992 CLC》第 1 条第 6 款第（1）项规定的污染损害。原告为确定“塔轮”溢油事故导致的海域污染程度、污染面积支出的调查、勘验、评估费用，为研究修复被污染的海洋环境发生的合理费用，属于《1992 CLC》规定的合理费用。事故海域海洋沉积物中油类污染物，虽经过一年降低到沉积物质量一类标准，但沉积物油类平均含量仍然没有恢复到事故前的水平，平均油类含量仍比事故前高出 0.68 倍，因此污染海域的海洋沉积物应予修复，但原告不能足以证明其技术方案能够达到预期的修复效果；游泳动物的损失客观存在，但原告所选物种目前尚不具备增殖放流的条件；污染事故曾造成油类浓度超过 50 μg/L 的面积约为 2195 km^2，海洋生态服务功能损失应予赔偿，但损失的计算依据不充分；潮滩损失的数额缺少背景值的依据。此外，事故海域临近河口，营养盐丰富，有利于浮游植物繁殖，自然恢复是可能的。最终，法院支持原告的部分请求，判定被告连带赔偿原告海洋环境容量损失 750.58 万元，以及调查、监测评估费用及其生物修复研究经费等 2452284 元。

海洋局提出的海洋沉积物恢复费用、潮滩生物环境恢复费用、游泳动物恢复费用等几项赔偿请求最终未获法院的支持的主要原因，并不在于这些赔偿请求就其性质而言不属于《1992 CLC》所规定的“污染损害”的范围或不受《民法通则》等国内法的保护，而是原告不能提供有力的证据来证明损害的存在及其具体数额。

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38 （2003）津海法事初字第 183 号判决书。

正如本案审判长、天津海事法院院长李柏华接受媒体采访时所说，[39] 缺少渤海海域环境本底资料，使得案发后难以对“塔轮”溢油造成的污染损害程度进行量化，这将直接影响到对该案事实的认定。并且，事发海域现场取证的技术也显得不很成熟，包括海域现场取证的覆盖面、监测手段、技术标准等。

海洋局诉两被告船舶碰撞油污损害赔偿案，是中国海洋行政主管部门首次代表国家就海洋环境污染损害向海事法院提起诉讼的案件。可见，掌握有关海洋环境的基础资料和相关的技术手段，对于行使海洋环境监督管理权的行政部门今后代表国家，向海洋污染责任人提出赔偿请求是非常重要的。

从上述判决可以看出，法院支持了海洋环境容量损失项目以及有关的调查、监测评估、生物修复研究费，也原则上支持了海洋生态服务功能损失项目。被告的诉讼代理人事后在有关会议上再次提出，“环境容量损失”、“生态服务功能损失”等关于海洋环境资源损失的索赔不应属于可予赔偿的污染损害。[40] 也有学者提出“环境”一词应当包括“自然资源”，但是我国未来油污损害赔偿立法应将此类损害归结为自然资源损害，而非环境损害，以便于确定索赔主体、赔偿范围和损害估算。[41] 作者认为，被告诉讼代理人所依据的《索赔手册》中关于“环境损害”的说明，并未完全排斥自然资源的损害。[42] 可以想见，今后关于“环境容量损失”、“生态服务功能损失”（以及下文述及的“渔业资源的中、长期损失”）等概念的具体涵义及性质，以及是否属于《1992 CLC》所规定的“污染损害”或者中国国内法所规定的“环境损害”的范围，将引起立法界、司法界、学术界和实务界的继续关注。

值得一提的是，美国《1990 年油污法》（OPA90）明确地将“自然资源”列入“环境”范畴，规定可以向责任人提起因油污致自然资源（包括相关的土地、鱼类、野生物、生物、空气、水、地下水、饮用水供应和其他该类资源）损害的赔偿请求。[43] 美国没有参加《1969 CLC》、《1992 CLC》，以及《1971 年设立国际油污损害赔偿基金国际公约》（以下简称“《1971 FUND》”）、《1992 FUND》，我们不能参考美国的国内立法来理解《1992 CLC》中关于“污染损害”的界定。但是，中国在建立和完善海洋环境污染损害赔偿法律机制时，可以一定程度地借鉴美国立法的有关内容。

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39 李明春、杨威：《两大难点困扰“塔斯曼海”案》，下载于 http://www.univs.cn/univs/ouc/hyzc/ info_display.php?id ＝ 104161, 2005 年 11 月 1 日。

40 Yang Wengui, Tong Mei and Jin Cong, The Scope of Compensation for Environmental Damage in Ship’s Oil Spill, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 357~377.

41 Xu Guoping, Paper on Mid-term or Long-term Oil Pollution Damage from Ships, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 345~356.

42 《索赔手册》（2005 年 4 月版）第 31 页。

43 《美国法典》第 1001 条第 20 项和第 1002 条第 2 款第 2 项第 2 目。

4. 渔业资源损失及有关调查费用

针对渔政处的诉讼请求，被告认为在事故后 11 个月，事故海域的渔业资源已经得到完全恢复，此次溢油事故未对海洋生态环境和渔业资源造成中、长期影响，根据《1992 CLC》、《油污指南》和《索赔手册》，原告的索赔不成立。

《1992 CLC》没有对渔业资源损失及其范围做出专门规定，《民法通则》、《海环法》、《渔业法》等法律也没有具体规定。农业部制订的《水域污染事故渔业损失计算方法规定》（1996 年 10 月 8 日公布并开始实施，以下简称“《计算方法》”）的有关规定和适用效力成为本案的争议焦点，法院对此做出了较为详细的解释。

法院认为，[44] 按照《计算方法》，污染事故渔业资源损失包括直接经济损失和天然渔业资源损失，在确定因污染造成的渔业资源损失额时，两者是不能割裂的统一整体，缺一不可。被告所称的渔业资源中，长期损失指的就是前述天然渔业资源损失。突发性的溢油事故，对海洋生物资源慢性中毒和物种的损失也非常明显。这种损害不仅会导致当时的渔业资源突然下降，而且污染物对以后的渔业资源的损害也是不可逆转的，其后果可能会直接影响到几年后渔业资源量的补充和物种的恢复。尽管涉案污染海域的水质在 4 个月后已恢复到事发前的水平，但水质的恢复并不等于渔业资源的恢复，被告的调查结果足以证明这一点。《计算方法》经过多年的实际调查，依据大量案例，由专家反复检验论证，并以国家规章的形式确定对天然渔业资源经济损失金额的计算，不应低于渔业资源直接经济损失的 3 倍。这一方法在国内已实施多年，是中国目前计算污染造成渔业资源损失的唯一规范性文件。依据该规定计算的渔业资源损失不是纯理论计算，而是采用专家评估法，以现场调查和天然渔业资源动态监测资料为依据，对污染造成的天然渔业资源经济损失做出的客观评估。其结论既有事实依据，又有法律依据。《1992 CLC》第 1 条第 6 款第（1）项没有规定污染造成的“渔业资源中、长期损失”不应赔偿。《民法通则》第 124 条和第 117 条第 2 款均规定污染环境造成损害的，应当承担赔偿责任，并未免除对此种天然渔业资源经济损失的赔偿责任。因此，对于天然渔业资源损失如何计算和是否赔偿，在《1992 CLC》中没有做出明确规定的情况下，依照黄渤海监测中心的监测结果，按照《计算方法》所得出的天然渔业资源经济损失属于客观存在的事实，既符合我国现有法律规定，也不违反《1992 CLC》的规定。原告为确定“塔轮”溢油事故导致的海域污染程度、污染面积及对渔业资源的影响而支出的调查评估费用，属于《1992 CLC》规定的合理费用，应由被告承担。

作者认为应当从两个方面来理解这一问题。

第一，就现有的法律依据而言，在《1992 CLC》、《民法通则》及其他法律没有特别规定“渔业资源损失”的赔偿时，法院在不违反上述公约、国内法律的原则

44 详细内容见（2003）津海法事初字第 184 号判决书。

的前提下，是可以适用《计算方法》这一部门规章，来具体确定渔业资源经济损失的赔偿数额的。[45]

第二，就渔业资源而言，恢复渔业资源需要采取专门的措施，由此产生的费用应当予以赔偿。《计算方法》规定，天然渔业资源损失的赔偿费用于增殖放流和渔业生态环境的改善、保护及管理。其中，通过增殖放流等方式恢复、改善渔业生态环境，恢复天然渔业资源，其目的符合《1992 CLC》第 1 条第 6 款的规定。当然，《计算方法》制订于 1996 年，各计算项目是否符合现行国际公约、国内立法的宗旨，作者认为不应简单地完全肯定或完全否定，而应在具体论证的基础上，做出客观判断。

目前，渔业资源的中、长期损失是否属于环境污染损害赔偿的范围，引起了各界人士的广泛关注。[46] 作者认为“渔业资源的中、长期损失”的具体涵义及性质，以及是否属于《1992 CLC》所规定的“污染损害”，是否属于国内法所规定的“环境损害”的范围，值得立法界、司法界、学术界和实务界进行深入探讨。美国《1990 年油污法》（OPA 90）关于可以向责任人提起因油污致自然资源（包括相关的土地、鱼类、野生物、生物、空气、水、地下水、饮用水供应和其他该类资源）损害赔偿请求的有关规定同样值得我们借鉴。[47]

五、余　论

船舶因海难事故造成海洋环境污染，往往引发诸多法律问题和实践操作问题。“塔轮”船舶碰撞海洋环境污染事故也是如此。有些问题在“塔轮”系列案中得以体现，有的尚未显现但是与该油污损害事故关系密切，值得关注，故此作简要说明或探讨。

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45 有观点认为《计算方法》属于部门规章，不具有普遍约束力；所规定的赔偿带有惩罚性质，与《民法通则》确立原则不符；依据该方法所得出的结论具有推理性质，不具有可确定性、可量化性和可预见性，与《民法通则》所确立的实际损害赔偿原则相悖，因此不应作为计算中长期损失的依据。See Yang Yunfu and Lin Cuizhu, Scope of Losses of Compensation for Damages Due to Oil Pollution of Ships in Chinese Waters, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 312~313.

46 Yang Yunfu and Lin Cuizhu, Scope of Losses of Compensation for Damages Due to Oil Pollution of Ships in Chinese Waters, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 311~314; Xu Guoping, Paper on Mid-term or Long-term Oil Pollution Damage from Ships, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 345~356; 赵劲松：《船舶油污损害赔偿中若干实务问题探讨》，下载于 http://www.cpiweb.org/showonenews.jsp?news_id ＝ 217, 2005/11/1；赵红：《关于审理船舶油污损害赔偿案件中的法律问题》，载中华全国律师协会海商海事专业委员会主办：《中国律师 2005 年海商法研讨会论文集》（2005 年）。

47 《美国法典》第 1001 条第 20 项和第 1002 条第 2 款第 2 项第 2 目。

（一）船舶碰撞对方当事人的法律责任

此次油污损害事故是因“塔轮”与中国籍沿海运输货轮“顺轮”发生船舶碰撞，致使“塔轮”所载原油泄漏入海造成的，属于两船碰撞，一船漏油造成海洋环境污染的情况。

目前国际公约和国内立法尚未就双方互有过失船舶碰撞，致一船漏油造成海洋环境污染的责任承担做出专门的法律规定，学界与司法界对此也存在较大的争议，目前有四种观点：（1）完全由漏油船舶承担赔偿责任，认为依据《1992 CLC》“谁污染，谁赔偿”的原则，以及《海环法》的无过错责任原则，应当由漏油船舶单独承担油污赔偿责任；（2）由漏油船舶先承担赔偿责任，再向碰撞对方船舶所有人追偿；（3）由碰撞双方承担连带赔偿责任，认为互有过失船舶碰撞造成油污损害构成共同侵权，依据《民法通则》第 130 条的规定，应由共同侵权人承担连带赔偿责任；（4）由碰撞双方按照碰撞责任比例承担赔偿责任，认为油污损害是由于互有过失船舶碰撞造成的，《海商法》是民法的特别法，应优先适用《海商法》第 169 条关于按照过失比例承担财产损害赔偿责任的规定。

“塔轮”系列案中，原告均只起诉两被告，没有将发生船舶碰撞的对方船舶“顺轮”船舶所有人列为被告。值得注意的一个细节是，渔政处曾向天津海事法院申请诉前扣押“顺轮”，在其“申请书”中称，原油污染是因“塔轮”与“顺轮”碰撞造成的，两船舶所有人均应对污染损害承担连带赔偿责任，赔偿国家渔业资源损失。法院裁定准许扣押“顺轮”，并责令被申请人提供 1000 万元人民币的担保。事后，“顺轮”船舶所有人自行赔付渔政处 50 万元人民币，渔政处并未向法院起诉“顺轮”船舶所有人，提出损害赔偿诉讼请求。因此，在两船碰撞，一船漏油造成海洋环境污染的情形下，与船舶碰撞对方当事人有关的诸多问题均未涉及。这些问题主要有：

1. 如果原告就其损害向“顺轮”船舶所有人另案提起损害赔偿请求，法院应否受理？

2. 如果原告在“塔轮”系列案中同时起诉“顺轮”船舶所有人，“顺轮”船舶所有人是否应当承担损害赔偿责任，以及承担赔偿责任的法律依据如何？

3. 同时起诉“顺轮”船舶所有人，后者应当承担赔偿责任时，应当与“塔轮”船舶所有人承担连带赔偿责任，还是应当按照各自过错比例承担赔偿责任？

4. 如果“顺轮”船舶所有人应当承担损害赔偿责任，其是否有权依据《海商法》关于海事赔偿责任限制的规定，限制自己的赔偿责任？

5. 如果原告的损害数额巨大，超过了“塔轮”油污责任限额和“顺轮”海事赔偿责任限额，是否应当启动海事赔偿责任限制程序？

6. “塔轮”系列案的被告在应诉时，是否有权同时向法院起诉，对“顺轮”船舶所有人提出追偿诉求？是否有权将“顺轮”船舶所有人列为第三人？

7. 如果向“顺轮”船舶所有人提起追偿诉讼，法院能否合并审理？

“塔轮”系列案的一审审理及判决并未提出甚至论证这些问题。我们不能奢望一宗或一系列案件能够明确所有问题。这些问题均值得我们进一步研究与探讨，也留待未来案件的明确论证。限于篇幅，作者将另文阐述对这些问题的理论探讨。

（二）《中华人民共和国海域使用管理法》在海洋污染损害赔偿中的适用性

于 2002 年 1 月 1 日开始实施的《中华人民共和国海域使用管理法》（以下简称“《海域法》”）第 2 条和第 3 条明确规定，海域属于国家所有，单位和个人使用特定海域 3 个月以上的排他性用海活动，必须依法取得海域使用权。因此，在渔业生产中，使用特定海域进行水产养殖需要取得海域使用权。《渔业法》第 11 条规定，单位和个人使用国家规划确定用于养殖业的全民所有的水域、滩涂的，应当取得养殖证，许可其使用水域、滩涂从事养殖生产。集体所有的或者全民所有由农业集体经济组织使用的水域、滩涂，可以由个人或者集体承包，从事养殖生产。因此，自《海域法》开始实施之后，海事法院在审理养殖户养殖损害赔偿案件时，应当具体审查当事人是否持有合法有效的海域使用权证书、养殖许可证或承包协议，以确定其是否具有合法的养殖权益。

“塔轮”系列案中，有一些养殖户通过其诉讼代表人、渔民协会，向两被告提出损害赔偿请求。在（2003）津海法事初字第 191 号案中，法院认定此次事故的油污没有抵达原告的养殖区域，没有给原告造成养殖损失，因而对于原告关于养殖损失的赔偿请求不予支持。法院在（2003）津海法事初字第 186 号案判决书中，肯定了河北省滦南渔监对于受害养殖户身份的核实情况，认定 15 位养殖户具有合法的养殖权益，并判定被告赔偿原告因此次事故遭受的养殖损失。

上述判决书没有提及对于《海域法》规定的海域使用权证书的审查，有些令人遗憾。但是在案发当时，《海域法》开始实施不到 1 年，海域使用权证书的核发工作尚未完全步入正轨，严格依据海域使用权证书来认定原告是否具有合法的养殖权益，可能与实际操作情况不相吻合。因此，判决书中没有提及对海域使用权证书的审查，是可以理解的。

随着海域使用权证书核发工作的正规化和普遍化，海事法院在此后的污染案件中，应当重视对海域使用权证书等相关证书与许可文件的审查。在刚刚审结的广西合浦西场永鑫糖业有限公司海域渔业污染损害赔偿系列案中，北海海事法院于 2005 年 10 月 15 日判定原告苏充均、洪基军、黄华德在案发时持有地方人民政府核发的海域使用权证和养殖证，两证处于有效期内，原告对该海域具有合法的使用权和养殖权，应受法律保护，被告广西合浦西场永鑫糖业有限公司超标排污

造成原告养殖文蛤死亡，应当赔偿原告文蛤损失人民币 128331 元。[48] 同时，法院认定洪基玲等原告未取得海域使用权和养殖权，擅自将文蛤苗非法投放养殖，违反了《海域法》和《渔业法》的强制性规定，其行为具有过错，致使文蛤被污染损害，对此应自负主要责任。但是法院认定原告对购买文蛤苗具有合法的财产权，最终判定被告广西合浦西场永鑫糖业有限公司对于违法排污造成原告投放的文蛤苗损失给予适当补偿。

（三）清污费的赔偿问题

发生海洋环境污染事故时，有关海事局往往基于《海环法》第 71 条的规定，依职权强制采取避免或者减少污染损害的措施。海事局既可以自行采取此项措施，也可以组织有关单位和个人采取相应措施。人们通常将此项措施所产生的费用支出统称为“清污费”。《海环法》第 90 条规定，造成海洋环境污染损害的责任者，应当排除危害，并赔偿损失。因此，海事局基于行政职责而采取或者组织采取相应清污措施的，由此产生的清污费用是否具有民事请求属性，是需要明确的问题。主流观点认为，从《1992 CLC》第 1 条第 6 款的规定，以及《民法通则》有关民事责任的规定看，海事局的这一措施属于排除海洋环境污染危害的措施，具有民事特征，应当由污染损害责任人承担赔偿责任。

“塔轮”油污事故发生后，天津市海事局立即启动天津水域污染应急计划，动用辖区内所有清污设备和人员，尽全力清除原油污染，同时对污染事故进行调查处理。经调查，认定“塔轮”违反了《海环法》第 62 条、第 65 条规定，依法对“塔轮”给予 20 万元人民币的行政处罚。2003 年 1 月 8 日，代理律师代表“塔轮”船舶所有人签收了此项行政处罚决定。

可惜的是，天津市海事局并没有就此次清污措施所产生的清污费用，对两被告提出赔偿诉讼请求。因此，对于上述问题，我们不能在“塔轮”系列案中找到明确的答案。

此外，海事局能否就清污费用向非溢油船（与溢油船发生碰撞的对方船舶）所有人提出赔偿请求，也是值得探讨的问题。与此相关的问题还有：

1. 如果非溢油船也是《1992 CLC》第 1 条第 1 款所规定的“船舶”，此项赔偿请求是否应当受《1992 CLC》的调整？如果非溢油船不是《1992 CLC》第 1 条第 1 款所规定的“船舶”，此项赔偿请求是否应当受《1992 CLC》的调整？

2. 如果此项赔偿请求不受《1992 CLC》的调整，其法律性质会不会发生变化？

3. 如果此项赔偿请求不受《1992 CLC》的调整，其是否属于《海商法》第 11 章所规定的限制性债权，因而可以从船舶碰撞对方责任人的海事赔偿责任限制基

48 北海海事法院（2005）海事初字第 028 号判决书。

金中受偿？还是属于非限制性债权，由责任人在海事赔偿责任限制基金之外另行赔偿？

4. 如果此项赔偿请求可以从船舶碰撞对方责任人的海事赔偿责任限制基金中受偿，则其受偿顺序如何，可否优先受偿？

这些问题均值得我们进一步研究与探讨。由于天津海事局也未就该清污费用向“顺轮”船舶所有人提出诉讼请求，因此，这些问题只有留待以后的船舶碰撞油污损害赔偿案件加以明确了。限于篇幅，作者将另文阐述对这些问题的理论探讨。

中国船舶油污损害赔偿基金法律制度研究

彭晋平 * 刘先鸣 **

内容摘要：我国正在着手制定油污基金管理使用办法，本文从法律的视角对建立我国油污基金制度的主要问题进行了研究。指出船东强制责任保险是建立我国油污基金法律制度的前提；分析了油污基金制度中摊款人、基金管理人和受害人之间的法律关系，指出他们之间的关系实质上是一种信托关系，进而提出了依据信托法理构建我国油污基金法律制度的思路；在此基础上，根据我国的海洋环境保护法和信托法等有关法律法规的规定，设计了我国油污基金管理组织的法律地位、组织机构及其职责、基金使用和监督等方面的具体法律制度。

关键词：油污 损害赔偿 基金中国

一、引 言

我国有着绵长的海岸线，诸多优良港口，随着我国经济的发展，航运业和石油进口量都呈现出良好的增长趋势，但这也给我国的海洋环境带来了污染威胁。从现实发生的油污事故来看，我国船舶溢油事故发生量处于上升态势。1976—1986 年 10 年间，我国沿海共发生 386 起油轮溢油事件，平均每年发生事故 35 起；1987 年到 1996 年 10 年间，共发生了溢油事故 1856 起，平均每年 186 起，相当于每 2 天发生一起。[1] 从潜在风险来看，我国海域内发生大规模石油污染事故的潜在可能性较大。原因在于以下 2 个因素：[2] 第一，我国海上石油运输量不断上升。自 1993 年我国成为石油纯进口国以来，石油进口量不断攀升。2004 年我国经海运共进口原油 1.1 亿吨，沿海石油运输量超过 2 亿吨。随着我国石油战略储备计划的实施，近期内我国的石油进口量还将上升。第二，我国现有油轮情况复杂。

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1 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 年版，第 236 页。

2 刘功臣：《建立符合中国国情的船舶油污损害赔偿制度》，载于《2005 上海国际海事论坛论文集》，第 2 页。

我国现有从事国际运输的油轮 111 艘，总载重吨约 350 万吨；从事国内沿海运输油轮有 676 艘，总载重吨约 270 万吨。目前从事国际运输的油轮运力尚不能完全满足进口石油运输总量的需求，吸引了大量外国油轮。此外，我国沿海尚存在一定数量的单壳油轮和低质量油轮，更加大了发生油污事故的风险。

就我国油污损害赔偿法律制度来看，在国际层面上，目前我国已经是 1992 年《国际油污损害民事责任公约》（以下简称“《民事责任公约》”）和《国际油污损害赔偿基金公约》（以下简称“《基金公约》”）的缔约国。但就 1992 年《基金公约》而言，考虑到我国（大陆地区）的摊款额度过高，而我国目前已经发生的案例对油污事故的索赔要求在 1992 年《民事责任公约》的责任限制之下基本都能获得满足，所以目前该公约尚未适用于大陆地区，而只适用于我国香港特别行政区。[3] 在国内法制度中，目前我国尚无直接针对油污损害赔偿的国内立法。在这种情况下，目前我国所属的油轮中，仅有载运量 2000 吨以上的油轮依据 1992 年《民事责任公约》的规定进行了强制保险，而 2000 吨以下的油轮则没有此要求，而且我国也尚未建立油污损害赔偿基金制度。

由于油污损害赔偿法律体系不健全，我国油污事故的受害人始终难以获得充分赔偿。不仅如此，连油污事故发生后的清污费用也不能保证，我国自有的海上清污力量始终没有得到发展。在 1987—1996 年间，经记录在册的 1748 起溢油事故中，仅有 131 起进行了清洁，占事故的 7%。发生在国轮及码头的 26 起 50 吨以上重大溢油事故中，仅有 7 起进行了清洁，占事故总数的 26%，溢出的 10172 吨油类，有 8346 吨未作任何处理便进入了海洋。即使事故进行了清污处理，水平也很低。[4] 我国清污费用缺乏稳定的资金来源，往往是海事部门用行政命令的方式，调动清污队伍进行清污，事后又无力偿还，极大地影响了清污的积极性。1973—2000 年间发生的油轮溢油量 50 吨以上的重大溢油事故中，清污率只有 41%。最近几年在国家、地方政府和交通部的共同努力下，对新近发生的船舶重大溢油事故都进行清污，方使得油污事故的清污比例上升到 44%。[5]

《中华人民共和国海洋环境保护法》（以下简称“《海环法》”）第 66 条规定，国家完善并实施船舶油污损害民事赔偿责任制度；按照船舶油污损害赔偿责任由船东和货主共同承担风险的原则，建立船舶油污保险、油污损害赔偿基金制度。实施船舶油污保险、油污损害赔偿基金制度的具体办法由国务院规定。根据该条款的授权，财政部和交通部联合起草制定了《船舶油污损害赔偿基金征收和使用管理办法》（以下简称“《基金管理办法》”），目前已经 3 次征求意见和修改，正报国务院批准。

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3 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 年版，第 237~241 页。

4 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 年版，第 236 页。

5 刘红：《油污赔偿应考虑国情》，载于《中国船检》2005 年 7 月。

从我国目前的立法准备工作来看，针对油污损害赔偿基金，在具体的政策方面已经有了较为充分的调研和探讨。[6] 但是，从法律角度对油污基金制度的研究则较少。而相对完善的法律制度又是基金有效运转必不可少的。本文试图对基金的主要法律问题进行研究，提出相关的立法建议，以期对我国正在进行的《基金管理办法》的制定工作有所助益。

二、基金有效运作的前提

船舶油污损害赔偿基金是石油货主承担损害赔偿责任的一项制度，根据我国《海环法》第 66 条，船舶油污损害赔偿应由船东和货主共同承担。由于船货双方在油污事故中致损的地位不同，决定了船东应负担第一位的责任，因此，建立船东民事责任制度就成为油污损害赔偿基金有效运作的前提。

（一）船货双方责任关系的理论分析

在海上石油运输过程中，油轮实际处于船舶管理人的占有和控制之下。无论是故意造成油污损害的行为，或因过失导致船舶碰撞、触底，进而引发溢油事故的行为，其直接的行为人都是船舶管理人。根据“自己责任”原则，油污污染事故发生后，船方应对自己所造成的污染损害承担赔偿责任。虽然在油污事故中，船舶所运载的油货也是造成污染的根源之一。如果没有油货运输，溢油事故也就不会发生。但根据侵权行为法原理，货方托运油类的行为只能算作油污事故发生的条件，而非原因。[7] 因此油污事故不可归责于货方。

然而，随着大型油轮的载运量越来越大，重大溢油事故所溢出的原油量非常大，在波浪、洋流的作用下，原油极易扩散，清污难度大，污染范围广。一旦发生油污事故，不仅对渔民、养殖业者、滨海旅游业者等人造成了巨大的经济损失，而且还会造成生态灾难。面对油污事故造成的惊人损害，船方往往只有承担一部分损失的能力，其余部分的损害由谁来承担？剩下的选择只有货主和受害者。石油货主作为石油海上运输的直接受益者，如果对油污事故造成的其余部分的损失不分担，而要求完全无辜的受害人来承担，显然是有违社会公平原则的。因此，石油

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6 2005 年 7 月，中国海事局在上海召开了 2005 年上海国际海事论坛，在此次论坛上，参与制定《基金管理办法》的几位专家介绍了目前立法工作的进展。详情请参见《2005 上海国际海事论坛论文集》。

7 关于原因与条件的辨析，请参见王旸：《侵权行为法上因果关系理论研究》，载于《民商法论丛》第 11 卷，第 462，466~470 页。

货主必须对油污损害承担一部分赔偿责任。[8] 这也符合国际普遍认同的“受益者付费”原则。[9]

从上述分析可知，在油污损害赔偿中，石油公司所承担的责任，是在船方责任不能实现的情况下对受害人遭受的损失所承担的第二位的赔偿责任，如果让石油公司承担全部责任或第一位的责任，则为本末倒置。

（二）船货主从责任制度的实践考察

船方赔偿责任制度作为赔偿基金制度的前提，不仅符合法理，也是国际上通行的实践。

1. 国际油污民事责任制度

1969 年的《民事责任公约》和 1971 年的《基金公约》是首创油污损害赔偿制度的实践，它们就采用了以船东为主货主为辅的船货主从责任机制。

1967 年利比里亚籍油轮 Torry Canyon 在英吉利海峡触礁，12 万吨原油溢入海洋，造成了巨大的经济损失和生态损害。[10] 这次事故促使国际社会着手建立能够保障油污事故受害人切实得到补偿的油污损害赔偿的国际法律制度。1969 年，国际社会签订了《民事责任公约》。依据该公约，油污事故发生后，首先由船东依严格责任的归责原则承担损害赔偿责任。[11] 为了保证船东有足够的财务能力来偿付其可能面对的索赔，该公约规定了强制保险制度。[12] 考虑到国际航运保险市场的金融能力，又规定了船舶油污损害赔偿责任限制制度。[13] 1971 年订立了《基金公约》，首次将石油货主引入赔偿责任机制之中。[14]

1969 年《民事责任公约》之下的油污责任限额，实际上划定了船方责任与货方责任之间的界限。在油污损失超出此限额，或因法定免责理由船方不负责任的情况下，由 1971 年《基金公约》建立起的“国际油污损害赔偿基金”负责赔偿。[15] 该基金由缔约国石油公司摊款建立，在具体油污案件中代表石油公司承担赔偿责

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8 台湾“行政院环境保护署”：《重大海洋污染赔偿求偿相关之规范（90A270）专案工作期末报告》，2001 年 12 月 26 日。

9 我国环境法中，有相似的“利用者补偿”原则。参见国务院 1996 年《关于环境保护若干问题的决定》（国发 [1996]31 号）；韩德培主编：《环境保护法教程》（第 4 版），北京：法律出版社 2003 年版，第 72~75 页。

10 At http://www itopf.com/torreycanyon/, 4 October 2005.

11 1969 CLC Convention, Art. 3.

12 1969 CLC Convention, Art. 7.

13 1969 CLC Convention, Art. 5.

14 See Thomas A. Mensah, Civil Liability and Compensation for Vessel-Source Pollution of the Marine Environment and the United Nations Convention on the Law of the Sea (1982), in N. Ando et al. eds., *Liber Amicorum Judge Shigeru Oda*, Netherlands: Kluwer Law International, 2002, pp. 1398~1401.

15 1971 Fund Convention, Art. 3.

任。[16]

这一机制由修订后的 1992 年《民事责任公约》和《基金公约》所继续坚持。截至 2005 年 11 月 1 日，全球共有 96 个国家同时加入了这 2 个公约。[17]

2. 美加两国的国内油污损害民事责任制度

1989 年，Exxon Valdez 号油轮在美国阿拉斯加附近海域触礁，大约 3.7 万吨原油溢出。[18] 这次事故使得美国认为国际油污公约体系无法真正保护其海洋环境，因此制定了严厉的 1990 年油污法，采用严格责任原则规定了船方的第一位责任。并依据《1986 年国内税收法典》第 9509 节的规定，美国财政部设立了总金额为 10 亿美金的“溢油责任信托基金”，用以实现货主的补充赔偿责任。

加拿大则独辟蹊径，既参加了国际公约体制，又建立了自己国内油污损害赔偿基金。1971 年加拿大航运法在传统的船舶所有人责任之外，设立了“海洋污染求偿基金”，从而在 1971 年《基金公约》生效前 7 年，便率先建立了自己的国内船货双层责任分担制度。[19]

（三）构建我国的船东责任法律制度

就涉外油污案件而言，我国作为 1992《民事责任公约》的缔约国，适用该公约中的相关规定。由于我国没有专门的油污损害赔偿立法，国内油污案件适用《海商法》和《海环法》。[20] 在国内法体制下，我国船东责任之实现尚存在诸多问题。

首先，从归责原则来看，船东承担责任的事故范围相对较窄。根据我国相关法律规定，我国油污损害案件，作为环境污染案件中的一类，适用无过错责任原则。[21] 相比 1992 年《民事责任公约》下的严格责任归责原则而言，我国国内法下船东承担责任的情况较少。比如，依据 1992 年《民事责任公约》的规定，完全由第三人故意所造成的损害方可作为船东免责的理由，而我国《海环法》则把第三者

16 1971 Fund Convention, Art. 10.

17 International Oil Pollution Compensation Funds (IOPCF), at http://www.iopcfund.org/92members.htm, 5 November 2005.

18 At http://www.itopf.com/casehistories.html #exxonvaldez, 1 November 2005.

19 Canada’s Ship-source Oil Pollution Fund, at http://www.epa.gov/oilspill/pdfs/macinnispaper.pdf, 5 November2005.

20 国内船舶油污损害赔偿案件，应该适用国际公约还是国内法，曾一度引起法学界的长期争议。2002 年，最高人民法院通过对山东省高级人民法院审理的“烟台海上救助打捞局与荣成市凤港渔业公司船舶油污损害赔偿纠纷”一案，确立了该类案件使用《海商法》和《海洋环境保护法》的原则。参见赵红：《关于审理船舶油污损害赔偿案件中的法律问题》，载于《2005 上海国际海事论坛论文集》，第 63~64 页。

21 《民法通则》第 124 条，《海洋环境保护法》第 90 条，《最高人民法院关于民事诉讼证据的若干规定》第 4 条第 3 款。

过失也作为责任人免责的理由。[22]

其次，从船方偿付能力来看，除了载运量 2000 总吨以上的国际航行油轮依据 1992《民事责任公约》实行强制保险之外，我国尚未建立油轮强制保险制度。而我国油轮的实际情况是小船多，事故多，赔偿力差。在我国沿海油轮中，1000 总吨（可近似认为载运量 2000 吨）以下小油轮占油轮总数的 71%。通过对我国沿海 1973—2003 年发生的溢油量 50 吨以上的重大溢油事故统计，小油轮占 66%。有些事故多发水域如广东省，小油轮事故占事故总数的 78%，事故风险很大。国内沿海航线 1000 总吨以下小油轮投保油污险的占此类油轮艘数的 5.2%，占总吨位的 5.3%。所能统计到的内河航线油轮投保油污险的油轮艘数只占内河油轮总数的 2.2%，占总吨位的 0.7%。这些数量众多的小油轮许多都是单船公司或个体船东，既没有保险，经营状况又不好，一旦发生油污事故，没有任何赔偿能力。[23]

再次，从责任限制来看，我国尚无专门针对油污事故的船舶责任限制，仅有《海商法》第 210 条之下的一般海事责任限制。这一限额远远低于 1992 年《民事责任公约》的标准。从我国近年来油污案件的索赔情况来看，此责任限制对吨位小的油轮限制太低，发生事故后，连清污费都不够。[24] 对吨位较大的油轮，暂时能够满足索赔要求，但能否适应我国经济和石油运输量的发展情况，则仍是疑问。

针对上述问题，我国正在进行相关的立法工作。据中国海事局船舶监督处鄂海亮副处长介绍，油轮强制油污保险制度将通过颁布实施新修订的《中华人民共和国防治船舶污染海洋环境管理条例》施行。[25] 该条例的送审稿已经于 2005 年 6 月 3 日通过了交通部部务会议审议，还有待报国务院批准发布。就强制保险而言，针对我国国内航线小油轮众多、清偿能力差的特点，我国应当建立国内航线油轮，不论大小，一律强制进行油污保险的制度，采取广保险、低保费、低保险限额的政策。而对于油污案件归责原则和责任限制制度，应尽快通过修改《海商法》或采用司法解释的方式，明确规定油污损害赔偿的严格责任制度，提高责任限制。

总之，在建立我国的油污基金制度的同时，应当通过适当的立法程序，建立适合我国现阶段实际的船东强制保险制度，完善船东的严格责任和责任限制制度，建立较完备的油污损害第一位责任制度。只有这样，才能为处于第二位赔偿机制的油污损害赔偿基金的有效运作提供前提条件。

三、依照信托法理建立我国的油污基金法律制度

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22 1969 CLC Convention, Art. 3 (2)；《海洋环境保护法》第 90 条。
23 刘红：《油污赔偿应考虑国情》，载于《中国船检》2005 年 7 月。
24 刘红：《油污赔偿应考虑国情》，载于《中国船检》2005 年 7 月。
25 该条例乃对 1983 年国务院公布的《防止船舶污染海域条例》的修订。

油污基金是石油公司依“受益者付费”原则承担赔偿责任的实现形式。作为一项民事法律制度，首先应当弄清油污基金的法律性质，才能依据相应的法律原理和规则，建立科学的油污基金法律制度。从油污基金的目的、功能、相关法律关系分析，该基金的性质应是信托基金。基金、摊款者、油污事故受害者之间的法律关系为信托法律关系。因此，必须依据信托法理，来设计油污基金的法律制度安排。

（一）信托法理概述

信托制度起源于普通法系，但现已为很多大陆法系国家所接受。我国 2001 年也颁布了《中华人民共和国信托法》（以下简称“《信托法》”）。按该法第 2 条规定，信托是指委托人基于对受托人的信任，将其财产权委托给受托人，由受托人按委托人的意愿以自己的名义，为受益人的利益或者特定目的，进行管理或者处分的行为。日本《信托法》、《布莱克法律辞典》和《美国信托法第二次重述》都对信托做了类似的界定。[26]

信托具有以下特征：[27]

（1）信托是一种以财产为中心的法律关系。信托的成立必须以委托人将信托财产转让给受托人占有为前提。信托的目的是为了对信托财产进行最有效地管理，以给受益人带来最大的受益。信托关系人的权利义务表现为各关系人对信托财产的权利和义务。

（2）信托是一种以委托人、受托人和受益人三个关系人构成的三方法律关系。委托人是信托财产所有人和设立信托的人；受托人是为了受益人利益占有信托财产并加以管理或处分的人；受益人是对信托财产享有利益的人。

（3）受托人不享有对信托财产的完全所有权，只享有一定范围内的处分权。信托设立时，委托人虽将信托财产的所有权转移给了受托人，但受托人在管理或处分信托财产时，并不能像管理或处分自己的固有财产那样，不受第三人的限制。它对信托财产的处理必须受信托目的和受益人利益的约束。因此，受托人对财产的所有权是不完全和受限制的。

（4）信托是一种以信任为基础的法律关系。信托必须以委托人将自己所有的某一特定财产（信托财产）转移给受托人占有才能有效成立，但委托人的真正目的并非在于使受托人取得该信托财产，而是要通过这种转让，使信托财产得到有效管理而成立信托关系。由此可见，委托人与受托人之间的互相信任是信托关系成立的基础。

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26 日本《信托法》第 1 条； Bryan A. Garner ed., *Black's Law Dictionary*, 7th edition, ST. Paul: West Publishing Co., 1999, p. 1513.

27 齐树洁、彭晋平：《契约型投资信托若干法律问题研究》，载于《政法论坛》1995 年第 2 期。

（二）油污基金各方法律关系分析

油污基金由石油公司缴纳摊款而设立，当发生油污损害时，给适格的受害者以损害赔偿。由此可见，油污基金涉及到 3 个利益相关者：作为基金摊款者的石油公司、基金本身、受害者。三者间的关系简单阐述如下：石油公司与基金之间，前者需向后者缴纳摊款；基金与受害人之间，前者在特定条件下满足后者的索赔要求；在摊款者与受害者之间，没有直接关系。

笔者认为，从法律上看，这三者间的法律关系性质，符合信托法律关系的基本要件和特征。

1. 从石油公司与油污基金之间的法律关系来看，石油公司承担摊款责任，即是将自己所有的财产转移给油污基金，符合信托关系的形式要件。摊款的目的是为了保证油污事故发生后，受害人可以获得妥善的赔偿，符合“为了受益人的利益”之特征。

2. 从油污基金本身来看，油污基金在此有双重含义。首先是石油公司的摊款所形成的资金集合。其次是这笔资金的管理者。就管理者与资金之间的关系而言，资金由管理者所占有，但不是其自有财产，管理者不能像处置自己的财产那样自由地使用这笔资金，而只能按照以基金财产对受害者进行赔偿的设立目的，在油污事故发生后，由管理者以自己的名义（而非石油公司的名义）赔付给油污受害者。这与受托人对信托财产所享有的权利和义务是一致。

3. 从油污基金与受害人之间的法律关系来看，油污基金并非油污事故中的侵权行为人，对受害人并不承担侵权法下的责任。油污基金与受害人之间也不存在合同或其他先在法律关系。但受害人却可以向油污基金就其在油污事故中所遭受的损失进行索赔。这是因为基金原本就是为了使油污损害的受害者受益——得到合理的赔偿而设立的，因此，油污损害的受害者实质上就是信托关系中的受益人。

（三）信托法理的价值分析

依据信托法理构建油污基金法律制度，具有诸多优点。

1．从对信托财产的管理来看，信托能够将财产隔离保护。当受托人的债权人向受托人提出请求时，信托财产并不属于受托人的个人财产。除了为受益人服务外，信托财产只能用来偿还合理地管理信托财产过程中产生的有关债务，或者受托人以受托人身份行事所产生的债务。[28] 受托人必须将信托财产与自己本人拥有的财产，分别管理。在管理中负担善良管理人的注意义务。[29] 因此，作为信托财产

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28 [英]D. J. Hayton 著，周翼、王昊译：《信托法》，北京：法律出版社 2004 年版，序言。

29 张淳：《信托法原论》，南京：南京大学出版社 1994 年版，第 150~152 页。

的油污基金，必将使由石油公司摊款形成的、基金所拥有的资金特定化，从而使这笔资金与基金管理者本身所有的财产、债务相区别，保证了资金的安全。同时，该资金特定化之后，如果依照规定可以进行合理、谨慎的投资，则可使其增值收益自动归属于油污基金，从而更有效地使这笔资金发挥最大效用。

2. 从受益人享有的权利来看，信托关系下受益人可以强制受托人履行其义务。按英美法系的规定，信托委托人将所有权一分为二，名义上之所有权（普通法上所有权）由受托人享有，而实质上之所有权（衡平法上所有权）则由受益人享有。对信托财产而言，受益人所享有的权利高于受托人所享有的权利，因此受益人可以强制受托人履行其义务。[30] 在大陆法系下，实行一元所有权原则，英美法二元所有权的理论无法得到适用。因此大陆法系的法学家便以种种理论对信托法律关系加以解释，但不论是哪种学说或立法实践，都尊重英美法下受益人所享有的受益权，并以保障此权利的实现作为信托法的根本要件之一。[31]

从设立油污基金制度的角度看，依据信托法理，作为信托受益人的油污受害人，其所享有的受益权能够得到法院的承认，能够以诉讼的方式实现，有力地强化了对油污受害人的保护。有此实体权利保障，油污受害人所享有的便非单纯的利益，而是可以请求强制执行的权利。对受害人赔付与否，不再仅仅是油污基金管理者可以自行决定的权利，而是其必须履行的义务。同时，由于诉讼方式的介入，对社会公众而言，可以借用司法模式对油污基金运作进行监督，有利于规范其赔偿行为。

3. 在国内法制度下创设的油污基金，并非完全由委托人自愿设立，而是基于委托人在环境法下的责任，属于法定信托。因此，石油公司负有承担摊款责任的法定义务，政府则有征收基金摊款的权力。如果不按信托法理使由此形成的油污基金成为与国家财产独立的信托财产，就会出现国家财政承担对油污受害人的赔偿责任的情形，如此一来，就将民事油污损害赔偿制度，转化为国家行政行为。在该行政行为下，尽管国家可以授予油污受害人特定的利益，但国家本身并非基于过错或现行法律责任而为此行为，故油污受害人不可以诉讼等强制手段实现其索赔目的，这样不利于对油污受害人的保护。而且，由于国家往往是自然资源的公共受（信）托人、或所有人，是油污案件中对自然资源损害（环境损害）进行索赔的主体，[32] 其法律地位与一般油污受害者完全一致。这种情况下，如果国家一方面以自己名义对油污受害人进行赔偿，另一方面又就油污事故造成的自然资源损害对自己进行索赔，无疑会发生身份混同，不利于解决问题。

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30 方嘉麟：《信托法之理论与实务》，北京：中国政法大学出版社 2004 年版，第 2 页；[英] D. J. Hayton 著，周翼、王昊译：《信托法》，法律出版社 2004 年版，第 10~14 页。

31 张悦：《论民法法系对信托的再造》（硕士论文），厦门：厦门大学 2003 年版，第 32~35 页。

32 张湘兰、徐国平：《船舶油污自然资源损害赔偿：法律制度障碍的跨越》，载于《武大国际法评论》2004 年第 2 卷，第 43~46 页。

（四）国际实践的例证

1. 从美国的油污基金制度来看，1990 年美国油污法所规定的“溢油责任信托基金”，直接以信托基金命名，其法律性质一目了然。

2. 1992 年国际《基金公约》创建的国际油污基金制度，由于其主体资格为国际组织，具有特殊性，因而没有直接冠之以信托基金的名称。尽管如此，但其本身各项制度、运作方式都是按信托法理设计的。国际油污基金主要以私法主体的身份展开与摊款者、油污受害者之间的关系。其核心目的亦是转移财产、管理财产，为受益人的利益服务。国际油污基金作为摊款资金的管理者，以自己的名义处分此财产，但又必须符合《基金公约》的目的，仅能为对油污受害者的偿付。这些特性，皆符合本文对油污基金是信托基金的分析。

综上所述，依据信托法理建立我国的油污基金法律制度，即可使基金制度建立在科学的法律基础上，符合创设油污损害赔偿基金制度的实际需要，能够较好地调整相关各方之间的关系。

四、我国油污基金主要的具体法律制度设计

（一）关于设立油污基金的目的

应当明确规定设立油污基金的目的为赔偿油污事故受害者的损失和保护我国的海洋生态环境。

《信托法》第 6 条规定，设立信托必须有合法的目的。我国的国内油污基金是依《海环法》规定设立的，属于法定信托，因此，设立油污基金必须符合该法的相关规定，否则，就构成信托目的不合法。根据该法第 66 条的规定，国家设立油污基金是为了由货主与船东共同分担油污损害赔偿责任。该法第 90 条第 2 款规定，对破坏海洋生态、海洋水产资源、海洋保护区，给国家造成重大损失的，国家有权要求赔偿损害。可见，赔偿受害者损失和保护海洋生态环境都是设立油污基金的目的，二者不可或缺，缺少其中的任何一项，依《信托法》第 11 条第 1 项规定，将导致信托无效。

（二）建立规范的信托财产确定制度

《信托法》第 7 条和第 11 条规定，设立信托必须有确定的信托财产，并且该信托财产必须是委托人合法所有的财产，否则信托无效。根据油污基金设立的目的，为了使基金资金符合信托财产的要求，根据我国的需要和现实条件，通过立法

作出如下制度化安排，建立明确、稳定的多元化资金确定机制。

1. 实行摊款石油货主范围法定制

目前，在确定石油货主的范围问题上，一种意见主张只有持久性油类的石油货主才须摊款。据中国海事局船舶监督处鄂海亮副处长介绍，我国油污基金中可能采取的摊款办法是，凡在我国港口接受从海上运输的持久性油类货主及其代理商，都需要交纳油污基金；对于在中国港口过境的持久性油类物质不征收油污基金，对于同一货主接受的中转运输的持久性油类物质只征收一次油污基金。[33] 另一种意见则主张所有通过船舶运输获得原油和燃油的石油货主都须摊款。[34] 我们认为，摊款石油货主的范围应与摊款标准的确定作为一个整体统筹考虑。如果摊款实行低标准，则货主范围应尽可能广。相反，若摊款实行高标准，货主范围可适当缩小。目前，在我国石油价格由政府决定的情况下，若油价不变，油污基金摊款将完全由石油公司承担，而不会转移给下游产业和最终消费者，因而需考虑石油企业的承受能力。若油价因此上涨，则需考虑油价对国民经济整体状况的影响。在石油价格形成机制短期内难以完全引入市场机制和国际石油价格呈上涨趋势的情况下，现阶段实行高标准摊款不是很可行。因此，应将所有原油和燃油货主纳入摊款范围内。

2. 实行摊款标准定期核定制和核定程序的法制化

虽然现阶段实行摊款低标准比较合理，但随着石油价格市场化进程加快和因石油进口量的激增带来的油污事故风险的加大，必然要求对摊款标准进行调整。为了避免频繁的标准调整导致不稳定和增加不必要的管理成本，应当明确规定，摊款标准每 2 年核定一次。

对摊款标准的核定程序，应当明确规定每次核定新标准前半年，由基金管理机构拟出书面建议初稿，建议中应说明核定新标准的依据、理由，以及新标准实施对摊款货主经营的影响，经征求国务院有关部门和石油货主意见后进行修改，形成正式的书面建议提交基金的权利机关表决，通过后形成送审稿报国务院审查决定。对大多数货主提出的意见没有采纳的，在提交的送审稿中要说明理由。如果多数货主意见与建议初稿中的新标准出现严重分歧的，基金管理机构应进行听证，并根据听证意见对建议初稿进行修改后提出正式的书面建议报基金的权利机关表决。

3. 建立基金资金来源的多元制

由油污基金的信托性质和目的所决定，基金的资金除了货主的摊款外，还应

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33 鄂海亮：《中国船舶油污赔偿机制的建立与发展》，载于《2005 上海国际海事论坛论文集》，第 118 页。

34 胡正良：《设立船舶油污损害赔偿基金的几个法律问题》，载于《2005 上海国际海事论坛论文集》，第 94 页；陈伯卫：《借鉴国际油污基金管理经验，构建我国船舶油污损害赔偿基金管理制度》，载于《2005 上海国际海事论坛论文集》，第 52 页。

当明确规定基金的资金组成包括下列几个部分：

（1）基金的投资收入。由于基金的资金性质是信托财产，按《信托法》第 14 条第 2 款规定，因信托财产的管理运用、处分或者其他情形而取得的财产，也归入信托财产。因此，基金不论是通过存入银行所获得的利息收入，还是通过国家投资政策允许的投资所获得的收入，都应当成为基金资金组成部分。

（2）海洋环境违法行为的罚款和违法所得。按《海环法》第 76 条、第 88 条规定，对违反该法，造成海洋生态资源破坏或船舶有不按该法规定配备防污设施、持有防污证书等行为时，有关海洋管理部门有权给予罚款和没收违法所得。这些资金应转入基金，专门用于海洋生态环境保护。

（3）海洋生态资源损害的追偿款。按《海环法》第 90 条第 2 款规定，国家有权要求造成海洋环境重大损害的责任者赔偿损失。当油污事故造成损害时，国家可以要求责任人赔偿损失。这项资金应转入基金，专门用于海洋生态资源的保护。

（4）海洋环保捐款。为了扩大油污基金的资金来源，应当鼓励法人或自然人向基金捐赠。

4. 建立高效率低成本的油污基金资金收缴制度

按信托法理和《信托法》的规定，信托财产必须由委托人将其转移给受托人取得。[35] 油污基金的资金作为信托财产，来源于上述五个方面，涉及的对象相当广，既有征缴违法所得和罚款的国家行政机关，也有自愿捐款的社会各界人士和组织，还有作为资金主要来源的众多石油货主。由于石油货主的摊款是基金资金最大部分，而且成员多分布广，因此，保证其足额及时缴交摊款是实现信托财产高效率低成本的转移，使基金得以顺利设立的关键。应该采取强制履行的措施，方能保证石油公司不会逃避此义务。如美国就采用石油税的形式，由税务机关代征。由于税务机关拥有较全面的征税信息和较高的管理技术，大大降低了管理成本，提高了效率。[36] 从我国的实践情况来看，基金摊款仅仅针对经由海上运输的石油而产生，不能照搬美国的模式。因为由税务机关代征，对石油运输途径、产地等信息的欠缺，必将大大增加执法难度和成本。而按照《海环法》规定和国家机关职责分工，我国的海事部门负责船舶载运危险货物（包括原油和燃油）的监督管理，熟悉油品运输业务；船舶载运原油和燃油货物需向海事部门办理申报和进港签证或进口查验。因此，海事部门掌握的数据齐全，工作比较有利，我国油污基金摊款由海事部门代为征缴，是一个比较好的选择。[37]

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35 《中华人民共和国信托法》第 14 条。

36 胡正良：《设立船舶油污损害赔偿基金的几个法律问题》，载于《2005 上海国际海事论坛论文集》，第 93 页。

37 陈伯卫：《借鉴国际油污基金管理经验，构建我国船舶油污损害赔偿基金管理制度》，载于《2005 上海国际海事论坛论文集》，第 53 页。

（三）关于油污基金管理组织的制度设计

油污基金管理组织在信托法律关系中就是信托的受托人，是信托事务的执行者。信托法上受托人的基本义务是必须遵守信托目的，忠实于受益人。我国《信托法》规定，受托人有“忠实履行受托义务”、“不得以信托财产为自己谋利”、“将信托财产与自己财产分别管理”、“亲自履行信托义务”、“损害赔偿责任”等义务。[38]《欧洲信托法原则》第 5 条中，对受托人的权利和义务也做了类似规定，其中，特别强调受托人最重要的义务是，严格遵守信托条款的规定，采取合理的注意以管理信托财产、为了受益人的最大利益行事，或者在目的信托的情况下，为了促进实现该目的而行事。

基金管理组织作为信托基金的受托人，根本任务是对基金进行有效的管理，核心是忠实履行受托人的信托义务。为了保证我国的基金管理组织制度能够有效地使基金管理机构最大程度地正确履行作为信托受托人的各项义务，应当通过立法对如下问题做出明确规定。

1. 管理组织的法律地位

设立中国油污基金理事会，隶属于国务院，其法律地位为事业法人。

如前所述，设立油污基金兼具保护环境和满足油污事故受害者索赔的双重目的，它兼有为公益和私益服务的双重性质。因此，其管理组织既不能由按照《信托法》第 6 章中公益信托规定的纯粹的公益机构担任，也不能由按一般信托关系中由委托人基于信赖而选任的其他组织或个人充任，而必须根据《信托法》第 4 条的规定，由特定的信托机构担任，该信托机构的组织和管理办法由国务院规定。这与《海环法》第 66 条的规定也是相一致。因此，设立中国油污基金理事会，在法律上是可行的。

中国油污基金理事会是为了管理油污基金而专门设立的组织，它以油污基金作为自身的财产，在油污事故的处理中，也是以自身财产独立承担责任的，这完全符合法人应当具备的条件。同时，由于基金设立的目的，油污基金理事会管理基金并不以营利为目的，所以应当赋予其事业法人地位。

从实务操作的角度考察，赋予中国油污基金理事会以事业法人地位可以使基金资金与征缴机构的财产独立，也与国家的财政资金独立，为实现信托法关于信托财产独立性的要求提供了最有效的保障。同时，当受害人为国家时，或是基金管理组织与受害人因损害赔偿发生诉讼时，基金理事会的法人地位可以有效防止因为基金管理机构的行政化或其法律地位不确定，导致不正当的行政干预，确保油污基金与受害人之间是民事法律关系性质。

从国际上现有的实践看，国际油污基金公约就明确规定，国际油污基金本身

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38 《中华人民共和国信托法》第 25~30 条。

应被各缔约国承认为独立的法律人格者。[39]

2. 基金管理机构组织及其职责

作为具有法人地位的中国油污基金理事会，必须具有完善的法人治理结构，才能保证它切实履行其作为受托人的各项受托义务。我们认为，由于公司的治理结构比其他各种法人治理结构更为严密，中国油污基金理事会的组织结构及其职责，应当以公司的内部治理结构模式为基础进行制度设计。

公司治理结构的通常模式，是设立股东大会、董事会、监事会三个机构。股东大会由所有出资人组成，是公司的最高权力机关，负责公司重大事项的决策；股东大会之下设有董事会，由股东大会选举产生，股东大会与董事会之间是信托关系，董事会作为股东的受托人负责经营管理受托管的财产，负有忠诚义务和审慎管理义务。[40] 它是公司的经营决策机关；监事会也由股东选任，负责对公司经营管理活动的监督。有的大型公司还雇佣职业经理人，负责公司的日常经营管理事务。规模较小的公司，一般不设职业经理人，常由董事会中的一个或部分成员负责日常经营管理事务。

以上述模式为基础，根据基金的公益性以及作为出资人的石油货主和公司股东各自与信托财产的利益关系不同等特点，借鉴国际经验，中国油污基金理事会应建立作为出资人代表的理事代表会，负责基金管理决策和日常事务的基金管理中心和对基金管理活动进行监督的基金监督部的三位一体的组织机构及其职责制度。

（1）理事代表会的职责及组成制度

理事代表会的组成。成员人数 12~13 名。由国务院办公厅、国家发展改革委员会、财政部、交通部、农业部、国家海洋局、国家环保总局各指派 1 名副职领导共 7 人，中国石油、中国石化、中国燃料总公司、中国电力总公司共 4 人，以及交纳基金摊款的中小石油货主代表 1~2 组成。由于理事代表会被赋予摊款费率标准建议权，而这对国家宏观经济具有重大的影响，国务院办公厅、国家发展改革委员会、财政部作为国家宏观经济的主要管理部门，他们参加是其履行职责的需要；交通部、农业部、国家海洋局、国家环保总局都具有管理海洋环境事务的职权，就可能收缴违法所得或罚款，他们具有出资人的资格，理应参加。[41] 中国石油、中国石化、中国燃料和中国电力四大公司是最大的石油货主，理应具有代表资格；[42] 另外，其他中小石油货主由于数量太多，虽然出于管理效率的考虑，不能都派代表参加，但也应当有权选派代表参加。大会每年至少召开一次会议。

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39 1992 Fund Convention, Article 2.

40 董学立著：《商事组织法》，北京：北京大学出版社 2004 年版，第 251、255、258 页。

41 《中华人民共和国海洋环境法》第 5 条。

42 刘红：《“建立中国船舶油污损害赔偿机制”中若干问题的探讨》，载于《2005 上海国际海事论坛论文集》，第 125 页。

基金理事代表会行使下列职责：

第一，提出摊款费率、基金赔偿责任限额和理事长人选建议，报国务院批准；

第二，审议、通过理事长关于设立任何临时性或永久性的附属机构的提议，报国务院批准；

第三，根据理事长（也是中心的主任）提名，批准基金管理中心其他领导人员的任免；

第四，制定理事会议事规则；

第五，审议批准基金索赔指南、索赔程序、财务管理等关键性文件；

第六，审议批准基金理事会的年度预算；

第七，审议批准对基金索赔的重大偿付。

从石油货主代表中选任基金监督部成员。作出这样的制度设计，是因为石油货主虽然是摊款人，但并不是其出资的受益者，这与公司股东是公司经营利益的享有是截然不同的，在集团利益的驱动下，他们很可能滥用其表决权，所以，从成员组成上必须把其席位控制在 50% 以下，才能既保障石油货主作为主要出资人的正当权利，同时又能够防止其形成利用多数表决权的优势，作出损害受害人权益和减轻或逃避其应尽义务的决定或提议，影响理事会公正的履行职责。

同时，摊款费率、理事会人选和机构设立等事项，都是涉及宏观经济政策和重大人事、机构的带有全局性的问题，所以，必须由国务院决定。

（2）基金管理中心的职责和组成

中心的组成。中心由 1 名主任、2~3 名副主任和油污清理处、损害理赔处、研究发展室、政策法律处和财务行政处等 5 个处室组成。基金理事长任中心主任。

依据我国相关法规的规定，国家海事行政主管部门（海事局）负有规制船舶造成污染的职责。[43] 因此，为了提高效率，节约成本，基金管理中心可以与海事局合署，充分利用现有资源。

基金管理中心行使下列职责：

第一，采取各种适当措施，按法律法规和基金索赔指南、索赔程序的规定处理对基金的索赔；

第二，拟订基金索赔的重大偿付方案；

第三，拟订基金索赔指南、索赔程序、财务管理等文件方案，提交理事代表会审议批准；

第四，提出摊款费率核定方案；

第五，根据本基金索赔和完成其他任务的需要，聘请法律、财务和其他专家担任工作；

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43 《中华人民共和国海洋环境保护法》第 5 条第 3 款；《中华人民共和国海上交通安全法》第 3 条；《中华人民共和国防止船舶污染海域管理条例》第 3 条、第 7 条。

第六，拟订基金理事会的上年度财务报告和年度预算，提交理事代表会审议批准；

第七，编制上年度基金活动报告；

第八，采取各种适当措施正确管理基金资产；

第九，完成基金理事会分配的其他工作。

基金中心主任享有提名副主任人选、委任部门负责人及批准对基金一般索赔的清付的职权。

上述关于中国油污基金理事会的机构及职责的设计，充分借鉴了 1992 年国际油污基金组织和美国油污基金中心的制度。如国际油污基金即是由一个作为最高权力机关的全体会员国的大会，一个作为决策和管理机构的由 15 个会员国组成的执行委员会组成，其各自职责也有类似规定。[44] 美国“国家污染基金中心”是一个综合性的管理机构，而非单纯的基金管理者。其不仅负责管理针对油污污染的“溢油责任信托基金”，而且还负责签发船舶财务保证证书，并且在油污事故中代表美国政府主张自然资源损害索赔，其职责范围甚至包括海岸警卫队内部或外部培训计划、海岸警卫队下属单位和用户 IT 系统维护等内容。该中心下设 8 个分支部门，分别为：船舶证书部、案件管理部、索赔裁定部、自然资源损害索赔部、财务管理部、客户服务部、信息技术部、法律部。[45]

（3）基金监督部的组成和职责

监督部的组成。监督部由来自石油货主的 3~5 名代表组成。

监督部的职责：

第一，监督基金征缴、管理和使用情况；

第二，审计或委托会计师事务所对理事会的基金使用和财务管理活动；

第三，向基金理事代表会报告管理中心或工作人员违反基金管理规定的行为，并提出处理建议；如基金理事代表会不处理或认为其处理不当时，有权向人民法院起诉，要求撤消违反基金管理规定的行为；

第四，向基金理事代表会提出罢免中心副主任以下工作人员的建议；

第五，向基金理事代表会提出完善基金管理机制和方式的建议。

石油货主作为基金的主要出资人，他们最关心自己的摊款使用情况，虽然我们必须适当限制其在基金理事会中的权利，但不能剥夺他们监督其摊款的征缴、管理和使用情况的权利，通过赋予他们基金理事会的监督部成员的资格的制度设计，既有利于加强对基金的征缴、管理和使用的监管，保证基金征缴、管理和使用的合法进行，也有利于他们与征缴机构、受害人之间建立起比较和谐的关系。这

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44 IOPCF, at http://www.iopcfund.org/staff.htm, 8 November 2005.

45 美国海岸警卫队“国家污染基金中心”网站，下载于 http://www.uscg.mil/hq/npfc/About%20Us/index.htm#organization，2005 年 11 月 8 日。

样的制度不仅是法人治理结构的要求，也是我国《信托法》的规定。

大陆法系国家的信托法，基于信托关系是由委托人出自一定目的设立，信托目的又是通过受托人对信托的执行来实现的事实，确认委托人为信托的利害关系人之一。[46] 我国《信托法》规定，委托人在信托关系中享有对基金管理的知情权、对管理方法的调整权、对受托人违反信托义务行为的撤销权、损害赔偿请求权，对受托人的解任权等诸多权利。[47]

（四）油污基金使用的法律制度

如前所述，设立中国油污损害赔偿基金的目的，是为了对发生在我国管辖海域的油污事故所造成的损失进行赔偿和补偿。一方面，由于我国管辖海域既有内水、领海，还有专属经济区，油污事故既可能是原油也可能是燃油，而且基金的赔偿只是对船东赔偿责任的补充，因此，基金使用的法律制度首先必须对这些问题做出明确规定，这从基金使用角度看，就是基金的适用范围问题，从信托关系的角度考察，就是基金信托的受益人的确定。由于设立时油污事故尚未实际发生，事故受害人是不特定的，必须对有权获得赔偿的受害人的资格事先做出明确规定，才能使信托受益人获得受益权从而实现信托目的。另一方面，由于油污事故造成的损失是多种多样的，而且往往数额巨大，而基金的资金又有限，不可能承担全部的损失赔偿和补偿，因此，基金使用法律制度还必须对基金的赔偿范围做出明确的规定。从信托关系分析，这实质上就是受益人的受益权及其实现方式问题。由于基金中的信托属于法定信托，信托受益人的受益权的内容、取得方式等不可能从信托文件确定，必须根据法律法规的规定。

1. 油污基金的适用范围法律制度

（1）明确油污基金所适用的油污事故范围

第一，在空间范围上，明确规定我国油污基金应适用于我国所有管辖水域，即内水、领海和专属经济区，以最充分地保护我国油污受害人。

第二，在时间范围上，明确规定 3 年的时效期间。即油污事故发生后，受害人可以在 3 年时效期间向油污基金索赔，逾期丧失受益权，以督促受害人及时履行权利。国际油污基金也是这样的做法。

第三，在事故的种类范围上，明确规定基金应适用于所有的原油和燃油污染损害，包括运输的船舶和溢油油类两个方面。因为前已论及，设立油污基金的摊款包括所有的原油和燃油货主，而且在海上油污事故中，燃油污染损害和非持久性油类的损害也是必须加以解决的问题。

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46 张淳：《信托法原论》，南京：南京大学出版社 1994 年版，第 173~173 页。
47 《中华人民共和国信托法》第 20~23 条。

（2）明确规定基金承担赔偿责任的条件

在油污损害赔偿制度中，船方责任是第一位的，基金赔偿责任是第二位的，只有在船方已承担或无法承担赔偿责任后，方才启动第二位的赔偿机制。因此，应当明确规定基金只有在下列条件下才承担赔偿责任。[48]

第一，发生在我国管辖海域内的船舶油污损害，如果船舶所有人或者其他责任人依法不承担损害赔偿责任；

第二，虽然船舶所有人按照法律规定应承担赔偿责任，但在财力上不能承担或者不能全部承担，而且其按照法律规定提供的责任保险或其他财务担保亦不能或不足以满足损害赔偿的请求；

第三，损害超过法律规定的船舶所有人或者其他责任人的赔偿责任限额。

同时，明确规定基金在下列情形免于赔偿：

第一，如果索赔人不能证明损害是由于船舶油污事件所造成；

第二，油污损害全部或部分地由于受害人故意或者过失所造成，基金可全部或部分地免除对该人的赔偿责任，但对预防措施的费用和因此引起的进一步损害的赔偿除外；

第三，油污损害是由于用于军事的、政府公务的船舶溢出或排放油类所造成，油污损害赔偿基金对发生在我国管辖海域的船舶油污损害免于赔偿。

（3）基金的赔偿范围

由于我国已经加入了 1992 年《民事责任公约》，在涉外油污事故中有义务履行其赔偿标准。出于法制统一、方便司法的目的，我国油污基金使用法律制度中对赔偿范围的规定应与 1992 年《民事责任公约》中规定的赔偿范围一致。[49]

根据1992《民事责任公约》中关于赔偿范围的规定和2005年最新颁布的《1992基金索赔手册》，结合我国油污事故索赔的实践，应当将下列项目规定为基金的赔偿范围。[50]

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48 胡正良：《设立船舶油污损害赔偿基金的几个法律问题》，载于《2005 上海国际海事论坛论文集》，第 97~98 页。

49 1992 年《民事责任公约》之中，损害赔偿的范围是通过对“污染损害”的概念定义来加以界定的。在公约中，“污染损害”是指（a）油类从船上的溢出或排放引起的污染在该船之外所造成的灭失或损害，不论此种溢出或排放发生于何处；但是，对环境损害（不包括此种损害的利润损失）的赔偿，应限于已实际采取或将要采取的合理恢复措施的费用；（b）预防措施的费用及预防措施造成的新的灭失或损害。见 1992 CLC Convention, Art. 1(6)。

50 鉴于 1992《民事责任公约》中关于赔偿范围的规定比较宽泛，国际油污基金在自己的索赔手册中，将主要的赔付项目列出，以方便索赔，并且对各个赔付项目的相关规定每年都加以修订。因为其并非法律，我国油污基金可以直接借鉴这些偿付项目。2005 年最新颁布的《1992 基金索赔手册》将船舶油污事故造成的各种污染损害分为 1. 清污作业费用和预防措施费用；2. 财产损害；3. 直接经济损失；4. 纯经济损失；5. 环境损害和研究费用；6. 专家顾问费用。见 Claims Manual, the IOPC Fund 1992, 2005 edition, pp.10~11,19~30.

第一，清污费用。从我国多年来对油污事故的处理经验来看，最大的问题是清污经费没有保证，出现谁清污谁负债的局面。

清污费与其他索赔事项不同，它发生于溢油事故的损害结果最终定型之前。清污费支出的大小，一般而言与清污效果成正比。如果清污费投入较高，清污效果好，则可以大大减少石油入海量，从而直接减少其他索赔项目的索赔量。相反，如果清污费用长久、始终不能够足额受偿，则必然影响到一国清污队伍的建设和发展。难以从根本上减少油污污染损害。因此，在油污事故发生后，及时采取应急措施、及时清污，便成了减轻油污损害的重要目的。正是基于此目的，美国、加拿大国内油污基金都将垫付清污费作为其用途之一。但油污基金并非完全承担此清污费用，而仅仅是垫付。垫付之后，油污基金取得代位求偿权，向油污事故的第一责任人船东（特殊情况下为第三人或受害者本身）求偿。当船东由于其财务能力限制，或油污责任限额，不能够满足损害赔偿要求时，由基金负担清污费。

在我国的许多赔偿案例中，清污费用只占很小的比例，赔偿比例最大的是海洋环境和中长期渔业资源的损失。有学者和官员担心长此以往，将对我国海洋环境和渔业资源造成更大的损失，[51] 因此提出了清污费优先受偿的建议。[52] 但我们认为，不必作出这种规定。

清污费优先受偿问题有两层含义。首先，是在船东责任下是否优先受偿；其次，是在油污基金承担责任下是否优先受偿。由于不论在船东责任下清污费是否优先受偿，只要它没有被清偿，便都会与其他损失一同进入基金的赔偿范围。这时，如果清污费优先受偿，则清污费作为油污基金垫付的债权，与油污基金承担的赔偿责任部分抵销，其他各项损失在油污基金的剩余限额下按比例受偿。如果清污费不优先受偿，则与其他损失一同在基金限额下按比例受偿。因此，清污费是否优先受偿的差别，仅仅在于油污基金抵销的债权额度不同。若优先受偿，则油污基金可以抵销的债权比较多，在基金限额下需要赔付给其他受害者的份额就比较少。这样一来，建立其油污基金制度后，清污费的优先受偿与否，便从行政部门是否有资金清污的问题，转化为油污基金自己内部的资金运作问题。诚然，在优先受偿的情况下，油污基金需要承担的赔偿责任会相对较小些。但考虑到垫付清污费是油污基金的公益服务功能，补偿受害人是油污基金的私益服务功能。如果以公益服务功能下的款项支出来挤占私益服务功能下受害人所能获偿的份额，似乎并不妥善。

是否优先受偿，只会影响到油污基金所承担的赔偿责任的大小，因此可以根据油污基金的财务能力来加以决定。但由于赔偿责任已经被基金赔偿限额给限定

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51 刘红：《油污赔偿应考虑国情》，载于《中国船检》2005 年 7 月。

52 刘功臣：《建立符合中国国情的船舶油污损害赔偿制度》，载于《2005 上海国际海事论坛论文集》，第 5 页；刘红：《“建立中国船舶油污损害赔偿责任机制”中若干问题的探讨》，载于《2005 上海国际海事论坛论文集》，第 129~190 页。

了，因此，不会对基金的财务能力造成太大的影响。

第二，财产损失。财产损失即公私财产因为被溢油污染而受损失，如渔船、渔具等被污染的损失。[53]

第三，直接经济损失。直接经济损失即由于财产被污染造成的直接收入损失，如鱼网被污染导致的渔民收入损失。[54]

第四，纯经济损失和环境损害。

纯经济损失，是指所有人或使用人的财产虽然没有被污染，但是收入遭受了损失，比如渔民的渔船和渔网没有被污染，但由于他们通常捕鱼的海域遭受了污染，而致使无鱼可捕的损失。与此相似的，还有由于油污事件期间顾客数量减少而造成的公共海滩附近的旅店或者饭店业主的损失。[55] 环境损害，1992 年《民事责任公约》没有对此概念下定义，只是规定污染损害包括环境损害，但限于实际采取或准备采取的恢复措施所支出的合理费用。这两类损失的共性在于都比较模糊，难以确定，而且损失数额巨大。

在我国油污事故司法实践中，最常遇到的便是中长期渔业资源损失。中长期渔业资源损失，即可以列为渔民所遭受的纯经济损失，又可以列为生态环境所遭受的损害。

在我国司法实践中，对于是否将中长期渔业资源损失列入损害赔偿范围，有着极大争议。因为此类损失数额巨大，如果允许纳入赔偿范围，则各索赔请求在责任限额下按比例受偿之时，会产生排挤效应，使得清污费用、直接经济损失等索赔要求只能获得很小一部分赔偿，因而引起了相关受害人的不满。对于这一问题，我国法院法官与交通部学者有着针锋相对的观点。法院方认为，在现行法律未作出限制性规定的情况下，天然渔业资源中长期损失作为油污损失的一种形态，相当于“CLC 1992”中的“环境损害”，应属于赔付的范围，法院应予赔偿。不能因为允许中长期损失参与索赔，众多近期损失的索赔主体将得到很少赔偿，便主张中长期损失不应列入索赔范围。[56] 而交通部学者认为，中长期渔业损失是依据公式计算的推理损失数据，但却占了全部赔偿额的 70%。由于这类赔偿数额巨大，存在许多不确定因素，如果接受这类赔偿，使许多急需赔偿的项目反而得不到应有的赔偿，也是目前国内基金的赔偿能力所不能承受的。因此，在现阶段，不能接

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53 MansJacobsson, The International Compensation Regimes and the Activities of the International Oil Pollution Compensation Funds, in *2005 International Maritime Forum Proceedings*, pp. 35~36.

54 赵红：《关于审理船舶油污损害赔偿案件中的法律问题》，载于《2005 上海国际海事论坛论文集》，第 68 页。

55 Claims Manual, the IOPC Fund 1992, 2005 edition, pp.10~11.

56 赵红：《关于审理船舶油污损害赔偿案件中的法律问题》，载于《2005 上海国际海事论坛论文集》，第 68 页。

受这类赔偿请求。[57]

其实，双方观点都有其合理之处。我们主张，应当将其列入赔偿的范围内。但同时，授权基金理事代表会，对损害证明和赔偿额采用严格标准，制定索赔指南作为具体实务操作规范，并规定每 2 年必须定期对索赔指南进行修订。理由在于我国《海环法》第 90 条第 2 款明确规定，破坏海洋生态、海洋水产资源、海洋保护区，给国家造成重大损失的责任者，应当赔偿损失。但是，考虑到一方面中长期渔业资源损失并非可以直接测算的损失，而是对生态系统造成的在将来可能发生的损失。而且我国目前在评估中长期渔业资源损失方面，并没有可靠的技术力量；我国的油污基金建立之初，财务能力也有限。如果因为在中长期渔业资源损失的因素作用下，每次油污事故赔付中都会用满责任限额，则很容易会导致油污基金的破产。但若为了防范这一点，而将责任限额定得比较低，则对于中长期渔业资源损失此类大宗索赔项目而言，会使得索赔没有实际效果。同时，大宗索赔项目在基金限额下对其他索赔项目的排挤效应，很可能使渔民、海滨养殖业者只能得到象征性的、极为有限的赔偿，会有损建立油污基金的目的，因此应从严控制。参照国际基金的经验，由基金理事代表会按此原则制定指南，既保证了基金法律制度的合法性，又具有灵活性，符合我国的现实情况，比较可行。

（4）赔偿责任限额

因为油污事故所造成的损害实在太过庞大，为了避免因某次大型油污事故的损害赔偿而导致油污基金破产，必须建立责任限额法律制度。责任限额的制定主要取决于油污基金的财务能力，以及实际油污事故的赔偿需要。由于基金责任限额和基金总量、摊款额度一样，都属于基金管理使用中的重大事项，同时责任限额也对社会经济发展有重大影响，所以应当根据国家经济形势不断修订，并规定由基金理事代表会提出建议，报国务院批准。

从可参考的立法例来看，不论是国际油污基金还是美国的油污基金，都规定有责任限额制度。

（5）基金的其他支出项目

基金设立的目的之一是赔偿受害人的油污损害和防治油污对海洋生态、资源、环境的损害，这需要很强的技术和人力支持，因此，应当规定基金可以有一定数量的资金用于油污防治特别是清污技术的研发，以及聘请有关的专家。国际基金和美国都有类似的规定。[58]

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57 刘红：《“建立中国船舶油污损害赔偿机制”中若干问题的探讨》，载于《2005 上海国际海事论坛论文集》，第 131 页。

58 Claims Manual, the IOPC Fund 1992, 2005 edition, pp.10~11, 19~30；胡正良：《设立船舶油污损害赔偿基金的几个法律问题》，载于《2005 上海国际海事论坛论文集》，第 98 页。

（五）基金监督制度

由于基金资金既有石油货主的摊款，也有政府罚款等财政性资金，还可能有社会捐款，数额也比较大，所以对基金的管理使用，除了通过前述的基金理事代表会、基金监督部等内部进行监督外，还应当建立外部监督机制，以确保基金管理使用的合法安全。具体来说，应当建立如下三项监督制度。

1. 基金使用信息公开制度。规定基金管理中心必须将赔偿额超过 900 万元的每起案件的处理情况，在案件处理完毕后的 1 个月内，向石油货主、政府海洋环境保护监督机关和审计机关，提交书面报告。[59] 这样，才能保证社会相关单位和部门的知情权。

2. 强制审计制度。规定基金管理中心每年年终时编制的基金资金管理使用报告书，必须经过审计师事务所的审计后，才能提交给基金理事代表会。必要时，可由国家审计机关进行审计。[60] 同时，规定审计师事务所对其出具审计报告的真实性的法律责任。针对在审核中发现的问题，应当规定相应的惩罚、处理制度。当构成犯罪时，交有关机关处理。

3. 司法监督制度。油污事故受害人与油污基金可能在损害事实、法律理解、基金工作人员处理行为等方面发生分歧，对此，应当规定受害人与基金理事会对损害赔偿发生争议的，可以向人民法院提起诉讼。将司法监督引入油污基金法律制度，使得油污基金的工作暴露于司法和大众监督之下。对油污基金管理者或工作人员的失职、越权、或挪用基金款项等违法行为，有权要求检察机关及时处理。

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59 近 5 年来我国油污事故损失平均为 896 万元，引自胡正良：《设立船舶油污损害赔偿基金的几个法律问题》，载于《2005 上海国际海事论坛论文集》，第 101 页。

60 《中华人民共和国审计法》第 14 条。

在中国水域发生的船舶油污损害赔偿损失范围

杨运福* 林翠珠**

内容摘要: 在中国水域发生的船舶油污损害赔偿的损失范围通常分为人身损害、水产和渔业损失、岸上和环境损失、清污费用。船舶油污造成的渔业资源中长期损失应予赔偿,但关键问题是如何界定中长期损失的合理性。强制清污所产生的清污费属于民事责任,责任人有权享受责任限制,但清污费应优先受偿;碰撞造成的清污费应按碰撞责任比例承担;实施强制保险和建立油污基金是解决清污费问题的有效途径。

关键词: 船舶 油污污染 损失范围

多年来,中国水域船舶油污污染事故频发。据统计,1976—2000 年,中国沿海共发生大小船舶溢油事故 2353 宗,平均每隔 4 天发生一宗,总溢油量约 3 万吨。[1] 船舶油污污染事故,往往造成巨大经济损失和严重的环境损害。

船舶油污损害赔偿损失范围如何界定,一直是争论不休的问题。笔者在此提出自己的一些观点和看法,以期对解决此方面的问题有所裨益。

一、概 述

船舶油污损害赔偿范围,是指船舶溢出或者排放油类、燃油等油类物质造成海洋环境污染后,受害人可以向污染责任人索赔损失的范围。[2] 它直接关系到责任人与受害人的切身利益。

中国现行的法律法规没有对船舶油污损害赔偿的损失范围作出规定。《中华人民共和国海商法》(以下简称"《海商法》")、《中华人民共和国海洋环境保护法》

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1 刘红:《尽快建立并实施我国船舶油污损害赔偿机制》,载于《2002 年深圳海事论坛论文集》,第 22 页。

2 司玉琢主编:《海商法专题研究》,大连:大连海事大学出版社 2002 年版,第 410 页。

（以下简称“《海洋环境保护法》”）和《中华人民共和国防止船舶污染海域管理条例》（以下简称“《防污条例》”）都未对船舶油污损害赔偿的范围进行规定。《中华人民共和国民法通则》（以下简称“《民法通则》”）仅对污染损害赔偿问题做了原则性的规定。[3]

参考《1969 年国际油污损害民事责任公约》（以下简称“1969CLC”）及其相关的议定书、《1996 年国际海上运输有害有毒物质损害责任和赔偿公约》（以下简称“HNS 公约”）和《2001 年国际燃油污染损害民事责任公约》（以下简称“《燃油公约》”）对赔偿范围的规定[4]以及结合中国的司法审判实践，笔者认为在中国水域发生的船舶油污损害赔偿的损失范围通常分为以下几种：

1. 人身损害。包括自然人的生命、身体健康因环境污染而受到损害所造成的医疗费、差旅费、误工费等损失。

2. 水产、渔业损失。包括污染造成的水产、渔业的直接损失和中长期渔业资源损失，例如油污污染造成水产养殖区、渔业水域鱼、虾、贝类等的死亡、减产，海洋自然保护区、珍稀海洋生物保护区海洋生物的死亡、减产等。对于直接损失的赔偿争议不大，但对中长期渔业资源损失是否应赔偿却争议很大。笔者将在下文专门探讨中长期渔业资源损失问题。

3. 岸上和环境损失。沿岸植物的死亡，海洋盐业、食品加工业、海水淡化业产量的减少，海上运动娱乐区、风景游览区、饮食服务业收入的减少，港口水域、一般工业用水区域的损失，海洋开发区和海洋工程作业区的损失，交通运输生产的损失等等。

4. 清污费用。治理污染所花费的费用。笔者将在下文专门论述清污费用的问题。

二、中长期渔业资源损失

（一）对中长期渔业资源损失的争议

中国理论界和司法实践中对在中国水域发生的船舶油污造成的中长期渔业资源损失是否应赔偿存在很大的争议，主要有 2 种观点：一种观点认为，船舶油污造成的渔业资源的中长期损失属于油污损害赔偿的范围；另一种观点认为，渔业资源的中长期损失不属于油污损害赔偿的范围。

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3 《中华人民共和国民法通则》第 117 条和第 124 条。

4 《1969 年国际油污损害民事责任公约》第 1 条、《〈1969 年国际油污损害民事责任公约〉1992 年议定书》第 2 条、《1996 年国际海上运输有害有毒物质损害责任和赔偿公约》第 1 条第 6 款和《2001 年国际燃油污染损害民事责任公约》第 1 条第 9 款。

广东省海洋与水产厅对1999年3月24日2艘中国沿海运输船舶“东海209”轮与“闽燃供2”轮在珠江伶仃水道碰撞造成重大油污损害案在广州海事法院提起一审诉讼，广州海事法院一审没有支持中长期渔业资源损失。[5]一审判决后，广东省海洋与水产厅提起上诉。广东省高级人民法院二审支持了中长期渔业资源损失。[6]

（二）笔者对中长期渔业资源损失的观点

笔者认为，在中国水域发生的船舶油污造成的渔业资源的中长期损失，对于证据充分、索赔合理的部分，应予赔偿；但关键的问题是如何界定中长期损失的合理性。

认定中长期损失的存在和数额的合理性，是中长期损失赔偿问题中的关键。中长期损失通常是将来的预计损失，而不是现时的、已发生的损失，也不具有确定性、量化性等特点，属仅凭理论性方法计算得出的抽象数字，且数额巨大。当前，油污损害赔偿纠纷案中大部分当事人或有关部门对中长期损失调查预测的方法不科学，调查结果不准确，中长期损失的索赔事实证据不足。

目前，计算中长期损失的主要依据是中国农业部1996年10月发布的《水域污染事故渔业损失计算方法规定》（以下简称“《计算方法》”）。《计算方法》规定：“天然渔业资源损失额的计算，由渔政监督管理机构根据当地的资源情况而定，但不应低于直接经济损失中水产品损失额的3倍。”[7]海洋天然渔业资源的损失是油污造成的损失之一，对海洋生态而言是直接的损害，对渔业生产而言则可以认为是间接的损失。

笔者认为，《计算方法》属于部门规章，不具有普遍约束力。况且，《计算方法》规定的赔偿带有惩罚性质，与《民法通则》确立的侵权损害应当按照补偿性或恢复原状原则不符；依据该方法所得出的结论具有推理性质，不具有确定性、量化性和预见性，与《民法通则》所确立的实际损害赔偿原则相悖。因此，《计算方法》不应作为计算中长期损失的依据。

广州海事法院在审理广东省海洋与渔业局诉南通天顺船务有限公司、天神国际海运有限公司船舶碰撞造成油污损害赔偿案中，综合该案的证据材料认定本案油污没有造成海洋渔业资源的中长期损失。[8]该院认为，赔付天然渔业资源损失的前提是存在该项损失，而且计算合理。因此，首先要解决本次油污是否造成了海

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5 广州海事法院（1999）广海法事字第150号《民事判决书》，第14~15、17页。
6 广东省高级人民法院（2000）粤高法经二终字第328号《民事判决书》，第26~27、29页。
7 农业部《水域污染事故渔业损失计算方法规定》第2条第2项。
8 詹思敏、宋伟莉：《广东省海洋与渔业局诉南通天顺船务有限公司等船舶油污损害赔偿案》，载于《2004年江苏海事高层国际论坛论文集》（下册），第5页。

洋环境资源的中长期损失这一事实问题，其次才是中长期损失如何认定的问题。原告提交的监测中心的调查报告认为污染严重，推测本案的油污造成了天然渔业资源的中长期损失，并且依据农业部规定的公式，以天然水产品的直接经济损失乘以 3 计算出天然渔业资源的中长期损失。然而，汕头海事局的调查报告、该院委托的鉴定中心的分析意见、被告委托的专家意见等都认为，本案船舶溢油量小，油污没有扩散，而且清污的效果不错，污染的程度不严重。监测中心在它次年发布的环境监测报告中也认为本案船舶油污没有对当地的海洋环境造成损害，而且渔业的捕获率比往年有所提高，这些构成了对监测中心所称的污染严重、需要 3 年才能恢复海洋环境论断的强有力的反证。因此，该院根据“盖然性占优势证据规则”认为本案船舶油污轻微，没有对海洋环境造成中长期影响的可能性更大，认定本案油污没有造成海洋渔业资源的中长期损失。

笔者认为，目前普遍存在中长期损失的调查报告不准确、依据不足的问题。探讨调查、预测中长期损失的科学方法，正确确定调查报告的采信标准，是中长期损失赔偿问题中的当务之急。

三、清污费用

（一）清污费用的法律属性

船舶在中国水域发生溢油事故后，清污工作通常分为两种情况：第一种是船东（或其他油污责任人）自行或委托他人进行的清污；第二种是海事行政主管部门（海事局）组织的强制清污。第一种清污所产生的清污费用属于民事责任，责任人可以享受责任限制，中国理论界和实务界中对此基本上没有争议。但第二种强制清污所产生的清污费用属于民事责任还是行政责任，能否享受责任限制，却有很大争议。

对于海事行政主管部门组织的强制清污所产生的清污费用的法律属性，中国理论界和实务中主要存在以下 2 种观点：

1. 强制清污所产生的清污费用属于行政责任

有人认为，既然强制清污行为属于行政强制行为，因此而产生的费用当然属于行政责任，海事行政机关可以责令责任人支付该费用，并不得享受责任限制。

2. 强制清污所产生的清污费用属于民事责任

1982 年制定的《海洋环境保护法》第 41 条规定：“凡违反本法造成或可能造成海洋环境污染损害时……主管部门可以责令限期治理，缴纳排污费、支付清理污染费用、赔偿国家损失……”《防污条例》第 39 条规定：“凡违反《中华人民共和国海洋环境保护法》和本条例造成海洋环境污染损害的船舶，港务监督可以责

令其支付消除污染费，赔偿国家损失……”从其措辞来看，清污费用属于行政赔偿责任的范畴。

但 1999 年修改的《海洋环境保护法》第 73 条规定：“违反本法有关规定，有下列行为之一的，由依照本法规定行使海洋环境监督管理权的部门责令限期改正，并处以罚款……”第 90 条规定：“造成海洋环境污染损害的责任者，应当排除危害，并赔偿损失；完全由于第三者的故意或者过失，造成海洋环境污染损害的，由第三者排除危害，并承担赔偿责任。”1999 年修改的《海洋环境保护法》第 73 条和第 90 条分别规定了行政责任和民事责任。中国立法者已将清污费用作为民事赔偿责任来对待。这与 1969CLC 和《1969 年国际油污损害民事责任公约 1992 年议定书》（以下简称“1992CLC”）的规定是一致的。因此，1999 年修改的《海洋环境保护法》已经明确将行政责任与民事责任分别规定在两个条文中，清污费用已经排除在行政责任范畴之外。因此，将清污费用归为行政责任于法无据。况且，将清污费用列为民事损害赔偿的范畴是国际上的通行做法。CLC 公约和《1971 年设立国际油污损害赔偿基金国际公约》（以下简称“1971Fund”）体系从未将清污费用单独列出。因此，强制清污所产生的清污费用属于民事责任。

笔者认为，责任人对海事行政部门采取的强制清污措施所产生的清污费用承担的是一种民事责任，该清污费应在责任限制额内受偿。理由为：

1. 责任人承担强制清污费用是一种民事责任

强制清污费用是为了防止或减轻污染损害而产生的，是油污侵权行为损害的一部分，且该两者存在因果关系，责任人承担强制清污费用符合侵权民事责任的构成要件。因此，由油污责任人承担强制清污费用这种民事责任，是具有法律依据的。

根据《民法通则》第 134 条规定，侵权民事责任的方式有停止侵害、排除妨碍、消除危险、返还财产、恢复原状、修理、重作、更换、赔偿损失、消除影响、恢复名誉、赔礼道歉等方式。1999 年修改的《海洋环境保护法》第 90 条规定：“造成海洋环境污染损害的责任者，应当排除危害，并赔偿损失……”因此，排除危害、赔偿损失是海洋环境侵权民事责任的方式。排除危害的方式，实际上包含了停止侵害、排除妨碍、消除危险三种责任方式的内容。责任人应当承担排除妨害的责任，并支付排除妨碍的费用。对于油污损害的排除妨害，实质上是受害人要求污染责任人立即停止或者排除已经发生的污染损害，或者预防或者减轻即将发生的污染损害。故而，这种责任方式是预防和减轻污染损害的有效手段。虽然强制清污行为本身是行政强制行为，但该行为的目的，并不是为了履行行政机关对海洋环境的管理和监督职责，而是为了防止和减轻油污对海洋环境的损害。因此，强制清污实际上是海事局代替油污责任人执行的一种排除危害的措施，该措施所产生的费用即清污费，应由油污责任人承担。因此，油污责任人承担清污费的实质是一种民事赔偿责任，清污费用作为一项预防措施的费用，应属于损害赔偿的范围。《中

华人民共和国海事诉讼特别程序法》（以下简称“《海事诉讼特别程序法》”）第 21 条第 4 项规定已将为预防、减少或者消除油污损害而采取的措施的费用列为海事请求。因此，从程序法角度而言，清污费属民事责任的范畴。

2. 责任人对强制清污费可以享受责任限制

由于强制清污费属民事责任的范畴，因此责任人对其应承担的强制清污费有权享受责任限制。

（二）清污费是否应优先受偿

船舶在中国水域发生油污事故后，对于船东（或其他油污责任人）自行或委托他人进行清污所产生的清污费不具有优先受偿权，中国理论界和实务中对此没有争议；但对海事行政主管部门组织的强制清污所产生的清污费是否具有优先受偿权，则争议较大。主要有 2 种观点：

1. 强制清污费应优先受偿

强制清污行为属于行政强制行为，因此而产生的费用当然属于行政责任，因此，强制清污费应优先受偿。

2. 强制清污费不应优先受偿

强制清污费用不属于行政责任的范畴，而是属于民事责任的范畴，而目前没有一部法律赋予清污费用优先受偿的权利。因此，强制清污费用优先受偿不合法律规定。

笔者认为，虽然强制清污费用属于民事责任的范畴，但应优先受偿。理由为：强制清污通常由海事行政部门组织。清污之后，由于责任人经济困难等多种原因，清污费用无法完全支付。在大多数情况下，海事行政部门在请求清污作业单位或清污受益单位垫付清污费用时只能依靠说服动员和有限的行政权力施加影响。目前，由于垫付费用常常得不到充分补偿，各清污单位清污的积极性已经严重受挫，甚至以缺乏资金为由怠于行动或者要求海事行政部门为清污费用提供高额担保。清污费用垫付问题客观上影响了清污的效果。清污效果好，必然可以减少污染损害；清污效果差，必然增加污染损害。目前，中国尚未建立油污损害赔偿基金制度，清污费无法从油污基金中得到补偿。基于此种情况，笔者认为，在中国油污损害赔偿基金制度建立之前，应参照《海商法》和《中华人民共和国破产法》（以下简称《破产法》）的有关规定，将在中国水域发生的船舶油污事故产生的强制清污费用作为优先受偿债权从船东建立的油污责任限制基金中先行支付。在将来建立油污损害赔偿责任基金后，通过立法确立强制清污费用的优先受偿地位。

（三）船舶碰撞造成油污的清污费的承担

对于在中国水域发生的船舶碰撞造成油污的清污费的承担，目前中国理论界和实践中主要有 3 种观点：1. 由漏油造成污染的船舶先承担；2. 由造成碰撞的两船按各自应负的责任比例承担；3. 由造成碰撞的两船连带承担。

本人认为第二种观点比较合理。理由为：第一，责任人自行或委托他人进行清污和强制清污所产生的清污费都属民事责任。既然属民事责任，则应根据《海商法》第 169 条的规定，由造成碰撞的两船船东按各自应负的责任比例承担。第二，1999 年修改的《海洋环境保护法》第 90 条规定："造成海洋环境污染损害的责任者，应当排除危害，并赔偿损失；完全由于第三者的故意或者过失，造成海洋环境污染损害的，由第三者排除危害，并承担赔偿责任。"

（四）清污费的构成

在中国水域发生的船舶油污造成的清污费的构成主要有：

1. 岸上和水上的清污作业和财产损失

对于采取合理措施清除水上溢油、保护易受污染损害的自然资源，清洁海岸线与海岸设施所产生的清污作业费用均应给予赔偿，包括购买或租用设备、材料的费用，清洗或修复清污作业设备的费用，以及对回收物的处理费等。对于所购买的设备，在计算赔偿数额时应扣减所剩的残余价值。

2. 救助和预防措施

主要目的是使预防环境污染的"救助作业"可以被归为清污费用，得到赔偿。

3. 处理回收物

清污作业中常常会收回大量的油和沾油废弃物。处置这些回收物所支付的合理费用也应赔偿，但如果索赔人从回收油的交易中获得了收益，那么此种收益应从基金的赔偿金额中扣除。

（五）对解决清污费问题的建议

笔者认为，实施船舶油污强制保险和建立船舶油污损害赔偿基金制度，是解决中国沿海运输船舶油污所造成的清污费问题的有效途径。

1999 年修改的《海洋环境保护法》第 66 条规定："国家完善并实施船舶油污损害民事赔偿责任制度；按照船舶油污损害赔偿责任由船东和货主共同承担风险的原则，建立船舶油污保险、油污损害赔偿基金制度。实施船舶油污保险、油污损害赔偿基金制度的具体办法由国务院规定。"该规定为中国实施船舶油污强制保险和建立船舶油污损害赔偿基金制度提供了法律依据。根据该规定，强制保险和基金制度是中国沿海运输船舶油污损害赔偿法律机制中不可缺少的部分，也是完善赔偿制度的重点。

实施中国沿海运输船舶油污强制保险制度，由油污保险人承担清污费。1969CLC 规定，实际载运 2000 吨以上散装油类货物的船舶必须进行强制保险。[9] 根据中国交通部（80）交港监字 1600 号文，航行国际航线、载运 2000 吨以上散装货油的船舶，必须持有“油污损害民事责任保险或其他财务保证证书”。[10] 因此，对于实际载运散装油类货物 2000 吨以上的从事国际航线运输的中国籍船舶须进行强制保险，已有明确规定。但对于从事中国沿海运输的船舶的油污保险问题，尚未有明文规定。因此，在中国沿海运输船舶油污损害赔偿民事责任制度中应明确规定强制保险，保险责任应包括清污费用等。当船舶发生油污污染产生清污费用时，清污费由油污保险人承担。

建立中国船舶油污损害赔偿基金，对于超过责任人责任限制的清污费、超出油污保险人所应承担的清污费、责任人无能力支付的清污费、找不到责任人的清污费，可以从基金中补偿，从而增加清污效果，减少污染损害。

因此，笔者建议，为有效地解决中国沿海运输船舶油污造成的清污费问题，中国应尽快实施沿海运输船舶油污强制保险制度，建立沿海油污损害赔偿基金。

9 《1969 年国际油污损害民事责任公约》第 7 条第 1 款。

10 中国交通部（80）交港监字 1600 号文：《关于认真贯彻执行〈1969 年国际油污损害民事责任公约〉的通知》。

South Africa's Practical Approach to Dealing with Oil Pollution Prevention and Ships in Need of Assistance

Patrick Holloway *

Abstract: This paper provides a comprehensive analysis about the South Africa's legal system and practical approach in the field of oil pollution prevention. As for the new question raised as the Place of Refuge, the author provides the position and applicable policy of South Africa's Authority.

Key Words: South Africa; Oil pollution; Prevention; Place of Refuge

I. South Africa, a High Risk Marine Pollution Area

Substantial volumes of shipping traffic passing between the economies of the west and the east are concentrated at the southern tip of Africa. Many of the vessels rounding the Cape of Good Hope are vessels which are too large to transit the Suez Canal, and include the largest tankers and bulk carriers in existence. This enormous volume of traffic is, particularly at certain times of the year, confronted with the combined influence of weather systems causing gale force winds and strong currents which, when in opposing directions, generate extreme swell and wave action and on the south east coast, abnormal waves, giving rise to structural failure and damage to ships. Fog along the west coast, ships sailing close inshore eastward bound on the east coast to avoid the strong flowing south westerly current, and busy shipping routes not regulated by traffic separation schemes, only increase the risk of maritime casualties.

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Despite its coastline of some 3,000 kilometers, there are only 7 commercial ports. With the exception of Richards Bay, none of them are deep water ports able to accommodate large vessels. The options available to a master in command of a vessel in distress are further limited to 3 obvious places of refuge, St Helena Bay on the west coast just north of Saldanha Bay, Table Bay and False Bay on either side of the Cape Peninsula, all falling within the internal waters of the country. A fourth less used option is Algoa Bay on the East Coast. Those options are further limited by use restrictions at certain times of the year due to the weather. False Bay would generally be the choice in winter while Table Bay or St Helena Bay, due to the prevailing wind direction, would be the choice in summer.

Marine pollution in any of these areas could cause extensive loss and damage as these unofficial places of refuge and the South African ports not only fall within environmentally sensitive areas, but also constitute some of the more populated areas and are the centres of the country's booming tourism industry. The fishing industry is an essential part of the South African economy, with the national fleet based at the national ports and other fishing harbours scattered along the coast. There is also a nuclear power station at Koeberg, just north of Table Bay.

The South African authorities have, on an annual basis, had to deal with ships in distress and in recent times, 4 of the 20 largest oil spills in history.[1]

Statistics show that the South African Maritime Safety Authority's (SAMSA's)[2] principal officers are among the most experienced in the world in assisting and dealing with ships in distress, due to the number of vessels they have been required to deal with over the years.

II. Practical Prevention and Intervention

During the early 1970s the South African coastline was subjected to extensive pollution from a number of high-profile incidents.

As a result of these incidents, an agreement was entered into between the South African Department of Transport and the then national shipping line, Safmarine, termed the Preventative Oil Pollution Service Agreement. Safmarine ordered the construction of 2 powerful ocean going salvage tugs and 5 oil pollution abatement vessels.

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1 1977, "*Venpet*" "*Venoil*"; 1983, "*Castello De Bellver*"; 1988, "*World Glory*"; 1992, "*Katina P*"; 1994, "*Apollo Sea*"; as well as the bulker *MV "Treasure"*, which sank approximately 15 miles north of Cape Town in 2000.

2 A juristic person established in terms of the South African Maritime Safety Authority Act 5 of 1998.

In 2003 the contract was put out to tender and was awarded for 5 years. The agreement is called The Standby Tug Agreement for Pollution Prevention and Response Plan on the South African Coast.

The somewhat unique partnership between government and private enterprise has been used as a model in other countries, including the UK, USA, Netherlands, France and Germany.

Since 1976, 412 vessels constituting over 12,500,000 DWT of ships and including 46 bulk carriers, 51 cargo/container ships and of particular interest, 124 tankers have been salved.

III. The South African Constitution[3]

The South African Constitution provides that everyone has a right to an environment that is not harmful to their health or wellbeing and to have the environment protected for the benefit of present and future generations. It allows for legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development.

The constitution encourages the application of international law in interpreting legislation[4]; provides that customary international law is automatically part of South African law, unless statute provides to the contrary,[5] and lays down a procedure for the adoption of international conventions.[6]

IV. Legislative Prevention and Intervention Measures

South Africa ratified the United Nations Convention on the Law of Sea (LOSC) in 1997. In terms of LOSC, South Africa, as a coastal State, may in respect of the exclusive economic zone (EEZ) "…adopt laws and regulations for the prevention, reduction and control of pollution from vessels…"[7] It is against the background of that Convention that the South African legislation and regulations should be read.

Legislation and regulations aimed at preventing and limiting marine pollution, and oil pollution specifically, is the background against which the employees of SAMSA make their decisions in relation to ships in distress and determine

3 Act 108 of 1996.
4 Act 108 of 1996, section 233.
5 Act 108 of 1996, section 232.
6 Act 108 of 1996, section 231.
7 LOSC, Art. 211(5).

whether or not to allow them to enter South African internal waters for the purpose of refuge. The two key authorities within whose responsibility issues of marine pollution fall are SAMSA and the Department of Environmental Affairs and Tourism (DEAT).

The most important statutes regulating the issue of marine oil pollution are the:

- Dumping at Sea Control Act;[8]
- Marine Pollution (Control and Civil Liability) Act;[9]
- Marine Pollution (Prevention of Pollution from Ships) Act;[10] and
- Marine Pollution (Intervention) Act.[11]

A. Dumping at Sea Control Act

This Act is administered by the DEAT and gives effect to the London Dumping Convention 1972. The Act imposes criminal sanctions for dumping substances and structures into the sea, without a permit. South Africa is a signatory to the 1996 Protocol, which will in due course replace the Convention.

B. Marine Pollution (Control and Civil Liability) Act

The purpose of the Act is stated as being:

- to provide for the protection of the marine environment from pollution by oil and other harmful substances, and for that purpose to provide for the prevention and combating of pollution of the sea by oil and other harmful substances;
- to determine liability in certain respects for loss or damage caused by the discharge of oil from ships, tankers and offshore installations; and
- to provide for matters connected therewith.

The Act is administered by SAMSA.

The objectives of SAMSA are:

- to ensure safety of life and property at sea;
- to prevent and combat pollution of the marine environment by ships; and
- to promote the Republic of South Africa's maritime interests.[12]

1. Criminal Liability and Exceptions

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8 Act 73 of 1980, as amended by the Dumping at Sea Control Amendment Act (No. 73 of 1995).
9 Act 6 of 1981.
10 Act 2 of 1986.
11 Act 64 of 1987.
12 Act 5 of 1998, section 3.

The Act prohibits the discharge of oil and provides that the master and the owner of a ship, tanker or offshore installation shall be guilty of an offence, unless one of the specified exceptions can be proved.

The onus of proving the exception is upon the accused.

The Act also makes provision that any discharge be reported as quickly as possible to the "principal officer", being the officer in charge of the SAMSA office at the nearest port. Failure to comply constitutes an offence.

2. Prevention

The Act empowers SAMSA to take a variety of possible steps to prevent pollution of the sea where a harmful substance is being, or is likely to be, discharged.[13]

For example, SAMSA may require the master or owner of a ship or tanker:

- to unload the harmful substance from the vessel or from a specified part of the vessel;[14] or
- transfer any harmful substance from a specified part of the vessel to another specified part of the vessel;[15] or
- dispose of the harmful substance in such manner and within such period as directed;[16] or
- to move the vessel to a place specified,[17] or not to move it from a specified place, except with approval and in accordance with conditions;[18] or
- not to unload the cargo or harmful substance except with the approval of the authority and in accordance with conditions;[19] or
- to carry out such operations for the sinking or destruction of the vessel or any part thereof, or the destruction of the harmful substances in the vessel or a quantity thereof, as specified.[20]

In order to prevent pollution, the authority is authorised, if it is likely that a harmful substance will be discharged, to take such measures including:

- the destruction, burning or disposal in any other manner of the harmful substance as it deems fit to guard against or to prevent pollution of the sea by such harmful substance;[21]

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13 Act 6 of 1981, section 4.
14 Act 6 of 1981, section 4(1)(a)(i).
15 Act 6 of 1981, section 4(1)(a)(ii).
16 Act 6 of 1981, section 4(1)(a)(iii).
17 Act 6 of 1981, section 4(1)(b).
18 Act 6 of 1981, section 4(1)(c).
19 Act 6 of 1981, section 4(1)(d).
20 Act 6 of 1981, section 4(1)(e).
21 Act 6 of 1981, section 5(1).

- to steer such course as specified;[22]
- to obtain the services of one or more suitable vessels to stand by the vessel during a determined period;[23]
- to take such other steps as specified to prevent the discharge or further discharge of any harmful substance from the vessel.[24]

If, in the opinion of SAMSA, the master and owner of the vessel in question are incapable of complying with the requirements made, then SAMSA may cause such steps to be taken as it has power to require and such power includes the power to require that a specified step not be taken.[25] The aforesaid provisions are also binding upon a salver performing salvage operations in connection with the vessel.[26]

SAMSA may cause any pollution of the sea to be removed.[27]

SAMSA may order any person who is capable of supplying goods or services required to combat pollution to do so and there are provisions for paying compensation to them.[28]

3. State Liability

The exercise of the powers afforded it in terms of the Act are somewhat tempered by a provision that if the owner of a vessel, in complying with a requirement of SAMSA, incurs any expenses and the discharge or likelihood of a discharge of the harmful substance in question was due wholly or partly to the fault of SAMSA, then in that case the amount of such expenses, or a proportion of them, shall become payable to the owner by the State.[29]

A further preventative provision allows any person authorised by SAMSA to board a vessel in the EEZ to ascertain whether any document required in terms of the Marine Pollution (Prevention of Pollution from Ships) Act;[30] which incorporates MARPOL 73/78, is carried aboard as required. The powers include the right to inspect and make copies of any documents or records; take samples and soundings; and test any equipment aboard the vessel.[31]

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22 Act 6 of 1981, section 4(1)(f).
23 Act 6 of 1981, section 4(1)(g).
24 Act 6 of 1981, section 4(1)(h).
25 Act 6 of 1981, section 4(2)(a) and (b).
26 Act 6 of 1981, section 4(2)(c).
27 Act 6 of 1981, section 5(2).
28 Act 6 of 1981, section 5(3) to section 5(8).
29 Act 6 of 1981, section 4(3).
30 Act 2 of 1986 and MARPOL 73/78 means the convention contained in the schedule to that Act.
31 Act 2 of 1986, section 7.

C. Marine Pollution (Prevention of Pollution from Ships) Act

The International Convention for the Prevention of Pollution from Ships, 1973, as amended by the Protocol of 1978 (MARPOL 73/78) was incorporated into South African law as a schedule to the Marine Pollution (Prevention of Pollution from Ships) Act.[32] The Act provides for the protection of the sea from pollution by oil and other harmful substances discharged from ships in terms of MARPOL 73/78 (operational discharges); makes it an offence for anybody to contravene any provision of the Act or MARPOL;[33] and provides that any person convicted of an offence in terms of the Act shall be liable to a fine not exceeding R 500,000 (+ /− USD 77,000) or to imprisonment for a period not exceeding 5 years or to such fine as well as such imprisonment.[34]

D. Marine Pollution (Intervention) Act

The Marine Pollution (Intervention) Act[35] gives effect to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 and to the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1973.

The Convention allows "…measures of an exceptional character…" to protect "the interests" of States parties "…against the grave consequences of a maritime casualty resulting in danger of pollution of seas and coastlines."

In terms of the Convention, parties "may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences."[36] The Convention applies to "any sea-going vessel of any type whatsoever".[37]

The measures taken shall be proportionate to the damage actual or threatened

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32 Act 2 of 1986.
33 Act 2 of 1986, section 3A(1)(a).
34 Act 2 of 1986, section 3A(4).
35 Act 64 of 1987.
36 The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Article I.
37 The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Article II section 2.

to it.[38]

Furthermore, the Protocol extends the measures allowed in terms of the Convention to include pollution or threat of pollution by substances other than oil.[39]

This Act makes provision for the penalty of a fine not exceeding R 500,000 or imprisonment for a period not exceeding 5 years, or both, for failure to comply with any regulation which the Minister of Transport may make relating to the carrying out or giving effect to the provisions of the Convention and the Protocol.[40]

Other Relevant South African Legislation

Other South African legislation which authorises protection measures includes the:

- Maritime Zones Act;[41] Wreck and Salvage Act;[42] Marine Traffic Act;[43]
- National Environmental Management Act;[44] Environment Conservation Act;[45] National Water Act;[46] Disaster Management Act.[47]

E. Maritime Zones Act [48]

This Act provides under the heading of Maritime Casualties that the Minister of Transport may take such measures as are necessary against a vessel in order to protect the coastline from pollution or any threat of pollution resulting from a maritime casualty or an act or an omission relating to such a casualty and which may reasonably be expected to result in a major harmful consequence.[49]

F. The Wreck and Salvage Act [50]

This Act authorises SAMSA to direct the master or owner of a ship to move a ship which has been wrecked, stranded or is in distress to a place specified by

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38 The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Article V section 1.
39 Protocol Relating To Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil 1973, Article I.
40 Act 64 of 1987, section 3(2)(a).
41 Act 15 of 1994.
42 Act 94 of 1996.
43 Act 2 of 1991.
44 Act 107 of 1998.
45 Act 73 of 1989.
46 Act 36 of 1998.
47 Act 57 of 2002.
48 Act 15 of 1994.
49 Act 15 of 1994, section 10.
50 Act 94 of 1996.

SAMSA or to perform such acts in respect of the ship as specified by them.[51] Should the order not be followed, SAMSA may cause the act to be performed.[52] The Act further makes provision for any wrecked, stranded or abandoned ship to be raised, removed or destroyed or dealt with in some other manner. The expense of the exercise may be recovered from the ship-owner, and if needs be, SAMSA may sell the wreck or the ship in order to defray the expenses incurred by them.[53]

The Act incorporates the provisions of the International Convention on Salvage, 1989, which is a schedule to the Act. South Africa is not a party to the Convention and accordingly has no international obligations arising out of it. The provisions of the Convention, acknowledging the right of a coastal State to take appropriate measures to protect its coastline and related interests from pollution or the threat thereof following upon a maritime casualty, provides for the right of a coastal State to give directions in relation to salvage operations.[54]

G. Marine Traffic Act

The Wreck and Salvage Act is complemented by the provisions of the Marive Traffic Act,[55] which prohibits the intentional sinking, dumping or disposal of a ship, a wreck or a hulk, except at a place agreed to by SAMSA; or the abandonment of a ship which is not in distress, a wreck, a hulk or an object, which may interfere with navigation.[56] Contravention of the provisions constitutes an offence.

H. National Environmental Management Act [57]

Administered by the DEAT, the aim of the Act is to provide for cooperative environmental governance by establishing principles for decision-making on matters affecting the environment; co-operation between government institutions; and procedures for coordinating the various functions. The Act provides for the general national environmental management, and more particularly, covers control of what is referred to as an "incident", which is defined as "an unexpected sudden occurrence... leading to serious danger to the public or potentially serious pollution

51 Act 94 of 1996, section 18(1)(a).
52 Act 94 of 1996, section 18(1)(b).
53 Act 94 of 1996, section 18(3), (4) and (5).
54 Article 9 of the International Convention on Salvage, 1989.
55 Act 2 of 1991.
56 Act 2 of 1981, section 6(1).
57 Act 107 of 1998.

of or detriment to the environment, whether immediate or delayed".[58]

The Act sets out the obligations of what are termed "responsible persons" and the "relevant authority" where such an emergency incident occurs. "Responsible persons" includes any person responsible for the incident; the owner of any hazardous substance involved in the incident; or the person who was in control of any such hazardous substance.[59]

The Act provides that the responsible person shall take all reasonable measures to contain and minimise the effects of the incident, including its effects on the environment and any risks posed by the incident to the health, safety and property of persons. Further duties and obligations include undertaking clean-up procedures and remedying the effects of the incident.[60]

I. Environment Conservation Act [61]

This statute provides the Minister of DEAT with far reaching and wide powers to order any person, whose act or omission has resulted in the environment being damaged or endangered, to do everything possible to avoid the environment from being endangered and to rehabilitate any damage caused to the environment.

J. National Water Act [62]

This statute protects the country's fresh water resources and holds the owner of any substance which pollutes or has the potential to pollute a freshwater resource responsible for taking all measures to contain and minimise the effects of such an incident.

V. South Africa's National Contingency Plan for the Prevention and Combating of Pollution from Ships

SAMSA has circulated a draft plan for discussion. Its purpose is to outline the national arrangements for preventing, responding to and combating hazardous substances spills into the marine and coastal environment. The primary focus is oil spills. The plan delineates the responsibilities of certain parties involved in

58 Act 107 of 1998, section 30.
59 Act 107 of 1998, section 30(1)(b).
60 Act 107 of 1998, section 28(1)(a), (b) and (c).
61 Act 73 of 1989.
62 Act 36 of 1988.

the national preparedness and response system, including both the public and private sectors. The protection and priorities to be employed during a response to an oil spill or risk of an oil spill are stated as being in the following preference order: human health and safety; natural environment; commercial resources and amenities.

VI. International Conventions

A. International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC)

Under OPRC party States undertake to take all appropriate measures to prepare for and respond to an oil pollution incident.

South Africa is not a party to OPRC; however, consideration is being given to acceding to it. As it is, South Africa *de facto* complies with most of the requirements of the Convention in as far as having a national emergency response plan is envisaged.

B. International Convention on Civil Liability for Bunker Oil Pollution Damage

Taking into consideration the number of incidents which have given rise to marine pollution as a result of bunker oil spills on the South African coast, it is not surprising that the country was one of the sponsors of the Convention.

Pollution caused by bunker spills is currently covered by the Marine Pollution (Control and Civil Liability) Act.

VII. Policy on Places of Refuge

The following extract is taken from a document headed "Places of Refuge", being the note of a British Maritime Law Association meeting dated 30 March 2004 and is an interesting observation by an independent third party of the South African position.

> *Some States have adopted a robust and positive approach to the matter.*
>
> *South Africa is in the vanguard. In the mid 1970s they placed tugs on station and adopted a sensible response to requests for places of refuge, of*

which there are precious few around the coastline.

They required a professional salver to be engaged under contract to salve ship and cargo.

The ship-owner had to have the requisite pollution liability cover.

The salvage plan had to be seen to be feasible.

The vessel had to be inspected by the authorities.

The salvers had to confirm that they would comply with all orders given to them by the authorities.

This system worked well for many years with a large number of VLCC/ ULCC casualties. Unfortunately things went wrong when the bulk carrier "Treasure" was allowed in to Table Bay suffering from structural damage.

The owners delayed making a decision regarding salvage assistance and the vessel was ordered out of the bay. Whilst being towed she broke in 2 and sank about 6 miles off the coast causing extensive pollution to the area by her bunkers.

Since then the South Africans have been reluctant to allow damaged casualties into their waters, e.g. "Bismihita La" and "Ikan Tanda".

To set the record straight, SAMSA are not reluctant as a result of the *Treasure* incident to allow ships in distress into South African waters. It is submitted that there were good reasons for not allowing either the *Bismihita La* or the *Ikan Tanda* into a South African port.

In the case of the *Bzsmihita La*, the owners apparently refused to cooperate at all with SAMSA and would not let SAMSA have access to the maser and crew. The authorities were accordingly in no position to assess the situation because they had no information about what the cause of the vessel's distress was.

In the case of the *Ikan Tanda*, she was floating on her tank tops, her bottom was open. SAMSA was prepared to allow her to be brought into a port; provided that a guarantee was put up for the estimated full potential cost which might have arisen should the vessel have sunk in a South African port. Owners were apparently only prepared to put up a guarantee to the limits of liability in terms of South African law, which are grossly inadequate. Both vessels were of a relatively low value.

According to the National Contingency Plan for the Prevention and Combating of Pollution from Ships, "SAMSA's strategy in respect of casualty response can

be described as 'risk based casualty management'."[63] It is stated that "risk based casualty management is based on a practical real time evaluation of the benefits versus the risks, as the event unfolds, and when necessary and possible, active intervention."

SAMSA's priorities in managing a casualty are:

(a) Safety of life at sea (saving the lives of persons on board or otherwise threatened by the casualty);

(b) The preservation of the vessel, or removal of the vessel from the shore, with harmful substances contained and intact, in order to prevent pollution;

(c) The removal of oil and other harmful substances, by the most practical means, from the vessel to prevent pollution, should the option in (b) above fail;

(d) The preservation of property (coastal properties, cargo and/or ship); and

(e) The removal of the wreck.

The draft paper continues as follows:

It is envisaged, and is indeed current practice (after considering, inter alia, the risks of pollution and financial implications presented by any particular damaged vessel) for SAMSA to allow the vessel to carry out repairs in the South African territorial waters or even carry out cargo transfers (under supervision) in a designated bay, where the benefits far outweigh the risk profile.

Benefits in this context also means assisting a vessel whilst there is opportunity and means, as opposed to dumping a developing situation upon a neighbouring State that may not be afforded the same opportunity and may not even have the means. A major pollution incident in neighbouring States has a possibility and is almost certain to affect South Africa in due course.

Where there is an imminent or possible threat of such incident, SAMSA will engage with the Department of Environmental Affairs and Tourism and other relevant authorities in the process of assessing the risk profile. If necessary, this will be via the Joint Response Committee (JRC)."[64]

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63 Draft South African National Plan for Prevention and Combating Pollution of the Sea by Oil, Chemical and Other Noxious and Hazardous Substances, p. 18.

64 Draft South African National Plan for Prevention and Combating Pollution of the Sea by Oil, Chemical and Other Noxious and Hazardous Substances, p. 19.

SAMSA's strategy is therefore to ensure that its various legislated responsibilities and duties are carried out. In effect, this means that whenever there is a spill of oil or any other harmful substance from a ship or offshore installation SAMSA will ensure that:

(a) there is an effective initial response, including communication with DEAT;

(b) there is effective communications and co-operation with affected authorities and parties by way of a Joint Response Committee;

(c) the methods and costs of carrying out the combating are in accordance with international practice and the Public Finance Management Act of 1999;

(d) costs and expenses of such combating are audited throughout in order to expedite any subsequent claims into the Marine Pollution (Control and Civil Liability) Act 6 of 1981;and

(e) State expenditure iro pollution combating is recovered from the owner in the most expeditious manner."

A. South African Law on Innocent Passage, Anchoring or Stopping in Territorial Waters, Internal Waters and Bays

In accordance with the LOSC, the Marine Traffic Act[65] and the amendment thereto, the right of innocent passage through territorial waters was extended to all ships. In accordance with LOSC Article 21, South Africa has adopted laws and regulations relating to innocent passage. However, in terms of the definition of internal waters in the Marine Traffic Act, the right of innocent passage is excluded from internal waters. All South Africa's obvious places of refuge fall within bays which comprise internal waters.

Entry into and departure from internal waters are regulated by the Marine Traffic Act and the Marine Traffic Regulations.[66] With the exception of certain categories of vessel, which include South African fishing boats, sports vessels, foreign vessels engaged in sport or recreation, South African national utility ships and foreign fishing vessels authorised to operate within South African internal waters, the master of any ship shall not, except as prescribed by the Regulations, enter or leave internal waters other than a harbour or fishing harbour.[67]

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65 Act 2 of 1981.

66 The Marine Traffic Regulations promulgated in terms of the Marine Traffic Act under Government Gazette 9575 of I February 1985.

67 Section 4(1) of the Marine Traffic Act 2 of 1981.

In terms of the Regulations, the master of a non-exempt ship is obliged, before the ship enters South African internal waters, to apply to the principal officer at the nearest harbour for permission for entry, and is required to provide certain information relating to the reasons for such entry, the ship's destination, route, period of intended stay and so on.[68] The principal officer may grant permission subject to conditions aimed at minimising the risk of the vessel stranding and preventing pollution, which shall be carried out at the expense of the owner.[69] The master or owner of the vessel may also be required to put up security to the satisfaction of SAMSA.[70] One of the important provisions in the circumstances is that should a vessel stop or anchor for repairs within the territorial or internal waters, it may not do so except with the main engine kept in readiness for immediate use.[71]

In accordance with international law, South Africa recognises that a ship in distress may enter internal waters.

These circumstances are regulated and require the master or owner of a ship, which has entered territorial or internal waters and has stopped, and/or anchored or is immobilised without permission, to notify the principal officer at the nearest harbour immediately.[72]

In theory, whilst principal officers are expected to comply with the letter of the law in the Marine Traffic Act and the Marine Traffic Regulations, it is clear that in practice SAMSA's policy on ports of refuge has been to consistently follow the fourth and most sophisticated of the approaches suggested by Professor E. Van Hooydonk,[73] which is based on "good management on the basis of the right of access".[74]

Each case is considered on its facts. The IMO Guidelines on Places of Refuge for Ships in Need of Assistance, adopted on 5 December 2003, are followed almost to the letter, and certainly in spirit, although this is not a published fact and the guidelines do not form part of South African law.

SAMSA, the DEAT and other government departments, have a comprehensive

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68 Section 5(1) of the Marine Traffic Act 2 of 1981 and Regulation 13(1) of the Marine Traffic Regulations.
69 Regulation 14(1) of the Marine Traffic Regulations.
70 Section 5(2) of the Marine Traffic Act.
71 Section 5(3) of the Marine Traffic Act.
72 Regulation 16(1) of the Marine Traffic Regulations.
73 E. Van Hooydonk, The Obligation to Offer a Place of Refuge to Ships, *Distress CMI Handbook*, 2003, p. 403.
74 E. Van Hooydonk, The Obligation to Offer a Place of Refuge to Ships, *Distress CMI Handbook*, 2003, p. 432.

action plan and casualty response approach. This approach allows for an effective initial response as well as communication and co-operation between the different authorities and interested parties by way of a Joint Response Committee. The methods and costs of carrying out the strategy are in accordance with international practise, which includes an ongoing audit of the costs and expenses.

Whilst SAMSA has prepared a comprehensive set of guidelines for their personnel to deal with pollution threats and the determination of whether or not to allow a vessel a place of refuge, these guidelines will not be published for public consumption.

South Africa's National Contingency Plan for the Prevention and Combating of Pollution from Ships provides guidelines for the overall strategy for oil pollution prevention and management, including an action plan for SAMSA, a casualty response unit, overall response policy, priorities and so on.

B. Application of the Policy on Places of Refuge

In practical terms, how the policy is implemented is as follows:

Immediately it comes to the attention of SAMSA that there is a vessel in distress, SAMSA requests essential information from the master and/or owner in order to make an initial assessment of the position. The vessel is requested to take up a holding position and this may be anything from 20 to 120 nautical miles offshore, depending on the scale of the threat and an immediate assessment of the prevailing wind and currents. A surveyor is then placed on board the vessel to consult with the master and crew, carry out an inspection and report back on the overall situation.

The golden rule, as far as SAMSA are concerned, is that the ship's master and owners must make a full and immediate disclosure of all the relevant facts and be seen to be co-operating in every way possible in order that SAMSA can make a proper assessment of the situation.

As the owners of the *Bismihita La* discovered, should there not be this initial co-operation, the likelihood of being offered a place of refuge are extremely remote.

Should the initial assessment be that the crew is at risk due to obvious structural damage to the vessel, arrangements will be made to remove the crew and in that instance, and on the assumption that the vessel is at risk, SAMSA will insist that salvers are appointed.

An important aspect of the initial assessment is calculating the limit of the ow-

ners' liability in terms of South African law and confirming what liability insurance is in place. Insurance cover is a pre-requisite and a guarantee to cover the cost of pollution damage and wreck removal may be requested. This will certainly be the case if, subject to the approval of the National Ports Authority (NPA), it is decided to bring the vessel into a port. The NPA has the right to refuse access to a vessel.

Should there be any risk to the environment, oil cargoes, and/or the bunkers would have to be trans-shipped and slop tanks sealed off.

SAMSA will consult with the DEAT, environmentalists and other experts, before deciding whether or not to offer the vessel a place of refuge, and if so, where.

As discussed earlier, South Africa has a very limited number of places of refuge. Taking all the factors into consideration, including for example, the threat to safety of people and the environment; the type of vessel and her size and draft; the prevailing wind and sea conditions at that time of the year; the ability at the location to undertake the possible trans-shipment of cargo or there pair of the vessel; leads one to the obvious conclusion, which is mirrored by the SAMSA approach, that in the context of the South African situations it is not possible to determine and designate places of refuge in advance. Each case has to be dealt with on its own specific facts.

From a policy point of view, the South African authorities will accordingly not be designating places of refuge.

In respect of the unofficially designated places of refuge, a well thought out decision making mechanism in respect of the choice to be made between them exists.

SAMSA will establish a Joint Response Committee made up of all the major role players and interested parties, which will meet regularly to consult and exchange information.

The DEAT will immediately undertake protection and/or clean-up measures.

The personnel and decision makers at SAMSA are professional, technically competent and experienced. This is evidenced by the large number of successful operations handled by the South African authorities involving ships in distress posing a threat of oil pollution damage.

In summary, the South African authorities continue to adopt an objective, practical and common sense approach, which it is suggested, is in line with the most advanced international thinking and which takes cognisance of international recommendations, including the IMO Guidelines.

论环境资源法律体系

文伯屏 *

内容摘要: 本文首先介绍了法律体系学概况，为研究中国法律体系问题提供正确的法理依据，阐明了建立科学的中国法律体系学说的重要理论意义和实践意义;其次，着重论述了中国环境资源立法简史和环境资源法体系的渊源、概念、结构、内涵、外延、特征及其在中国法律体系中的位置等;再次，将环境资源法与经济法作了比较研究，强调指出环境资源法不是经济法的组成部分，而是与刑法、民法、行政法等部门法并列的一级部门法。

关键词: 环境 资源 法律体系

一、法律体系学概况

法律体系又称法的体系，以法律体系为研究对象的学科称为法律体系学，又称体系法学，是专门研究一个国家或地区由全部现行法律规范分类组合而形成的相互联系、有机统一的法律体系的综合性法学学科。这门学科，不仅反映一个国家法制完备和健全的状况，而且在一定程度上反映这个国家在立法意识、法制基础、立法技术等方面的成熟程度和水平的高低。如果一个国家法律体系不统一，各行其是，各立章法，势必给立法、司法和守法带来混乱不堪的局面。因此研究法律体系这门学科具有十分重要的意义。由于每个国家的历史传统、民族习惯以及经济、政治、文化发展水平的不同，其法律体系学的形成和发展具有各自不同的特点和风格。[1]

从世界范围法律体系学发展的历史和趋势来看，法律体系学主要有两种类型:

（一）资本主义国家法律体系学说

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1 金哲、姚永抗、陈燮君主编:《世界新学科总览续编》，重庆:重庆出版社 1990 年版，第 53 页。

1. 公法和私法是法律体系的基本结构

资本主义国家法学界普遍地把法律分为公法和私法，最早由罗马法学家乌尔比安提出，一直为后代法学家所沿用。在划分公法、私法的标准方面，西方法学家们的见解各不相同，具有代表性的有利益说、主体说、权力说、关系说等。主张“利益说”的学者认为：凡有关公益的法律，即直接保护国家和集体利益的法律为公法；凡有关私益的法律，即保护私人利益的法律为私法。主张“主体说”的学者认为：凡以国家或公共团体的一方或双方为法律关系主体的法律为公法，凡法律关系主体的双方都是公民个人的法律为私法。主张“权力说”的学者认为：凡规定国家与公民之间的权力服从关系（亦称“纵的垂直法律关系”）的法律为公法；凡规定公民之间权益平等关系（亦称“横的平行法律关系”）的法律为私法。主张“关系说”的学者认为凡规定国家机关之间或国家与公民之间的政治生活关系（亦称“公权法律关系”）的法律为公法；凡规定公民之间或国家与公民之间的民事生活关系（亦称“私权法律关系”）的法律为私法。资本主义国家的法律体系普遍划分为公法和私法两大部门，但也有人反对这样分类。

2. 阶梯式的等级规范体系学说

资本主义国家中反对将法律划分为公法与私法的学者也不乏其人。如美国法学家奥斯汀认为，一切法律都是由特定的主权者所发布命令的总和，而且一切法律都是通过国家权力而起制约作用的，根本不因公法和私法而有所不同。美籍奥地利法学家凯尔森也反对把法律划分为公法和私法，他强调法的体系是各种法律规范的总和而各种法律规范的效力则永远来自规范。他主张用阶梯式的等级来规定规范的体系，即从“最高规范”和“基本规范”中派生出来的国际法、宪法、法律、命令等规范来构成法律体系，反对以公法与私法作为法律体系的基础。

3. 法律体系的其他分类方法

在资本主义国家法律体系中，还有许多分类方法，诸如：按法律形式来分，有成文法和不成文法；按法律内容来分，有实体法和和程序法；按法律效力来分，有强制法和任意法；按法律关系主体来分，有国际法和国内法；按法律渊源来分，有固有法和继受法。在英美法律体系中，还有普通法与衡平法、制定法与判例法之分。这些分类方法都从不同角度构建了国家的法律体系。第二次世界大战后，西方国家一方面出现经济高速发展，另一方面出现严重的社会弊端，因而兴起了介于公法与私法之间的经济法和社会法（它包括垄断法、证券交易法、社会保险法、环境保护法等）。有些国家的法学者把这类法律规范称为“中间领域的法律规范”，它们也是各国法律体系的重要组成部份。

（二）社会主义国家法律体系学说

社会主义国家法律体系的构成完全排除划分为公法与私法的观点。列宁早在

俄国十月革命后就明确否定了这一点。他在新经济政策初期谈到民法关系时说：“我们不承认任何‘私法’，在我们看来，经济领域中的一切都属于公法范围，而不属于私法范围。”[2] 因为社会主义法律体系是建立在生产资料公有制的基础上，它失去了划分公法与私法的基础。

社会主义国家法律体系研究的主要内容是：

1. 关于法律的相互联系和相互协调统一的问题

在社会主义经济和社会日益发展的情况下，立法范围日益扩大，立法内容也越来越专门化。这种情况，虽然有助于人们对法律的研究和适用，但它往往会促使人们用狭窄的专业化观点来看待法律现象。为了防止和克服这种狭窄的法制观点，必须加强对法制进行综合性或整体性的研究和分析，必须不断注意完善法律的一般原则和基本制度，以保证实现各类法律部门和法律规范的相互联系和协调统一。正如恩格斯指出：“在现代国家中，法必须适应于总的经济状况，不仅必须是它的表现，而且还必须是不因内在矛盾而自己推翻自己的内部和谐一致的表现。”[3] 恩格斯的这个论断，对研究和完善社会主义法律体系具有重要的指导意义。

2. 关于法律体系的客观基础问题

前苏联有些法学者认为，法律体系是一种客观存在的社会法律现象，这种现象是由社会主义条件下社会关系性质所决定的，人们不能随意对它进行创造或改变，法学研究者的任务，在于自觉地、能动地认识和利用法律体系。但是，人们也必须看到，各种具体的法律形式，具有一定的主观性，因为它是由立法者自觉创制规范的结果。从这个意义上说，法律体系既具有客观性，又具有主观性。这种见解，在前苏联法学界有争议，认为把法律体系说成是客观的、第一性的东西，把立法活动说成是主观的、第二性的东西，是缺乏科学依据的。

3. 关于法律体系的基本成分问题

有人主张法律体系应以各个法律部门为基础。这种观点，受到了前苏联著名女法学家雅姆波利斯卡娅等人的反对。她认为法律部门不是法律体系的基本单位，而是以相互紧密联系为一个统一整体的法律规范组成的。

4. 关于法律部门的划分及其标准问题

这个问题在社会主义法律体系学说中一直存在着争议。焦点是前苏联国家和法的理论权威伊尔•亚力山大罗维奇•阿尔扎诺夫在 30 年代提出的“法律的调整对象是划分法律部门的标准”。这个观点成为前苏联法的体系的基本原理。后来，前苏联法学工作者普遍认为，划分法律部门的标准，除法律调整对象外，还必须把法律的调整方法作为一个补充标准。社会主义国家对法律部门的划分，一般是按照法律调整对象和调整方法相一致的观点来进行的。

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2 《列宁全集》第 36 卷，北京：人民出版社 1985 年版，第 587 页。
3 《马克思恩格斯选集》第 4 卷，北京：人民出版社 1995 版，第 483 页。

5. 关于法律部门相互关系和发展趋势问题

当前社会主义国家法律发展的趋势之一是：法律调整的一体化和专门化相结合。一体化主要是指加强法律内部的相互联系和协调，旨在使各个部门之间、规范之间建立更加紧密的、有机的联系。这种联系，不仅表现在法的内容上的联系，还表现在法的形式上的联系，如工业法、农业法、商业法等；另一种趋势是有些新兴的法律部门由于客观的需要，逐渐合并而独立成为更高层次的法律部门，如环境保护法、自然资源法、国土法、生态法逐渐合并成为环境资源法，与民法、刑法、行政法等并列为国家一级部门法。

6. 关于法律体系和立法体系的联系和区别的问题

一般来说，法律体系的单位是指各个法律部门、法律制度等；立法体系的单位是指纲要、法典和条例等。这两个体系从整体上说是相辅相成的，是一个统一体的两个方面。从严格意义上说，法律体系和立法体系在概念上是不能等同的，其区别在于：（1）范围不同：法律体系是指现行的全部法律规范；立法体系则包括失效的或过时的法律规范；（2）主客观方面不同：法律体系的客观性是以法的起源、法的历史发展规律和社会经济的要求为基础，它是立法者不能任意改变的；（3）形成的因素不同：立法体系受国家制度和立法机构等方面的影响；而法律体系的形成是法的历史发展规律的结果；（4）功能不同：法律体系注重于法学理论的指导意义，它是立法体系的基础；而立法体系则注重于反映现实等等。

党的十六大指出，发展社会主义民主政治，最根本的是要把坚持党的领导、人民当家作主和依法治国有机统一起来；提出“到 2010 年形成中国特色社会主义法律体系”的要求；明确把“依法执政”列为党的领导干部必须不断提高的五种能力之一。[4] 上述论断正是本文的重要理论意义和实践意义之所在。

二、中国环境资源法律体系

（一）环境资源立法简史

中国环境资源立法简史大体可分以下 4 个阶段：

1. 1972 年—1978 年（起步阶段）

1972 年在瑞典首都斯德哥尔摩举行的联合国人类环境会议，中国代表团在周总理的亲切关怀和指导下，参加了人类环境会议。1973 年 8 月召开第一次全国环境保护会议，制订了“环境保护三十二字方针”，即“全面规划、合理布局、综合利用、

4 博悦：《积极创建和发展中国特色法学理论》，载于《中国社会科学院院报》2005 年 5 月 12 日。

化害为利、依靠群众、大家动手、保护环境、造福人民”。1974 年颁布了几个环境保护单行法规，如《工业“三废”排放试行标准》、《防止沿海水域污染暂行规定》等。粉碎“四人帮”以后，环保和自然资源法制建设提到了重要地位。1978 年通过的宪法，在总纲中规定“国家保护环境和自然资源，防治污染和其他公害。”

2. 1979 年—1988 年（迅速发展阶段）

1982 年颁布了新宪法，1988 年颁布了第一次宪法修正案，这 10 年中颁布了《环境保护法（试行）》、《森林法（试行）》（1979 年）、《海洋环境保护法》、《文物保护法》（1982 年）、《水污染防治法》、《森林法》、《药品管理法》（1984 年）、《草原法》（1985 年）、《土地管理法》、《矿产资源法》、《渔业法》（1986 年）、《大气污染防治法》（1987 年）、《野生动物保护法》（1988 年）等。

3. 1989 年—1998 年（渐进成熟阶段）

1993 年颁布了第二次宪法修正案，这 10 年中颁布了《环境保护法》（1989 年）、《防洪法》（1997 年）等；修订了《土地管理法第一次修订本》（1989 年）、《水污染防治法》、《矿产资源法》（1996 年）、《森林法》（1998 年）等。

从 1979 年改革开放 20 年以来，国务院和省、自治区、直辖市加强了环境和自然资源立法工作，据统计，国务院发布的环保行政法规有 29 件；环保部门发布的规章有 70 余件；省、自治区、直辖市发布的环保地方性法规有 900 余件；国家制定的环境标准有 395 件。此外，刑法、民法、行政法等部门法中还包含一些环保和自然资源法律规范。总之，环保法体系和自然资源法体系已初步形成。

4. 1999 年至今（环境资源立法深入发展的新阶段）

1999 年颁布了第三次宪法修正案，2004 年颁布了第四次宪法修正案。为了适应客观形势发展的需要，经中国法学会批准，于 1999 年 11 月 20 至 22 日在武汉大学召开了“中国法学会环境资源法学研究会第一次会员代表大会暨可持续发展环境资源法学国际研讨会”。这次会议标志环保法、自然资源法、国土法、生态法融合形成环境资源法体系。这一阶段，颁布了《气象法》、《公路法》（1999 年）《种子法》（2000 年）、《海域使用管理法》、《防沙治沙法》（2001 年）、《清洁生产促进法》、《环境影响评价法》、《测绘法》、《农村土地承包法》（2002 年）、《公路法》、《道路交通安全法》、《传染病防治法》（2004 年）、《可再生能源法》（2005 年）等；修订了《大气污染防治法》（2000 年）、《渔业法第一次修订本》、《药品管理法》（2001 年）、《水法》、《文物保护法》（2002 年）、《放射性污染防治法》（2003 年）、《固体废物污染环境防治法》、《种子法》、《野生动物保护法》（2004 年）、《土地管理法第二次修订本》、《渔业法第二次修订本》（2005 年）等；国务院和省、自治区、直辖市加强了配套法规的制定和修订。

总之，从 1972 年至今 30 多年来，已制定的环境资源法律有 30 个以上，环境资源法已形成一个大体系。这一成果，在我国法制史上是空前的、巨大的，这对建成有中国特色的社会主义法律体系，保障和促进生产力和先进文化的发展、社会

秩序的稳定、人民生活质量的提高都起了很重要的、不可替代的作用。

（二）关于“法律体系”的定义

法律体系或称法的体系，“通常指由一个国家的全部现行法律规范分类组合为不同的法律部门而形成的有机联系的统一整体。”[5] 法律体系说明一个国家法律规范之间的统一、区别、相互联系和协调性。中国是社会主义国家，中国的法律体系是有中国特色的社会主义国家法律体系。

“环境保护法”，是调整因保护和改善环境而产生的社会关系的法律规范的总和，即狭义的环境法。[6]

“自然资源法”，指调整人们在自然资源开发利用、保护和管理过程中发生的各种社会关系的法律规范的总称。[7]

“国土法”，指调整有关国土的调查、规划、开发、利用、治理、保护的社会关系的法律规范的总和。[8]

“生态环境法”，新出版的专著《生态环境法论》的作者说：“在法律领域，生态学的积极应用主要表现为自然资源保护立法，更准确地说应当是生态环境保育立法，即包括生态环境保护和建设两个方面的法律体系。”“所谓生态环境法就是现代意义上的环境法，因而生态环境法亦可简称为环境法。而事实上环境法的概念更易为人们所理解和接受。”[9]

“环境资源法”，是调整有关调查、规划、开发、利用、治理、保护生态环境和国土资源的社会关系的法律规范的总称。

这个概念包括三层含意：(1)调整范围，包括有关调查、规划、开发、利用、治理、保护生态环境和国土资源的全过程，而不仅仅只是“保护”过程。“在开发中保护，在保护中开发”，保护必须与调查、规划、开发、利用、治理生态环境和国土资源的全过程紧密结合，才能真正达到保护的目的。(2) 调整对象，包括因调查、规划、开发、利用、治理、保护生态环境和国土资源所产生的社会关系。(3) 环境资源法的体系是调整上述范围、上述对象的法律规范的总称，而不是法律的总称。

“环境法”，有狭义、广义之分，简言之：狭义的环境法，指“环境保护法”；广义的环境法，指“环境资源法”。

需要特别注意的是：狭义环境法与广义环境法最重要的区别是法律体系不同，前者体系比较小，后者比前者大多了。（参看下面图 1 ：环境保护法体系示意

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5 《中国大百科全书 • 法学》，北京：中国大百科全书出版社 1984 年版，第 84 页。
6 文伯屏著：《环境保护概论》，北京：群众出版社 1982 年版，第 1 页。
7 肖国兴、肖乾刚编著：《自然资源法》，北京：法律出版社 1999 年版，第 33 页。
8 《中国大百科全书 • 法学》，北京：中国大百科全书出版社 1984 年版，第 254 页。
9 周珂著：《生态环境法论》，北京：法律出版社 2001 年版，第 34 页。

图和图 2：环境资源法体系示意图）

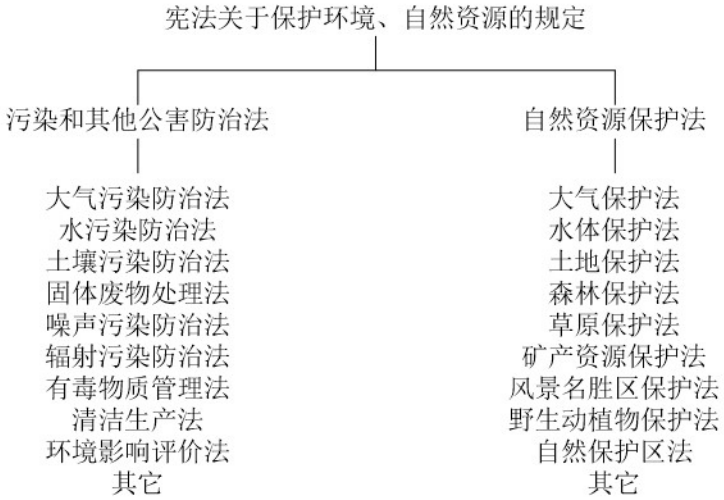

图 1 中国环境保护法（狭义环境法）体系示意图

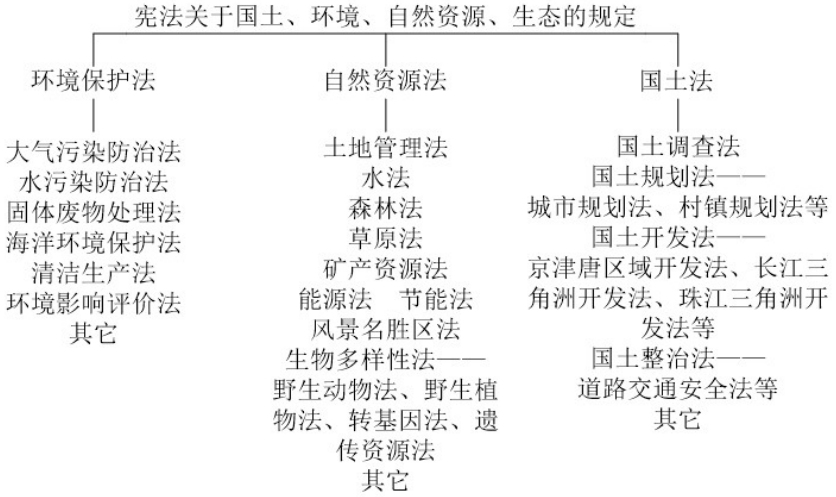

图 2 中国环境资源法（广义环境法）体系示意图 [10]

（三）环境资源法的内涵、外延

当代中国环境资源法体系是中国现行的环境和自然资源法律规范组成的、分门别类的、多层次的、互相配合的有机整体。其大致情况如下：《中华人民共和国宪法》（以下简称宪法）第 9 条规定："矿藏、水流、森林、山岭、草原、荒地、滩涂

10 括号内的法律不是现行法，是预计将制订的法律。

等自然资源，都属于国家所有，即全民所有；由法律规定属于集体所有的森林和山岭、草原、荒地、滩涂除外。国家保障自然资源的合理利用，保护珍贵的动物和植物。禁止任何组织或者个人用任何手段侵占或者破坏自然资源。”第10条规定：“城市的土地属于国家所有。农村和城市郊区的土地，除由法律规定属于国家所有的以外，属于集体所有；宅基地和自留地、自留山，也属于集体所有。国家为了公共利益的需要，可以依照法律规定对土地实行征收或者征用并给予补偿。任何组织或者个人不得侵占、买卖或者以其他形式非法转让土地。土地的使用权可以依照法律的规定转让。一切使用土地的组织和个人必须合理地利用土地。”第22条规定：“国家保护名胜古迹、珍贵文物和其他重要历史文化遗产。”第26条规定：“国家保护和改善生活环境和生态环境，防治污染和其他公害。国家组织和鼓励植树造林，保护林木。”第33条规定：“国家尊重和保障人权。”等等。这些规定是具有最高法律效力的环境资源法规范。

现行环境资源法律规范大体分为以下7类：第一类是综合性的法律规范，例如《环境保护法》；第二类是污染或其他公害防治法，例如《大气污染防治法》、《水污染防治法》、《环境噪声污染防治法》、《固体废弃物污染防治法》、《清洁生产促进法》、《环境影响评价法》等；第三类是自然资源法，例如《土地管理法》、《森林法》、《野生动物保护法》、《矿产资源法》、《节约能源法》、《煤炭法》等；第四类是名胜古迹等文化环境保护法，例如《风景名胜区管理暂行条例》、《自然保护区管理条例》、《园林绿化保护条例》等；第五类是国土法，包括国土调查法、国土规划法（如《城市规划法》）、国土开发法（如京津唐区域开发法、长江三角洲开发法）、国土整治法等；第六类是有法律效力的环境资源标准，包括环境质量标准、污染物排放标准、其他标准；第七类是其他部门法（行政法、民法、刑法、经济法等部门法）中的环境资源法律规范，例如《刑法》关于破坏环境资源保护罪、非法占用耕地罪的规定等，又如《食品卫生法》、《文物保护法》、《消防法》等法律法规中的有关规定。[11]

上述7类环境资源法律规范，按其法律效力分为若干层次，即：全国人民代表大会制定的；全国人大常务委员会制定的；国务院制定或认可的；国务院各部门发布的；省、自治区、直辖市等地方立法机关制定的。环境资源法的内涵，简言之，就是环境保护法、自然资源法、国土法、生态法的融合。上述7类环境资源法律规范，也就是环境资源法“内涵”的主要内容，其“外延”是城市规划法、能源法、综合利用法、防洪法等等。

（四）环境资源法体系在整个法律体系中的位置

11 澳大利亚的环境法体系中的第四大类就是“相关法规”，即包括职业安全、劳动保护、消费者权益保护和刑事法律中有关环境保护的规定。

环境资源法是中国法律体系中的一级部门法。其根据除以上所述外，还有一个重要根据是中国法理学专家的研究成果，中国法理学专家认为，中国的法律体系应当是：在宪法的统率下分为 10 个一级部门法，即：宪法（此处其所以与其他法并列，是就学科而言，而不是就法律效力而言；此部门法包括由宪法派生的选举法、组织法、香港特别行政区基本法等）、行政法、刑法、民法、商法、经济法、劳动法、环境保护法和自然资源法、诉讼程序法、军事法。[12]

图 3 中华人民共和国法律体系示意图

也有的法学者认为宪法之下的一级部门法应当只是行政法、经济法、民商法、刑法、社会法，环境法只是经济法或行政法的组成部分；还有的法学者认为一级部门法应当划得更多，婚姻法、社会保障法等也应当划为一级部门法。笔者认为上述 10 个部门法的划分是最合理的。因为：划分部门法的目的，主要是有助于人们学习、了解、研究、执行中国的现行法，提高全民的守法、执法水平，促进法学的研究和发展；划分部门法的标准，主要是法律所调整的不同社会关系，即调整对象，其次是法律调整的方法；划分部门法的原则是，应考虑到不同社会关系领域的广泛程度和相应法律、法规的多寡，不应将一级部门法划分得过宽过少或过细过多。前苏联和民法法系国家一般都将一级部门法划为十个上下。从中国现阶段法制的实际情况看，一级部门法划分为上述 10 个是最合适的；划分过多或过少的观点都有很大的片面性；从我国的国情来看，环境保护法、自然资源法、国土法、生态环境法四者融合、合并为一个一级部门法，是有中国特色社会主义法律体系发展规律的必然结果。这个部门法的名称仍用“环境资源法”，可以简称“环境法”，其主要理由是：（1）“国土”、“环境”、“自然资源”、“生态系统”是孪生姊妹关系，有很大的共性。例如土地、河流、海洋、大气、森林、草原、矿藏等等，既是国土资源的组成部分，又是最基本的环境因素和最主要的自然资源、生态系统。“环境资源法”既突出了“环境”，又突出了“国土资源”、“自然资源”概念，其内涵、外延与这个部门法的内容比较贴切，与最高立法机关——全国人大的环境资源保护委员会相适应，与中国法学会环境资源法学研究会的名称吻合。（2）便于与国际惯例接轨。其他国家绝大多数学者都称这个部门法为“环境法”；称国际法的一个分支为“国际环境法”。国际社会有三个著名的学术组织：一是“环境法国际理事会；二是“世界自然与自然资源保护联盟”，现简称为“世界自然保护联盟”，下设“环境法委员会”等 6 个委员会；三是联合国环境规划署。这三个机构是国际社会环境

12 沈宗灵主编：《法理学》，北京：北京大学出版社 1996 年版，第 304~324 页。

资源法领域的权威性学术机构，对学术交流与合作有巨大的影响力。(3) 中国法理学界也称这个部门法为“环境法”，上述划分 10 个一级部门法的倡导者——北京大学法理学家沈宗灵教授的观点在法学界是有代表性的。(4) 从文字表述的精炼来说，“环境法”最精炼，所以简称环境法也可以；但是应明确区分广义环境法（即环境资源法）和狭义环境法（即环保法）。

（五）环境资源法的特征

1. 法律规范的科技性

例如大气污染防治法、水污染防治法、环境标准（环境质量标准、污染物排放标准等）……其科技性很强。学习和研究环境法，要求知识面广，不仅需要宽广的社会科学知识，而且需要具备一定的自然科学知识，例如经常见到的 SO_2、CO、BOD、COD、ppm、苯并芘，都是自然科学名词。

2. 法律手段（规范）的多样性

环境资源法的调整方法是多种多样的，既使用民法、经济法手段，又使用行政法、刑法等手段。

3. 法律规范的独特性

例如：环境污染纠纷中的损害赔偿，不能实行传统民法损害赔偿的过失责任原则，而必须实行无过失责任原则；不能实行传统民法损害赔偿中的举证责任制度，而应实行污染损害赔偿举证责任倒置制度；环境资源法除了担负调整因调查、规划、开发、利用、治理、保护生态环境和国土资源而产生的社会关系以外，还担负着调整人与自然关系的任务。

三、环境资源法不是经济法的组成部分

1. 调整对象不同

经济法的调整对象，不仅在经济法、民法、行政法学界存在意见分歧，而且在经济法学界内部也没有形成统一的认识，有些经济法学家甚至认为经济法不是一个部门法。笔者认为最合法理的认识如下：经济法的调整对象是，需要由国家干预的具有全局性和社会公共性的经济关系。具体范围包括三个方面：(1) 宏观调控经济关系；(2) 市场秩序经济关系；(3) 社会保障经济关系。

环境资源法的调整对象是，有关调查、规划、开发、利用、治理、保护生态环境和国土资源的社会关系。具体范围包括三个方面：(1) 环境保护方面的社会关系；(2) 自然资源方面的社会关系；(3) 国土整治方面的社会关系。

2. 法律体系不同

经济法体系结构如下：(1)宏观调控法，又可以划分为产业法、计划法、投资法、预算法、税法、中国人民银行法、价格法等。(2) 市场秩序法，又可分为反垄断法、反不正当竞争法、产品质量法、消费者权益保护法、广告法、计算与标准化法等。(3) 社会保障法，又可分为社会保险法、社会救助法、社会福利法、社会优抚法等。[13]

环境资源法体系结构如下：(1) 环境保护法，又可分为大气污染防治法、水污染防治法、固体废物处理法、海洋环境保护法、环境影响评价法、清洁生产法等。(2) 自然资源法，又可分为土地管理法、水法、森林法、草原法、矿产资源法、煤炭法、能源法、节能法、生物多样性法、风景名胜区法等。(3) 国土法，又可分为城市规划法、村镇规划法、水土保持法、防洪法、区域开发法等。

3. 法律特征不同

经济法的突出特征是，与经济领域有密切关系，与经济学有密切关系；经济立法是国家宏观经济政策的具体化、定型化、条文化，主要应遵循客观经济规律。而环境资源法的突出特点是，与生态环境、自然资源有密切关系，涉及社会科学、自然科学广泛领域；环境资源立法是国家环境保护、自然资源、能源、国土整治政策的具体化、定型化、条文化，不仅要遵循客观经济规律，还要遵循客观自然规律、生态规律。

4. 环境资源法的任务是经济法无法包括的

我国经济法的任务主要是，通过法律调整，维护社会主义市场经济秩序，保证实现国民经济和社会发展计划，巩固人民民主专政，保障社会主义现代化建设的顺利进行。而环境资源法的任务主要是：通过法律调整，落实科学发展观、可持续发展战略，合理开发、利用自然资源，保护生活环境和生态环境，防治污染和其它公害，从而保障社会主义现代化建设的顺利进行，保护公民的健康、安全和子孙后代的幸福。需要着重指出的是，从落实科学发展观来看，落实城乡发展、区域发展、经济社会发展、国内发展和对外开放的统筹，是经济法和环境资源法共同的任务；但是落实人与自然和谐发展的统筹，构建人与自然和谐的社会，则是无可替代地要依靠环境资源法制建设来担负这项法律保障任务的。

总之，环境资源法与经济法都是我国整个法律体系中的重要组成部分，都是相辅相成的一级部门法。认为环境资源法是经济法的组成部分是没有法理根据的、是站不住脚的。

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13 黄锡生、曾文革主编：《经济法学》，重庆：重庆大学出版社 2003 年版，第 4~5 页。

简评《UNCITRAL 货物运输法草案》

张清姬 *

内容摘要: 统一海上货物运输法的立法工作自 1998 年 5 月开始以来，已历经 7 年，对草案的讨论也日渐成熟。从当前的会议讨论来看，这次草案对现行的海上货物运输公约的改动相当大，牵涉了包括适用范围、责任制度、提单制度等对承托双方利益攸关的制度，并针对现行海运界新出现的情况，规定了一些新的制度。尽管统一立法工作尚未完成，但这种大范围的改动，将对各国造成不同程度的影响。为此，研究草案对现行公约的变动有其重大的意义。

关键词: 履约方　适用范围　责任基础　单证制度　风险分配

自 1998 年 5 月国际海事委员会（CMI）受联合国贸易法委员会（UNCITRAL）委托开始草拟货物运输法草案以来，统一海上货物运输法的工作已经紧张有序地进行了 7 年。到目前为止，运输法工作组为审议 CMI 于 2001 年 12 月向 UNCITRAL 递交的《CMI 运输法草案》，已开展了 7 次工作组会议，[1] 其中第 9、10、11 次会议上对草案进行逐条分析修改，完成了一读，其成果为《[全程或部分途程] [海上] 货物运输文书草案》（以下简称“《运输法草案》”）。[2] 由于二读工作尚未结束，在二读过程中就某些问题达成的意见还没有形成系统的文件，因此，本文将主要以运输法草案为基础，并在相关问题中加入二读意见，以此对现行的公约与草案的内容进行比较研究，从而就统一海上货物运输公约的立法工作的进展情况做简单的说明。

此次运输法草案是在基于“现行的国内法和国际公约在许多问题上留下了严重漏洞”，[3] 海商法领域三大公约——《海牙规则》、《海牙—维斯比规则》及《汉

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1 工作组从第 9 届会议开始审议，到目前为止已经进行到第 15 次会议，第 16 次会议将于 2005 年 11 月 28 日至 12 月 9 日在维也纳进行。

2 本文中对于草案条文的引用如未说明，均指一读后形成的运输法草案，条文中 [ ] 内的内容表示待商议的内容，草案的具体条文请参见 A/CN. 9/WG.III/WP. 32，下载于 http://www.uncitral.org，2005 年 11 月 25 日。

3 《大会正式记录，第 51 届会议，补编第 17 号》（A/51/17）第 211 段，下载于 http://www.uncitral.org，2005 年 11 月 25 日。

堡规则》[4]并存的基础上，UNCITRAL 为“在尚无统一规则的领域中制定统一规则”[5]的意图下进行的。

从总体上来看，此次草案的规定是对海上货物运输公约的一次重大改革，它不同于《海牙—维斯比规则》对当时现存之《海牙规则》的修修补补式的修改，但也没有像《汉堡规则》一样对《海牙规则》进行了脱胎换骨的变化，而是针对现实中出现的各种问题及各行各业的呼声，对现有的《海牙—维斯比规则》和《汉堡规则》进行了综合，吸取各规则的优势，通过对承运人归责原则的重新梳理，对船货双方的风险利益进行了再分配。由于草案内容相对以前的公约变化相当大，且各国及一些相关的非政府间国际组织及利益集团都对统一海上货物运输法律表现出了前所未有的关切。不仅 CMI 所隶属的 16 个国家海商法协会参与了此次的立法工作，纷纷提出了各自的意见，且瑞典、意大利、荷兰、美国及中国等国家还先后递交了各自的提案，而联合国贸易和发展委员会、欧洲经济委员会、国际铁路运输、国际货运代理协会联合会和国际多式联运委员会等 11 个非政府间组织也应邀出席了每一届工作会议，并分别代表不同的行业利益对草案提出了许多有益的建议。这种大规模的参与正显示了该草案的地位，也必将给各国国内法造成不同程度的影响。因此，研究运输法草案内容变化的重要性将是不可忽略的。限于篇幅，本文只择其重要之处作一说明。

一、运输法草案对现行海上货物运输公约的修改

（一）承运人范围的扩大

草案在讨论过程中摒弃了过去《汉堡规则》中“承运人”与“实际承运人”的定义，采用“承运人”与“履约方”的定义。对于承运人的定义，草案仍然沿用了《汉堡规则》及《海牙—维斯比规则》的定义方式，即承运人是指与托运人订立运输合同的人。而对于履约方的定义，工作组在第 12 次会议的讨论过程中，提出了海运履约方与非海运履约方的概念。在这次会议中，履约方被定义为“指非承运人，该人应承运人的请求或在其监督或控制下，直接或间接地实际履行［或承诺履行］[6]承运人在运输合同项下对货物运输、装卸、保管或［存储］的任何职责，而无论该人是否为运输合同的订约方、是否在该合同中指明或是否在该合同项下负有法律

4 由于《海牙—维斯比规则》是对《海牙规则》的修改，其不同之处甚少，下文在比较时，将主要以《海牙—维斯比规则》与《汉堡规则》为主要对象。

5 《大会正式记录，第 51 届会议，补编第 17 号》（A/51/17），第 210 段。

6 会议在讨论过程中，工作组作出了一个临时决定，不在“承诺实际履行”这一句短语前后加方括号，目的是扩大该定义的范围，澄清其在根据运输合同实际履行方面所设置的限制。参见 A/CN. 9/544 第 42 段。

责任。‘履约方’一词包括本款（f）和（g）项中界定的海运履约方和非海运履约方，但不包括托运人或收货人雇用的任何人员，或托运人或收货人聘用人员（承运人除外）的雇员、代理人、承包人或分承包人。”海运履约方“系指在货物到达装货港［或者，在转运情形中，到达第一装货港］至其离开卸货港［或者可能是最后卸货港］期间履行承运人的任何责任的履约方。”在货物离开港口至其到达另一装货港这一期间履行承运人的任何责任的履约方不应被视为海运履约方。非海运履约方“系指在货物到达装货港之前或者在货物离开卸货港之后履行承运人的任何责任的履约方。”[7] 会议同时认为，海运履约方应承担赔偿责任，而非海运履约方将被排除在草案的赔偿责任范围制度之外，但仍纳入履约方的范围。

尽管履约方的具体定义尚未完全确定，海运履约方与非海运履约方的界线仍有待讨论，但是有一点是很明确的，即履约方的定义取代过去《汉堡规则》中“实际承运人”的定义，不仅将直接或间接从事运输的当事人纳入履约方中，还将其扩大到了包括从事装卸、保管或存储的任何法律职责的当事人，这将使承运人[8] 的实际范围从海上扩大到陆上，几乎将所有的与货物运输合同有关的人都涵盖其中。

（二）适用范围的扩大

随着全球经济的发展，传统国际货物贸易运输方式发生了很大变化，集中体现在货物运输集装箱化和“门到门”运输的普及，越来越多的集装箱货物班轮运输的海运合同将海运段前后的海运包括在内。基于目前的这种现实，会议重点讨论了是否应将适用范围扩大到“门到门”运输的问题。尽管与会者从最初的认可适用范围扩大到“门到门”运输，到目前尚存有争议，但相对于现行的公约而言，草案的适用范围将仍会有所扩大。在第 12 次会议中，工作组首先确定了一般性政策，即文书的草案应该涵盖单式或多式联运的“门到门”货物运输，前提条件为，此类运输涉及海运段，并且此类海运段涉及跨国界运输。[9] 在这一政策下，经过几次会议的讨论后，工作组在第 15 次会议中就运输合同做了如下定义：“运输合同系指承运人收取运费负责将货物从一地运到另一地的合同。合同必须就海上运输作出规定，还可以就海上运输前后其他运输方式的运输作出规定。”[10] 此运输合同的定义意味着运输合同已经不仅仅限于海运阶段，它将部分经由海路运输的合同都纳入了本草案的适用范围。而这一点在现行的《海牙—维斯比规则》与《汉堡规则》均只适用于海上运输阶段。《汉堡规则》第 1 条第 6 款规定一个既包括海上运输又

7 A/CN. 9/544 第 29 段。
8 此处的“承运人”是指承担与承运人相同责任的当事人，因在概念上没有相应的词，因此借用了“承运人”的概念，它与草案定义中的“承运人”含义不同。
9 A/CN. 9/544 第 57 段。
10 A/CN. 9/576 第 52 段。

包括某些其他方式运输的合同，则仅其有关海上运输的范围，才视为公约所指的海上运输合同。

（三）承运人责任基础的变化

由于承运人责任制度为整个海上货物运输的核心内容，任何一个海事公约中承运人责任制度的规定都将是其主要内容，从海商法三大公约的形成历史上看，每一个公约都是一些国家因对当时现有的承运人责任制度不满而推动形成的，[11] 这反映了承运人责任制度在海事运输领域中举足轻重的地位。而此次立法也不例外，三大公约在船货双方利益分配上的重大不同也是本次立法活动的主要原因之一。承运人的责任制度无疑是此次立法工作的重点工作，也是其中争议最多、工作最艰难的一个部分。责任制度是以责任基础为核心的，所谓责任基础，即通常所说的归责原则。在承运人的归责原则上，现行的《海牙—维斯比规则》及《汉堡规则》分别采用了不完全过错归责原则与过错责任原则。《海牙—维斯比规则》第四条第 2 款（a）—（q）项列举了 17 项免责事由，其中（a）和（b）项中的航海过失免责和火灾免责，承运人可以在其雇用人员有过失的情况下援引适用，其他免责是在承运人履行其义务的前提下，反映了通常不涉及承运人的过失的情形（诸如承运人所无法控制的事件、托运人的作为或不作为、货物的瑕疵或内在缺陷等）。这种大量免责规定的存在使船货双方的风险分配显得不太公平，正是基于这个原因，以美国为首的贸易大国以及一些发展中国家在上世纪中期强烈要求重新立法，其直接成果就是《汉堡规则》。然而过于注重货方利益的《汉堡规则》并不成功，它在 1992 年生效后极少被运用，几乎成了一纸空文。

此次草案意图在归责原则上综合两者的利弊，尽量平衡两者之间的利益关系。为了能更好地征求多数人的意见，草案在第 14 条中规定了三个备选案文。其中案文 A 采用了推定过错责任的归责原则，其第 1 款规定“如果货物的灭失、损坏或迟延交付发生于第 3 章所界定的承运人责任期间，则承运人对此种灭失、损坏或者迟延交付造成的损失应负赔偿责任，除非承运人能证明该灭失、损坏或迟延交付既非其本人也非第 15(3) 条所指任何人的过失造成的。”其第 2 款将列举的 9 项除外风险作为承运人无过失的推定而规定。根据这一规定，一旦某一项货损能够确定，则推定承运人对此项货损存有过失，承运人应对其本人或其他相关人员并无过失，或者货损的发生是由可免责的事由造成承担举证责任。备选案文 B 第 1 款规定与《汉堡规则》第 5 条第 1 款采用了过错责任原则，并将已经履行了谨慎

11 无论是《海牙规则》的订立，还是之后对其进行修改的《海牙—维斯比规则》及《汉堡规则》的制定，都是当时各利益方及各相关国家因对现有的承运人责任制度不满而发起的。

义务或并未促成这种损失的发生的举证责任分配给了承运人，第 2 款则将 9 项除外风险作为一种免责规定。备选案文 C 采用了严格责任，而将承运人无过失作为不承担责任的法定理由。经几次会议的讨论，到目前为止，会议结合了案文 A 与案文 B 的规定，在以下几个方面基本达成了一致：

首先，草案摒弃了近年来一直为许多国家，尤其是货主国家及发展中国家所批判的过失免责的规定。草案经多方商议，目前基本上都已经同意废除现有的不公平条款——航海过失免责条款。

其次，重新拟制火灾免责。现行的火灾免责是不完全过失免责，且举证责任是由索赔人承担，这使得索赔人难以在火灾导致的损害中真正获得赔偿，因此多数与会者都提出应重新拟制火灾免责。

第三，草案对举证责任的分配规则作了明确规定。从现行的公约来看，《海牙—维斯比规则》与《汉堡规则》在举证责任的分配上有很大的不同。《海牙—维斯比规则》没有对举证责任的分配做出非常明确的规定，但根据其所采取不完全过失归责原则以及诉讼法上谁主张谁举证的原则，索赔人除应证明货物损失发生在承运人责任期间外，还应证明承运人对货损的发生存在过失，对于货方而言，这种举证责任是相当重的。当然，如果承运人试图主张货损是由船舶不适航（指在途中不适航）或其他免责事由造成，则承运人应负举证责任，火灾免责除外。而《汉堡规则》规定承运人负有关于导致损失的原因以及承运人及其它相关人员没有过失的举证责任。在缺乏关于损失的原因的充分证据的情况下，承运人将承担（全部）损失。因此，承运人在发生无法解释的损失的情况下通常负有赔偿责任。另外，根据这两个公约的规定，在存在多个原因的情况下，除非承运人可以证明可以定量的损失部分完全是由于其应免责的原因所导致的，否则承运人将承担全部损失。草案在经过后来的讨论后，基本上认为索赔人只需证明（a）灭失、损坏或迟延交付；或（b）造成或促成灭失、损坏或迟延交付的情形发生在第 3 章所界定的承运人的责任期内，而对货损发生原因或者承运人没有过失的举证责任交给了承运人。

（四）单证制度的变化

提单制度是海上货物运输的一项重要的制度，它形成于长期的商业惯例，具有源远流长的历史。然而由于现代技术的进步，集装箱的发明与电子技术的运用使原有的商业惯例的存在基础发生了巨大的变化。现行的提单制度在解决一些新出现的法律问题上显得捉襟见肘。草案针对当前所出现的问题作了相应的规定。

1. 基本明确了持单人的定义

草案第一条第（f）款规定“持单人”系指：当前持有可转让的运输单证或对可转让电子记录拥有排它［使用权］［控制权］的人，并且具备下列条件之一：（一）单证为凭指示单证的，单证指明其为托运人或收货人，或该人是单证的适当被背

书人；（二）单证为空白背书凭指示单证或无记名单证的，该人是单证的持有人；（三）使用可转让电子记录的，该人根据第 62.4 条能够证明其对该记录享有［使用权］［控制权］。关于何谓提单持有人，现行的公约中并没有做出规定。

2. 对持单人的权利做出了明确的规定

根据草案的规定，持单人享有提货权、控制权、索赔权等等，这些规定使持单人的权利有了明确的法律依据。

（五）其他新制度的增加

1. 关于电子商务的规定

现行的三大公约中均未就电子商务问题作出规定，而今天，随着电子商务技术的发展，电子商务问题已经是各法律体系中不可回避的问题，草案同样需要针对现实的情况对其中相关的问题进行规定。草案就电子提单的定义及其操作规则问题作了规定。

2. 增加了控制权制度

草案在其中的第 11 章专章规定了控制权相关问题。这一章的规定是在“目前的海运情况已不一样了。在许多行业中使用可转让运输单证在迅速减少，或者已完全消失”[12] 的现实前提下规定的。根据第 53 条的规定，货物控制权是指与承运人就修改运输合同达成协议的权利以及根据运输合同在第 7(1) 条所规定的责任期间内就货物向承运人下达指示的权利，包括（a）不变更运输合同而就该货物下达指示或变更指示的权利；（b）在货物到达目的地之前请求交付货物的权利；（c）用其他任何人包括控制方替代收货人的权利；［（d）与承运人就修改运输合同达成协议的权利。］根据本条的规定，控制权人享有下达指示、在货物到达目的地之前请求交付货物、变更收货人以及与承运人协商变更合同的权利。

现行的海事公约没有对这一问题做出规定，但其他领域的运输公约对此问题已有相应的规定，例如 1956 年《国际公路货物运输合同公约》中的货物处置权，华沙公约中的处置权等等。

3. 对权利转让作了具体的规定

现行的公约只对提单的转让作了规定，但对于提单转让的后果没有明确的规定，由此导致了许多诉讼上确定权利人的争议。草案在第 12 章中对权利转让的方式及法律后果作了规定。

4. 对诉权作了具体的规定

草案第 13 章对诉权作了明确规定。由于当前的公约对诉权的规定不甚明确，诉讼中关于哪些人享有诉权亦是案件争讼的重点。针对这些问题，草案意图对诉

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12 A/CN.9/WG.III/WP. 21 第 185 段。

权主体做出明确规定。

二、运输法草案将造成的影响

由于海上货物运输牵涉了多方当事人的利益，海事公约所作的任何修改，都将可能对货物贸易运输所涉及的各个行业造成影响，尤其是其中与运输关系比较密切的行业，对其所造成的将可能是无法估量的。

（一）对船货双方的影响

由于船货双方是利益相对的两方当事人，因此对其中一方当事人的利通常情况下是对另一方当事人的不利，因此本文将草案对二者的影响结合起来论述。此次草案是在现有公约的基础上对海上风险在船货双方之间的一次再分配，因此货物运输的直接当事人——船货双方无疑将受到重大的影响。

首先是过失免责的废除将使承运人的责任加重。航海过失将不再是承运人的免责事由，承运人所应承担的责任当然地因此而加重。相反这对货方而言，无疑是一个喜讯。同时，根据现行的《海牙—维斯比规则》，火灾免责也是承运人的一个重要的免责事由。海上货物运输中，发生火灾是非常常见的，而它给船货双方所造成的损失也是巨大的。但由于火灾发生的具体原因通常都比较难以调查，而对于货方来说，要取得火灾发生的具体原因的证据，更是难上加难，几乎是不可能的，因此对于火灾所造成的损失的责任分配，也在较大的层面上牵涉了船货双方的利益。本次草案中，已有人提出要废除火灾免责，且草案也对此建议作了考虑，如果这项建议被接收，这对货方来说，又是草案将给其带来的又一利益。当然，过失免责的取消以及火灾免责可能取消给货方带来的利益是一种长远的、隐藏的利益。而在短期之内，它所直接反映出来的可能反而会是一种不利影响。这是因为由于承运人责任加重，这必然使承运人的运输成本增加，为平衡这种经济利益上的损失，承运人的最直接的措施将会是提高运费，而短期内，虽然货方的风险有所降低，但保险公司可能并不会降低保险费用，这样货方就无法从保险费用的降低中平衡提高的运费。

其次，举证责任的重新分配也将给船货双方带来不同的影响。对于由于海上货物运输所产生的损失，有关损失的原因的证据常常难以获得，对于货物的收货人或托运人尤其如此，他们可能无法了解任何有关事实。此外，货物在转运中的灭失、损坏或延误常常是由于多种因素所导致的，在这种情况下，关于不同的确认原因在多大程度上导致了一项损失的证据可能更难以寻找。在这个背景下，显然承运人和货主之间举证责任的分配规则对于在双方当事人之间的总体风险分配来

说至关重要。而从会议对于第 14 条的讨论来看，与会人者基本上都主张将货损发生的原因的举证责任赋予承运人，因此当损害发生的原因不明时，则承运人将承担赔偿责任。这种趋势对于货方而言是一个利好趋势，而对于承运人来说将是一个负担。

第三，控制权的规定对货方而言也将是一个好消息。控制权是单方面地赋予了控制方一定的权利，在承运人可以执行的情况下，承运人将必须服从控制权人的指示。此规定将使通常作为托运人的卖方对货物的支配拥有法律上的直接依据，对货方而言，这一权利的规定无疑明确了货物的支配权人，有利于货方的控制。对于承运人而言，此规定也并不完全是不利规定。虽然控制权的规定在一定程度上将加重承运人的责任，但同时也应注意到，控制权是在承运人条件允许的情况下方可行使，且承运人可以就此要求控制权人补偿因此而支出的费用，从这个角度而言，控制权是在承运人方便的基础上方可以行使的。更应该注意的是，由于控制权的规定，使承运人的对应方得到了明确，承运人既应对运输合同的当事人——托运人负责，又应对提单关系的当事人——提单持有人负责的状态得以改变。根据草案的规定，他只需对控制权人负责。对于承运人而言，现在大量因无单放货而发生的对其不利的案件将会因为控制权的规定而大大减少。从这个角度上来说，控制权的规定对承运人而言未免不是一个利好规定。

（二）对保险界的影响

这里的保险界包括了船东互保协会与商业保险公司，草案对此两个不同的保险行业的影响是不同的。

由于保险公司所承担的主要是分散货方的风险，因此保险公司利益的波动将受到货方利益波动的影响。过失免责制度的废除将使货方的风险有所降低，因航海过失导致的货损将可以直接从承运人处获得赔偿，保险人的保险责任自然将随之下降。而相反，对于船东互保协会而言，由于过失免责的取消，承运人所承担的风险加大，他会将这种风险向船东互保协会投保，由此将这种风险转嫁给船东互保协会，从而加重互保协会的赔偿责任。

（三）对中国的影响

我国既是航运大国，又是贸易大国。截至 2000 年底，中国国际海运船队达 2525 艘、3700 多万载重吨。2000 年中国国际海运船队占世界商船队总量的 5.3%，集装箱位占世界总量的 5.0%，船队总运力在世界商船队中的排名位居第五。[13] 然

13 《2000 年中国航运发展报告》，下载于 http://www.moc.gov.cn，2005 年 11 月 25 日。

而尽管我国在总运力上是一个航运大国，单个企业的竞争能力却非常低。2000 年，在中国境内登记注册从事国际海上运输的 290 家航运公司中，除中远集团、中海集团外，大部分企业规模偏小，平均船舶运力不足 1 万载重吨，许多公司为单船公司。企业规模偏小，缺少抵御市场风险的能力，规模经济效益不能发挥，[14] 同时，我国的商船队普遍存在船龄长、技术性能差，船员技术水平总体落后的问题，因此由于航海过失所造成的货损相对其他发达国家而言更为普遍。[15] 草案废除了航海过失免责后，船东将必须对此部分过失产生的损失承担责任，这对我国商船队而言，无疑是一个巨大的考验。此外，对于规模相对比较小的企业而言，举证能力相应的比较低，而草案在加重了船东的举证责任后，也将对给我国船舶公司造成一些不利的影响。

尽管目前草案还在讨论阶段，其最终是否能通过并生效仍是一个未知的问题，但此次草案至少反映了一种趋势，且美国 99'COGSA 在废除过失免责方面也已走在了前列，因此我国应在加强各船运公司相应的管理能力，改进航海技术与船员技术水平，改善船舶运输能力方面做出努力，使我国的船舶公司能在将来的法律环境中处于竞争的优势。

14 《2000 年中国航运发展报告》，下载于 http://www.moc.gov.cn，2005/11/25，2005 年 11 月 25 日。

15 司玉琢主编：《海商法专题研究》，大连：大连海事大学出版社 2002 年版，第 21 页。

论《UNCITRAL 运输法草案》对凭单放货规则的改革

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内容摘要: 为解决提单迟延的难题，《UNCITRAL 运输法草案》对可转让提单的“提货凭证”功能进行了大胆改革，在一定条件下，承运人被赋予了法定的无单放货的权利。本文认为，这样的制度设计，不具有合理性与可操作性，甚至还会鼓励欺诈;而真正能够解决提单延迟问题的，是海运单与电子提单，在电子提单未普及前，凭保函放货是唯一务实的方法。

关键词: 提单 无单放货 提单延迟 电子提单 保函

一、引 言

在笔者看来，正在二读审议过程中的《UNCITRAL 运输法草案》[1]（以下简称“《草案》”）对现行制度最为激进的改革，莫过于对提单[2]“提货凭证”功能的变革。

我们知道，提单一直被喻为“打开浮动仓库的钥匙”，这是对它所具有的“提货凭证”法律功能的形象描述，也是一百多年来海商法领域形成的一个被国际社会所普遍接受的规则：在通常情况下，承运人只能将货物交付给合法的提单持有人，通俗地讲，即“认单不认人”。

然而，在《草案》下，提单的“提货凭证”功能已经被大大“弱化”了，承运人凭单放货的义务不再作为一项基本原则，相反，在一定条件下，承运人被法定地赋予了无单放货的权利。

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1 《草案》二读文本的英文全称为“Draft instrument on the carriage of goods [wholly or partly] [by sea]”，编号为：A/CN. 9/ W GIII/ WP32，下载于 http://www.uncitral.org。2005 年 11 月 28 日至 12 月 9 日，UNCITRAL 运输法第三工作组将召开第 16 次会议，继续对《草案》进行二读审议，“货物交付”是其中讨论议题之一。还需要说明的是，《草案》名称及具体条款中有方括号的地方表明，方括号中的内容是否保留目前尚存不同意见。
2 本文论述的“提单”仅限于“可转让提单”，不包括记名提单。

这种具有离经叛道意味的制度设计，在《草案》一读后，总体上已经得到了UNCITRAL 工作组的认可。[3] 但是，值得我们反思的是，《草案》的改革真的能解决提单延迟的难题吗？它能满足当今航运与贸易的现实需要吗？它又将给国际贸易带来怎样的影响？本文将围绕《草案》的相关规定，联系提单法的理论与实践，对此展开评述，以期能够为完善《草案》的规定以及我国代表团参加 UNCITRAL 运输会议提供些许有益的建议。

二、《草案》的改革背景

在当代国际航运与贸易实践中，提单似乎陷入了一个难以克服的困境之中：在很多情况下，货物已经到达目的地，而提单还继续停留在贸易领域的流转过程中，由于提单是“提货凭证”，承运人有义务收回提单再交付货物，但是，为了避免船舶滞港、货物滞港而给承运人带来损失，同时为了配合货方及时接收货物、加速货物流转的商业需求，承运人往往需要在接受保函的情况下无单放货。据粗略统计，班轮运输中存在 15% 的无单放货现象，租船运输则高达 50%，某些重要商品如矿物、油类货物运输几乎是 100% 的无单放货。[4]

导致提单延迟的主要原因是航运本身发生了革命性的变化，航运技术的高度发展以及快速、便捷集装箱运输方式的广泛使用，使得货物运输速度已经大大提高；而与之形成鲜明对比的是，提单在贸易领域的流转依然像过去一样缓慢，这就形成了一对尖锐的矛盾。

起草者认为：

（1）无单放货现象普遍存在，使得提单的提货凭证功能与航运实践发生了很大的偏离，这说明继续维护提单的“提货凭证”功能已有些不合时宜；[5]

（2）在航运实践中，不可能永远做到要求收货人在提货时交出提单，因此，一味地要求承运人必须凭单放货是不现实的，“把无单放货的责任总是推到承运人头上，这没有反映当前的现实”；[6]

（3）虽然承运人在无单放货时可以要求保函，但保函本身并不能免除承运人承担无单放货的责任，承运人在承担责任后能否通过保函将损失追偿回来，存在变数。提单迟延本是由贸易上的原因造成，与承运人无关，“凭单放货”的要求反而让承运人负担无单放货的风险，对承运人有失公允。[7]

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3 Gertjan van der Ziel, Background Paper on Delivery to The Consignee (Chapter 10), *CMI Yearbook*, 2005, p. 172.

4 See Article 9. 4. 2.4 of “Draft Outline Instrument” by CMI ISC, 20 November 2000.

5 《草案》一读文本（编号 A/CN. 9/WG. III/WP. 21）第 162 段说明。

6 《草案》一读文本第 181 段说明。

7 《草案》一读文本的说明。

《草案》对提单“提货凭证”功能的改革，正是基于上述认识完成的。

三、对《草案》第 49 条 (b)(c) 两款的分析

《草案》第 10 章第 49 条专门规定了可转让单证签发后货物如何交付的问题。其中，（b）、（c）两款是《草案》改革可转让提单“提货凭证”功能的核心规定，有必要进行全面的考评。

（一）第 49 条（b)(c）款规定[8]

（b）货物抵达目的地后，如果持有人未向承运人请求交付货物，承运人应通知控制方，或者如果尽其合理的努力未能确定或找到控制方的，则通知托运人。在此种情况下，控制方或托运人应向承运人发出有关货物交付的指示。如果承运人尽合理的努力也未能确定、找到控制方或托运人的，则第 31 条所规定的人视为本款所指的托运人。

（c）承运人按本条（b）款规定依控制方或托运人的指示交付货物的，视为已经按照运输合同 [向持有人] 履行了交付货物的义务，无论可转让运输单证是否被缴回给承运人，或者可转让的电子记录下请求交付货物的人是否根据第 6 条提及的程序规则证明其为持有人。

可见，《草案》不再坚持绝对的“提货凭证”功能，一旦提单迟于货物到达目的地，或者由于其他原因提单持有人未能在货物到达目的地时要求提货，承运人就有权听从控制方或托运人（包括单证托运人）的指示予以放货，这样的放货行为视为承运人已经向提单持有人履行了交付货物的义务，无需承担无单放货的责任。显然，《草案》改革的实质是将无单放货的风险转归于货方，即由发出交货指示的控制方或托运人来承担错误放货的责任。

严格地说，《草案》在此只是“弱化”了提单的提货凭证功能，而没有彻底地抛弃该项功能，因为在货物到达目的地后，承运人只有在得到控制方或托运人指示的情况下才能无单放货，而如果控制方或托运人并没有发出指示的话，提单的提货凭证功能将依然保留，承运人并不能自由地无单放货给收货人，而只能根据《草案》第 50 条的规定处置货物（例如，将货物贮存在合适的地点、在一定条件

8 需要说明的是，《草案》第 49 条 (b)(c)(d) 三款规定同时也是针对“电子提单”（《草案》称之为“可转让的电子记录”）作出的。我们认为，电子提单属于新生事物，《草案》也并没有对电子提单如何转让确定具体规则，在这样的背景下，讨论电子提单下承运人如何履行交付货物的义务似乎为时尚早，因此，本文对这三款的评论仅仅针对纸提单，不包括电子提单。

下出卖货物等等）。

（二）理论分析

我们认为，《草案》一方面维持提单的可转让性，而另一方面又不坚持绝对的“凭单放货”功能，这本身就是一个自相矛盾的制度设计！提单上的所有权利随着提单的转让而转让是可转让提单的应有之意，这也已经得到了《草案》的确认，《草案》在“Chapter 12 Transfer of rights”中开宗明义地规定：“If a negotiabletransport document is issued, the holder is entitled to transfer the rights incorporated in such document by passing such document to another person ...”，[9] 这里的“the rights incorporated in such document”，自然应当包括“提货权”。[10] 既然提货权已经合法转让给了提单持有人，托运人早已失去了提货权，承运人又怎能在提单延迟的情况下听从托运人等人的指示无单放货而不承担责任呢？这在法理上无论如何都是讲不通的。

显然，如果不坚持绝对的“凭单放货”功能的话，必然需要同时舍弃单证的“可转让性”，这就使提单转化为海运单了。因此，从理性的角度分析，对于单证功能的设计，只有 2 种选择：要么是传统提单，要么是海运单，并没有一条“中间道路”可走。

（三）《草案》规定是否具有可操作性

具有可操作性是一个完善的法律规范所必备的要素，无论有多么充分而合理的理由，若据此而设计出来的法律规范不具有可操作性，在实践中都将形同虚设。

1. 在提单延迟时，（b）款要求承运人首先应当尽合理的努力去寻找、通知控制方，以获得他的交货指示。

“控制权”规定在《草案》第 11 章，其含义是指在承运人运输、掌管货物期间，在不妨碍承运人正常营运的条件下，控制方享有要求承运人中止运输、变更目的地或收货人等权利。根据《草案》的规定，在签发可转让提单的情况下，控制方就是提单持有人。[11] 因为提单是可以不断转让的，在提单尚未到达目的地而继续流转于贸易领域中时，承运人要确定谁是控制方几乎是不可能的；退一步讲，假设货物到达目的地时承运人确实知道某人是控制方并通知了他，而该人在发出交货指示时可能不再是控制方（因为提单在这段时间内可能又被转让了），应如何处理？

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9 《草案》第 59 条第 1 款。

10 蒋跃川：《论权利转让——评〈UNCITRAL 运输法草案〉关于权利转让的规定》，载于司玉琢主编：《中国海商法年刊》2003 年卷，第 23 页。

11 《草案》第 54 条第 2 款。

承运人是不是还有谨慎的义务保证某人在发出交货指示时还具有控制方的身份？承运人又如何能完成这样的义务呢？另外，何谓“尽合理的努力”？“尽合理的努力”的标准又是什么？可以预料，这些问题将在实践中产生大量的争议。

2.（b）款还规定，若承运人找不到控制方，应转而寻求托运人或《草案》第 31 条所规定的人，而托运人或草案第 31 条所规定的人有义务向承运人发出交货指示。《草案》第 31 条所规定的人指的是“单证托运人”：在提单中被记载为托运人，但不是与承运人订立运输合同的人，比较典型的例子是 FOB 卖方。

这样的规定也是不现实的。在提单转让后，虽然托运人知道他的下一手提单持有人是谁，但由于提单具有可转让性，其可以处于不断流转的状态，在货物到达目的地之时，托运人无法知道提单已经流转给何人，因此，其在客观上根本不能给出一个正确的指示。法律给一个人设定一项他根本无法履行的义务，合理性何在？又如何操作？显而易见，一个谨慎的托运人是不会给出交货指示的，因此，该规定在实践中难免形同虚设。

3. 既然本款规定控制方或托运人在货物到达目的地时有义务向承运人发出货物如何交付的指示，那么，必然的结果是如果控制方或托运人拒绝做出指示就应承担相应的责任。承担何种性质的责任呢？《草案》并无具体规定，其实也很难做出一个合理的界定，尤其是，若托运人客观上根本无法给出一个正确的指示，《草案》还要令其承担不给出指示的责任，这不是很荒谬吗？

（四）从国际贸易的角度审视《草案》的规定

1.“提货凭证”功能被如此弱化的提单，大大降低了其可信赖性，甚至可以说为海运欺诈又开启了一扇“方便之门”，我们有理由相信国际贸易各方不会接受这样的单证。

按《草案》的规定，提单一旦延迟，承运人就可以听从控制方或托运人的指示放货。这样的话，即使持有提单，也可能无法有效地控制货物，在“单证买卖”下，有谁还会愿意购买这样的提单？

更令人担忧的是，这样的制度安排将极大地方便控制方或托运人从事欺诈活动。其实，在讨论过程中，《草案》规定可能会便利欺诈的声音一直都存在，[12] 但似乎未能得到起草者的真正重视，起草者对此的解释是：如果提单持有人积极行动的话，完全可以避免托运人等人欺诈性指示放货，因为持有提单的收货人或银行有义务密切关注货物的动态，在货物到达目的地后，可以通过及时提货来保护自己的利益。[13]

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12 《草案》一读文本第 180 段说明。
13 《草案》一读文本第 177 段与第 181 段说明。

暂且不问事实上提单持有人是否真的可能准确把握货物的到达时间，以及要求接受提单质押的银行随时注意提单项下的货物动向，是否是一个过于沉重的负担；即使提单持有人能够做到这一点，起草者的理由就能成立吗？答案是否定的。我们知道，可转让性决定了提单在整个贸易领域的流转速度并不是以其中某个提单持有人的意志为转移的，而是取决于整个买卖合同链的长短、买卖合同链是否顺畅、银行业务操作速度的快慢、邮递服务效率的高低以及是否发生了一些意外事故等多种因素，有着错综复杂的原因，因此，在目前的国际贸易中，提单延迟才无可避免地成为一种普遍的现象，其实，这一点也同样为《草案》的起草者所认识，[14] 而且正是《草案》改革“提货凭证”功能的逻辑起点，遗憾的是，起草者在论证提单持有人可以通过积极行动来保护自己权益的时候，似乎又彻底将这一客观前提忘记了：当提单还处于整个贸易链的某个中间环节时，持有提单的银行或某贸易方往往远离货物目的港，即使他知道货物已经到达，他又如何能够做到在目的港凭单提货而保护自己的利益呢？

2.《草案》的规定，将使 FOB 贸易的卖方处于几乎无任何保障的境地。

《草案》规定：若承运人通过合理努力无法找到并确认控制方（本文已经指出，这一点是很难做到的），则首先应听从托运人的指示；只有在找不到托运人的情况下，再听从《草案》第 31 条所规定的人（单证托运人）的指示。

如此规定，显然没有慎重考虑 FOB 贸易下卖方的利益。我们知道，在 FOB 贸易术语下，货物的买方是与承运人订立运输合同的托运人，而提单上记载的托运人一般是货物的卖方（单证托运人）。目前各国法律之所以允许提单正面“托运人”一栏中可以写上卖方的名字（从合同的角度来看，卖方其实并不是真正的托运人），我国《海商法》与《汉堡规则》甚至不惜在立法上扩大托运人的定义，[15] 其最直接、最真实的意图就是为了保护 FOB 卖方的利益，使之有权向承运人要求签发提单而控制货物；而依照《草案》的设计，只要作为托运人的 FOB 买方拖延接受卖方转让的提单，即使买方未支付货款，他也有机会指示承运人将货物交给自己，而承运人无需承担无单放货的责任，此时，FOB 卖方又如何保证自己的权利？

支持《草案》规定的理由是，这样的设计符合航运实践，因为航次租船合同中大都有无单放货的约定，[16] 这将有利于现代贸易。[17] 这种理由显然是站不住脚的。虽然在 FOB 贸易下，航次租船合同中往往有承租人可以凭保函提货的约定，但不能不指出的是，这一做法满足的仅仅是贸易中买方的利益，而不是卖方利益；况且，

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14 参见本文“二、《草案》改革背景”。

15 我国《海商法》第 42 条中“托运人”的定义是：1. 本人或者委托他人以本人名义或者委托他人为本人与承运人订立海上运输合同的人；2. 本人或者委托他人以本人名义或者委托他人为本人将货物交给与海上货物运输合同有关的承运人的人。

16 《草案》一读文本第 174 段说明。

17 《草案》一读文本第 181 段说明。

目前各国法律也并没有像《草案》那样免除承运人无单放货的责任。法律在本质上是一种利益的平衡，有人甚至称之为“平衡的艺术”，以完全舍弃一方利益（FOB 卖方）为代价而满足其他当事方（FOB 买方与承运人）利益的制度安排，又如何能被认为是有利于现代贸易呢？

（五）从承运人的角度审视《草案》规定

若《草案》规定最终被接受为公约的正式案文，这对承运人来说也未必是一个福音。

首先，由于《草案》规定并不具备可操作性，即使有这样的规定，承运人也往往无法得到控制方或托运人的指示，因提单延迟而致不能及时提货的问题还是得不到解决;况且，其中模糊不清的规定，反而会给承运人增加风险，例如，“尽合理努力”就属于非常模糊的字眼，若法院最终认定承运人可以“尽合理努力”找到控制方，而承运人却听从了托运人的指示放货，承运人还是要承担无单放货的责任。

其次，即使《草案》将来成为公约，也并不是世界上所有国家都会参加该公约。承运人根据《草案》的规定所实施的无单放货行为，可以得到公约参加国的认可，但是，如果货方在非缔约国对承运人提起无单放货的诉讼，结果将如何？这里将涉及复杂的法律适用问题，非缔约国法院将根据本国的冲突规范来决定公约是否适用，如果公约不能被适用的话，承运人还是不能避免承担无单放货责任的结局，更为不利的是，此时，承运人已经失去了保函的“庇护”。

总之，《草案》第 49 条（b）（c）两款的设计，既缺乏理论支持，又不具有合理性与可操作性，甚至会鼓励欺诈。坦率地讲，如此改造提单“提货凭证”功能的方案，是不成功的。

四、《草案》改革后的提单是否还是物权凭证？

（一）问题的提出

众所周知，提单之所以被公认为国际贸易的基石，是因为它所特有的物权凭证功能，基于此功能，转让提单可以起到转让货物所有权以及设定货物质权的作用，这对买卖货物的当事人以及信用证下的银行来说，是至关重要的。

其实，《草案》也清楚地意识到提单是集运输合同功能与物权凭证功能于一身的单证，而且，其改革本意并不是要彻底消融提单的物权凭证功能，而是要在物权

凭证功能与运输合同功能之间达致一种新的平衡。[18] 但是，值得我们反思的是，《草案》第 49 条（b）（c）两款对提单“提货凭证”功能进行改革后，提单还能发挥物权凭证的功能吗？

（二）两大法系下的结论

1. 英美法系

虽然英美法对提单物权凭证功能并不存在一个准确一致的定义，但各种论述的核心基本上都指向了“推定占有”的概念。[19] 例如，对提单“物权凭证”功能比较权威的解释是：“它是一份关于货物的单证，它的转让起到了转让对货物推定占有的作用，并可以起到转让货物财产权的作用。”[20] 其实，提单能够起到转让货物所有权以及设定货物质权的作用都是由“推定占有”衍生出来的。

Carver 在《Carriage of Goods by Sea》[21] 一书中指出：“提单转让行为导致的是推定占有，即向承运人请求提货权利的转让”。

“提单作为 document of title 的本质在于转移推定占有，即转移向承运人请求交付的权利”，《Chorley & Giles' Shipping Law》一书如是说。[22]

Paul Todd 认为：“由于货物的交付必须提交正本提单，这意味着提单的转让也就能够转让对卸下的货物进行占有的权利，由于这个原因，提单被说成是‘document of title’，代表着处在海上的货物；以及被说成转让了对货物的推定占有……”[23]

显然，在英美法下，提单的推定占有作用必然要求提单持有人获得确定的提货请求权，即承运人应当凭单放货，这是提单能够成为物权凭证的根本所在，如果像《草案》那样弱化提单的“提货凭证”功能的话，提单将不再是物权凭证。

2. 大陆法系

从大陆法系的角度来看，提单能否发挥物权凭证的功能，关键是要看持有提单是否能够满足物权变动的公示性要求。物权的公示，是指物权变动时，为保护交易安全，必须将物权变动的事实通过一定的公示方法向社会公开，从而使第三

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18 司玉琢、蒋跃川：《关于无单放货的立法尝试—评〈UNCITRAL 运输法草案〉有关无单放货的规定》，载于司玉琢主编：《中国海商法年刊》2003 年卷，第 17 页。

19 这也正是我国学者认为 document of title 应译作“占有证券”的原因，参见姚洪秀、王千华：《浅谈海运提单所证明的权利属性》，《中国海商法年刊》1997 年卷。

20 *Benjamin's Sale of Goods*, 6th edition, London: Sweet & Maxwell, 2002.

21 1982 年第 13 版。

22 转引自姚洪秀、王千华：《浅谈海运提单所证明的权利属性》，载于《中国海商法年刊》1997 年卷。

23 Paul Todd, *Bill of Lading and Bankers' Documentary Credits*, London/Newyork: Routledge, 1990, p. 7.

人知道物权变动的情况，以避免第三人遭受损害。[24] 对于动产所有权，各国物权法大多以交付或占有作为公示的方法[25]，而当货物还在海上运输时，卖方根本无法完成货物的实际交付，于是，提单被视为货物的象征，占有提单即相当于占有了货物，这样的结论都属于法律上的拟制。但是，我们必须清醒地认识到，这样的法律拟制并不是可以凭空捏造出来的（例如，我们不能简单地将海运单也拟制为货物），而是需要其他特定条件的支持。

按照民法占有理论，占有可分为直接占有与间接占有，当货物还在海上运输时，对货物的直接占有人是承运人，而提单持有人只能是间接占有。间接占有是指并不直接占有某物，但可依据一定的法律关系而对于直接占有某物的人享有返还占有请求权，故可对于该物形成间接的控制和管理。[26] 显然，提单持有人间接占有能够成立，在法律上必须认可提单持有人对承运人享有返还占有请求权—交付货物请求权，使间接占有能够顺利转化为直接占有，否则，间接占有就成了无源之水、无本之木。其实，占有提单之公示作用的实质在于，法律认可提单持有人能够通过占有提单向任何第三人公示他享有向承运人提货的排他性权利，否则，公示作用就可能“名不符实”了。

然而，提单持有人的交付货物请求权已经被《草案》改造得非常“脆弱”，只要提单迟于货物到达目的地，或者由于其他原因提单持有人未能及时要求提货，提单持有人的交付请求权就会被他人（例如，托运人）取而代之，如此“脆弱”的请求权显然不能满足间接占有下公示作用的要求，持有提单的公示作用可以说是“名存而实亡”。可见，在《草案》的设计下，按照大陆法系的理论，提单的物权凭证功能也已经完全丧失了。

（三）《草案》的改革后果

结果是——这可能令《草案》的起草者也始料未及[27]——在《草案》下，提单转让根本无法转让货物的推定占有或间接占有，提单转让也无法确定地起到转让货物所有权的作用，同样，银行占有提单也不能享有货物质权，这将严重扰乱国际贸

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24 物权变动之所以需要公示，这是由物权本身的性质决定的，因为物权具有排他性与优先性，如果物权变动不采用一定的公示方法，某人享有某种物权，第三人并不知道，而该人向第三人主张优先权时，必然会使第三人遭受损害。

25 交付作为公示方法，是着眼于动态的物权变动，处于静态的动产物权，则以占有作为公示的方法，二者相辅相成，共同构成动产物权关系的公示方法。

26 王利明著：《物权法论》，北京：中国政法大学出版社 1998 年版，第 819 页。

27 《草案》一读文本第 162 段指出，提单物权凭证功能与运输合同功能都应得到尊重，但应根据具体情形决定哪种功能优先。据此，我们推断起草者设计第 49 条（b）（c）两款的本意可能是：若承运人没有无单放货，或者提单转让发生在无单放货前，提单将依然可以发挥物权凭证的功能。通过本文上面的分析可知，这显然是不能成立的。

易的秩序：已经支付货物价款而持有提单的人，在法律上可能并未取得货物所有权，[28] 如果卖方破产的话，货物还会被认定为卖方的破产财产；承运人听从托运人的指示无单放货后，持有提单的银行不但不能要求承运人承担无单放货的责任，由于其未能获得货物质权，也不能通过法院扣押、拍卖该货物优先受偿。

如此提单，还会被国际贸易的各参与方使用吗？答案是不言而喻的。

五、如何解决提单延迟问题？

我们认为，真正能够解决提单延迟问题的，是海运单与电子提单。因此，《草案》应精心设计关于海运单与电子提单的法律规则，关于这方面的工作，有待于进一步加强。例如，对于海运单下的权利如何转让《草案》没有做一个统一的规定，反而留给了国内法；[29] 而对于电子提单《草案》更是未规定任何实质性的转让规则。[30]

（一）鼓励海运单的使用

英国法官 Antony Lloyd 在“提单，我们真的需要它吗？”的演讲中曾指出：“除了仍需要物权凭证的少数情况外，我确信海运单将最终取代提单作为统一的海上货物运输合同。”[31] 这是一个正确的意见。

目前，海运单的使用已经形成一定规模，但可转让提单的使用量依然要大于海运单。而联合国贸发会所做的调查表明：人们往往是出于习惯使用可转让提单，而并不是真正对物权凭证的需求。[32] 毫无疑问，这需要商业人士在未来的商业实践中加以改进。[33]

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28 当然，所有权变动的问题非常复杂，各国规定也不一致。不过，按照大陆法系的观点，物权变动之所以需要公示，这是由物权本身的性质决定的，因为物权具有排他性与优先性，如果物权变动不采用一定的公示方法，某人享有某种物权，第三人并不知道，而该人向第三人主张优先权时，必然会使第三人遭受损害。

29 《草案》第 61 条。

30 《草案》在第 2 章“电子通信”对于电子提单如何转让并没有设定实质性的规则（当然，这一点是非常困难的），只是简单地规定要依据当事人之间约定的程序来进行。

31 Anthony Lloyd, The Bill of Lading: Do We Really Need It? This paper was given as the Sixth Annual Lecture of the Institute of Maritime Law of the University of Southampton, 24 November 1988.

32 丁丁、杨运涛：《国际贸易中运输单证的作用》，载于《中国海商法协会通讯》2004 年第 6 期，译自联合国贸发会秘书处文件“The Use of Transportation Documents in International Trade”。

33 有人建议，为鼓励使用海运单，承运人可以采取这样的办法：如果托运人愿意接受海运单，那么，承运人可以提供一个较低的运价；如果托运人坚持得到可转让提单，则提供一个高价。参见杨大明：《论无正本提单交付货物—潜在的各种危险》，载于《中国海商法年刊》2000 卷，第 57 页。

《草案》已经将不可转让单证纳入了其调整范围，这将大大促进海运单的推广使用，显然，《海牙一维斯比规则》仅适用于提单或类似的物权凭证，是目前海运单未能得到广泛使用的一个重要原因。[34]

（二）电子提单

要彻底解决提单延迟问题，方法只有一个——正如杨良宜先生所指出的："无单放货的救星：电子提单"。[35] 联合国贸发会在对《草案》的改革表示强烈反对的同时，也认为采用电子提单才是解决问题的根本。[36] 这是因为电子提单可以利用"功能等价法"保留纸提单的物权凭证功能，还可以（1）大大加快贸易领域的整个操作时间；（2）使承运人在货物到达目的地时很容易确定谁是收货人。[37]

当然，电子提单的全面实行必须建立在电子商务的平台之上，也就是说，它必须依赖于整个国际贸易形态的变化，国际贸易从实物交易到单证交易是一次飞跃，从单证交易到信息交易将是一次更大的飞跃，这是贸易活动电子化、网络化与数字化的最后结果。因此，电子提单取代纸提单是一个必然的趋势，但还有一段很长的路要走。

（三）结论

从表面上，《草案》的改革涉及的仅仅是承运人的货物交付义务，但是，由于提单同时是重要的贸易单证，其引发的后果却是动摇了整个国际贸易的基石，假若接受这样的改革，无论单证买卖还是信用证的法律规则，几乎都要推倒重来，这几乎是不现实的。

最后，本文还要指出的是：在电子提单还没有真正普及前，承运人签发了纸提单的话，凭保函放货还是一种务实的解决方案。对此，也许可以做如下解释：提单延迟，归根结底是国际贸易形态尚未充分发展造成的，在这个"中间阶段"，我们尚无法彻底消除提单所带来的问题；货方提供可靠保函才能提货，交易成本中增加

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34 丁丁、杨运涛：《国际贸易中运输单证的作用》，《中国海商法协会通讯》2004 年第 6 期，译自联合国贸发会秘书处文件"The Use of Transportation Documents in International Trade"。

35 杨良宜著：《提单及其付运单证》，北京：中国政法大学出版社 2001 年版，第 150~156 页。

36 See UNCTAD Commentary on CMI/UNCITRAL Draft Instrument on Transport Law, at http://www.mcgill.ca/maritimelaw/maritime-admiralty/.

37 例如，根据 1990 年 CMI《电子提单规则》，每一次转让行为都要通过承运人配发"私人钥匙"（Private Key）来进行，因此，在货物到达目的地时承运人当然知道谁是收货人；在 1999 年的 Bolero（Bill of Lading Electronic Registry Organization）系统下，每一次货物转让都要通过"权利登记处"（Title Registry）进行，货物到达后，承运人只要查询一下"权利登记处"就可知道谁是收货人了。

了一笔不菲的担保费用，这是货方所必须付出的代价，而船方凭保函放货也往往存在一定的风险，这是船方所必须付出的代价。从宏观上看，与其说凭保函放货的做法对船方不公平，[38] 倒不如说是船货双方共同承担了提单延迟所带来的不利益，国际贸易与航运本来就是一对孪生姊妹，相互依存，是一个利益的共同体，由它们共同来承担提单在这个特定历史时期下的负面作用，也可以说是合理的。“法律的生命在于经验，而非逻辑”，这一法律格言适用于保函的方法来解决提单延迟问题是很合适的：从理论上看，它显然是不完美的，但是，它却是务实的解决方法。

38　这是《草案》改革所坚持的观点。

Conflict of Jurisdictions in Maritime Disputes in China

ZHANG Liying *

Abstract: This article discusses relevant legal issues with regard to the conflicts of jurisdictions between China's domestic courts and foreign courts, as well as between arbitrations in one country and litigations in another country. More conflicts of jurisdiction occur in maritime field than in any other field due to the peculiarities of maritime law and maritime disputes, e.g., "personification" of ship, *Action in Rem*, forum shopping, and the arrest of ships. By focusing on these peculiarities and drawing upon useful experiences from foreign practice, this article put forward some of the author's own views concerning the resolution of this problem on the basis of an analysis of relevant cases and theories of foreign States.

Key Words: Conflict of jurisdictions; "Personification" of ship; Doctrine of reciprocity; *Action in Rem*; Forum shopping

I. Introduction

Though as a developing country, China boasts one of the five biggest fleets in the world in terms of DWT (by the end of 2003).[1] With the accelerated development of China's foreign trade and maritime activities, international trade and maritime disputes in China has been on the rise. Also, there were an increasing number of cases occurred with regard to the conflict of jurisdictions between China's domestic courts and foreign courts, as well as between arbitrations in

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1 The Top Ten Fleets in the World in DWT (Dead Weight Tonnage) (by the end of 2003) are as following: Greece: 19.8%; Japan: 13.9%; Norway: 7.9%; China: 5.6%; US: 5.4%; Germany: 5.4%; Hong Kong: 4.7%; South Korea: 3.4%; Taiwan: 3.1%; Singapore: 2.4%. At http://www.moc.gov.cn/2004-12, 15 December 2004.

one country and litigations in another country[2] in recent years. Since China lacks complete regulations in this regard,[3] due to the shortage of related experiences, most of the Chinese courts tend to insist on their own judicial jurisdiction in a bid to protect the interests of Chinese parties in a more effective way.[4] As a result, it often leads to conflict of jurisdictions, which on the contrary brought forth parallel litigations, also has an adverse effect on China's investment circumstances. Most of the western countries have already had a rather complete set of regulations in the respect of conflict of jurisdictions. This paper is aimed at learning experiences from these countries, on the basis of analyzing relevant cases and theories of the United States, the United Kingdom and other country. Further, it is also supposed to put forward some of the author's views concerning the resolution of the conflict of jurisdictions.

The body of this article can be divided into three parts. Part II gives an overview on the conflict of jurisdictions, which illustrates several forms of jurisdictional conflicts in the field of maritime affairs in China, with emphasis on the conflict between China's domestic courts and foreign courts, as well as between arbitration in one country and litigation in another country. Part III analyzes the reasons why there are more cases of conflict of jurisdictions in the area of maritime than in any other field. The focus of this part is the particularities of maritime litigations. Part IV contains some principles on the resolution of jurisdictional conflicts, and offers the author's views in this respect. Hopefully, these views would be of some use for the settlement of this issue in China.

II. An Overview of the Conflicts of Admiralty Jurisdiction in China

Four major approaches are taken in China for the resolution of maritime disputes: consultation, settlement by the HSA,[5] arbitration and litigation. The latter three approaches are bound to bring about conflicts, which consist of the conflicts of jurisdiction between two domestic maritime courts, the maritime court and non-

2 Cao Jianming, A speech on the 20th Anniversary of the Founding of Admiralty Courts, at http://www.china court.org/public/detail.php?id = 120768, 27 November 2005. (in Chinese)

3 There is only one article dealing with this problem, that is article 305 of Supreme People's Court Opinions on Certain Questions Concerning the Application of the Civil Procedural Law of the People's Republic of China (1992).

4 Zhang Xiaomei, Jurisdictions of Maritime Disputes in China, at http://www.cnki.net/oldcnki/index4.him, 27 November 2005. (in Chinese)

5 HSA refer to as Harbor Safety Administration, at http://www.gzjt.gov.cn/zcfg/zcfg_result.asp?cata_id = 6&action = search, 27 November 2005. (in Chinese)

maritime courts, domestic maritime courts and foreign counterparts, as well as conflicts between arbitration and litigation and those between litigation and the administrative handling of HSA.

A. Conflicts of Jurisdiction between Maritime Courts and General Courts[6]

There has been a continual conflict of jurisdiction between maritime courts and general courts. The Supreme Court of the P. R. C has already issued orders[7] that the local general courts are not authorized to hear any maritime cases which the maritime courts has the exclusive jurisdiction. However, the local general courts in practice hear and determine maritime cases frequently. Besides objection to jurisdiction by any of the parties, this problem may also be resolved domestically through such means as coordination and document-issuing by the superior courts.[8] Nevertheless, for certain cases, their jurisdiction is so ambiguous that it is reasonable for both local general courts and maritime courts to hear, such as the cases within the port.[9] However, considering that these conflicts may be solved domestically, they are not addressed in this thesis.

B. Conflicts between Judicial Jurisdiction and Administrative Authorities

China resolves certain disputes through the administrative process, whereas the United States tends to rely on litigation. There exists a fairly complicated relationship between Chinese maritime courts and China Maritime Safety Administration (CMSA) who cooperate with yet at the same time oppose each other. For example, when the court wants to arrest a ship, it is the CMSA that carries out the arrest. To some extent, it is also beneficial for the parties to resolve their dispute through mediation by the CMSA instead of litigation, especially in cases concerning collision and general average, which may last for long time and

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6 Chinese courts may be classified into two kinds: special courts and general courts. Special courts include maritime courts, railway transportation courts, and military courts. Maritime courts have exclusive jurisdiction for maritime cases; railway transportation courts have exclusive jurisdiction for criminal cases of jeopardizing railway transportation and cases of disputes on railway transportation; and military courts have exclusive jurisdiction for the cases of crimes committed by military personnel.

7 Supreme People's Court Opinions on Certain Questions Concerning the Scope of the Jurisdiction of Admiralty courts (2001). This opinion tries to specify whether a particular dispute is an admiralty or maritime case.

8 See Supreme People's Court, Working Report of the Supreme People's Courts to the National People's Congress (2003).

9 See Maritime Litigation, at http://www.cnnb.com.cn/gb/node2/node743/node747/userobiect7ai7258.html, 27 November 2005. (in Chinese)

cost a lot. In this regard, the CMSA played a positive role in resolving maritime disputes. However, on the other hand, nowadays, it is quite often the case that the CMSA interferes excessively with maritime disputes, which conversely brought inconveniences and troubles to the parties to the disputes. For instance, in a multiple-party case in which the CMSA is a stakeholder,[10] the CMSA often negotiate with some parties on behalf of the other parties. Since the CMSA has its own stake in the dispute, the settlement of this dispute may turn out to be unfair to some parties, or fail to produce satisfactory results to some parties. In case of unequal contribution of costs and charges, the CMSA may even be sued. It is hoped that the process and result of law enforcement by the CMSA can abide by the regulations and rules in China. However, considering that these conflicts may be solved domestically, they are not addressed in this paper either.

C. Conflicts of Jurisdiction between a Domestic Court and a Foreign Court

Conflicts of jurisdiction are very likely to result in the same action pending in several courts. This may occur in the following occasions:

1. The same plaintiff files actions against the same defendant based on the identical factum in several court at the same time.[11] Since the aim of the plaintiff in this occasion is to exert pressure upon the defendant, his motive is defective. In other occasions, the plaintiff may just wish to conclude the case much faster or files the suit in places where there exists the defendant's property he wants to seize.

2. The two parties respectively bring a suit against each other in courts of different States.[12] That is to say that the plaintiff in State A is equivalent to/became the defendant in State B, and *vise versa*.

3. More than one plaintiff in one case sues the same defendant in different States.[13] For example, when the ship owners of A and B agree to commence an action in a certain State, the cargo owners file a suit against the ship owners in another State, and the family members of the death in vessel B sue vessel A in a third State.

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10 The CMSA may be an interested party in cases such as maritime salvage or compulsory removal of wreck. At http:// www.gzjt.gov.cn/zcfg, 27 November 2005. (in Chinese)

11 Lawrence Collins, *Dicey and Morris on the Conflict of Laws*, London: Stevens & Sons Limited, 1987, p. 395.

12 Lawrence Collins, *Dicey and Morris on the Conflict of Laws*, London: Stevens & Sons Limited, 1987, p.395.

13 Lawrence Collins, *Dicey and Morris on the Conflict of Laws*, London: Stevens & Sons Limited, 1987, p.395.

III. Peculiarities of the Conflicts of Jurisdiction in the field of Maritime Dispute

More conflicts of jurisdiction occurred in maritime field than in any other field due to the peculiarities of maritime law and maritime disputes. Thus, some knowledge of these peculiarities is helpful for the resolution of the conflicts.

A. The "Personification" of Ships

The "personification" of ship makes ships having some peculiar characteristics other than normal things and enables ships having a status of defendants in lawsuits.[14] Due to the mobility of ships, the plaintiff may choose to file the suit in any places where the ship may call at, which makes it easier to bring forth conflicts of jurisdiction. Things cannot be served, whereas ship can be served. Even though the ship owners are exempted from liability, ships should occasionally be liable to arrest and held responsible.

Though as objects of property right，ships are often regarded as natural persons or legal persons in legal documents. This is called "personification" of ship. It puts emphasis on the legal character of ship and makes the status of ship rising from an object to a "person".[15] A ship has a number of characteristics similar to a natural person, for example, a ship has its nationality, name, home port, age, tonnage, and its life periods starts from the moment when it was launched until when it lost its navigation capability. The personification of ship brings changes to the legal status of a ship which is different from normal things.

B. Actions in Rem

The legal personality of a ship is chiefly reflected in *actions in rem*. In the Anglo-Saxon legal system, a ship may be held liable for the torts it has committed and for the contracts it has breached, therefore, a ship may act as a party in *actions*

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14 The Bold Buccleugh, 7 Moore, P. C. 267 (1852). It was held that a lien for collision damage could be enforced against the offending ship in the hands of an owner who had bought her after the collision and whose good faith and lack of notice the court was willing to assume.

15 Hebert, The Origin and Nature of Maritime Liens, *Tul. L. Rev*., Vol. 4, 1930, p. 381.

in rem. For example, in some American cases such as *The Little Charles*,[16] *The Palmyra*,[17] *The Brig Malek Adhel*,[18] ships were regarded as a party during the litigation.

Normally, an *action in rem* is commenced by arresting property, typically a vessel. And an *action in rem* is not applicable for all maritime disputes because the arrest procedure is authorized only to enforce a maritime lien[19] or as otherwise permitted by statute.

C. Forum Shopping and the Arrest of Ships

In the battle over venue in international litigation, the defendant is far more impotent. Shopping is by no means the sole domain of plaintiffs，for with the exception of cases in which negative declaratory relief is sought by a party which would normally be a defendant, plaintiffs enjoy the initial choice.[20] The connecting factors of establishing jurisdiction mainly include the *forum domicilii*, seat of business, seat of ship, *lex loci delictic ommissi* and ship arrestment location (including arrestment of sister ship). Among all the factors, ship arrest location is most frequently used in practice, since it is favorable for the plaintiff to conduct forum shopping in the following three respects: At first, ship arrest location is a common connecting factor in maritime disputes and tends to be more flexible to plaintiff than other jurisdictional bases, such as nationality or domicile. Furthermore, using ship arrestment location to establish jurisdiction could guarantee that the plaintiff is available for due compensation. Last but not least, the determination of ship arrestment location has less influence from the defendant. In most of the cases, the competent jurisdiction should have major relations with the defendant, such as the domicile and business seat of the defendant while in cases

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16 The Little Charles 26 Fed.Case.979, Case No.15, 612 (C. C. D. Va. 1819). In this case, the vessel was so used without the knowledge or consent of the owner. Marshall wrote: "But this is not a proceeding against the owner, it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable, that the vessel should be affected by this report.

17 "The Palmyra" 25 U. S. (12 Wheat.) 1 (1827).

18 "The Brig Malek Adhel " 43 U. S. (2 How.) 210 (1844).

19 "The Rock Island Bridge" 73 U. S. (6 Wall.) 213 (1867).

20 Andrew Bell, *Forum Shopping and Venue in Transnational Litigation*, London: Oxford University Press, 2003, p.338.

relating to ship arrestment location, although the ship is owned by the defendant, the arrestment location is decided to a large extend by the plaintiff, for the ship sails all the time. As mentioned above, if the defendant intentionally hides the ship in order to evade arrestment, it would definitely suffer from business losses. Thus, the determination of ship arrestment location is more influenced by the plaintiff. Furthermore, most of the countries now admit the arrest of the sister ships or associated ships,[21] which makes the defendant more passive.

D. The Jurisdiction of Maritime Courts Is Broader

In China, the jurisdiction of maritime courts is broader than that of general courts. For example, as to the agreed jurisdiction, according to the Article244 of the Civil Procedural Law of the PRC, litigants in a case concerning contract disputes or disputes over property rights involving foreigners may agree in writing to choose the court at the place that has an actual connection with the dispute as competent court， and pursuant to the Article 8 of the Special Maritime Procedure Law of the PRC, agreed jurisdiction in the maritime fields doesn't require actual connection between the dispute and the selected maritime court. This "particular agreed jurisdiction" is regarded as a break through to the Civil Procedural Law, and reflects a tendency of the maritime courts to expand their jurisdiction. Another example is about the disputes involving oil pollution of the sea. Generally, disputes arising out of this kind of tort are governed by the law of the place where the tort is committed. However, the Special Maritime Procedure Law provides for a few new connecting factors in addition to those established in the Civil Procedural Law. In accordance with the Article 7 thereof, a maritime court of China should have the jurisdiction over cases in which prevention measures for oil pollution of the sea are taken in the place where the maritime court is located, even though the pollution is not actually occurred in Chinese seas.

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21 E E Sharp & Sons Ltd v. MV Nefeli 1984 (3) SA 325 (C) is the first reported case to deal with the arrest of an associated ship. The case involved an admiralty action in rem for the attachment of the ship Nefeli. The ship was registered in Panama and owned by a Greek company. The applicant's maritime claims were in respect of goods supplied to the vessel and also to certain other vessels alleged to be associated or sister ships. There was no difficulty in obtaining an order for the arrest in respect of the claims against the Nejeli itself. All the ships concerned were owned by separate companies, and, as King A J observed, this is precisely the situation which the section is intended to cater for, namely a series of "one ship" companies, all controlled by the same interests, but previously because of their separate legal personalities immune from attachment in respect of debts incurred in respect of the sister ship.

IV. Resolution of Conflicts of Jurisdiction in Maritime Disputes

With the development of China's foreign trade after its entry into the WTO, there is an increase of maritime disputes involving conflicts of jurisdiction. However, China has no complete set of regulations with regard to the resolution of international parallel litigation. The resolution of the problem of parallel international litigation will be conductive to the maintenance of the legal stability and harmony of international civil litigation.

A. The Principle of Comity

Though there is no provision in Chinese law on the settlement of parallel international litigations, the doctrine has been given intermittent recognition in relevant jurisprudences of the Supreme People's Courts and practices of People's Courts. According to Article 306of Supreme People's Court Opinions on Certain Questions Concerning the Application of the Civil Procedural Law of the People's Republic of China (1992), "in regard to cases over which the courts of both the People's Republic of China and foreign States have jurisdiction, the People's Court may establish jurisdiction where one party brings such a case before the foreign court whilst the other before the People's Court of the People's Republic of China." This opinion by the Supreme Court is too simple to resolve the problem of parallel litigation. Nevertheless, this opinion uses the term of "may" instead of "must" or "shall", which means that the people's court may, or may not, establish its jurisdiction in case of parallel litigation. In practice, Chinese courts have always regarded the jurisdiction of cases involving foreigners as one of the representations of the State sovereignty, and that there is no obligation for the Chinese courts to recognize the judicial judgment by foreign courts. Therefore, Chinese courts rarely insisted the prohibition of simultaneous actions pending in courts of different countries.[22] A typical example is that, in *Tianjing Native Products Import & Export Company v. A Belgian Compan*y,[23] the People's Court overlooked the difficulties

22 Xi Yaoming, Lis pendens in Civil procedure, *Judicial Review*, Vol. 6, 2002, pp. 15~17. (in Chinese)

23 Tianjing Native Products Import & Export Company v. A Belgian Company, in Lin Zhun ed., *Selected Cases of Private International Law*, Beijing: Law Press China, 1996, pp. 64~68. (in Chinese)

in enforcement of its judgment both in China and in Belgium.[24] In this case, the Chinese party can only get a piece of paper.

Current legal stipulations and judicial practices in China often overemphasize the principle of State sovereignty, so that Chinese courts always accept any case over which they have jurisdiction, regardless of whether or not there is any other simultaneous actions pending in other countries, and they may also refuse to recognize and enforce judgments by foreign countries, if they have already made their own judgment on the case. One of the major shortcomings of this practice is that it attaches too much emphasis on State sovereignty and neglects international coordination. It is influenced by the current judicial chauvinism and is not conducive to the development of China's foreign relations with other countries and the normal operation of international business and trade. However, an overview of the practice of Chinese courts regarding parallel litigation may find that the idea of insisting on the jurisdiction of domestic courts still prevails.

In the opinion of the author of this article, China should adopt the doctrine of international comity when dealing with *lis pendens*. As the world today is featured with expanding economic cooperation and exchanges, it is both natural and evitable that there may be disputes of various kinds. Thus, if courts of a State are always fighting for their own jurisdiction during international civil litigations, especially in cases over which all relevant courts of different States have jurisdiction, the State will certainly end up in an undesired situation and its relations with other States may even be affected. In a word, the principle of international comity shall be deemed as a fundamental principle for courts of different States to deal with the issue of conflicts of jurisdiction in international civil litigations.

B. The Principle of Reciprocity

The compliance with the principle of international comity is necessarily related to that with the principle of reciprocity and closely associated with the recognition and enforcement of judgment. If a foreign court held an unfriendly or even hostile attitude to China during a case involving parallel litigation, e.g., the foreign court

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24 Lin Zhun ed., *Selected Cases of Private International Law*, Beijing: Law Press China, 1996, pp. 64~68. (in Chinese) In this case, the defendant had appealed to a Belgian court for the payment of goods by the plaintiff. In spite of this, the People's Court concerned accepted the action in the name of the People's Court of the place where the contract was performed and subsequently delivered judgment. Though jurisdiction seemed to be asserted, enforcement was a big problem, for the defendant had no domicile and no distrainable property in China, and the defendant had brought the same action in a Belgian court which exercised its jurisdiction.

insisted on accepting a case simultaneously pending in a court in China, the Chinese court shall not only assert its own jurisdiction, but also deal with future similar cases involving this State on the basis of reciprocity.

C. The Principle of Effective Jurisdiction

In line with the principle of effective jurisdiction, a Chinese court should only insist on its own jurisdiction over cases in which the parties and their properties are within its effective control and its judgment on which may be enforced in China or could be recognized and enforced by the foreign court also appealed to by the parties. This is because if the effective judgment by the Chinese court could not be enforced at all, the judgment is just equal to a blank paper for the winner party. In this case, it is better to give up its own jurisdiction; otherwise, it would have negative effects on the dignity of the court. This principle differs from the doctrine of effectiveness (i.e., the doctrine of actual control) in the UK and the US. In line with the doctrine effectiveness in the UK, a UK court may establish its jurisdiction as long as its summons could reach the party within the boundary of the UK. However, the principle of effective jurisdiction referred to in this article chiefly emphasizes the enforceability of the judgment, with an aim to restrict the jurisdiction of China's courts over foreign-related cases.

D. The Principle of Conditional Limitation

All States that prohibit parallel litigation also adopt the principle of conditional prohibition or limited prohibition and up till now none of them has adopted the principle of unconditional (or unlimited, or complete) prohibition, China should abide by the principle of conditional prohibition in order to improve relevant regulations. In other words, while complying with the principle of international comity by observing international treaties and respecting international customs and conventions, China should also insist on its State sovereignty, which is the basis for the compliance with the principle of comity. Therefore, China should unconditionally admit but not completely prohibit parallel litigation.

E. To Accelerate the International Uniformity of Maritime Legislations

The lack of uniformity in maritime legislations of different States can account or the principal reason why venue may be of critical significance as well as the pre-eminent explanation for the phenomenon of forum shopping. Procedural differences

between jurisdictions will make some forums far more attractive than others from the plaintiff's perspective; furthermore, the relative lack of uniformity in both a State's domestic laws and applicable laws and regulations dictates the differences in the substantive principles which will be applied in a given case depending on the forum selected. A large part of maritime legislations involves techniques and profession knowledge. For this part, it is easy to gain uniformity in admiralty area than any other areas. Even though international conventions have their limitations, they could still reduce conflicts of jurisdiction to some extent. In the maritime field of disputes, the primary task should be to promote the international legislations concerning the arrestment of ships, the uniformity of which may reduce the conflicts of jurisdictions in maritime disputes to some extent.

The International Convention relating to the Arrest of Sea-going Ships was concluded in Brussels on May10, 1952. The general purpose of the Convention, which has been ratified or acceded to by no fewer than 63 States, is to provide internationally uniform rules as to the right to arrest sea going ships through judicial process in order to secure maritime claims against the owners of the ships.

The current draft of the Convention is made in 1999.

V. Conclusion

There are no other means of solving the conflicts of jurisdiction in maritime litigation than domestic legislation and international cooperation, with the major solution being legislation and judicial practice at the domestic level. However, at present, there are almost no regulations concerning the settlement of conflicts of jurisdiction in maritime litigation in China, which is an urgent problem. The author of this article holds the view that there are both general principles on and maritime-area-specific approaches to the settlement of this problem. As for general principles, it is advisable for China to correct its past practices concerning judicial jurisdiction which are featured with the overemphasis of State sovereignty and the lack of comity. Besides, as conflicts of jurisdiction in maritime litigation have their own particularities, specific approaches should be taken to solve this problem. The traditional presumed theory of the personification of ships no longer has its reason for existence, but instead has brought forth troubles to the new ship-owner as well, and what's worse, has becomes one of the causes of forum shopping. Thus, the abandonment of this theory may, to some extent, reduce conflicts of jurisdiction in maritime litigation. The international unification of maritime legislation is the best way to solve the problem of conflicts of jurisdiction, but not necessarily the most effective way, considering the fact that it involves the coordination of various States.

论欧盟对班轮公会反垄断豁免的审查

徐　峻 *

内容摘要: 本文通过对欧盟条约对协议垄断和豁免的规定、欧盟对班轮公会反垄断豁免的立法的介绍，及欧盟委员会对 4056/86 号条例的审查的分析，提出关于我国班轮运输业反垄断豁免的立法的建议。

关键词: 欧盟　班轮公会　反垄断豁免审查

欧盟委员会于 2003 年对班轮公会的反垄断豁免权展开了审查，并于 2004 年公布了一份白皮书，虽然审查的最终结果还没有出来，但对于班轮公会的传统认识是一次严峻的挑战。

一、欧盟条约对协议垄断和豁免的规定

欧盟条约第 81 条[1] 是针对限制竞争的企业间协议、企业集团的决议以及其他一致行为(以下总称“协议”),其第(1)款规定了限制竞争协议是被禁止的，同时第(3)款又规定了豁免限制竞争协议必须同时满足的条件（以下简称“四个要件”）：

1. 有助于商品生产或流通，或有利于推动技术进步或经济发展；

2. 消费者能公平地分享到豁免带来的利益；

3. 为实现上述目的的限制竞争是必不可少的；

4. 不能排除市场竞争。

二、欧盟对班轮公会反垄断豁免的立法

考虑到海运业的特殊性，为避免对海运的过分管制，1986 年欧共体理事会通过了 4056/86 号条例，赋予了班轮公会有限度的反垄断豁免，主要内容包括：

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*　徐峻，中远集装箱运输有限公司。

1　即原《欧共体条约》第 85 条。

1. 4056/86 条例适用范围

4056/86 条例适用于进出欧盟各成员国港口的国际海上班轮运输，但不适用于不定期船运输。

2. 反垄断豁免范围

根据 4056/86 号条例规定，一个或数个班轮公会的全部或部分成员以固定运价、运输条件和其他内容为目标而制定的协议、决定和一致行为可豁免适用条约第 81 条第（1）款的禁止性规定，前述的“其他内容”包括：（1）协调船期表、开航时间或是挂港日期；（2）决定班期频率；（3）协调班轮公会成员之间的航班或挂港分配；（4）调节公会成员的运力投人；（5）在公会成员间分配货源或收人。

3. 班轮公会反垄断豁免的条件和义务

豁免的条件是：在欧盟市场范围内，协议、决定和一致行为对于同类货物运输，不得因原产国或目的地或装港或卸港的不同而使用不同的费率和运输条件，从而损害某些港口、运输使用者或承运人的利益。

豁免的义务包括：（1）班轮公会应与托运人之间就费率、运输条件和班轮服务质量进行协商；（2）托运人有权自由安排内陆运输和码头服务；（3）班轮公司的运价应能方便地被查询等。

三、欧盟委员会对 4056/86 号条例的审查

（一）过程

欧盟委员会于 2003 年 3 月开始对 4056/86 号条例[2]进行审查，这是该条例颁布以来面临的第一次审查。审查的核心内容是 4056/86 号条例赋予的班轮公会反垄断豁免的正当性。欧盟委员会向航运界和有关政府部门发布了调查问卷，这份问卷有 21 个问题，共收到了 36 份答复，包括班轮公司、托运人、货运代理和有关政府部门等。欧盟委员会于 2003 年 12 月 4 日就审查 4056/86 号条例举行了听证会。2004 年 10 月，欧盟委员会发布了《关于审查 4056/86 号条例的白皮书》（以下简称“《白皮书》”）。[3]

《白皮书》称，在最近十几年里独立承运人（即班轮公会以外的承运人）在大多数欧洲航线上的作用变得越来越重要，同时承运人之间采用联营体和联盟（不涉及固定运价）的合作形式也是越来越多，而且承运人与托运人之间的秘密服务

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2 Council Regulation (EEC) No 4056/86 of 22 December 1986, laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport.

3 White paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport.

合同也在大量地增加。这些发展产生的问题是——4056/86 号条例中的班轮公会反垄断豁免在《欧盟条约》第 81 条（3）款下是否仍然正当。《白皮书》最后认为，没有确凿的证据证明，班轮公会反垄断豁免在目前的市场环境下和第 81 条（3）款“四个要件”的基础上仍然是正当的，因此欧盟委员会建议：考虑废止 4056/86 号条例中的班轮公会反垄断豁免，并进一步考虑是否有其他替代方法。

（二）前景

4056/86 号条例作为集体豁免条例是由原欧共体理事会通过的，因此对于它的任何修改必须是欧盟理事会层面的立法行动，欧盟委员会可以提供相关建议，但是决定权在欧盟理事会，所以有关欧盟班轮公会反垄断豁免“存亡”的最终结果目前还很难预料。

（三）意义

欧盟委员会对班轮公会的审查说明了不存在“天然”享有反垄断豁免的行业，即使是传统的班轮运输业要保持豁免也应符合一般的竞争规则，就欧盟而言就是符合“四个要件”的规定。

比如，欧盟规范班轮公司联营体反垄断豁免的 823/2000 号条例，[4] 其有效期只有 5 年，到 2005 年 4 月 25 日终止。欧盟委员会之所以对其设置有效期，主要目的是能定期对该豁免进行审查（五年一审），以保证其赋予的集体豁免能始终符合“四个要件”的规定。而欧盟委员会于 2004 年开始审查 823/2000 号条例，并认定其符合“四个要件”，同意继续给予续展。2005 年 4 月 20 日，欧盟委员会发布了 611/2005 号条例，对 823/2000 号条例做了小幅度的修改，并对联营体赋予反垄断豁免直至 2010 年 4 月 25 日。值得注意的是，4056/86 号条例并没有设置有效期。

限制竞争协议具有破坏竞争的“本性”，但并非都不好，它也会产生一种高效率，由此带来的是成本的降低、商品或服务质量的提高以及新产品和新技术的产生等，换言之，当它产生的积极的经济利益大于其限制竞争带来的负面影响时就应该考虑对其进行豁免。而在一定期间内对这种豁免进行审查，有利于保护消费者的利益，并避免豁免被滥用。从这个角度看，不管最终的审查结果如何，欧盟对于 4056/86 号条例的审查是有积极意义的。

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4 Commission Regulation (EC) No. 823/2000 of 19 April 2000, on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

四、关于我国班轮运输业反垄断豁免的立法

我国目前对班轮运输业反垄断豁免没有明确的立法规定，但是将来在《中华人民共和国反垄断法》出台后，必须制定相关法律法规明确赋予班轮运输业反垄断豁免，否则将会与我国贸易伙伴国家（地区），如美国、欧盟、澳大利亚等的相关立法发生冲突——这些国家（地区）都有明确的立法规定赋予班轮运输业反垄断豁免。立法冲突的结果将使得经营中国航线的班轮公司处于一种显著不对称的法律环境中，这将不利于我国班轮运输业的稳定，并将对我国的对外贸易产生重大影响。

因此，我国的交通主管部门应该从现在开始，广泛调查我国班轮业的竞争现状，包括班轮公会、联营体、联盟和运价协议组织等，从适用范围、条件和义务等方面研究我国班轮业竞争和反垄断豁免的立法，并加快有关的立法工作，使得其能与《中华人民共和国反垄断法》保持同步，为有效地规范我国航运市场的竞争行为提供一个公平、合理的法律环境，以切实保障我国航运市场的健康发展。

关于海底沉没物相关法律问题的几点思考

徐锦堂 *

内容摘要: 从法律定性上看，海底沉没物不是无主物，也不是“人类共同继承遗产”，原则上归其沉没时的物主或其继承人所有。当然对按照一定的程序不能辨明所有权人的海底沉没物，除文物和公共财产外，自其沉没时视为无主，适用先占制度。《保护水下文化遗产公约》对水下遗产的保护和管理已经作了公平合理的规定，我国有必要加入该公约，但是该公约没有对水下文化遗产的归属问题做出任何规定，同时在水下文化遗产保护和管理制度的可行性方面也存在一定的问题。

关键词: 海底沉没物　无主物　水下文化遗产　产权

海底沉没物位于海洋底部，而海洋又被划分为领海、毗连区、专属经济区、大陆架和公海以及国际海底区域等不同的部分，各个部分的法律地位迥乎其异，因此关于海底沉没物的法律争议——从其法律属性、法律归属到对其的保护管理——比较复杂。事实上，人们对关于海底沉没物许多问题的认识还是模糊的。正是因为其法律地位未能廓清，才导致各国认识上的分歧，而这对海底沉没物尤其是水下文化遗产的保护极为不利。如果说若干年前限于人类的技术水平，海底沉没物（尤其是水下文化遗产）所遭受的破坏尚不严重的话，那么随着现代科学技术的进步，这种破坏日趋严重，保护水下文化遗产已成为亟需解决的问题。我国对国际海底沉没物的法律规定比较全面，但在其学术研究方面基本上还处于空白阶段，鲜有学者对此进行深入探讨。在国际法实践中，我国政府也很少利用有关的国际法和国内法来维护自己的正当权益。本文试图对海底沉没物的若干法律问题进行初步探讨，希望能在一定程度上廓清海底沉没物的法律属性、归属和管理等问题，以期能抛砖引玉，引起大家的关注，加强这方面的研究。

一、海底沉没物的法律属性

要恰当地解决海底沉没物的归属和保护等方面的问题，首先必须弄清海底沉

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没物的法律属性。目前，无论是国内还是国际上，对海底沉没物的法律属性问题都存在着一些不科学的认识，因此有必要进行探讨。

（一）海底沉没物是无主物吗？

不少人认为海底沉没物就是无主物，对于这一观点需要从理论上予以斟酌。何谓“无主物”？从罗马法以来，无主物就是“在现实中不归任何人所有的可交易物”，[1] 依照罗马法，无主物共有五种：即从未为人所有的物、敌人物、无人继承的遗产、遗弃物，另外埋藏物一般也被视为无主物。[2]

显然，海底沉没物不属于上述五种无主物中的任一种。那么仅仅因长期没有实际控制或多年不能实际行使所有权，能否构成物主丧失所有权及海底沉没物属于无主物的理由呢？首先，所有权是一种法律上的支配权，失去实际控制并不必然导致所有权的丧失。其次，物主对物的所有权不会因“多年不能实际行使”而丧失。第一，沉没物在其沉没于海底期间不为任何人所占有，因此根本不存在取得时效的问题，即任何其他人都不可能根据时效取得海底沉没物的所有权。第二，至于消灭时效，它是指“权利人在法定期间内持续不行使其权利因而丧失请求权或其权利的制度”，是一种债的消灭，[3] “时效排除的只是诉权”，[4] 其仅适用于请求权，而导致请求权产生的母体权利本身则不会因时效届满而消灭，“对所有权不适用消灭时效”。[5] 德国、瑞士、日本等国法律也都规定所有权不得为消灭时效的客体。可见，从古罗马到现代，消灭时效的客体是债权，所有权是不适用消灭时效的。因而，物主长期不行使所有权并不当然导致丧失所有权。此外必须注意的是，物主对其沉没物不行使权利并非因为主观的原因，而是客观上的不能，一旦条件允许，他就会行使其权利。正如国际打捞联盟顾问毕晓普所说：“物主在 100 年后行使其对沉没物所有权的例子很多”。[6] 第三，所有权是一种完全物权和无期物权，它不会仅仅因为时间的流逝而消灭，而且作为一种绝对权和对世权，更不会仅

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1 [意] 彼德罗•彭梵得著，黄风译：《罗马法教科书》，北京：中国政法大学出版社 1992 年版，第 185 页。

2 周枏著：《罗马法原论》（上册），商务印书馆 1994 年版，第 318~319 页；另见 [意] 彼德罗•彭梵得著，黄风译：《罗马法教科书》，北京：中国政法大学出版社 1992 年版，第 199~200 页。

3 周枏著：《罗马法原论》（上册），北京：商务印书馆 1994 年版，第 918 页。

4 [意] 彼德罗•彭梵得著，黄风译：《罗马法教科书》，北京：中国政法大学出版社 1992 年版，第 302 页。

5 [德] 迪特尔•梅迪库斯著，邵建东译：《德国民法总论》，北京：法律出版社 2001 年版，第 90 页。

6 Jon Henley, UN Shuts Lid on Sunken Treasure Chests New Convention Aims to Outlaw the Pillage of Ancient Shipwrecks and Drowned Civilizations, at http://www.common-dreams.org/headlines01/1103-03.html, April 15, 2004.

仅因为空间的变换而丧失。物主一旦拥有某物的所有权，那么其所有权的存在便不会仅仅因为该物所处的位置不同而有所差异。

（二）海底沉没物是“人类共同继承的遗产”吗？

也有人认为海底沉没物（尤其是位于“区域”的海底沉没物）是“人类共同继承的遗产”。《联合国海洋法公约》在其序言中规定：“除其他外，国家管辖范围以外的海床和洋底区域及其底土以及该区域的资源为人类的共同继承财产”，第136 条进一步明确规定，“区域”及其资源是人类的共同继承财产。那么位于“区域”的海底沉没物是否就是区域资源，进而属于人类的共同继承财产呢？对此，《联合国海洋法公约》的界定是清晰的：其第 1 条规定，“区域”是指国家管辖范围以外的海床和洋底及其底土；第 133 条规定，“资源”是指“区域”内在海床及其下原来位置的一切固体、液体或气体矿物资源。也就是说，在海洋法上，“资源”只包括矿物资源，海底沉没物不是矿物资源，也就不构成海洋法上的“人类共同继承的遗产”了。因此，从实在法的角度来讲，海底沉没物不是“人类共同继承遗产”。

那么从法理上讲，海底沉没物能否构成“人类共同继承的遗产”呢？答案依然是否定的。要构成“人类共同继承的遗产”，首先必须是自然资源，是自然界赋予人类社会的礼物；其次必须是对人类社会的生存和发展至关重要的资源；再次必须是处于任何私法所有权、国家主权或管辖权范围之外的资源。如果不能满足这三个条件，任何资源都不可能成为“人类共同继承的遗产”。笔者认为，“海底沉没物”并非自然资源，而且并不排除私法所有权的存在，因此不能满足上述构成条件，不能成为“人类共同继承的遗产”。

（三）海底沉没物的物主并不当然丧失对沉没物的所有权

罗马法上关于沉没物的研究比较薄弱，只是粗线条地认为沉没物的性质“与遗失物类似”，[7] 所以沉没物通常是适用有关遗失物的规定。对于遗失物，各国或地区法律一般规定，拾得人具有通知、保管和返还遗失物的义务，同时遗失人具有偿还费用、支付报酬的义务，如果遗失人在一定的期限内没有主张权利，则拾得人取得遗失物的所有权。[8] 海底沉没物是不以所有者意志为转移的沉没于水下的物，物主对其沉没往往没有主观上的过错。所有权并不因物的沉没而当然丧失，但所有权人应就其物主身份承担证明责任。当然，物主是否存在与物主能否辨明在理论上完全是两回事。

7　周枏著：《罗马法原论》（上册），北京：商务印书馆 1994 年版，第 319 页。
8　如台湾“民法”第 803~807 条的规定。

二、海底沉没物的法律归属

海底沉没物本身的复杂性决定了其法律归属问题的复杂性，海底沉没物归其沉没时的物主所有虽然是一项原则，但是一条原则并不能解决现实生活中的所有问题。海底沉没物的法律归属问题还必须分门别类、条分缕析。

（一）可辨明物主和不可辨明物主的海底沉没物之归属

前已言明，主张所有权的人应证明其物主的身份。以物主身份能否辨明为标准，海底沉没物可分为可辨明物主的和不可辨明物主的两类。所谓“不可辨明物主”既包括在一定期限内无人主张所有权的情况，也包括虽有人主张所有权但在一定期限内不能有效证明的情形。[9] 如果说，这一划分标准对陆上物也是适用的话，那么由于海底沉没物沉没多年的特殊状况，物主辨明的意义就要复杂得多，它是权利主张的第一道也是最难的一道关口。

辨明是至关重要的程序问题，必须严格遵循程序正义的原则，使相关权利人都能得到公平的对待。笔者认为，主张权利的公民应自有关国家向国内公布关于海底沉没物的发现或打捞信息时起 1 年内，但最迟应在海底沉没物打捞出水后 6 个月内，提出权利主张。权利主张是否成立由沿海国或协商国会议在受案之日起半年内决定。

海底沉没物的物主一旦按照规定的程序辨明，就可恢复对海底沉没物的占有和控制，现实地实现其所有权。当然，所有权人应偿还打捞者因打捞、保管该遗产而花费的全部费用，并应支付给打捞者一定的报酬，报酬由双方协商决定，但一般不应低于该沉没物价值的 30%。[10] 如果物主不偿还费用或者支付报酬，打捞者可以留置该遗产的适当部分，直到获取其全部应得为止。当然物主也可以放弃其对该遗产的所有权，这样他就不必偿付费用和支付报酬了。

海底沉没物如果不能按照规定的程序辨明其物主，可以推定其为遗弃物，遗弃行为自海底沉没物沉没时即发生法律效力。此时，海底沉没物为无主物，适用先占制度，由先占人获得其所有权。但打捞人并不一定就是先占人，位于领海的

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9 根据沉没物是否可辨明其主而进行分类是一种非常普遍的做法，《联合国海洋法公约》第 303 条、我国《民法通则》第 79 条、最高人民法院《关于贯彻执行〈民法通则〉若干问题的意见》第 93 条以及国务院《关于外商参与打捞中国沿海水域沉船沉物管理办法》第 2 条等的规定都体现了这一分类。

10 此比例借鉴了台湾民法第 805 条的规定。

沉没物，按照主权先占的原则，[11] 其先占人应是国家。[12]

（二）沉没时为公共财产和沉没时为私法财产的海底沉没物之归属

公共财产[13]和私法财产是性质完全不同的两类财产，公共财产是指服务于社会公共利益而非用于商业活动的财产，在性质上属于禁止流通物，是不能或不宜为私人所有的，即不能先占取得也不能时效取得，这一点已为罗马法以来许多国家所承认[14]。私法财产则是指服务于所有权人个体利益的用于民商事活动的财产，它要受取得时效的限制，如果占有人公开、和平、自主地占有某一私法财产达到一定期限，则原所有权人就会丧失对该财产的权利。

沉没时为公共财产的海底沉没物归属于国家，当然其前提是该公共财产的所属国可以初步判定。因为公共财产不受民法上先占制度和取得时效的约束，那么作为公共财产的海底沉没物在出水后无论被打捞人占有多长时间，占有人都不能取得其所有权。对于可以确定为公共财产但不能辨明所属国的海底沉没物，如果其位于某国领海，则推定其为沿海国所有；如果其位于某国毗连区、专属经济区或大陆架，则也推定其为沿海国所有；如果其位于公海，则为其文化上的来源国所有。主张海底沉没物为其公共财产的国家也须按照一定的程序承担举证责任，即除须证明其是该海底沉没物的所有权人外还须证明该海底沉没物是公共财产。国家作为一个高度理性的组织，与私人相比，这一责任的履行要容易一些。当然，国家也须偿还打捞者的打捞、保存费用并支付相应报酬。

对于不能辨明物主的私法财产的归属问题详见下文讨论。

（三）出水时为文物和为一般物的海底沉没物之归属

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11 “主权先占”是指国家本身自动取得在其领土范围内的无主物的所有权的制度，它是先占原则的一种特殊形态。如无特别强调，本文所谓先占是指一般意义上的先占，即私人先占。

12 正如国际法学者刘楠来所指出的：“若能弄清物主是谁，一般来讲都承认物主的权益，对于在沿海国的领海范围内发现的无主物，则属于沿海国所有。”参见罗昌平：《中国沉船之宝引发国际争议》，下载于 http://www.cars.net.cn/webnew/file/200308188095.html，2004/9/11。

13 在这里公共财产与公有财产并不完全相同，公共财产是从财产的性质和直接目的来划分的，而公有财产是从财产的权利主体的身份来划分的。公有财产主要包括国家所有和集体所有的财产。以国有财产为例，它又包括具有经营性收益性的国有财产和不具有经营性收益性的国有财产两部分，大体上只有后者才属于公共财产，前者则属于私法财产。参见高富平著：《物权法原论》，北京：中国法制出版社 2001 年版，第 776 页。

14 罗马法上，凡属于国家的物、国库的物、皇帝的物，都不适用取得时效的规定，参见［意］彼德罗•彭梵得著，黄风译：《罗马法教科书》，北京：中国政法大学出版社 1992 年版，第 222 页；周枏著：《罗马法原论》，北京：商务印书馆 1994 年版，第 355 页；高富平著：《物权法原论》，北京：中国法制出版社 2001 年版，第 672 页。

已成为历史文物的海底沉没物又被称为水下文化遗产，其归属与一般的海底沉没物的归属有所不同。但这首先就面临着依何法律规定为标准来判断沉没物为文物的问题，其次，则是已认定为文物的沉没物的归属问题。

笔者认为，位于某国内水、群岛水域或领海的海底沉没物是否构成文物，应以该沿海国的法律为准。而且无论该海底沉没物是否构成文物，也不管该海底沉没物的来源国如何，只要在一定的期限内不能辨明其物主，就归沿海国所有。

位于某国毗连区、专属经济区或大陆架的不能辨明物主的海底沉没物是否构成文物，则不能一概而论。如果海底沉没物的来源国为该沿海国或者来源国不明，那么其是否构成文物，以该沿海国的法律为准。如果构成文物，则受其管辖并为其所有。如果海底沉没物的来源国为另一国家或另一些国家，则其是否成为文物以相关国家共同参加的国际条约为准，如无共同参加的国际条约，则由各方协商决定。如果协商一致认为构成文物，则对其管理和归属也由各方协商决定；如果不能协商一致，则以沿海国法律为准。对于不构成文物的沉没物适用先占制度。

位于公海或“区域”的海底沉没物，无论其是否构成文物，均由与其确有联系的国家保护和管理及决定打捞的批准事宜。此时，只要按照规定的程序不能辨明其所有权人，海底沉没物就可适用先占制度，归先占者所有。

我国 1989 年《水下文物保护管理条例》规定，对遗存于中国领海的一切起源于中国的、起源国不明的和起源于外国的文物，及遗存于中国毗连区、专属经济区或大陆架的起源于中国的和起源国不明的文物，归中国所有，受中国管辖；对遗存于外国毗连区、专属经济区或大陆架以及公海的起源于中国的文物，中国享有辨认器物物主的权利。另外国务院 1992 年发布的《关于外商参与打捞中国沿海水域沉船沉物管理办法》还规定，在我国沿海水域内捞获的沉船沉物中夹带有文物或者在打捞作业活动中发现文物的，应当立即报告当地文物行政管理部门，由文物行政管理部门按照我国有关文物保护的法律、法规处理。

可见我国关于无主水下文物的归属有比较全面和明确的规定，[15] 但条例对遗存于我国毗连区、专属经济区或大陆架的起源于外国的文物归属和管辖尚无规定，对遗存于公海或外国毗连区、专属经济区或大陆架的起源于我国的文物，也只是规定了国家享有辨认器物物主的权利，这是远远不够的。依照《保护水下文化遗产公约》的规定，对位于我国毗连区、专属经济区或大陆架的来源于外国的水下文化遗产，我国作为协调国享有保护和管理的主要职责（但并不享有所有权），当然来源国也有权参与保护和管理。而对位于外国毗连区、专属经济区或大陆架但与我国确有联系的水下文化遗产，我国也对其保护、管理和归属问题享有参与协

15 这一点也得到了西方学者的承认，他们认为：“在详细分析了其他国家所采行动之后，所制定出来的机制，因此使得中国在这方面处于领先的地位。”转引自傅崑成：《联合国教科文组织 2001 年〈保护水下文化遗产公约〉评析》，载于厦门大学海洋法律研究中心编：《纪念〈联合国海洋公约〉签署二十周年学术研讨会论文集》，第 158 页。

商的权利，而且当水下文物位于公海且来源于我国时，我国还可主导对水下文物的保护和管理。所谓“辨认器物物主的权利”可以理解为当我国作为协商国时在协商过程中的参与管理的一项权利。笔者建议相关条例办法在修订的时候，应该借鉴公约中的协调国和协商会议制度，将依照公约我国可以享有的权利予以明确规定。

（四）位于领海、毗连区、专属经济区或大陆架和公海的海底沉没物之归属

根据《联合国海洋法公约》，国家领海、毗连区、专属经济区、大陆架、公海和“区域”的法律地位是不一样的，相应地，位于海洋不同部分的海底沉没物的归属也就有所差别。

对于特殊的海底沉没物的所有权归属问题前文已有较为详细的论说，那么一般的海底沉没物的产权归属又如何呢？笔者认为按照规定的程序不能辨明物主的一般海底沉没物，当其位于某国内水、群岛水域或领海时，则无论其来源国如何，都适用主权先占制度，从其沉没时起即归沿海国所有。如果其位于某国毗连区、专属经济区或大陆架，若其来源国为沿海国或者来源国不明，则归沿海国管理，适用先占制度，从打捞结束时即归打捞者所有；若其来源国为另一国家或另一些国家，则由沿海国和其他与海底沉没物确有联系并表达了协商意愿的国家共同管理。此时，也适用先占制度，沉没物从打捞结束时起即归打捞者所有。如果其位于公海，则由其来源国单独管理；如果还有其他与沉没物确有联系的国家，则由他们共同选定一个“协调国”按照共同的决定来进行管理，此时“协调国”通常会是来源国。如果来源国不明，则由与其确有联系的所有国家选定“协调国”对海底沉没物进行协商管理。无论来源国是否明确，位于公海的一般沉没物都为无主物，适用先占制度。

我国 1992 年《关于外商参与打捞中国沿海水域沉船沉物管理办法》第 15 条规定：在中国领海内捞获的沉船沉物，属中国所有，中外打捞人都可从捞获物或者其折价中取得收益。在中国毗连区、专属经济区或大陆架捞获的沉船沉物，中外打捞人按照合同规定的比例对捞获物或者其折价进行分成。对一般海底沉没物来说，这是比较科学合理的规定，也是完全符合国际法的。当然，该办法没有对位于公海的不可辨明物主的一般沉没物的归属做出规定，这也是可以理解的，因为国内法不宜对此加以规定，但显然也应适用先占制度，归打捞人所有。

（五）国家对海底沉没物主张权利之根据

当国家以海底沉没物的所有权人的名义主张权利时，他是作为私法意义上的

物主而存在的。当国家对位于其内水、群岛水域或领海等主权领域内的无主沉没物主张所有权时，他根据的是主权先占原则。

当海底沉没物位于国家的内水、群岛水域或领海或毗连区、专属经济区或大陆架时，国家对遗产保护和管理的权利根据在于属地管辖权。

当海底沉没物的待辨明的所有权人是其公民时，国家有协助本国公民辨认和行使所有权的权利和义务。这是国家的属人管辖权所决定和要求的。

当海底沉没物位于他国内水、群岛水域或领海、毗连区、专属经济区或大陆架或者公海并且不可辨明其所有权人时，如果可以确定本国为该海底沉没物的来源国，则国家对海底沉没物行使或参与行使保护和管理的权利，直到该海底沉没物新的所有权人产生时为止。这种监护的权利源于国家的属物管辖权。当然属物管辖权不及属人管辖权优越，而属人管辖权又不及属地管辖权优越。

三、从《保护水下文化遗产公约》看对水下文化遗产的保护和管理

随着科技的进步，现在已基本上不存在处于人类的发现或打捞范围之外的水下文化遗产了。由于水下文化遗产本身就是或者携带有大量宝藏，国际海洋探宝者对其存在着极大的兴趣，对水下文化遗产的商业开发亦日益频繁。尽管经过批准的商业开发本身并不违反国际法，但是许多探宝公司为了自己的巨额收益而对海底遗产进行掠夺式或破坏性的打捞，极大地损害了这些水下文化遗产的完整性。因此，保护水下文化遗产不仅具有十分重要的意义，而且是一项越来越紧迫的任务。联合国教科文组织 2001 年第 31 届大会通过了《保护水下文化遗产公约》，该公约对水下文化遗产的保护和管理作了比较详细的规定，但遗憾的是公约至今尚未生效。

公约中所定义的水下文化遗产是指“部分或全部的、周期性或持续性的位于水下至少 100 年并且能够反映人类生存之文化、历史或考古特性的全部遗迹”。公约规定在允许和实施任何针对水下文化遗产的活动之前，遗产的原址保存应为首选。对于已经打捞出水的水下文化遗产则应以能确保其长期保存的方式存放、维护和管理。公约禁止缔约国利用其辖区支持任何违反公约的针对水下文化遗产的活动，同时要求缔约国保证其国民或船舶不以违反公约的方式实施任何针对水下文化遗产的活动。公约要求缔约国采取措施阻止水下文化遗产的非法进出口或在其领土上处置或占有非法打捞出水的水下文化遗产。对违反公约的行为，缔约国应予严厉制裁并剥夺其非法所得；对位于领土上的非法打捞出水的水下文化遗产，缔约国应予没收。公约还要求缔约国在水下文化遗产的保护和管理方面相互合作和协助，并承诺与其他缔约国分享关于水下文化遗产的信息。缔约国之间就

公约解释或适用上的争端应通过磋商、教科文组织调停、调解、仲裁、国际海洋法法庭及其海底争端分庭和国际法院等和平途径解决。公约自第 20 份批准、接受、赞同或加入文书交存之日起 3 个月生效。

公约最实质性的条款是第 7 条至第 12 条，其主要内容如下：

1. 管理和批准权

公约第 7 条规定，缔约国对位于其内水、群岛水域或领海的水下文化遗产享有管理和批准的专属权利，未经其明示同意不得从事对水下文化遗产的任何活动。公约第 8 条规定，缔约国对针对位于其毗连区的水下文化遗产的开发活动也享有管理和批准的权利，并有权对未经其许可的将水下文化遗产移出其毗连区的活动加以管辖。

按照第 8 条的规定，沿海国对位于其毗连区的水下文化遗产还须遵守第 9 条和第 10 条的规定。从这两条的规定来看，沿海国对位于其专属经济区或大陆架的水下文化遗产原则上并无单独管理的权利，而只有保护的义务。

2. 报告和通报制度

公约第 9 条对位于专属经济区或大陆架的水下文化遗产的报告和通报制度进行了规定。公约规定沿海国对位于其专属经济区或大陆架的水下文化遗产均有保护的义务，进而当其国民或悬挂其旗帜的船舶发现或意图实施针对位于其专属经济区或大陆架的水下文化遗产的活动时，沿海缔约国应要求其国民或船主向其报告此类发现或活动情况。如果其国民或悬挂其旗帜的船舶发现或实施针对位于其他缔约国专属经济区或大陆架的水下文化遗产的活动时，缔约国应要求其国民或船主向其和该其他缔约国报告此类发现或活动情况;或者要求其国民或船主只须向其报告此类发现或活动情况，同时保证立即有效地转告所有其他缔约国。对此两种报告方式，缔约国选择采用任一者。无论如何，缔约国应将向其报告的发现或活动情况通报总干事。总干事则应即时将向其通报的所有信息通知全体缔约国。而与相关水下文化遗产确有联系，特别是文化、历史或考古上联系的缔约国均可向在专属经济区或大陆架上沉有该水下文化遗产的另一缔约国声明其参加就如何有效保护水下文化遗产而进行协商的意愿。

按照第 10 条的规定，该沿海缔约国应与所有声明了协商意愿的其他缔约国就如何更好地保护水下文化遗产而进行协商，并以“协调国”的身份主持。除水下文化遗产遇到紧急危险外，协调国并无单独对水下文化遗产采取措施或发出授权的权利。此种权利由协商各国共同享有，对于协商各国共同商定的保护措施，协调国应加以实施并为此发出一切必要之授权，除非包括协调国在内的协商各国同意另一协商国实施此类措施或发布此类授权。但是在防止干涉本国主权或管辖权的时候，沿海缔约国有权单独地禁止或批准任何针对位于其专属经济区或大陆架的水下文化遗产的活动。即使在平时，协调国还可单独自主地对位于其专属经济区或大陆架的水下文化遗产进行初步考察并为此发出一切必要之授权，同时应将相

应结果即时通报总干事，总干事应将此类信息即时通知其他缔约国。协调国在主持协商、采取措施或发布授权或初步考察时，应是为了缔约国整体利益而非其自身利益而行事。而且任何此类行动本身并不构成协调国享有《联合国海洋法公约》等国际法并未规定的优先权或管辖权的根据。

第11条对位于国际海底区域的水下文化遗产的报告和通报制度进行了规定。缔约各国对位于国际海底区域的水下文化遗产也均只负有保护的义务。如果其国民或悬挂其旗帜的船舶发现或实施针对位于区域的水下文化遗产的活动时，缔约国应要求其国民或船主向其报告此类发现或活动情况，同时应将向其报告的发现或活动情况通报总干事和国际海底管理局秘书长。总干事则应即时将向其通报的所有信息通知全体缔约国。与相关水下文化遗产确有联系的缔约国均可向总干事声明其参加就如何有效保护水下文化遗产而进行协商的意愿，此时应特别考虑水下文化遗产文化、历史或考古来源国的优先权。按照第 12 条的规定，总干事应邀请所有声明意愿的缔约国就如何更好地保护水下文化遗产而进行协商并选定“协调国”，此时协商各国一般会选择水下文化遗产的来源国为协调国。总干事亦应邀请国际海底管理局参加此类协商。除水下文化遗产遇到紧急危险，任何国家均无权对位于国际海底区域的水下文化遗产单独采取措施或发布授权，此项权利也为协商各国共同享有。对于协商各国共同商定的保护措施，协调国应加以实施并为此发出一切必要之授权，除非包括协调国在内的协商各国均同意由另一协商国实施此类措施或发布此类授权。但协调国可单独自主地对位于国际海底区域的水下文化遗产进行初步考察并为此发出一切必要之授权，同时应将相应结果即时通报总干事，总干事应将此类信息通知其他缔约国。协调国在主持协商、采取措施、发布授权或初步考察时，应是代表全体缔约国为了人类整体利益而行事，并应特别考虑相关水下文化遗产的文化、历史或考古来源国的优先权。

公约还规定：如果没有船旗国的同意，任何缔约国不得从事或准许从事针对沉没于毗连区、专属经济区或大陆架、国际海底区域的国家船舶和飞行器的活动。但沿海国从事或准许从事针对位于群岛水域或领海的国家船舶和飞行器的活动是否也须船旗国同意，公约并未加以明确，公约只是规定缔约国应将可辨明国籍的国家船舶和飞行器的发现情况通知已缔结公约的船旗国，如果可行，亦应通知与此国家船舶和飞行器确有联系，特别是文化、历史或考古上联系的其他国家。笔者认为针对位于群岛水域或领海的水下遗产的活动，须经沿海国和可辨明的船旗国的共同同意才为恰当，这有利于国际和谐社会的建立。

由上述规定可以看出，对于针对位于缔约国内水、群岛水域和领海的水下文化遗产的活动，沿海缔约国享有管理和批准的专属权利；对于针对位于其毗连区的水下文化遗产的活动，沿海国在《联合国海洋法公约》第 303 条的基础上可以享

有管理和批准的权利；[16] 对于针对位于其专属经济区或大陆架的水下文化遗产的活动，沿海缔约国原则上没有单独的管理权利，只有在防止干涉其主权或管辖权时，在水下文化遗产遇到紧急危险时，或者对水下文化遗产进行初步考察时，才有权独自采取措施或发布授权，而且这种单独行动权应是专属于该沿海缔约国或协调国的；而对于针对位于国际海底区域的水下文化遗产的活动，任何缔约国均无独自管理的权利，只有在水下文化遗产遇到紧急危险时，缔约国才有采取措施加以防止的义务。对位于国际海底区域的水下遗产的初步考察是专属于协调国的权利。当然，报告和通报制度是整个公约的基础。

由此可见，公约关于水下文化遗产的保护和管理方面的规定比较周全严密，也是公平合理的，它正确地处理了国家属地管辖权、属人管辖权和属物管辖权的关系，代表了国际社会协调合作发展的趋势。不过公约回避了水下文化遗产的产权归属这一根本性的问题，完全没有考虑水下文化遗产物主的辨明和物主权利的问题。然而，在对产权不作清晰规定的情况下，财产能否得到有效保护和管理仍存在很大疑问。明晰水下文化遗产的法律定性和产权归属，是当前国际社会定纷止争，保护水下文化遗产的治本之道，笔者认为公约应对这一最根本的问题予以明确规定。另外公约还有些条款，如对位于国际海底区域的水下文化遗产“应特别考虑文化、历史或考古来源国的优先权”，在这里，“优先权”的具体内涵和实际指向仍有失明确。因此，公约在合理性方面和操作性方面都存在一定的瑕疵，其保护水下文化遗产的目的能否得到很好的实现仍有待时间与实践的检验。当然，由于公约迄今尚未生效，所以目前各国基本的做法仍然是按照属地的原则，由沿海国对位于其内水群岛水域或领海、毗连区、专属经济区或大陆架上的水下文化遗产行使保护的义务和管理批准的权利，打捞收益由沿海国和打捞者最后分成，对位于公海的水下文化遗产则基本上无人保护和管理。[17]

另外，在处理保护管理与开发利用两者之间的关系问题上，由于公约的主旨是确保和加强对水下文化遗产的保护，所以公约对水下文化遗产的开发利用多为消极性的规定。公约原则上禁止水下文化遗产的商业开发，与水下文化遗产有关

16 《联合国海洋法公约》第 303 条规定：1. 各国有义务保护在海洋发现的考古和历史性文物，并应为此目的进行合作。2. 为了控制这种文物的贩运，沿海国可在适用第三十三条时推定，未经沿海国许可将这些文物移出该条所指海域的海床，将造成在其领土或领海内对该条所指法律和规章的违反。3. 本条的任何规定不影响可辨认的物主的权利、打捞法或其他海事法规则，也不影响关于文化交流的法律和惯例。4. 本条不妨害关于保护考古和历史性文物的其他国际协定和国际法规则。

17 1999 年 5 月，英国打捞专家迈克•哈彻在印尼海域里发现了中国“泰兴号”沉船，用了 3 个月的时间和近 300 万美元将其打捞出水。沉船上有近 100 万件中国瓷器，他们将 65 万件古瓷打碎而只留下了 35.6 万件。这些陶瓷 2000 年在德国拍卖到了 2240 万德国马克（约 1100 多万美元），全部由迈克•哈彻和印尼政府平分。参见罗昌平：《中国沉船之宝引发国际争议》，下载于 http://www.cars.net.cn/webnew/file/200308188095.html，2004 年 9 月 11 日。

的任何活动只有在得到适当主管机构授权且完全符合公约规定并保证实现对水下文化遗产最大保护的时候，才受到法律的保护。公约鼓励为考察或建立档案资料而对位于原址的水下文化遗产进行谨慎和非侵入性的观访，以提高公众对水下文化遗产的了解、鉴赏和保护意识，而且这类观访不得对水下文化遗产的保护和管理构成妨碍。这样就有一些人，尤其是打捞公司认为，公约对水下文化遗产的保护和管理过于严格，对开发利用考虑不够。他们说，与其让一些具有很大经济价值的沉没物在水下慢慢腐烂，还不如尽快打捞出来，造福于现代人。[18] 这一观点也并不是一点道理没有。

四、结　语

海底沉没物的法律研究一直不为人们所重视，直到现在其理论意义和实践价值也只被极少数人认识，笔者对这一问题展开探讨，就是希望能够促进对此问题的研究，为我国实务界更好地处理海底沉没物问题有所裨益。总而言之，笔者认为：由于所有权是一种完全物权、无期物权、绝对权和对世权，因此就其本质而言，它是绝对不会仅仅因为时间的流逝或空间的变换而消灭的。因此，海底沉没物不能直接成为无主物。从国际法律及理论的角度上看，海底沉没物也不构成“人类共同继承的遗产”。海底沉没物原则上归属于其沉没时的所有权人，但所有权人须证明其物主身份并向打捞者偿还费用并支付报酬。海底沉没物如果不能按照规定的程序辨明其物主，则视为遗弃物，自其沉没时即为无主物。与海底沉没物确有联系的国家按照属地管辖权优于属人管辖权、属人管辖权优于属物管辖权的原则对其行使保护和管理的权利。除文物的归属有所例外之外，对于不能辨明所有权人的水下沉没物一般都适用先占制度，归先占者所有。

关于对海底沉没物保护管理和开发利用的关系，笔者认为，对于具有重大的不可替代的科学、艺术和历史价值的海底沉没物，各国在打捞问题上应极为慎重，站在维护人类整体利益和对人类文明负责的高度上处理这个问题，牢固树立“保护第一”的观念，如果不能确保出水后对文化遗产的永久保存，就应严格禁止打捞，实现对水下文化遗产的原址保护。对于其它具有相当科学、艺术和历史价值的海底沉没物，如果能够确保出水后对文化遗产的长期保存，则可以批准打捞，否则予以禁止。对于以经济价值为主的海底沉没物，如果其经济价值会随着时间的流逝而减缩，那么在不破坏其价值的前提下，应鼓励对海底沉没物尽早打捞和开发利用，以实现其对人类的最大功用。

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18 罗昌平：《中国沉船之宝引发国际争议》，下载于 http://www.cass.net.cn/webnew/file/200308188095.html，2004 年 9 月 11 日。

关于水下文化遗产争端的解决，笔者认为，为了预防争端的发生，各国可以就水下文化遗产的保护、管辖和归属等问题事先签定双边或多边公约，作为日后解决争端的依据。对于已经发生的争端，则应通过和平方式加以解决，对于管辖管理方面的争议，争议各方可以先行善意协商；协商不成的，可以提请联合国教科文组织调停调解；调停调解不成的，可以通过国际常设仲裁院仲裁，或者通过国际法院或国际海洋法法庭解决。对于水下文化遗产归属方面的争议，当事人可以向有关国家的主管机构或法院提出主张，在有些情况下，则是向协商国会议提出。

我国关于海底沉没物的规定已经非常科学，在国际范围内都属先进，但是仍然有需要完善的地方，比如对位于公海或外国毗连区、专属经济区或大陆架的海底沉没物的管辖和归属也应有所规定，以扩大对海底沉没物的保护和管理范围。我国还应充分借鉴《保护水下文化遗产公约》中比较合理的条款，比如报告和通报制度、协调国和协商会议制度等，加强各国在保护水下文化遗产方面的合作，更好地实现对水下文化遗产的最大保护。总的来看，公约对像我国这样的历史上海上贸易发达的国家赋予了在保护和管理水下文化遗产方面更大的职责，我国应加入该公约并促成公约的早日生效。在公约生效以前，我国也可依据国际私法和一般法理，娴熟地运用有关国家和国际法律更有效、妥当地保护或参与保护水下文化遗产，这既有利于维护我国的正当权益，更有利于防止对水下文化遗产的非法或不当打捞，以加强对人类文化遗产的保护。

人类共同继承财产概念特质研究

金永明 *

内容摘要：人类共同继承财产原则已成为《联合国海洋法公约》的重要原则。但国际学术界对人类共同继承财产概念性质仍众说纷纭。本文在剖析人类共同继承财产概念形成过程及其内涵的基础上，论述了人类共同继承财产概念性质，即指出此概念为具有丰富内容和具体原则的法律性质概念，且已发展成为习惯法概念，各国必须遵循。同时，阐述了研究人类共同继承财产概念特质的理论意义和实践意义。

关键词：《联合国海洋法公约》 人类共同继承财产 法律性质

人类共同继承财产原则已成为《联合国海洋法公约》的重要原则，但国际学术界对人类共同继承财产概念性质仍众说纷纭。笔者认为，研究人类共同继承财产概念特质，尤其是其性质，既有利于推进对其法律性质的正确揭示，也有助于各国更好地理解和执行上述原则。当然，还有利于包括我国在内的各国更正确地开发和利用及管理上述原则所确定的“区域”资源，促进各国社会经济持续协调发展。

一、人类共同继承财产概念形成过程

笔者认为，作为 1982 年《联合国海洋法公约》（以下简称“《公约》”）“区域”制度基础的人类共同继承财产概念形成过程，大致可分为以下 4 个阶段：

1. 萌芽阶段，即人类共同继承财产概念的提出。主要标志为，马耳他驻联合国大使阿维德帕多于 1967 年在第 22 届联大会议上首次提出了人类共同继承财产概念。他指出：目前国家管辖范围以外海洋下的海床洋底为人类共同继承财产，并建议联大对此问题进行研究。为此，该届联大接受他的建议，并通过了第 2340 号决议。该决议决定成立由 35 个成员国组成的专门研究各国管辖范围以外海床洋

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底和平特设委员会（简称特设海底委员会）。[1] 此后联合国为完成上述任务进行了不懈努力。

2. 形成阶段，即人类共同继承财产概念的形成。主要标志为，经海底委员会多次审议和讨论，第 25 届联大（1970 年）通过了第 2749 号决议，即“关于各国管辖范围以外海床洋底与下层土壤的原则宣言”（简称“原则宣言”）决议。该决议是以 118 票赞成、0 票反对和 14 票弃权的结果获得通过的。“原则宣言”宣告：“各国管辖范围以外海床洋底及其下层土壤以及该地域之资源，为全人类共同继承之财产。”可见，该“原则宣言”不仅采纳了帕多教授创建的概念，同时也表明国际社会同意将此概念适用于国际海底区域（《公约》简称“区域”）。

3. 发展阶段，即人类共同继承财产概念的发展。主要表现在，“原则宣言”所宣告的原则，包括人类共同继承财产概念所包含的其他原则，被联合国机构决议及其他国家集团与国际组织宣言和决议所引用。其中主要有 1979 年《联合国贸发会议关于开发海床资源的决议》、1972 年《圣多明各宣言》、1973 年《美洲国家组织美洲间法律委员会关于海洋法的决议》、1973 年《不结盟国家第四次会议关于海洋法的宣言和决议》等。[2] 同时，人类共同继承财产概念在 1979 年《月球协定》（即指导各国在月球和其他天体上活动的协定）第 11 条也得到了确认。例如，《月球协定》第 11 条第 1 款规定，月球和其他天体及其自然资源为全人类的共同财产。可见，“原则宣言”宣告的人类共同继承财产概念在国际社会获得了发展。

4. 确立阶段，即人类共同继承财产概念的确立。换言之，经过联合国长达 15 年（1967 年至 1982 年）的激烈争论，人类共同继承财产原则终于在公约确立了其地位。主要标志为，公约制定了以人类共同继承财产原则为基础的国际海底区域（简称“区域”）制度。[3] 例如，公约第 136 条规定：“‘区域’及其资源是人类共同继承财产。”

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1 1968 年联大在审议了特设海底委员会的报告后，通过了第 2467 号决议（1968 年 12 月 21 日）。其中第 2467A 号决议指出，大会决定设立由 42 个成员国组成的各国管辖范围以外海床洋底和平使用委员会（简称海底委员会，即由特设海底委员会改为常设海底委员会）。

2 例如联合国贸易和发展会议于 1976 年 6 月 1 日通过了关于《开发海床资源的第 108V 号决议》，决议重申“联大宣布在国家管辖范围以外的海床洋底及其底土，以及该区域的资源，都是人类的共同继承财产”；《圣多明各宣言》规定，承袭海以外和承袭海所没有覆盖的大陆架以外的海床及其资源，根据联大第 2749 号决议所通过的宣言，是人类的共同继承财产；《美洲国家组织美洲间法律委员会关于海洋法的决议》第 13 款指出，200 海里地带及大陆架以外的海床洋底以及从那里可能采掘的资源，是人类的共同遗产；《不结盟国家第四次会议关于海洋法的宣言》，与会国家元首和政府首脑重申他们赞同 1970 年联大通过的“原则宣言”的基本原则，根据这些原则在国家管辖范围以外的区域和海底资源是人类的共同财富；其关于海洋法问题的决议重申，国家管辖范围以外的区域和海床洋底资源和底土是人类的共同财产的原则。

3 国际海底区域制度的内容主要规定在公约第十一部分及其附件三（探矿、勘探和开发的基本条件）、附件四（企业部章程）。

当然，公约还丰富和拓展了人类共同继承财产的概念内涵。

二、人类共同继承财产概念内涵研究

笔者认为，人类共同继承财产概念内涵主要有以下几个方面：

1. 法律属性。从公约有关规定看，应该承认共同继承财产概念是法律概念，不是政治概念。其法律属性主要表现在：此概念的主体是全人类，即它既包括现代的人类，也包括将来的人类。其客体是财产，这里所指的财产是指国家管辖范围以外的海床和洋底及其底土的任何部分及其资源；[4] 其财产的所有权性质是共同的，而这种共同所有的性质是特殊的。即其要求国际社会统一管理“区域”内财产，包括“区域”内资源和从“区域”获得的收益。[5]

2. 一般要素。对于人类共同继承财产概念，一般来说，主要包括不得单独占有、共同管理、共同获益、和平使用、为后世保留等要素。[6]

3. 基本原则：

（1）不得据为己有原则，即任何国家或自然人或法人不得将“区域”的任何部分或其资源据为己有；

（2）遵守宪章规则原则，即“区域”开发应遵照联合国宪章的原则和目的进行；

（3）共同使用发展原则，即“区域”应为全人类的利益而使用，特别要用于促进贫困国家的发展；

（4）和平使用保留原则，即“区域”应专为用于和平目的而保留；

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4 公约第 1 条第 1 款 a 项。

5 例如公约第 137 条第 2 款规定，对“区域”内资源的一切权利属于全人类，由管理局代表全人类行使；公约第 157 条第 1 款规定，管理局是缔约国按照本部分组织和控制“区域”内活动，特别是管理“区域”资源的组织；公约第 140 条第 2 款规定，管理局应按规定，通过任何适当的机构，在无歧视的基础上公平分配从“区域”内活动取得的财政及其他经济利益。

6 Barbara Ellen Heim, Exploring the Last Frontiers for Mineral Resources, A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica, *Vanderbilt Journal of Transnational Law*, Vol. 23, 1990, pp. 819, 827.

（5）国际机构管制原则，即“区域”内开发活动应由国际机构统一管制。[7]

当然，上述基本原则是一个整体，必须全面执行，不可偏废。

4. 主要内容。公约所丰富和拓展的人类共同继承财产概念内容是对上述基本原则的具体化及细化，其具体内容主要有九个方面：

（1）“区域”及其资源性质与范围。公约第 136 条、第 1 条第 1 款（a）项规定了这方面的内容，“区域”是指国家管辖范围以外的海床和洋底及其底土，“区域”及其资源是人类共同继承财产。

（2）禁止独自占有“区域”及其资源。公约第 137 条第 1 款规定：“任何国家不应对‘区域’的任何部分或其资源主张或行使主权或主权权利，任何国家或自然人或法人，也不应对‘区域’或其资源的任何部分据为己有。任何这种主权和主权权利的主张或行使，或这种据为己有的行为，均应不予承认。”

（3）共同参与管理。公约第 137 条第 2 款规定，“区域”内资源的一切权利属于全人类，由国际海底管理局（以下简称管理局）代表全人类行使；公约第 157 条第 3 款规定，管理局以所有成员主权平等的原则为基础；公约第 159 条第 1 款规定，大会应由管理局的全体成员组成。

（4）遵守宪章规则及有效参与“区域”内活动等。体现这些内容的条款主要为公约第 140、148、138、141 和 145 条。例如，公约第 138 条规定，“区域”内活动应遵守公约第十一部分的相关规定及联合国宪章所载原则和其他国际法规则；公约第 148 条规定，应按照第十一部分的具体规定促进发展中国家有效参加“区域”内活动，并适当顾及其特殊利益和需要，尤其是其中的内陆国和地理不利国在克服因不利位置，包括距离“区域”遥远和出入“区域”困难而产生的障碍方面的特殊需要。

（5）为全人类服务。公约涉及这些内容的条款主要为第 151、145 条，第 155 条第 2 款，第 147、143、144 和 149 条。例如，公约第 143 条第 1 款规定，“区域”内的海洋科学研究，应按照第十三部分（海洋科学研究）专为和平目的并为谋全人类的利益进行；公约第 149 条规定，在“区域”内发现的一切考古和历史文物，应为全人类的利益予以保存或处置，但应特别顾及来源国，或文化上的发源国，或历

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7 例如，帕多教授在联大提出的提案中，建议联合国起草一项条约宣布海床洋底是人类的共同继承财产，其中包含下列原则：（1）在目前国家管辖范围以外海洋下的海床洋底不得以任何方式由国家据为己有；（2）在目前国家管辖范围以外海洋下的海床洋底的探索应以符合联合国宪章的原则和目的的方式进行；（3）在目前国家管辖范围以外海洋下的海床洋底的使用及其经济开发应以保障人类利益的目的进行，使用和开发海床洋底所得的纯财政收益应首先用于促进贫困国家的发展；（4）在目前国家管辖范围以外海洋下的海床洋底应专门永远用于和平目的。同时，在备忘录中他又认为，建议的条约应设想创立一个国际机构（a）作为所有国家的受托者，对目前国家管辖范围以外海床洋底承担管辖权；（b）调整、监督和控制其上的一切活动；和（c）保证从事的活动符合于建议的条约的原则和规定。参见联合国文件，A/6695，1967 年 8 月 18 日。

史和考古上的来源国的优先权利。

（6）非“区域”部分适用公海自由原则。公约第 135 条规定规定，对“区域”上覆水域或其水域上空应适用不同于“区域”的法律制度和原则。换言之，“区域”及其资源不适用公海自由原则，而应适用人类共同继承财产原则。

（7）禁止变更人类共同继承财产原则。例如公约第 155 条第 2 款规定，审查会议应确保继续维持人类共同继承财产的原则；公约第 311 条第 6 款规定，缔约国同意关于人类共同继承财产的基本原则不应有任何修正，并同意它们不应参加任何减损该原则的协定。公约作上述规定的目的是为了避免动摇据此概念制定的其他制度的法律基础。

（8）分配外大陆架非生物资源。公约第 82 条规定，沿海国对 200 海里外大陆架非生物资源的开发，应缴付费用或实物，且管理局应将上缴的费用或实物公平地分享给缔约国。公约作这一规定的目的是为了体现人类共同继承财产概念的实质，即真正实现公平分享利益的目的。

（9）解决“区域”内争端。公约不仅规定了解决“区域”争端的专属机构——国际海底争端分庭的职权，而且还规定了国际海底争端分庭的咨询管辖权及其咨询意见的效力。例如，公约第 159 条第 10 款规定，管理局大会对于提交给分庭征求咨询意见的审议事项，应在收到分庭的咨询意见后，才能对此提案进行表决；否则，应推迟对该提案的表决。

5. 重要特征。据公约有关规定，人类共同继承财产概念的特征主要为：共同共有、共同管理、共同参与、共同获益。显然，它们是人类共同继承财产概念内容和原则及其属性的概括。

（1）共同共有。即“区域”及其资源属于全人类共有，为全人类利益服务；任何国家或自然人或法人不能单独地对“区域”的任何部分予以所有或分割或利用。例如，公约第 137 条第 1、2 款，第 140、143、149 和 141 条。笔者认为，这是一种特殊的所有权方式，其特殊性主要体现在：共同共有人对共同财产有平等的权利，但这种权利是不能独立地支配的；这种权利的行使必须得到全体共同共有人的同意，即代表全人类的管理局的同意；任何国家或国家集团未经国际社会的全体同意而对共同财产所作的任何行为是对共同财产的侵犯，都是违法的。

（2）共同管理。即“区域”内资源的一切权利由代表全人类的管理局行使，并为全人类的利益和发展进行管理。例如，公约第 137 条第 2 款，第 157 条第 1 款，第 144、145 条，第 150 条第 2 款，第 151、155 条。共同管理的表现形式就是建立管理局，各国通过管理局共同参与“区域”内活动的管理工作，由管理局控制“区域”内活动，管理“区域”内资源。

（3）共同参与。即“区域”内活动向所有国家开放，目的是通过平等参与“区域”内活动，使发展中国家和管理局企业部提高开发“区域”资源活动的技术和获得人员培训的机会，以求得发展。例如公约第 141、148、150 条。而根据公约第

170 条第 1 款的规定，企业部为直接进行“区域”内活动以及从事运输、加工和销售从“区域”回收的矿物的管理局的机关。

（4）共同获益。即“区域”内活动取得的收益，由各国共享，为人类获益，且所有国家共同分享的利益，不是平均分享，而要优先照顾发展中国家和尚未取得完全独立或联合国根据决议所承认的其他自治地位的人民的利益和需要，例如公约第 140 条。只有这样，才能达到公平分享的目的，实现共同获益和共同发展。

当然，人类共同继承财产概念的上述特征是相互关联的，即共同获益是共同财产的归宿，共同参与是共同获益的手段，共同管理是共同获益的措施，共同共有是共同管理和共同参与以及共同获益的基础。

三、人类共同继承财产概念性质评析

如上所述，公约不仅确立了人类共同继承财产概念，而且丰富和拓展了其内涵，但国际社会对此概念性质的争论仍较为激烈。择其要者，主要有下列五种观点：

1. 一般法律原则观点。持这种观点的学者认为，人类共同继承财产概念属于一般法律原则概念。代表人物是美国的沙赫特。

2. 强行法规则观点。发展中国家的某些学者认为，人类共同继承财产概念是强行法规则概念。主要代表人物是印度的阿南德、乌拉圭的保利罗、前苏联的莫夫昌。他们主张这一观点的目的是为阻止或反对个别国家通过公约体制外的协定开发“区域”内资源。

3. 政治性质观点。一些学者认为，人类共同继承财产概念不是普遍的法律概念，而是政治性质概念。主要代表人物是美国的拉斯昌和布伦南、英国的布朗和施瓦曾伯格。

4. 哲学性质观点。有学者认为，人类共同继承财产概念是哲学性质概念。因为它缺乏成为法律原则的明确性，并且缺乏作为习惯法的两个要素，即国家实践和法律确信。主要代表人物是美国的乔伊斯和巴肯伯斯等学者。

5. 习惯法观点。发展中国家的一些学者认为，人类共同继承财产概念是习惯法概念。理由是，确定人类共同继承财产概念的联大第 2749 号决议（即“原则宣言”决议），是以 118 票赞成、0 票反对、14 票弃权通过的，并在以后的联大决议及联合国框架外的国家集团组织、其他国际组织的宣言和决议中多次获得确认，这显然已经满足了作为习惯法的条件。

应该说，上述观点从不同角度而言均有一定道理，但笔者认为它们各有不妥之处。现对上述观点作一初步评析：

（1）关于一般法律原则观点，应该看到，国际法院规约（1945 年）第 38 条第 1 款虽规定一般法律原则可作为法院裁判的准则，但它对一般法律原则的定义或

内容并未作出任何规定。这就造成学者之间理解不一。实际上，作为国际法渊源的一般法律原则并不多见，国际法院（包括其前身国际常设法院）在审判案件时，也很少适用一般法律原则。[8] 同时，从公约缔约国数量来看，人类共同继承财产概念在现阶段还不属一般法律原则。这是因为现有联合国会员国为 191 个，而公约缔约国只有 147 个，仅为联合国会员国的 77%。换言之，此概念作为一般法律原则的观点还未被联合国所有会员国所接受。

（2）关于强行法规则观点，从维也纳条约法公约第 53 条的规定来看，一般国际强制规则（强行法规则）必须是国际社会全体接受并予以公认之规则。而从公约缔约国数量与联合国会员国数量的上述差异来看，人类共同继承财产概念还未被所有联合国会员国所接受，因此，现阶段人类共同继承财产概念也不是强行法规则。

（3）关于政治性质观点，应该看到，帕多教授在第 22 届联大不仅提出了人类共同继承财产概念，而且还提出了人类共同继承财产所包含的法律原则，如和平保留利用原则、为全人类利益服务原则、共同使用分享原则和国际机构管制原则等。显然，这些原则是具有法律性质的。同时，联合国始终是将国际海底区域的所有问题作为法律问题加以处理的。可见，政治性质观点亦难以成立。应当看到，一些学者主张人类共同继承财产概念为政治性质概念的目的，是为将“区域”置于法律真空状态，并在此基础上企图利用公海自由原则开发和利用“区域”及其资源。

（4）关于哲学性质观点，如上所述，人类共同继承财产概念是一个具有丰富内容和具体原则的法律概念。诚然，在这个概念中包含着一些道德要素，因此在制定“区域”内活动政策和条件时，必须考虑将来人类的利益和需要，例如应有效开展“区域”内活动避免不必要的浪费、采取限制生产的政策等。但这些内容显然都是人类共同继承财产概念本身所要求的或可引申出来的。可见，人类共同继承财产概念虽具有一些道德要素，但不为哲学性质概念。

（5）关于习惯法观点评析。如上所述，人类共同继承财产概念起源于联大“原则宣言”决议。因此，为评析习惯法观点，必需考察该决议的法律性质。因为弄清

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8 利用一般法律原则裁判案件的事件主要有：（1）1928 年常设国际法院对霍茹夫工厂案（案件实质性阶段）的判决。常设国际法院阐述如下：“对于违法行为，都产生恢复原状或对损害作出赔偿的义务，这是一项一般法律概念。”（2）1962 年国际法院对寺庙案的判决。国际法院认为，泰国试图以错误为由推翻地图所记载的边界，而对此泰国一直并未提出异议，法院适用禁止反言的原则驳回了泰国的主张。（3）1970 年国际法院对巴塞罗那电车案（第二阶段）的判决。国际法院认为，有关处理有限责任公司及其董事方面的国家权利，在国际法中发生了还没有确立规定的问题时，认定必须对照国内法的相关规定（国际法院类推了国内法制度中有限责任公司的一般概念）作出判断。参见真山全：《一般法律原则》，载西井正弘编：《图说国际法》，东京：有斐阁，1998 年版，第 10 ～ 11 页；[英] 伊恩布朗利著，曾令良、余敏友等译：《国际公法原理》，北京：法律出版社，2003 年版，第 13 ～ 14 页；PCU.Ser.A, No.9, p.21; ICJ. Reports, 1962, p.32; ICJ.Reports, 1970, pp.33 ～ 34.

了该决议的法律性质，起源于该决议的人类共同继承财产概念的法律性质也就迎刃而解了。实际上，发展中国家学者的观点，即人类共同继承财产概念为习惯法概念的观点，片面强调了联大决议性质本身，却没有全面考察联大决议的具体形式和内容及作用。而关于联大决议的法律性质，理论界是有争议的。[9]

笔者认为，作为“原则宣言”的联大决议是具有法律性质的决议。主要理由为：

第一，“原则宣言”获得多数赞成。如上所述，“原则宣言”是以 118 票赞成、0 票反对、14 票弃权通过的。这说明绝大多数国家是赞成“原则宣言”的。换言之，多数国家是愿受“原则宣言”约束的。

第二，“原则宣言”受到广泛尊重。首先，“原则宣言”的有关原则多次被联合国机构的决议、其他国家集团和国际组织的宣言或决议所引用。例如 1979 年《联合国贸易和发展会议关于开发海床资源的决议》、1972《圣多明各宣言》、1973 年《美洲国家组织美洲间法律委员会关于海洋法的决议》、1973 年《不结盟国家第四次会议关于海洋法的宣言和决议》等，均引用了“原则宣言”宣告的人类共同继承财产原则。其次，该“原则宣言”宣告的原则在月球协定中不仅得到引用，而且得以发展。例如：《月球协定》第 11 条第 1 款规定，月球及其自然资源均为全体人类的共同财产。可见，“原则宣言”在国际社会是受到尊重的。

第三，“原则宣言”得到多国遵守。这从公约缔约国遵守人类共同继承财产原则得以反映。尤其是各国 1994 年《关于执行 1982 年 12 月 10 日联合国海洋法公约第十一部分的协定》（以下简称“《执行协定》”）的缔结，巩固和发展了人类共同

9 一般来说，联大决议只具有建议性质，在法律上对各会员国没有拘束力，但是联大决议对下列事项还是有拘束力的。例如，有关联合国组织和构成方面的决议、预算方面的决议、制定内部规则的决议，参见宪章第 5 条、第 6 条、第 23 条第 2 款、第 61 条第 2 款、第 97 条、第 17 条、第 21 条和第 101 条第 1 款等。当然，由于联大决议内容广泛、形式多样，有些决议直接推动了公约的制定。例如，1948 年世界人权宣言导致了国际人权公约（1966 年）的形成，1963 年各国探索和利用外层空间活动的法律原则宣言导致了外层空间条约（1967 年）的形成，1970 年“原则宣言”导致了联合国海洋法公约（1982 年）的形成。另外，国际社会为解决联大决议的法律性质问题，曾在理论上作了尝试，提出了即时习惯法和软法理论：第一，对于即时习惯法理论。其主张，只要具备单一要素（主观要素），即联大决议表明了各国的法律确信（信念），该决议通过后就能马上成为习惯法。但国际法院在 1969 年北海大陆架案件判决中，没有支持不需要客观要素（国家实践）就能成为习惯法的即时习惯法理论。这种观点的理论意义在于，它不同于原来的习惯法形成模式，主张法律信念在国家实践之前先行；它改变了国家实践比法律信念先行或同时进行的传统模式。即时习惯法理论在国际法的新兴领域，尤其是科技不断发展后才能实现使用和开发资源目的的领域，例如国际海底区域资源开发、外层空间资源利用、南极区域自然资源开发和利用，在尽快确立这些区域地位的法律地位及其实施资源开发方面，具有重大影响和作用。第二，对于软法理论。这种观点认为，联大决议虽不如条约那样对会员国的权利和义务作出严格规定，但从联大决议的规则和内容能成为会员国国家行动的方针，能成为会员国实施行动的框架等意义方面来说，可把联大决议看作是处于法律领域和非法律领域之间的软法。但由于联大决议内容不一、形式多样，且软法概念本身并未明确，这种理论也不能解决联大决议的法律性质问题。

继承财产原则。[10] 最近，美国海洋政策委员会和参议院外交委员会都建议美国政府应加入公约，这表明美国也将遵循公约制度，包括“区域”制度。[11] 可见，其规范作用正在扩大。

同时，笔者认为，“原则宣言”对于人类共同继承财产概念发展为公约原则的作用，也是巨大的。主要表现为：

首先，“原则宣言”使概念得到肯定。自联大“原则宣言”通过后，“人类共同继承财产”的提法不再是海底委员会和第三次联合国海洋法会议争论的焦点，即“原则宣言”宣告的人类共同继承财产概念得到国际社会的肯定。

其次，“原则宣言”使概念获得地位。公约“区域”制度方面的规定，不仅采用了“原则宣言”宣告的原则，而且还丰富了其内涵，使人类共同继承财产概念获得了成文法的地位，并进而发展成为公约的重要原则。

再次，“原则宣言”使概念内容扩展。关于“区域”制度的内容主要规定在公约第十一部分。其中第一节（一般规定）和第二节（支配“区域”的原则）是“区域”制度的根本性规定，第三节（“区域”内资源的开发）以及公约附件三、四是上述两节所规定的原则的具体化。当然，公约不仅仅是重复“原则宣言”的内容，公约还补充和丰富了“原则宣言”的原则和内容。这已从上述的第二部分得以反映。

综上所述，“原则宣言”是具有法律性质的决议，当然，其具有法律效力。因此，宣言确立的人类共同继承财产概念应为法律性质概念，且此概念已发展成为习惯法概念，它对各国均有拘束力。应该指出，对人类共同继承财产概念的其他观点及不合理解释，多是在资金和技术上具有开发“区域”资源能力的英美等少数学者所为。他们作这种解释的目的是为给勘探和开发“区域”内资源的活动寻找理论支撑，拒绝履行公约所要求的法律义务。

四、研究人类共同继承财产概念特质的意义

（一）理论意义

1. 有利于我国全面理解公约的制度与原则。公约制定于 1982 年，它是对原

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10 例如《执行协定》序言指出，本协定的缔约国重申国家管辖范围以外的海床和洋底及其底土（简称“区域”）以及“区域”的资源为人类的共同继承财产。

11 美国于 2000 年由国会设立和总统任命成员的美国海洋政策委员会，其职责是就制订协调和综合的国家海洋政策进行调查和提出建议。该委员会已建议美国应该加入公约。美国参议院外交委员会也于 2003 年召开了两次听证会，在分析和比较了美国的关注和利益后，该委员会也建议美国尽快地批准公约，以确保美国在海洋事务中的主导权和在国际管理机构中的话语权及保障美国的利益。美国加入公约，必将推动公约制度和原则，包括“区域”制度原则的大发展。

来不合理的海洋法制度的修改、补充和完善，且它是一个全面调整海域所有问题的公约。制定公约目的是为了建立公正和公平的国际海洋法律新秩序，而制定在人类共同继承财产原则基础上的“区域”制度是实现公约目的的一个重要措施。当然，对该论题进行研究有利于我国从整体上认识和理解公约的原则和制度，并在理论上指导我国实践，回击某些西方发达国家分割公约内容、片面处理海洋事务的行为。

2. 有利于各国理解和执行公约机构制定的规章。关于“区域”制度的规章，如《“区域”内多金属结核探矿和勘探规章》（ISBA/6/A/18，以下简称“《勘探规章》”）以及《“区域”内硫化物和富钴结壳探矿和勘探规章草案》（ISBA/10/C/WP.1），均是由公约设立的机构——管理局制定的。这些规章，较好地反映了公约体制（公约及其附件）的原则和制度，是公约“区域”原则和制度的具体化及实际化，对各缔约国均具有拘束力。对该论题进行研究，即揭示人类共同继承财产概念实质，有利于各国理解和执行公约机构制定的规章。

3. 有利于国际社会理解公约体制外活动的违法性。因为“区域”制度的基础——人类共同继承财产之共同参与、共同获益、共同发展等的特征，要求国际社会对“区域”内活动必须由管理局统一管理和控制，而公约体制外活动的协定或安排无法实现上述目的，且无法解决它们之间关于“区域”活动的争端，又无法保证投资者对“区域”矿区的排他性权利及其权益。因此，建立在公海自由原则基础上的其他安排或协定都是错误的和违法的，必须予以消除。

4. 有利于国际社会积极借鉴或发展“区域”制度。众所周知，建立在人类共同继承财产原则基础上的“区域”制度，已对外层空间和南极区域产生积极影响，并在此理论影响基础上考虑或制订了有关制度。笔者认为，随着人们对人类共同继承财产法律性质研究的深入，国际社会将在更大的范围内对人类共同继承财产原

则予以借鉴和发展。[12] 因为，在这些区域适用以人类共同继承财产原则为基础的制度，有利于国际社会的和平与发展。

（二）实践意义

1. 有利于各国将“区域”制度作为本国实践的行动准则。如上所述，人类共同继承财产概念为习惯法概念，对各国具有拘束力。因此，“区域”制度必将成为指导各国实践的行动指南。从目前各国实践看，各国是接受和遵守《公约》（包括“区域”制度）的制度和原则的。显然，《公约》（包括“区域”制度）已得到普遍遵循，也得到稳定发展，并已成为管理海洋活动的权威性文件。

2. 有利于“区域”制度在公约体制内获得发展。《公约》第 82 条、第 76 条第 8 款规定，沿海国对 200 海里外非生物资源的开发，应通过管理局缴付费用或实物；同时，沿海国对 200 海里外大陆架界限的划定应接受大陆架界限委员会的建议。这些规定体现了“区域”制度中要求国际组织公平合理分享资源的原则。为此，俄罗斯和巴西已分别于 2002 年 1 月和 2004 年 5 月向公约大陆架界限委员会提交了本国 200 海里外大陆架申请方案。公约体制内的活动正在落实“区域”制度的原则。

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12 当然，“区域”制度在外层空间和南极区域的全面应用是有一定难度的，因为它们之间存有明显区别。笔者认为，（1）“区域”与外层空间的主要区别为：第一，制度的形成过程不同。外层空间法的形成和发展是通过谈判制定条约而实现的；而海洋法人类共同继承财产概念在公约中的确立是通过将海洋法所有问题提交给第三次海洋法会议进行审议，并在一揽子交易后形成的。第二，制度包含的内容不同。与人类共同继承财产概念相关的外层空间条约的相关条款主要为：第 1 条（自由探索和利用外层空间）、第 2 条（禁止占有外层空间）、第 3 条（遵守国际法和联合国宪章）和第 4 条（用于和平目的，禁止军事利用）。这些规定虽然体现了人类共同继承财产概念的要素或特点，包括具体的原则，但外层空间条约并没有对外层空间的资源开发（包括国际管制制度和利益分享）作出任何规定，这与公约体系相比存在明显不足。而在月球协定中，虽然首次规定了人类共同继承财产概念适用于外层空间，也明确规定了管制外层空间资源制度的宗旨，例如：《月球协定》第 11 条第 1 款、第 5 款、第 7 款。这些规定虽比外层空间条约的相关规定有进步，但是对于开发月球自然资源的国际制度，包括国际管理机构，要在等到开发时才建立指导包括适当程序在内的国际制度方面，与公约体制相比仍有很大差距。（2）“区域”与南极区域的主要区别为：第一，前提条件不同。在南极区域，存在国家根据扇形理论对南极领土主张权利的情形，虽然这些权利主张并没有得到承认，但这毕竟不同于“区域”和外层空间。第二，法律制度不同。南极区域存在控制南极地位的国际协议，即《南极条约》。其中南极条约（1959 年）重要的相关条款主要为：第 1 条（专用于和平目的，禁止军事利用）、第 4 条（冻结南极地域的领土主权权利和对领土的要求权）、第 5 条（禁止在南极实施核爆炸和处置放射性核废料）、第 7 条（承认缔约国可单独视察南极区域的任何地区，包括设施）、第 9 条（召开协商国会议、共同协商问题、提出解决的措施）等；而在“区域”并不存在相关的制度。例如“原则宣言”指出，大会确认在各国管辖范围以外有一个海床洋底及其下层土壤之地域存在，其确切界限尚未确定；承认现有公海制度中并无实体规则管制上述地域之探测及其资源之开发。因此，在南极适用《公约》“区域”制度有一定的难度。

3. 有利于“区域”制度对其他国际法领域产生一定影响。到目前为止，根据《勘探规章》的有关规定，例如《勘探规章》第 23 条，[13] 管理局已与 7 个已登记的先驱投资者 [14] 签署了勘探“区域”内多金属结核资源的合同，但由于受国际矿物市场价格、多数国家国内经济对矿物需求并不高涨等因素的影响，以及受勘探区域地貌、海流速度、环境影响评估、开发技术和设备等原因的制约，商业性“区域”内资源开发活动还未实质性地展开。但笔者认为，随着“区域”制度在公约体制内的实施和发展，它在其他国际法领域（例如外层空间和南极区域）会获得借鉴和应用，这也有利于国际社会的和平、稳定和发展。

4. 有利于推动国际海底区域资源开发相关领域的大发展。由于开发“区域”资源需要强大的技术支撑，“区域”制度的实施，可推动国际海底区域资源开发相关领域的大发展，尤其对深海开发技术、装备技术、环境处理技术、船舶技术、加工运输技术等的推动和发展，并促进各国在海洋资源开发方面的制度建设。就我国而言，研究人类共同继承财产概念特质，对落实党中央、国务院的“开发海洋资源”战略决策，确保社会经济持续发展所需资源，复兴中华民族具有更为重大的实践意义。

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13 例如《勘探规章》第 23 条第 1 款规定，一项勘探工作计划经理事会核准后，应按本规章附件三（勘探合同）规定写成管理局与申请者之间的合同；第 2 款规定，合同应由秘书长代表管理局与申请者签署。

14 国际海底区域资源开发的 7 个已登记的先驱投资者分别为：印度国家海洋研究院、法国大洋结核块研究协会、日本深海资源开发公司、俄国海洋地质作业南方生产协会、中国大洋矿产资源研究开发协会、韩国海洋研究开发院、国际海洋金属联合组织。

可持续发展观与海法的关系

梅 宏 *

内容摘要：海法是规范人类的各种海域活动，并调整由此产生的社会关系的法律规范之总称。虽然“海法”的概念尚未得到国内学者的普遍接受，但是依可持续发展观审视涉海法律，对有关海洋、海事方面的法律、法规予以整合、系统化，更新其立法指导思想与基本原则，树立全面的立法目的，为海洋环境资源的可持续利用提供立法保障，为时代发展之需要。进而，以海洋环境资源法的生态化调整方法和调整机制为主体，以海法部门中其他法律对利用海洋环境资源的社会关系进行调整为必要补充，构建综合调整人类与海洋关系的海法调整机制，有利于改变当前涉海法律零散不全，且调整手段单一性、分割性、无序性、矛盾性的局面。

关键词：可持续发展观 环境时代 海法

一、“海法”的概念与范围

人类最初是从陆地走向海洋的，海上活动的许多规则因而带有陆上活动积累和总结的色彩和痕迹，[1] 先民的法律是以规范陆域活动的“陆法”为主。海上活动多样性、综合性、复杂性的特点决定了“陆法”无法调整全部的海上活动。随着科技水平提高、社会经济生活不断进步，人类对海洋的开发、利用、研究、保护等活动日益频繁、活跃，对海洋的认识与重视的程度显著提高。完善、丰富涉海法律并依据科学理念将其整合为一体，进而确立“海法”部门，有利于海上活动的开展，学理上对此讨论亦颇有价值。

所谓海法，是规范人类的各种海域活动，并调整由此产生的社会关系的法律规范之总称。它涵盖的内容十分广泛，不仅包括规定各种海域的法律地位、具有海上国际法性质的法律规范，而且包括港口行政机关对港口进行管理、具有海上行政法性质的法律规范，以及调整平等主体在海上的人身关系和财产关系、具有海上私法性质的法律规范。海法不仅调整各国对内海、领海等海域确立主权而形

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1 张永坚：《海商法特点研究撮要——兼谈海商法之体系》，载于《海商法研究》2003 年第 1 辑。

成的静态的法律关系，还调整国家、法人、其他组织和自然人对海洋进行资源开发、科学研究、环境保护、航海贸易等形成的动态的法律关系。在这些关系中产生的诸多法律问题不是仅凭已有的某一部门法的单独调整或某几个部门法的共同调整所能解决的，而要求在传统的法律领域中出现新的突破，以适应变化的客观形势之需要。

海法是与海洋相关的法律综合发展、相互作用的必然结果。当前，各种涉海法律散见于其他法律部门中，如海上国际法归于国际法之中，海上行政法归于行政法之中，海商法亦成为民商法的特别法；它们在其他法律部门中总是很明显地表现出自身的特殊性与独立性，往往被当作该门类中的特例或特别法；对于海洋活动中出现的问题，要么是几个法律部门都有规定，但存在法律冲突；要么是几个法律部门都未规定，形成法律调整上的“真空”；由于对海洋活动的特殊性和技术性不甚精熟，已有法律的调整也难以产生切合实际的法律效果，如此种种，不能适应海洋活动现实发展的需要。随着海法调整的社会关系日趋多样化和复杂化，以及涉海法律自身所具有的内在统一性的不断增强，针对海上活动的特殊性，构建专业性突出的海法部门，已成为时代的需要。

海洋所产生的国际关系、行政关系、民商事关系及刑事关系互相交错、互相作用、互相影响，并日趋多样化和复杂化，构成海法调整对象的完整系统。海法所调整的社会关系是以海洋这个巨大的空间为依托而产生和发展起来的。存在于同一空间使得这些社会关系具有了该空间所赋予的某些特色，这些特色正是海法调整对象系统的共性之所在。

依据调整对象的不同性质，海法可分为海公法与海私法。海公法，为调整国家与公民、法人或其他社会组织之间的海事社会关系的法律规范的总称，主要包括海运行政法、[2] 海域使用管理法、海洋环境保护法、海洋资源保护法等；海私法，是指调整私人间海事社会关系的法律规范的总称，主要包括海商法、海事国际私法。

一般来说，一国海法法律规范的效力，大致分为五个层次：第一层次是宪法中有关宣告海洋领土、海洋权益、海洋资源的合理开发和海洋环境的有效保护等的根本性规定；第二层次是维护国家主权和海洋权益的海洋基本法，如《领土及毗连区法》、《专属经济区和大陆架法》；第三层次是关于海洋的开发利用、海洋环境保护的单项法律和海洋资源综合性管理法，如海域使用管理法、海洋环境保护法等；第四层次是海洋管理、海事管理方面的行政法规、部门规章等；第五层次则是各地因地制宜制定的地方性法规、规章。我国目前虽然已颁布了近 30 项涉海法律、法

2 海运行政法，是指调整国家海运行政机关在行使行政职权的过程中所形成的海运行政管理关系的法律规范之总称。

规[3]，但还远远不能适应我国海洋经济发展的需要。因而，增加法律供给，完善我国海法的立法工作是当务之急。

笔者认为，将与海洋有关的法律整合为一体，建立我国的海法部门，是海洋世纪法制建设的重要工作。我国虽然先后通过了《中华人民共和国海洋环境保护法》、《中华人民共和国海上交通安全法》、《中华人民共和国渔业法》、《中华人民共和国矿产资源法》、《中华人民共和国领海及毗连区法》等海洋法律和涉海管理法律，国务院也制定了《对外合作开采海洋石油资源条例》、《涉外海洋科学调查研究管理规定》、《铺设海底电缆管道管理规定》和《矿产资源勘查区块登记管理办法》等行政法规，但至今缺少一部海洋管理的根本大法，上述法律亦存在立法理念不统一和制度设计亟待完善等问题。

值得注意的是，学界在合称上述法律时，使用着不同的概念，有称为“海洋法律体系”的，[4] 有称为“海事法”的，[5] 也有主张用“海法”来指称上述法律的，[6] 环境资源法学者则强调构建我国的“海洋环境资源法体系”、[7] “海洋资源法律体系”[8] 或“海洋资源保护法律体系”[9]。笔者认为，上述概念在内涵上有明显不同，作为调整与海洋有关的各种特定社会关系的法律规范的总称，只宜采用“海法”这一合

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3 迄今为止，我国已颁布实施的涉海法律、法规主要有：1.《中华人民共和国政府关于领海的声明》；2.《全国人大常委会关于批准〈联合国海洋法公约〉的决定》；3.《中华人民共和国领海及毗连区法》；4.《中华人民共和国政府关于中华人民共和国领海基线的声明》；5.《中华人民共和国专属经济区和大陆架法》；6.《中华人民共和国海洋环境保护法》；7.《中华人民共和国海上交通安全法》；8.《中华人民共和国渔业法》；9.《中华人民共和国矿产资源法》；10.《中华人民共和国测绘法》；11.《中华人民共和国对外国籍船舶管理规则》；12.《中华人民共和国涉外海洋科学研究管理规定》；13.《关于外商参与打捞中国沿海水域沉船沉物管理办法》；14.《外国籍非军用船舶通过琼州海峡管理规则》；15.《国际航行船舶进出中华人民共和国口岸检查办法》；16.《中华人民共和国对外合作开采海洋石油资源条例》；17.《铺设海底电缆管道管理规定》；18.《中华人民共和国海洋石油勘探开发环境保护管理条例》；19.《中华人民共和国防止船舶污染海域管理条例》；20.《中华人民共和国海洋倾废管理条例》；21.《中华人民共和国防治海岸工程建设项目污染损害海洋环境管理条例》；22.《中华人民共和国防治陆源污染物污染损害海洋环境管理条例》；23.《中华人民共和国防止拆船污染环境管理条例》；24.《中华人民共和国海上交通事故调查处理条例》；25.《中华人民共和国船舶和海上设施检验条例》；26.《中华人民共和国海上航行警告和航行通告管理规定》；27.《中华人民共和国渔业法实施细则》；28.《中华人民共和国水下文物保护管理条例》；29.《中华人民共和国水生野生动物保护实施条例》等。

4 姚慧娥：《论面向新世纪我国海洋法制建设的完善》，载于《中国法学会环境资源法学研究会年会论文集》（2003 年），第 507~511 页。

5 司玉琢：《国际海事立法趋势及对策研究》，北京：法律出版社 2002 年版。

6 司玉琢、胡正良、曹冲：《试论海法独立学科体系》，载于《航海教育研究》1997 年第 1 期。

7 蔡守秋、何卫东：《当代海洋环境资源法》，北京：煤炭工业出版社 2001 年版，第 14~17 页。

8 李铮：《海洋资源可持续利用若干问题之立法思考》，下载于 http://www.riel.whu.edu.cn/show.asp?ID ＝ 737, 2005 年 9 月 20 日。

9 赵英杰、刘乃忠：《我国海洋资源可持续利用的措施及立法保障研究》，载于《中国法学会环境资源法学研究会年会论文集》（2003 年），第 527~530 页。

称。“海洋法律体系”或“海洋法体系”虽然表义明确，但其狭义仅指“国际海洋法”，广义也至多涵盖“海公法”的内容，而无法包容私法性质的法律规范。从事海洋立法、执法的工作人员常常使用“海洋法制建设”这一名词，就其突出行业特点而言，无可厚非，但是考虑到“环境时代”[10]，为实现海洋资源的可持续利用和海洋生态的良好发展而对法律进行适时变革时，就不能只提海洋法制建设，因为其内容显然不够全面。“海事法”的提法则因“海事”一词的语义不明确而容易给人概念不清、界定不严的印象。[11] 广义的“海事法”，除了海上运输、海上保险、海难救助、船舶碰撞等狭义海商法的内容外，还可包括一切与“海”有关的法律，如港口法、航道法、船员法、船舶法、航运管理法、海事司法等，但通常不包括国际海洋法、海洋环境保护法、海域使用管理法及海洋行政法规，故其内涵也小于“海法”。

在强调环境资源保护的今天，根据可持续发展战略构建海洋环境资源法律体系并创新一系列基本制度，以实现海洋环境资源的可持续利用，固为海法建设的重点，但“海洋环境资源法体系”只是“海法”中的一部分。[12] 笔者认为，顺应可持续发展观对环境时代法制建设的要求，应全面、系统地调整、改进现行海法，更新我国海法的指导思想，创新海法制度，不仅重视依可持续发展观对海洋环境资源法律进行立、改、废，更应在具有一体化的海法部门中强调环境观，对包括海商法、海事行政法在内的所有涉海法律、法规渗透法律生态化理念。[13] 这是环境问题的整体性、综合性特点所决定的，也是涉海法律、法规之间的内在相关性所提供的可

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10 关于“环境时代”及类似提法，现已多见于环境资源法论著中。有学者将其诠释为“环境文明时代”（参见陈泉生、张梓太合著：《宪法与行政法的生态化》，北京：北京：法律出版社 2001 年版），也有学者将其释为“环境危机时代”，如徐祥民教授的《对“公民环境权论”的几点疑问》一文（参见《中国法学》2004 年第 2 期）。本文主要论述可持续发展观对海法在 21 世纪发展的理论启示，即着眼于当前和未来，故所谓“环境时代”与“21 世纪”在本文中就成了可以并提或替换使用的名词。

11 “海事”一词，在我国，常用于不同的场合。就其含义，大致可归纳为狭义和广义两种概念。狭义的“海事”专指“海损事故”或“海难”，广义的“海事”，则指“海上事务”，即与船舶在海上航行有关的一切事物。

12 蔡守秋教授在《当代海洋环境资源法》一书第一篇“当代海洋环境资源法总论”中释义“海洋环境资源法”时，对“海洋环境资源法”的广义、中义和狭义作了介绍，并指出其书中的海洋环境资源法“基本上是中义的海洋环境资源法，即调整有关海洋环境资源的开发、利用、保护、改善的社会关系的法律规范的总称。不难看出，“海洋环境资源法体系”是海法体系的子集，无论是其概念内涵还是其规范构成都是以公法性质的海法规范为主，很难将海商法、船员法、海事国际私法等私法内容包容其中。参见蔡守秋、何卫东：《当代海洋环境资源法》，北京：煤炭工业出版社 2001 年版，第 14~20 页。

13 “法律生态化”，是指按照环境时代的要求，逐渐将生态原理引入部门法领域，将生态学的原则、环境保护的要求作为法的修正标准之一，对现行法律进行全方位的调整、改进和创新，用生态学的理论和观点审查各种法律行为，使其更加符合生态规律的要求。建立在可持续发展观基础之上的法律生态化理念对来源于人本主义的传统法理进行反思，从多维视角探究生态与法律的关系，将生态保护要求和可持续发展的思想融入各个法律部门中，使法律的指导思想、立法目的和具体制度遵循生态环境的原理、容纳并满足环境保护的要求，推动现代法制朝着与环境友好、有利于实现可持续发展的方向改革。

能。

法律概念是人们从法律实践活动中概括、抽象、提炼出的具有共同特征的有关法律及其现象的理论范畴。“概念是法律思想的基本要素，并是我们将杂乱无章的具体事项进行重新整理归类的基础。”[14]“某一法律概念形成的过程也伴随着一个人们达成某种价值认同的过程。”[15] 海法概念的确立，缘于人们在制定和适用涉海法律、法规的过程中，对涉海法律、法规负载同样价值功能，调整一体化的社会关系，及涉海洋环境资源这一重要客体的明确认识。海法概念的确立，体现了一种理智地区分和归类的专业智慧，凭借这种专业智慧，丰富多样的涉海法律活动得到全面、有序的规范，海法部门也因此取得更高的科学性与合理性。提出海法这一概念的重要性还在于，概念是适用法律规则和原则的前提。“概念的独特功能在它通过对各种事实因素的区分归类而为法律规则和原则的使用提供了可能。”[16]

当前，虽然“海法”的概念尚未得到国内学者的普遍接受，但是依可持续发展观审视涉海法律，对有关海洋、海事方面的法律、法规予以整合、系统化，更新其立法指导思想与基本原则，树立全面的立法目的，构建完善的法律制度，为海洋环境资源的可持续利用提供立法保障，已成为学界共识。

海法部门的建立与完善，并不是简单的法律汇编，也不是仅由海洋、海事立法、行政、司法部门工作人员和致力于该领域研究的学者探讨的问题，而应列为一国法制建设的重点，得到广泛重视。海法部门的建立及其具体制度的改进、创新，在一国实施可持续发展战略过程中具有重要的意义。保护海洋环境和海洋生物多样性、合理开发利用海洋资源是一项复杂的系统工程，实现“法律对社会的控制”需要海法部门中各种性质的法律、法规都吸收可持续发展思想。

二、我国海法的立法现状及存在的问题

我国改革开放之前，总的说来，对海洋立法不够重视，这集中体现在未能形成一部规范海洋活动的全国性单行法，仅发布了若干有关领海、海峡、海港、船舶管理、保护水资源等方面的政策性文件以及行政条例、法令、规则等。20 世纪 80 年代以后，我国海洋、海事法制建设进入全面发展的阶段。主要表现在：

1. 在我国环境保护的基本法《中华人民共和国环境保护法》对海洋环境保护作了原则性规定之后，1982 年全国人大常委会通过了《中华人民共和国海洋环境保护法》，1999 年进行了修订，这是我国第一部关于海洋的单行法，它针对的是

14 《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。
15 陈金钊：《法理学》，北京：北京大学出版社 2002 年版，第 92 页。
16 张文显：《法理学》，北京：法律出版社 1997 年版，第 76 页。

海洋生态的保护问题，表明我国已将海洋事业的发展与海洋环境保护有机地结合起来，一并纳入了依法治理的轨道。为实施该法，国务院相继发布了《中华人民共和国防止船舶污染海域管理条例》、《中华人民共和国海洋石油勘探开发环境保护条例》、《中华人民共和国海洋倾废管理条例》、《防止拆船污染海洋环境管理条例》、《中华人民共和国防治陆源污染损害海洋环境管理条例》、《中华人民共和国防治海岸工程项目污染损害海洋环境管理条例》。此外，国家环境保护总局、国家海洋局、交通部、沿海省、市等部门还制定了相应的条例、规章、地方法规，这些法律、法规、规章的颁布使我国关于海洋环境保护的法律体系初步形成。

在海洋开发、利用管理方面，20 世纪 80 年代以来，我国政府陆续颁布了《中华人民共和国领海及毗连区法》（1992 年 2 月 25 日，我国第 7 届人大常委会第 24 次会议通过，当日起生效）、《中华人民共和国专属经济区和大陆架法》（1998 年 6 月 26 日，我国第 9 届人大常委会第 3 次会议通过，当日起生效）、《中华人民共和国海域使用管理法》、《海洋自然保护区管理办法》等法律、法规，意味着我国从 20 世纪 70 年代后期就开始规划的领海、毗连区、专属经济区、大陆架四大海域的基本法，经过 30 余年持久不懈的努力，已经初步实现系列、配套。

现有涉海法律、法规的空间效力及于领海、毗连区、专属经济区、大陆架等主权管辖海域。从内容上看，领海与毗连区法、专属经济区和大陆架法构成我国法律保护海洋权益的“宪章”。海域使用管理法建立的海域使用审批、有偿使用、功能区划三项制度，为实现我国海洋的综合管理提供了必要的法律手段。海洋环境保护法、矿产资源法、海上交通安全法、涉外海洋科研管理条例等法律、法规，使海洋资源开发、环境保护、海上交通运输、海洋科学研究等主要的海洋开发利用活动有法可依，有章可循。

2. 我国在大量的法律、法规中对涉海活动做出了具体规定。例如，1986 年颁布的《渔业法》及其实施细则中，指明其适用于领海及我国管辖的一切其他海域，在海洋捕捞许可证、海上渔事作业范围、海洋渔业资源保护等方面都有明确的规定。同年颁布的《矿产资源法》，则使我国海洋石油、天然气的工业开采有法可依。我国政府及有关主管部门，依据各种单行法规，发布了数目众多、覆盖面宽广的涉海行政法规，诸如：1982 年的《对外合作开采海洋石油资源条例》、1983 年的《防止船舶污染海域管理条例》和《海洋石油勘探开发环境保护管理条例》、1985 年的《海洋倾废管理条例》、1988 年的《防止拆船污染环境管理条例》、1989 年的《铺设海底电缆管道管理条例》和《水下文物保护管理条例》、1993 年的《国家海域使用管理暂行规定》、1996 年的《涉外海洋科学研究管理规定》等。

3. 在参与国际海洋法条约方面，我国显示出积极的姿态。仅在 1980 年一年间，我国就先后加入 1972 年的《海上避碰规则公约》、1969 年的《国际油污损害民事责任公约》、1969 年的《国际船舶吨位丈量公约》、1972 年的《国际集装箱安全公约》和 1974 年的《国际海上人命安全公约》等 5 个国际海事公约。之后，我国批准或

加入了更多的国际海洋法律文件。我国自始至终参加了 1973 年至 1982 年的联合国第三次海洋法会议，1982 年 12 月 10 日，我国成为首批签署《联合国海洋法公约》的 119 个国家之一。历经充分审议，1996 年 5 月 15 日，我国第 8 届人大常委会第 19 次会议批准了《联合国海洋法公约》（同年 6 月 17 日起该公约对我国生效）。我国成为《联合国海洋法公约》的缔约国，标志着我国海洋事业全面走向以法治海、面向世界和发展经济的轨道。顺应“海洋世纪”的国际潮流，为规范我国的海洋开发管理工作，近年来我国关于海洋管理的专门性法律、法规明显增多。这些海洋法律、法规不仅成为我国贯彻“依法治国”基本方略的组成部分，也成为我国海洋法制建设的重要基础。

但不容忽视的是，我国的海洋、海事法制现状还存在亟待弥补的不足之处：

1. 迄今为止，我国海洋活动存在着缺乏宪法依据的重大缺憾。我国作为一个海洋大国，却在宪法这部根本大法中，见不到明确述及“蓝色国土”和海洋其他问题的片言只字。唯一隐约提到海洋的条文是我国 1982 年宪法的第 9 条，其规定：“矿藏、水流、森林、山岭、草原、荒地、滩涂等自然资源，都属国家所有……”此处“矿藏”可解释为包括了海底矿产资源，“滩涂”应当是包括了河岸滩涂和沿海滩涂。我国近年采取的制宪方式为拟制宪法修正案，在已生效的宪法修正案中，依然无一处涉及海洋。

2. 某些重要领域仍存在立法空缺。尽管我国在 1998 年颁布了《专属经济区和大陆架法》，填补了我国海洋立法的一个大的空白，但由于费时 6 年之久，使得其在 1992 年因《领海及毗连区法》通过所掀起的我国海洋立法的高潮而一度沉寂，也使得我国在制订海洋基本法方面同周边国家拉大了时差。至今，我国的海洋立法仍有许多空缺：如在海洋权益管理部分尚缺乏海上人工构造物管理方面的立法；在海洋资源开发方面尚无《海洋资源开发保护基本法》、《海岸使用管理法》、《海岸带管理法》等综合性法规。

当前，我国法律中许多海洋活动的规则是在非以海洋为专门适用客体的单行法中附带规定的。例如，《农业法》、《渔业法》、《矿产资源法》等，主要都不是针对海洋，尽管其中含有涉及海洋活动的法律规范。关于海洋活动的专门化法律、规章迄今甚少，尤其是关于新兴海洋产业的单行法仍付空阙。

我国需要尽快建立、健全海洋法律法规体系，制定和实施《海洋开发管理法》、《海岸带管理法》、《海岛开发管理法》、《海洋自然保护区和特别保护区管理条例》、《海岸工程管理条例》等综合管理法规；制定和实施与国家法规相配套的区域管理和地方管理法规，如《渤海开发管理法》、《南沙群岛及邻近海区开发管理法》和省级海岸带管理条例等；对已制定并公布执行的海洋基本法规、综合管理法规、行业管理法规和地方管理法规进行补充、修改和不断完善。

3. 制定于 20 世纪 80 年代早、中期的涉海法律，深受计划经济体制和传统“重陆轻海”观念的影响，很难适应现时海洋权益保护、海洋资源开发的需要。例如，

调整我国海洋油气资源开采的主要法律是《矿产资源法》（1986 年）、《对外合作开采海洋石油资源条例》（1982 年）与《海洋石油勘探开发环保条例》（1983 年），调整渔业资源的主要法律是《渔业法》（1982 年）、《渔业法实施细则》（1987 年）、《水产资源繁殖保护条例》（1979 年），这些法律带有很深的计划经济的烙印，不能完全适应市场经济的需求；有些海洋立法仅仅是陆地立法的简单延续，根本没有顾及海洋本身的特征。

4.《海商法》缺乏与海洋法律的协调、统一。在我国，海商法的立法、司法及学术研究与海洋法的理论、实践长期相互隔离，归属于不同的领域，二者同为海法的内在关联性被忽视。“我国（大陆）的海商法及其研究，走了一条相当独特的发展道路，也就是重实务和实际应用，强调个性化和行业特殊性，偏重表象、程序、具体业务；却比较忽视对这些典型特征所反映的法律实质、法的基本理论及发展规律的学习和探讨，也比较忽视对海商法与法的体系中其他相关各法之间内在联系的研究。”[17]

5. 有的法律规范效力层次太低，难以实现立法目的。比如，《外籍船舶管理规则》和《海洋自然保护区管理办法》，前者涉外性很强，后者在环境保护中举足轻重，倘若仅停留在部门规章的层次上，执行起来势必困难重重。因此，应尽量提高其效力层次，以法律、行政法规的形式出现，增强其实用性。

6. 有的法律规范太单一，不能发挥统一协调的作用。我国现时期的涉海法律法规中，占主导地位的是中央和地方政府部门的行政性法规、规章，且一经颁布实施，较少适时地进行修订、补充，致使其可操作性大为减弱。典型的表现是，在海洋资源开发管理方面，行业管理法规较多，缺乏海洋资源开发综合协调、管理方面的法规。

随着社会的不断发展，人类越来越重视对海洋的开发利用，1993 年第 48 届联大通过决定敦促各国要保护海洋资源，加快海洋立法的进程。我国于 1994 年根据联合国《21 世纪议程》和本国国情制定颁布了《中国 21 世纪议程》。《中国 21 世纪议程》提出了我国可持续发展的战略、对策及行动方案，其中有关海洋可持续发展的战略是重要的组成部分。而我国现有的上述涉海法律、法规，在指导思想上并没有把可持续发展以及资源立法作为重要的立法目的，对可持续发展和资源立法缺乏具体明确的规定，致使这些法律、法规难以适应保护海洋国土资源、实现海洋经济可持续性发展的需要。

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17 张永坚：《法之家庭的游子——我国海商法研究的回归与发展》，载于《海商法研究》2001 年第 2 辑。

三、可持续发展观对海法的启示

21 世纪是海洋事业大发展的时代，各国从国民经济发展战略的高度，重视海洋资源的合理开发与利用，强调海洋生态环境的保护与改善，运用科技手段、经济手段、法律手段及教育手段等多种方式建设海洋事业，发展各种文明、进步的海上活动。

21 世纪又是环境文明时代。上世纪中后叶，人类遭受了自然环境的一连串打击和报复；痛定思痛，人类开始认真思考人与自然的关系，领悟尊重自然、人与自然和谐相处的真谛。走进倡导环境保护的新纪元，有识之士对于人类生存环境问题的历史性思考愈加深刻，在可持续发展观这一挑战人类现存生产方式、生活方式的革命性理论的指导下，“对传统的以当代人为本位的法律思想、法律观念、法律价值取向、法律重心、法律救济、立法倾向等进行深刻的反思”，[18] 已成为当代法学研究和法制建设的重点之一。

海法所调整的各种行为，都将直接或间接影响海洋环境资源的质量、存量和效用。实现海洋资源的可持续利用，加强海洋环境保护，是环境时代对海洋事业发展的要求；保护海洋环境、保证合理开发、利用海洋资源，是“海洋世纪”的历史使命。[19] 有鉴于此，作为对涉海活动实行“规则之治”的海法，应接受可持续发展观的启示与指导，从中获得立法指导思想、立法目的及其基本原则、调整机制的深刻启示，为海法在时代大潮面前一唤而出、应势而起做好理论准备。

（一）立法指导思想与基本原则的进步

当前，在我国海洋作业及与海洋有关的经济活动中，一个突出的问题是有关主体为追逐经济利益，不惜以非持续性方式利用海洋环境资源，结果导致海洋生物资源衰退、局部海域生态破坏严重、环境污染加剧以及海洋灾害频繁等。

实践证明，推行可持续发展战略是海洋环境保护得以良性运行、海洋资源得以永续利用的唯一方案。因此，海法部门的各项法律应树立以可持续发展为核心的立法指导思想，并将“以可持续发展为导向的原则”作为立法的基本原则。

一个国家立法的指导思想，总是同该国的政治发展目标、经济和社会发展目标等相适应。既要加快发展，又要在发展过程中保持经济、人口、资源与环境的相

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18 陈泉生：《可持续发展与法律变革》，北京：法律出版社 2000 年版。

19 2004 年世界环境日的主题是“海洋兴亡，匹夫有责”。这一主题强调人类社会再也不能把世界海洋当成一个方便的垃圾倾倒场，或被当作一个取之不尽的财富来源；要求各国政府和人民对如何对待海洋作出抉择，同时吁请我们每个人都尽力为保护海洋而采取行动。

互协调，是我国当前和今后相当长时期的发展目标。为实现这一目标，我国必须走以最有效利用资源和保护环境为基础的循环经济之路，贯彻以人为本，全面、协调、可持续发展的观念，实现经济增长方式的根本性转变；必须加强法制，充分发挥环境法律法规的规范作用、社会作用，积极改善人类与自然之间的关系。可持续发展观与时代需要合拍，它把经济发展与生态的可持续性有机地结合起来，主张对人类发展的基础——环境、资源与能源的开发与利用，应当维持和建立在利用效率最大化和废弃（污染）物质最小化之上。这一思想得到全社会的重视与接受，立法者已将其作为制定法律、修改法律的指导思想，而这一立法指导思想在法的创制过程中的具体落实，就是确立以可持续发展为导向的立法原则。

以可持续发展为导向的原则（以下简称“可持续发展原则”），是指在进行环境与自然资源立法时，应当充分地考虑实现人类社会、经济发展所必需的环境与自然资源条件，以及考虑地球环境与自然资源满足世代间人类发展所可提供的能力和基础，并以此作为指导立法以及确立法律规范的理论基础。[20] 可持续发展原则要求人们尊重、实现和维护自然价值，重新规范对自然的态度和行为，建立一种人与自然互利共生、和谐发展的新型关系，并且通过完善社会经济活动，如寻求科学的资源评估和定位方法，把资源核算纳入国民经济核算体系的方法，以及制定自然资源价格改革的经济手段，实现经济、社会、生态效益的统一。

法律原则是法律时代精神的集中体现。在立法中，法律原则作为法律概念和规则的基础与出发点，对于整个国家的法律制度及规范体系起着统帅和指导作用。环境时代的海法建设从可持续发展观中获得良多启示，确立了融公平性原则、持续性原则和共同性原则于一体的可持续发展[21] 为海法的指导思想，将富有时代新意的法的价值要素凝结在可持续发展原则中，并以该原则作为海法的目的与海法具体制度、规则之间的桥梁，运用可持续发展原则对海法的各项制度、各个效力层次的规则予以整合，力求消除和防止海法制度与规则的内部矛盾，实现海法内部的和谐统一。

具体而言，在海洋资源的开发利用和海商、海事活动领域中，应将资源有限、自然相关、环境污染和生态破坏具有不可逆转性等“铁的”生态规律作为行为的警

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20 金瑞林、汪劲：《中国环境与自然资源立法若干问题研究》，北京：北京大学出版社 1999 年版，第 62 页。

21 “可持续发展可以归结为三个原则，这些原则都是以人的发展为基本目标的。一是公平性原则——强调本代人之间的公平和代际之间的公平。二是持续性原则——人类经济和社会的发展不能超越资源和环境的承载能力。三是共同性原则——虽然各国可持续发展的具体模式不同，但人类只有一个地球；面对共同挑战，人类只有形成共识、采取共同的行动，才能实现共同的未来。”（参见陈映霞：《一种新型的生态人类中心主义——从两点论和重点论相结合的辩证观点看可持续发展》，载于《怀化师专学报》2002 年第 3 期；转引自吕忠梅主编：《超越与保守——可持续发展视野下的环境法创新》，北京：法律出版社 2003 年，第 13 页）。

示，尽快建立起面向未来持续发展的前瞻性和预警性反馈机制，保证海洋环境利益不因经济活动而受损，实现海洋环境资源的可持续利用。我国业已制订的海法法律、法规，涉及海洋资源合理开发和海洋生态环境保护的法律规范已占了相当的比例，这种良好的势头应予保持和扩大。不仅仅是海洋环境保护法、海洋资源法律、法规要将可持续发展原则奉为圭臬，海法部门中的其他法律，包括亦属商事法律、具有突出的“营利性”特征的海商法，也要在环境时代及时改进。当前，我国《海商法》的修改已提到议事日程，海商法专家受交通部委托以科研项目形式完成了《海商法》的修改建议稿。在正确预测国际海事立法发展趋势的基础上，《海商法》修改建议稿依据适时性原则增设了船舶污染损害赔偿制度。

从保护海洋环境资源的观念出发，当代海法应运用可持续发展观分析海法理论的不足与缺陷，依据可持续发展原则创新海法制度、规则，建立一体化的海法部门，推动海法从技术工具的法向价值蕴涵的法转变。

（二）立法目的全面张本

法律是立法者依照一定目的制定的、具有国家强制性和社会普遍性的行为规范。制定一部法律，其首要条件应当是使实定的法律符合立法者的意图和动机，也即符合立法的目的。海法的立法目的决定着整个海法的指导思想、海法的调整对象，也决定着海法的适用效能。目的乃是立法者对海法所要追求的价值的最直接、最明确的表达。

我国目前的海法并不是一部法律的概念或名称，而是指规范人类在海域从事的各种活动，调整由此产生的社会关系的法律规范之总称。虽然所调整的社会关系中都包含涉海因素，但是由于法律性质不同、调整对象和调整方法存在很大差异，海法部门中公法性质的法律、法规与私法性质的法律、法规在立法的形式和目的上并不一致。在这个涵盖了若干不同性质、不同内容的海法规范的法律部门中，我们细心探察，又不难发现：无论是当代国际海洋法、各国的海事行政法，还是技术性、实践性突出的海商法，抑或是海事冲突法、海事程序法，在各自推陈出新、不断修正的立法进程中，都已开始将“促进经济、社会的可持续发展”作为立法追求的终极目的。这些具有涉海因素的法律、法规基于实质目的的一致性又能够殊途同归，其法学理论经科学整合，形成具有内在统一性的海法部门。

近世的环境危机，一次次上演于海洋之上，世人对保护海洋生态的积极关注、政府对发展海洋事业的科学思考促使与海洋有关的一切法律开始考虑保护海洋生态整体价值。基于整体价值的海法，确立了实现海洋环境资源可持续发展的立法目的，对不利于海洋生态保护的经济发展行为进行限制；考虑到海洋环境资源的经济价值和战略意义关系到后代人的重大利益，环境时代的海法特别强调海洋环境资源利用的代际公平。立法者在制定海法时，要求各项海洋资源分配和利用的内

容均体现代际公平思想，旨在构建一套体现代际公平的法律制度，如海洋资源功能分区、海洋资源有偿以及海洋资源综合管理等制度。基于对人类命运的关注和对子孙后代利益的关心，海法必须在短期行为与长期规划之间进行协调，而对海洋环境保护和资源利用做出理性的制度安排就是二者协调的产物。

保护海洋生态系统的平衡与稳定，衡平世代间人类在既得利益与长期发展和繁衍上的相互关系，最终实现社会经济的可持续发展，是环境时代海法立法的任务即立法的实质目的。这一实质目的或任务，充分体现了当代海法的可持续发展观。

（三）构建综合调整人类与海洋关系的海法调整机制

1. 构建海法调整机制的必要性

创立良好的海法调整机制，是构建我国一体化海法部门后必然产生的要求，也是解决各种涉及海洋环境利益的法律冲突之需要。

法律调整机制，是指由法律调整主体、调整对象、调整行为（包括调整方法和调整过程）结合起来的整个系统的内部结构、内在联系和运作方式的统一，主要指法律对其调整对象实施影响、实现其调整功能的运作机理和运作方式。[22]

我国海法的缺陷需要法律调整机制的弥补。从我国海法目前的现状来看，维护国家主权和海洋权益的海洋基本法、海洋资源综合性管理法、海洋环境保护专门法、专项资源法和海洋行业管理法、海商法、海事诉讼特别程序法及调整各种事项的行政法规已陆续制定，海法体制的基本构架已经初步搭建形成，但存在的问题仍然很多，缺乏有效的海法调整机制是其中之一。例如，每部法律都明确了法律目的，规定了各种不同的法律手段，但相关的法律规范之间没有统一的指导机制，致使法律目的和调整手段之间分割和孤立；同时由于不同的海洋法律、海事法律之间指导机制不统一，造成利益重叠或缺位，有些利益没有或极少有相应的调整保护手段，有些利益的调整保护手段又相互掣肘，从而导致法律运行不畅，降低了法律的可信任度，损害了法律的权威性。一个典型的例子就是“五龙闹海”。[23]在我国目前海洋管理以分散的行业管理为主、集中协调为辅的体制下，由于涉海管理部门的职权分工不甚明确，相互不能形成协作，造成权力的重叠和效能的掣肘，而海洋行政主管部门负责综合管理的权威又未形成，实际上是只有分散管理而缺乏协调管理的机制，涉海行业管理部门各行其是，“五龙闹海”现象愈演愈烈。

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22 蔡守秋：《调整论——对主流法理学的反思与补充》，北京：高等教育出版社 2003 年版，第 556 页。

23 我国现行海洋环境管理体制上，存在环保部门、海洋部门、海事部门、渔业部门及军队“五龙管海”的现象，五个部门各自依职权对海洋进行分散的多头管理，受这种体制不顺的影响，出现了所谓的“五龙闹海”现象。

可见有了法律目的和法律手段，却不能把二者有机结合，权利义务仍然不明确，利益渠道仍然不畅通。机制层面的缺失，正是问题的关键所在。

要改变这种手段单一性、分割性、无序性、矛盾性的局面，就必须全盘考虑，在不同法律手段中融入统一的运转机制，使之在同一系统中相互协调地发生作用，体现整体性优势。只有使整个海法部门的“循环系统”畅通迅捷，才能使各个“肢体”灵活有力，使不同的法律手段在统一的法律机制中运行。因此，海法调整机制的建设必不可少。

海洋环境资源的稀缺性与人们对海洋环境利益需求日益增长之间的矛盾难于解决，造成了海洋环境资源问题。海洋环境承载能力的有限性即环境资源的稀缺性引发了经济个体间利用资源的无序竞争，尤其是面对海洋环境无主、资源无价状况时，各个经济主体往往受本身利益驱动而尽可能地免费或低价占有、使用资源以降低生产、防治成本。这种无限追求利益最大化的自发冲动性必然引起激烈的利益冲突，最终造成海洋环境资源的滥用、浪费乃至耗尽。解决环境利益冲突需要有序化的法律调整机制。

在法律基础理论领域，海法调整机制和海法立法目的以及海法的调控手段构成了一个完整统一的部门，无论缺少哪一方面，理论体系都不健全。海法调整机制不仅为调整现实利益冲突提供了有效的思路，为现行环境法律提供了可行的运转机制，也为弥补我国海法领域基础理论的薄弱环节提供了有力的补充。

2. 调整人类与海洋关系的海法调整机制

在人类利用海洋环境、开发海洋资源的活动中，形成了人类与海洋之间的关系。在各种与调整人类与海洋关系有关联的法律、法规中，海洋环境资源法中有关调整人类与海洋关系的规范最多、最集中，调整作用亦最明显、有效。海洋环境保护、海洋资源管理方面的法律、法规，是基于法律目的、任务、作用、功能及人类与海洋的关系可以成为法律调整的关系这一基本性质。例如，我国海洋环境保护法的立法宗旨是：保护和改善海洋环境，保护海洋资源，防治污染损害，维护生态平衡，保障人体健康，促进经济和社会的可持续发展。这一立法目标是根据中国海洋环境保护政策和海洋环境保护的任务确立的，反映出该法的目的、任务、作用、功能之一，就是保护资源、合理开发利用资源，就是调整人类与海洋的关系。我国《海洋环境保护法》的法律规范已现实地将人类与海洋的关系上升到法律调整范畴，这不仅有助于海洋环境资源的内在价值受到尊重与保护、外在价值得到持续开发和利用，还有助于实现人类长远的海洋利益这一根本价值。海洋环境资源法创立了专门调整人类与海洋关系的调整机制，主要是：海洋环境资源调查机制，海洋环境资源信息显示机制，海洋环境资源问题预防机制，海洋环境资源行为机制，海洋环境资源整治、补救机制，海洋环境资源行为激励和责任追究机制，海洋环境资源行为监督管理机制等。

海洋环境资源法之外的其他海法，因不直接调整人类与海洋的关系，在过去

缺乏可持续发展观指导的时期，其立法理念、立法指导思想与立法原则等方面，没有反映环境保护的要求。基于人类与海洋之间关系的发展日益复杂，环境时代客观上要求将环境保护的观念渗入每一项利用海洋环境资源的行为规范中，要求在完善海洋环境资源法专门调整人类与海洋关系的调整方法与机制的同时，对非环境资源法性质的其他海法（如海商法、海上行政法等）所运用的传统调整方法和机制（包括民商法调整方法和机制、行政法调整方法和机制、刑法调整方法和机制、诉讼法调整方法和机制等）予以绿化或生态化（指用生态观点、环境观点进行改造、完善），使其成为综合调整人类与海洋关系的海法调整机制的有机构成，从而实现可持续发展视野下海法的全面创新。

本文强调“海法”这一概念，提出整合海法制度、规范，形成一体化的海法，主要意图在于促进现有的法律、法规更好地、全面系统地调整人类与海洋之间的关系，使海洋生态利益得到重视与保护、人类海洋活动得以持续发展。构建一体化的海法，不是简单地将散见于各法律部门的涉海法律组合在一起，因为单纯以法律调整对象的相关性（均调整人类直接利用海洋、在海上发生或结果影响到海洋的行为）来组建法律部门，于理论研究而言，意义不大；更何况，我国现行的维护国家主权和海洋权益的海洋基本法、保护海洋生态、防治海洋环境污染损害的海洋环境保护法、调整海域及其资源开发利用中各种社会关系的海洋资源综合性管理法及专项资源法、调整船舶关系和海上运输关系的海商法、海洋行业管理法、海事部门行政法等法律、法规，在立法目的、立法原则等方面有很大不同，仅凭调整对象中都包含涉海因素将其汇编在一起，也不能对立法部门、执法部门、司法部门及业务部门起到学理上的指导作用。构建一体化的海法，是海洋环境的整体性在客观上对环境时代法制建设的要求。海洋环境的整体性对于人类的意义是：海洋环境是人类的“共同的利益”。无论是海洋大国，还是内陆国家，无论是深海海底的勘探、开发，还是航海通商的运输、贸易，都必须对属于人类整体的海洋环境利益予以保护。

《里约环境与发展宣言》的最响亮的口号是“可持续发展”。这是一个充分考虑了地球环境整体性的口号，是关于人类整体利益的口号，它启示我们：为了具有“整体理性和相互依存性”的地球环境，必须对环境和自然资源加以保护，要求影响环境的各种主体履行其环境义务，至少是不害的义务；必须从整体上把握地球上发生的自然变化的规律、生态价值和对人类的意义。在海洋环境资源保护方面，亦应在全球视野下，充分认识海洋环境的整体性、共有性和侵害海洋环境行为的“公害性”，综合运用法律调整机制、行政调整机制、市场调整机制、科学技术调整机制、社会调整机制等多种机制来调整人类与海洋之间的关系，从而形成多种调整人类与海洋关系的机制和模式。就法律调整机制而言，通过立法可以将上述方法法定化，即将上述方法提高到法律原则、法律手段、法律制度的高度；通过法的实施，可保障上述各种调整人类与海洋关系的方法贯彻与落实。

环境时代，我们对海洋环境这个本来具有非常明显的整体性的对象作整体的观察和思考，重新审视保护海洋环境资源的立法工作，会发现：第一，以可持续发展为宗旨的有效的海洋环境污染控制需要依靠多种手段的综合运用，海洋环境保护法律制度模式应从单一的“命令一控制”模式转向多种机制协同控制模式。第二，在多种机制协同控制模式下，不但强行性规范对于控制海洋环境污染是十分必要的，而且非强制性手段的应用也是十分重要的。海洋环境资源法律制度既应改进强行性规范，增强法律制度的严格性、强制性、适用性、时效性，又应加强任意性规范，通过采用教育、示范、说服、劝告、建议、协商、合作、提供经费、知识、技术帮助等手段和方法，引导法律关系主体双方在法律许可的范围内做出有利于海洋污染防治和海洋环境保护的自愿行为。第三，在运用法律调整人类与海洋的关系时，不仅要发挥海洋环境资源法的调整功能，还应当本着环境保护、可持续发展的观念，对各种与海洋环境资源有直接或间接关系的法律行为规范予以审查，对各种涉海法律、法规予以绿化，更新其指导思想，调整、改进具体制度，将与海洋环境有关的一切法律、法规予以整合，以实现一体化海法全面调整人类与海洋关系的理想效果。

依据法律的调整对象、调整方法等标准和划分法律部门的目的原则、规范原则、平衡原则、发展原则、开放原则，通常认为，我国的法律体系包括以下主要的法律部门：宪法、行政法、民商法、刑法、经济法、劳动法与社会保障法、环境法与自然资源法、诉讼法、军事法。[24] 笔者提出整合各类涉海法律、法规，形成一体化海法，并不是为了在一国法律体系中为其争取一席之位，而主要是一种学理上的思考。通过理论上对不同性质、不同内容的涉海法律、法规、公约、惯例予以整体性研究，注意这些法律、法规内部的协调，在统一的立法指导思想的指导下，注意制度安排的系统化和合理化，实现法律功能和价值的整合。

24 李龙：《法理学》，北京：人民法院出版社、中国社会科学出版社 2003 年版，第 369~378 页。

海事局关于执行《关于 1973 年国际防止船舶造成污染公约的 1978 年议定书》新修订的第 13G 条和新增第 13H 条的通知

（海船舶 [2005]123 号）

中国船级社、中国船东协会、各有关船公司、各直属海事局：

国际海事组织（IMO）第 50 届特别海上环境保护委员会通过了对《1973 年国际防止船舶造成污染公约的 1978 年议定书》（简称《73/78 防污公约》）附则Ⅰ修正案，修订了淘汰单壳油船的时间表（第 13G 条），并增加了限制单壳油船载运重油的新规定（第 13H 条）。该修正案于 2005 年 4 月 5 日生效。我国是《73/78 防污公约》附则Ⅰ的缔约国，该修正案对我国具有约束力，交通部已发布了《关于〈73/78 防污公约〉附则Ⅰ修正案和〈状况评估计划〉修正案生效的公告》（交通部 2005 年第 4 号公告），各海事主管机关、船公司应认真执行公告中的相关规定。现就执行附则Ⅰ新修订的第 13G 条和新增第 13H 条的有关条款要求通知如下：

一、对于第 13G(5) 条，允许中国籍第 2 类和第 3 类单壳油船在规定的淘汰日期之后继续运营到不超过 2015 年交船周年日或船龄满 25 年（取其早者）。海事主管机关将按照第 13G(8)(b)(i) 条的规定，拒绝 25 年船龄以上的外国籍油船进入我国管辖的港口或近海装卸站。于 2015 年开始，拒绝所有根据第 13G(5) 条在规定淘汰期限后继续运营的外国籍油船进入我国管辖的港口或近海装卸站。

二、对于第 13G(7) 条，不允许中国籍第 2 类和第 3 类单壳油船在规定的淘汰日期后继续运营。海事主管机关将按照第 13G(8)(b)(ii) 条的规定，拒绝此类在规定的淘汰日期后继续运营的外国籍油船进人我国管辖的港口或近海装卸站。

三、对于第 13H(5) 条，允许符合该条规定的中国籍单壳油船在满足状况评估计划 (CAS) 的前提下运营至船龄满 20 年。按照第 13H(8)(b) 条的规定，海事主管机关将拒绝根据 13H(5) 条在规定的淘汰日期后继续运营的 20 年船龄以上的外国籍油船进入我国管辖的港口、近海装卸站和在我国管辖水域内进行过驳作业。

四、对于第 13H(6) 条，不允许载运重油的 600 载重吨及以上的中国籍单壳油船在规定的淘汰日期后继续运营。海事主管机关将按照第 13H(8)(b) 条拒绝此类外国籍油船进入我国管辖的港口、近海装卸站和在我国管辖水域内进行过驳作。

五、国内沿海和内河航行油船暂不执行附则Ⅰ新修订的第 13G 条和新增第 13H 条的规定。

请各直属海事局尽快将本通知转发辖区内有关船公司，及时做好宣贯工作。

海事局

二〇〇五年四月五日

卫生部关于发布《深海石油作业职业卫生管理办法》的通知

（卫监督发 [2005]40 号）

各省、自治区、直辖市卫生厅局，中国海洋石油总公司：

根据《职业病防治法》的有关规定，为了加强海洋石油作业用人单位的职业病防治工作，有效地预防、控制海洋石油作业职业病危害，现将《深海石油作业职业卫生管理办法》印发你们，请遵照执行。

二〇〇五年一月三十一日

深海石油作业职业卫生管理办法

第一条 为了预防、控制和消除深海石油作业职业病危害，保护劳动者健康，依据《中华人民共和国职业病防治法》（以下简称职业病防治法），结合深海石油作业职业卫生管理的特殊情况，制定本办法。

第二条 本办法适用于中华人民共和国领域内深海石油、天然气的勘探、开发、生产等上游项目及石油、天然气的加工利用等中下游项目的职业病防治活动。

第三条 本办法所称上游项目，是指海深 5 米以上海底石油、天然气的勘探、开发、生产等作业；

本办法所称中下游项目，是指对深海开采的石油、天然气陆地后续加工等作业。

第四条 卫生部是深海石油作业职业卫生监督管理的主管部门。

中国海洋石油总公司负责本公司所属用人单位的职业病防治的监督管理，设立海洋石油作业职业卫生监督管理办公室（以下简称海卫办）。

第五条 深海石油作业用人单位（以下简称用人单位）应当建立健全职业病防治责任制，加强职业病防治管理，为劳动者创造符合国家职业卫生标准和卫生要求的工作环境和条件，对本单位产生的职业病危害承担责任。

第六条 深海石油作业的新建、改建、扩建、技术改造、技术引进项目（以下统称建设项目）应当执行职业病危害预评价、控制效果评价的制度和职业病危害防护设施的“三同时”制度。

第七条 对上游建设项目，在项目的总体开发方案阶段，建设单位应当委托具有相应资质的职业卫生技术服务机构对建设项目进行职业病危害预评价。

对中下游建设项目，在项目的可行性论证阶段，建设单位应当委托具有相应资质的职业卫生技术服务机构对建设项目进行职业病危害预评价。

第八条 核准建设项目的审查要求。

（一）报国务院投资主管部门核准的建设项目。

在基本设计前，建设单位应当向海卫办提交职业病危害预评价报告书，其报告书应当经海卫办初审合格后，报卫生部审核。

预评价报告确定为严重职业病危害的建设项目，在基本设计阶段，建设单位应当将职业病防护设施设计报海卫办初审合格后，报卫生部审查，符合国家职业卫生标准和卫生要求的，方可施工。

（二）非国务院投资主管部门核准的建设项目。

按规定不需要报国务院投资主管部门核准的上游建设项目，建设单位应当将预评价报告书报海卫办审查。预评价报告确定为严重职业病危害的建设项目，在基本设计阶段，建设单位应当将职业病防护设施设计报海卫办审查，符合国家职业卫生标准和卫生要求的，方可施工。海卫办将审查结果报卫生部备案。

按规定不需要报国务院投资主管部门核准的中下游建设项目，建设项目的职业病危害预评价应当按所在地省级卫生行政部门的规定执行。

第九条 基本设计阶段，建设单位应编写建设项目的职业卫生专篇，并落实经审核同意的预评价报告所提出的职业病防护措施。

第十条 设计阶段，建设项目的设计单位应当依据《工业企业设计卫生标准》，并根据深海石油、天然气作业环境的特殊性，结合国际通行的规范标准，对建设项目卫生辅助用室及建筑物的采光、通风等内容进行设计。

第十一条 建设项目在施工过程中，职业病防护设施要与主体工程同时设计、同时施工、同时投入生产和使用。

第十二条 建设项目试投产后六个月内，建设单位应当委托具有相应资质的职业卫生技术服务机构进行职业病危害控制效果评价，并按照本办法第八条的分类规定进行验收，合格后，方可投入正式生产和使用。

第十三条 用人单位应当按照职业病防治法的规定，采取职业病防治管理措施，并建立健全职业健康监护、职业病危害告知等规章制度。

用人单位应当在可能发生职业病危害的作业场所配备专职的职业卫生医师或者专职、兼职职业卫生管理人员，负责作业场所职业病防治管理和现场监护。

用人单位应当在可能发生职业病危害的作业场所配备急救设施和药品，

第十四条 用人单位的负责人应当接受海卫办组织的深海石油作业职业卫生培训，并按照《职业病防治法》及本办法，负责本单位的职业病防治工作。

用人单位应当组织员工进行上岗前、在岗期间的深海石油健康检查及职业病

防护作业培训，培训内容和考核结果应当存入用人单位职业卫生档案。

从事作业场所职业病防治的职业卫生医师和卫生管理人员应当参加经海卫办组织或认可的职业病防治知识培训，经考核合格后，方可上岗。

第十五条 用人单位应当根据职业病危害预评价报告对作业过程中存在或者潜在的职业病危害因素进行识别、告知和控制。

对患有职业禁忌症的员工不得安排其从事所禁忌的作业；对在职业健康检查中发现有与所从事的作业相关的健康损害的员工，应当及时调离原工作岗位。

第十六条 用人单位应当建立健全深海石油作业的操作规程，保护员工的职业健康。对有可能接触职业病危害因素的员工应配备相应的个人防护用品；个人防护用品必须符合职业病防治的要求。

第十七条 用人单位应当对存在硫化氢、放射性同位素危害等特殊作业场所安装报警装置，并设置中、英文警示标识。

第十八条 当作业场所发生职业病危害事故时，专职医生或者专职、兼职职业卫生管理人员应当及时对受害员工进行现场抢救并采取控制措施，组织同一作业场所的员工进行应急性健康检查；情况紧急时，所在地的监督管理机构应当迅速启动应急救援预案。

用人单位应当将职业病危害事故情况及时报告监督管理机构和海卫办，海卫办接到报告后，应当及时会同有关部门组织调查处理，必要时，可以采取临时控制措施。

第十九条 用人单位应当委托具有相应资质的职业卫生技术服务机构对作业场所的职业病危害因素进行检测，每年至少一次，检测结果存人用人单位职业卫生档案，并及时将检测结果向员工公布。

用人单位应当将检测结果定期向海卫办报告。中下游项目的用人单位应当按规定同时向所在地行政主管部门报告。

第二十条 用人单位应当保证作业场所的职业病危害因素的浓度（或强度）符合国家职业卫生标准和卫生要求。对于职业病危害因素超过国家卫生标准的工作场所，应当配备有效的职业病防护设备，并加强对职业病防护设施的管理和维护，保证其处于正常运行状态。

第二十一条 用人单位的职业病危害项目应当按照卫生部《职业病危害项目申报管理办法》的规定向海卫办申报，由海卫办负责向国家行政主管部门申报；中下游项目的用人单位应当同时按规定向所在地行政主管部门申报。

第二十二条 用人单位发现有职业病病人或者疑似职业病人，应当按照卫生部《职业病诊断与鉴定管理办法》的规定报告和妥善处理，保障职业病病人依法享有国家规定的职业病待遇。

第二十三条 凡具备下列条件的职业卫生技术服务机构，可以向海卫办提出申请，经海卫办审核合格后，可为深海石油作业提供职业卫生技术服务。包括建

设项目职业病危害评价、职业病危害因素的检测与评价、职业健康检查。

（一）取得卫生部建设项目职业病危害评价甲级资质的；取得省级卫生行政部门批准的职业健康检查资质的；

（二）熟悉深海石油作业特点，并具备相应的专业技术人员和工作经验的；

（三）制定有出海开展职业卫生技术服务的防范意外事故方案、应急措施、海上安全管理规章与服务行为规范；

（四）出海从事职业卫生技术服务的人员必须持有相应的健康证和接受过海上求救培训并取得相应证书；

（五）作业场所应当使用经鉴定合格的防爆型设备。

海卫办应当定期向用人单位公布符合条件的职业卫生技术服务机构的名册，供建设单位或用人单位选择。

第二十四条 职业卫生服务机构出具的建设项目职业病危害预评价报告书，应当符合深海石油作业的特点，评价建设项目的职业病危害程度时，应当符合以下要求：

（一）建设项目职业病危害程度的确定，应当符合卫生部《建设项目职业病危害分类管理办法》的规定，并评估建设项目职业病危害发生的可能性及后果，确定建设项目属一般或严重职业病危害项目；

（二）预评价报告中必须对硫化氢、放射性危害做出风险评价，并充分考虑噪音、化学危险品、高温等对作业人员的危害。

第二十五条 职业卫生技术服务机构出具的建设项目职业病危害控制效果评价报告书，应当针对深海石油作业的特点，提出符合职业卫生法律法规、标准和技术规范的要求和建议，并写明下列事项：

（一）建设项目的职业病危害程度，职业病防护设施的运行情况及效果；

（二）职业病危害及其事故的防范原则、防范措施以及安全操作程序和人员培训；

（三）建设项目投入使用后的日常监督和检测实施方案。

第二十六条 海卫办监督管理深海石油作业职业病防治活动，履行下列职责：

（一）负责组织起草深海石油作业职业卫生管理规定及相关标准，报卫生部审查同意后，纳入国家职业卫生立法及标准体系；

（二）负责对深海石油作业用人单位职业病防治的监督管理；

（三）负责对深海石油作业新建、改建、扩建项目的职业病危害预评价报告、控制效果评价报告和严重职业病危害项目的防护设施设计的初步审查，经审查后，报卫生部审批；

（四）负责接受深海石油作业用人单位的职业病危害项目申报及管理工作，并按规定向国家行政主管部门报告；

（五）负责组织深海石油作业用人单位职业卫生法规、规范及标准的宣传培训工作；

（六）负责深海石油作业用人单位职业病病人或疑似职业病病人的报告及统计工作，并按规定向卫生部报告；

（七）完成卫生部交办的其他工作。

第二十七条 根据工作需要海卫办可设立地区职业卫生监督管理机构，监督管理机构履行下列职责：

（一）用人单位职业病防治各项规章制度建立情况的监督检查；

（二）用人单位职业卫生培训情况的监督检查；

（三）职业病危害防护设施使用和维护情况的监督检查；

（四）职业病危害检测和职业健康监护工作情况的监督检查；

（五）建设项目职业病危害预评价、控制效果评价及职业病防护设施“三同时”执行情况的监督检查；

（六）用人单位职业禁忌和职业病患者的处理情况的监督检查；

（七）每季度向海卫办报告职业卫生监督检查的情况；

（八）当所在辖区用人单位发生职业病危害事故时，应当立即采取应急救援和控制措施，并及时向海卫办报告，协助海卫办进行调查处理；

（九）完成海卫办交办的其他工作。

第二十八条 海卫办及所属的监督管理机构在执行任务时，有权采取下列措施：

（一）进入被检查单位和职业病危害现场，了解情况，调查取证，要求派人协助工作；

（二）对违反职业病防治法律、法规的用人单位提出整改要求；

（三）发现危及劳动者健康的重大职业病危害，有权通知现场负责人立即采取防护措施或暂停作业；

（四）控制职业病危害事故的现场，封存造成职业病危害事故或者可能导致职业病危害事故发生的材料和设备。

第二十九条 用人单位违反《职业病防治法》及有关法规、规章及本办法规定的，由海卫办按照有关规定予以处罚。

第三十条 本办法自 2005 年 4 月 1 日起施行。

中华人民共和国防治船舶污染内河水域环境管理规定

（2005 年 6 月 20 日第 12 次交通部部务会议通过，自 2006 年 1 月 1 日起施行。）

第一章 总则

第一条 为加强对防治船舶污染内河水域环境的监督管理，保护内河水域的环境及资源，促进经济和社会的可持续发展，根据《中华人民共和国水污染防治法》、《中华人民共和国水污染防治法实施细则》等法律、行政法规，制定本规定。

第二条 船舶在中华人民共和国内河水域从事航行、停泊、作业及其他影响内河水域环境的活动，适用本规定。

渔船和军队、武警的现役在编船舶不适用本规定。

第三条 防治船舶污染内河水域环境，实行预防为主、防治结合的原则。

第四条 国务院交通主管部门主管全国防治船舶污染内河水域环境的管理工作。

国务院交通主管部门海事管理机构具体负责全国防治船舶污染内河水域环境的监督管理工作。

各级海事管理机构依照各自的职责权限，负责本辖区防治船舶污染内河水域环境的监督管理工作。

第二章 一般规定

第五条 中国籍船舶防治污染的结构、设备、器材，应当符合国务院交通主管部门的规定和国家有关规范、标准，经船舶检验机构检验、认可，并保持良好的技术状态。

外国籍船舶防治污染的结构、设备、器材，应当符合中华人民共和国缔结或者加入的有关国际公约，经船旗国政府或者其授权的船舶检验机构的检验、认可，并保持良好的技术状态。

第六条 船舶必须按照有关规定，持有有效的防污染证书、文书。

船舶进行涉及污染物的作业，应当按照规定在相应的记录簿上如实记录并规

范填写。

第七条 船员应当具有相应的防治船舶污染内河水域环境的专业知识和技能，熟悉船舶防污染程序和要求，并按照规定参加相应的培训、考试和评估，持有有效的职务适任证书和相应的培训合格证书。

第八条 任何在内河水域航行、停泊和进行相关作业的船舶，都不得违反法律、行政法规和国务院交通主管部门的规定，向内河水域排放污染物。

禁止船舶在内河水域载运法律、行政法规和国务院交通主管部门规定的不得在内河水域运输的危险化学品。

禁止船舶在内河水域使用焚烧炉。

第九条 依法设立特殊保护水域，应当事先征求海事管理机构的意见，并由海事管理机构发布航行通（警）告。设立特殊保护水域，应当同时设置船舶污染物和其他有毒有害物质接收及处置设施。

在特殊保护水域内航行、停泊、作业的船舶，应当遵守特殊保护水域有关防污染的规定、标准。

第十条 船舶在城市市区的内河航道航行时，应当按照规定使用声响装置。

航行于城市市区内河航道的挂浆机船舶，应当将挂浆机置于封闭装置之内或者采取其他等效措施，以降低机器运转产生的噪声对环境的危害。

第十一条 所有船舶、单位和个人均有维护内河水域环境的义务，在发现船舶存在污染内河水域环境的行为时，应当立即向海事管理机构报告。

第三章 船舶载运污染危害性货物及相关作业

第十二条 船舶载运污染危害性货物进出港口，有关单位应当按照法律、行政法规和国务院交通主管部门关于船舶载运危险货物的管理规定，事先向海事管理机构办理申报手续，经同意后，方可进出港口。

第十三条 托运人交付船舶载运具有污染危害性货物，应当采取有效的防污染措施，确保货物状况符合船舶载运要求和防污染要求，并在运输单证上注明该货物的正确名称、数量、污染类别、性质、预防和应急措施等内容。

第十四条 污染危害性货物，其包装与标志应当符合国家有关要求。

曾经载运污染危害性货物空的容器和运输组件，在未彻底清洗或者消除危害之前，应当按照原所装货物的要求进行运输。

第十五条 交付船舶载运危害性不明的货物，货物所有人或者代理人应当按照国务院交通主管部门的有关规定申请进行货物危害性评估。评估机构应当根据评估结果确定船舶载运技术条件，并明确相应防污染措施。

第十六条 船舶从事污染危害性货物装卸作业和水上过驳作业时，必须遵守

有关作业规程，并会同作业单位商定操作方案，合理配置和使用装卸管系及设备，针对货物特性和作业方式制定并落实防污染措施。有关防污染措施应当在作业前报海事管理机构备案。

污染危害性货物作业规程由国务院交通主管部门另行制定。

第十七条 从事船舶油料补给服务（作业）的船舶、单位，应当符合国家有关标准和要求，配备足够的防污染设备和器材，取得国家规定的经营资格。

船舶从事油料补给服务（作业）的，还应当遵守船舶载运危险性货物的有关规定。

第十八条 长江、珠江、黑龙江水系干线超过 300 总吨和其他内河水域超过 150 总吨的船舶从事下列活动，应当采取包括布设围油栏在内的防污染措施：

（一）散装持久性油类的装卸和过驳作业；

（二）散装比重小于 1(相对于水）、溶解度小于 0. 1%具有污染危害性货物的装卸和过驳作业；

（三）可能造成水域严重污染的其他作业。

布设围油栏方案应当在作业前报海事管理机构备案。因自然条件或其他原因限制，不适合布设围油栏的，可采用其他防污染措施，但应当将采取的替代措施及理由在作业前报海事管理机构备案。

第十九条 船舶排放含有有毒物质的洗舱水，应由有资质的单位按照有关规定接收和处理，不得直接排放进人内河水域。

船舶进行洗（清）舱、驱气或者置换，应当遵守《船舶载运危险货物安全监督管理规定》等相关规定。

第二十条 船舶在港口进行下列活动，应当事先按照有关规定报经海事管理机构批准：

（一）船舶排放压载、洗舱和机舱污水以及残油、含油污水等其他残余物质；

（二）船舶冲洗载运有毒有害物质、有粉尘的散装货物的甲板和舱室。

第二十一条 载运污染危害性货物的船舶进出港口和通过桥区、交通管制区、通航密集区以及航行条件受限制的区域，必须采取海事管理机构规定的航行保障安全措施。

第二十二条 150 总吨及以上的油轮和 400 总吨及以上的非油轮，应当将油类作业情况记载在由海事管理机构签发的《油类记录簿》中。

150 总吨以下的油船和 400 总吨以下的非油船应当将油类作业情况记载在《轮机日志》或者《航行日志》中。

载运散装有毒液体物质的船舶应当将有关作业情况记载在由海事管理机构签发的《货物记录簿》中。

《油类记录簿》、《货物记录簿》应当随时可供检查，用完后在船上保存 3 年。

第二十三条 船舶运输散发有毒有害气体或者粉尘物质等货物时，必须采取

密闭或者其他防护措施。对有封闭作业要求的污染危害性货物，在运输和作业过程中应当采取措施回收有毒有害气体。

第四章　船舶垃圾和生活污水

第二十四条　总长度为12米及以上的船舶应当设置统一格式的垃圾告示牌，告知船员和旅客关于垃圾管理的要求及处罚规定。

400 总吨及以上的船舶和经核定可载客 15 人及以上且单次航程超过 2 公里或者航行时间超过 15 分钟的船舶，须备有符合编制要求的《船舶垃圾管理计划》和海事管理机构签发的《船舶垃圾记录簿》。

除本条第二款规定以外的船舶，有关垃圾处理情况应当如实记录于《航行日志》中，以备海事管理机构检查。

《船舶垃圾记录簿》应当随时可供检查，用完后在船上保存 2 年。

第二十五条　禁止向内河水域排放船舶垃圾。船舶垃圾必须由有资质的单位接收处理。

船舶应当配备有盖、不渗漏、不外溢的垃圾储存容器，或者实行袋装，以满足航行过程存储船舶垃圾的需要。

禁止使用不可降解的一次性发泡塑料餐具。

第二十六条　船舶应当对所产生的垃圾进行分类、收集、存放。垃圾处理作业应当符合《船舶垃圾管理计划》中所规定的操作程序。

船舶垃圾中的危险性物品和有毒有害性物品应当单独存放，并应当向接收单位提供所含物质的名称、性质和数量等资料。

第二十七条　客运、旅游船舶应当建立垃圾管理制度，配备专（兼）职环保监督管理员，负责船上环境卫生的管理工作。

第二十八条　船舶应当按照规范要求设置与生活污水产生量相适应的处理装置或者储存容器。

任何船舶不得向内河水域排放不符合排放标准的生活污水。

第五章　船舶污染物的排放与接收

第二十九条　船舶排放船舶污染物应当符合国家和地方有关污染物排放的标准及要求。不符合排放标准和要求的船舶污染物，应当委托有资质的污染物接收单位接收处理，不得任意排放。

第三十条　港口、装卸站应当具备与其装卸货物和吞吐能力相适应的污染物接收或者处理能力，满足到港船舶的需要。

港口、装卸站应当将接收或者处理能力的情况向海事管理机构备案。

第三十一条 从事船舶污染物接收、船舶清舱作业活动的单位，必须具备相应的接收处理能力，配备足够的防污染设备，建立安全与防污染制度。

从事船舶污染物接收、船舶清舱作业活动的单位，应当将其接收和处理能力向海事管理机构备案。

第三十二条 在船舶污染物接收和排放作业以及船舶清舱、洗舱作业过程中，船方和作业单位必须遵守有关操作规程，落实防污染措施，防止污染物溢漏。

污染物接收单位应当在污染物接收作业完毕后，向船舶出具污染物接收处理单证，并由船长签字确认。

船舶凭污染物接收处理单证向海事管理机构办理污染物接收处理证明，污染物接收处理证明由船方保存在相应的记录簿中备查。

第三十三条 来自疫区船舶的船舶污染物、船舶垃圾、压载水、生活污水，应当经检疫部门检查处理后方可处理。

对含有有毒有害物质或其他危险成份的船舶污染物的接收和处理，必须符合国家环境保护主管部门有关危险废物的管理规定。

第三十四条 船舶动力装置运转产生的废气以及船上产生的挥发性有机化合物，不得超过国家和地方规定的标准向大气排放。

第六章 船舶拆解、打捞、修造和其他水上水下施工作业

第三十五条 在船舶修造及其相关作业过程中产生的污染物，应当由具备资质的单位回收处理，不得投弃入水。

船舶在船台（排）修理完毕或者建造竣工下水后，应当及时清除相关污染物。

在船坞内进行的修造作业结束后，应当进行坞内清理和清洁，并在开启坞门或者沉坞前，向海事管理机构提交船坞清洁报告。

第三十六条 从事船舶打捞作业和水上水下施工作业的单位，在申请施工作业时，应当说明留存在船上的污染物种类、数量，有关作业方案，防污染措施和应急预案等内容。

第三十七条 在内河水域内从事废船拆解作业应当严格按照《防止拆船污染环境管理条例》的要求执行，防止拆船污染内河水域环境。

第七章 船舶污染事故应急反应

第三十八条 海事管理机构应配合地方人民政府制定船舶污染事故应急计划。

第三十九条 船舶修造厂、拆船厂和从事散装污染危害性货物装卸作业的经营人应当制定相应的污染事故应急计划，并报海事管理机构备案。

第四十条 150 总吨及以上的油轮、油驳和 400 总吨及以上的非油轮、非油驳的拖驳船队应当持有经海事管理机构批准的《船上油污应急计划》。

150 总吨以下油船需制定油污应急预案。

第四十一条 载运散装有毒液体物质的船舶应当配备经海事管理机构批准的《船上有毒液体物质污染应急计划》。

400 总吨及以上载运有毒液体物质船舶，用《船上污染应急计划》替代《船上油污应急计划》和《船上有毒液体物质污染应急计划》。

第四十二条 制定污染事故应急计划的单位和船舶应当定期组织应急演练，作好相应记录，并不断完善应急计划。

第四十三条 港口、装卸站以及从事船舶修造、打捞、拆解等作业活动的单位和载运污染危害性货物的船舶，应当配备符合国家有关标准和适合当地水文条件的防污染应急设备和器材。

第四十四条 在内河水域内清除污染需使用化学消油剂的，应当事先向海事管理机构提出申请，说明消油剂的牌号、计划用量和使用地点，经审核同意后，方可投入使用。

第四十五条 船舶发生污染水域事故，应当立即向最近海事管理机构如实报告，同时按照污染事故应急计划的程序和要求，采取相应措施。在初始报告以后，船舶还应当根据事故的进展情况进一步作出补充报告。

船舶发生水上交通事故，存在沉没可能时，或者在船员弃船前，应当尽可能地关闭所有液货舱或者油舱（柜）管系的阀门，堵塞相关通气孔，防止溢漏，并且应当在事故报告书中，说明存油或者液货的数量以及通气孔的位置。

第四十六条 海事管理机构接到船舶污染事故的报告后，应当按照污染事故应急计划的程序作出反应。

当污染可能涉及周边国家或者地区水域时，由国务院交通主管部门海事管理机构按照有关国际条约或者双边协定的要求，通知周边国家或者地区的海事主管机关，共同采取必要的防污染行动。

第四十七条 船舶发生事故，造成或者可能造成内河水域环境污染的，海事管理机构可以采取必要的防污染措施，包括强制清除、强制打捞或者强制拖航等应急处置措施，由此发生的一切费用，由责任方承担。

第八章 污染事故调查处理

第四十八条 发生船舶污染事故的当事方应当在 24 小时内向事故发生地的海事管理机构提交污染事故报告书。报告书的内容包括：

（一）船舶或者设施的名称、呼号或者编号、国籍、所有人或者经营人名称及

地址；

（二）发生事故的时间、地点、气象和水文情况；

（三）事故原因或者初步原因判断；

（四）污染物的种类和数量，或者预估数量及污染范围；

（五）已采取或者准备采取的防污措施及污染控制情况；

（六）援助或者救助要求；

（七）需要报告的其他事项。

第四十九条 海事管理机构接到船舶污染事故的报告后，应当及时开展调查。

海事管理机构应当按照规定的程序和方法开展船舶污染事故调查。事故调查应当全面、客观、公正。

事故当事人及有关人员，应当接受调查，积极配合，如实陈述事故的有关情况和证据，不得谎报、隐匿或者毁灭证据。

第五十条 船舶、设施或者有关作业活动造成水域环境污染损害的，应当按照有关法律、行政法规的规定承担损害赔偿费用。

第五十一条 船舶被处以罚款或者需承担清除、赔偿等经济责任的，其所有人、经营人或者有关当事方，必须在离港前办妥有关财务担保手续。

第九章 法律责任

第五十二条 海事管理机构发现船舶存在污染隐患的，应当责令立即消除或者限期消除隐患；有关单位和个人不立即消除或者逾期不消除的，海事管理机构可以采取责令其临时停航、停止作业，禁止进港、离港，责令驶往指定水域等强制性措施。

第五十三条 违反本规定，污染应急计划或者垃圾管理计划未得到落实的，由海事管理机构责令限期纠正，并给予警告或者处以 2 000 元以下罚款。

第五十四条 违反本规定，有下列行为之一的，由海事管理机构处以警告或者 10 000 元以下罚款：

（一）船舶未持有有效的防污证书、防污文书，或者不按照规定记录操作情况的；

（二）船舶未配备防污染设备或者防污设备存在重大缺陷，在海事管理机构限期内不予纠正的；

（三）船舶靠泊未按照规定配备防污染设备或者防污设备存在重大缺陷的港口、装卸站的。

第五十五条 船舶和相关单位、人员有其他违反本规定行为的，由海事管理机构根据《中华人民共和国内河海事行政处罚规定》等规定给予相应的处罚。涉

嫌构成犯罪的，依法移送国家司法机关。

第五十六条 海事管理机构行政执法人员滥用职权、玩忽职守、徇私舞弊、违法失职的，依法给予行政处分；构成犯罪的，依法追究刑事责任。

第十章 附则

第五十七条 本规定中下列用语的含义是：

（一）内河水域，是指在中华人民共和国境内可供船舶航行的江、河、湖泊、水库等水域。

（二）船舶，是指各类排水或者非排水船、艇、筏、水上飞行器、潜水器、移动式平台以及其他水上移动装置。但不包括渔船和军队、武警的现役在编船舶。

（三）作业，是指与船舶有关的作业活动，包括船舶运输、装卸、油料补给、污染物接收以及船舶修造、打捞、拆解等作业活动。

（四）污染危害性货物，是指直接或者间接地进入水域，会产生损害生物资源、危害人体健康、妨害渔业和其他合法活动、损害水体使用素质和减损环境质量等有害影响的货物。包括《经一九七八年议定书修订的一九七三年国际防止船舶造成污染公约》(MARPOL73/78) 附则Ⅰ“油类物质名单”、附则Ⅱ“散载运输的有毒液体物质清单”所列明的物质以及按照附则Ⅲ“包装形式有害物质的鉴别导则”的鉴别标准确定的有害物质。

（五）船舶垃圾，是指船舶在日常活动中产生的生活废弃物、垫舱和扫舱物料，以及船上其它固体废物等。包括《经一九七八年议定书修订的一九七三年国际防止船舶造成污染公约》(MARPOL73/78) 附则Ⅴ所定义的垃圾。

（六）生活污水，是指任何型式的厕所以及厕所排水口的排出物和其他废物；医务室的面盆、洗澡盆和这些处所排水孔的排出物；装有活的动物处所的排出物；或者混有上述排出物的其他废水。

（七）船舶污染物，是指由船舶或者有关作业活动对水域环境造成污染损害的物质，其中包括油类、油性混合物、液态化学品、货物残余物、包装形式的有害物质、压舱水、废气、噪声等。

（八）危险化学品，包括爆炸品、压缩气体和液化气体、易燃液体、易燃固体、自燃物品和遇湿易燃物品、氧化剂和有机过氧化物、有毒品和腐蚀品等。

（九）有毒液体物质，是指排入水体将对水资源或者人类健康产生危害或者对合法利用水资源造成损害的物质。包括《经一九七八年议定书修订的一九七三年国际防止船舶造成污染公约》(MARPOL73/78) 附则Ⅱ“散载运输的有毒液体物质清单”中列明的物质。

（十）特殊保护区域，是指各地人民政府按照有关规定划定并公布的需要特

别保护的区域。

第五十八条 因船舶或者有关作业活动污染水域环境，受到损害的单位和个人有权要求造成污染损害的当事方赔偿损失。具体赔偿办法遵照国家有关规定执行。

第五十九条 界河水域内防治船舶污染活动优先执行国际公约和双边协定。

第六十条 本规定自 2006 年 1 月 1 日起施行。

中华人民共和国可再生能源法

（中华人民共和国第十届全国人民代表大会常务委员会第十四次会议2005年2月28日通过，自2006年1月1日起施行。）

目录

第一章　总则

第一条　为了促进可再生能源的开发利用，增加能源供应，改善能源结构，保障能源安全，保护环境，实现经济社会的可持续发展，制定本法。

第二条　本法所称可再生能源，是指风能、太阳能、水能、生物质能、地热能、海洋能等非化石能源。

水力发电对本法的适用，由国务院能源主管部门规定，报国务院批准。

通过低效率炉灶直接燃烧方式利用秸秆、薪柴、粪便等，不适用本法。

第三条　本法适用于中华人民共和国领域和管辖的其他海域。

第四条　国家将可再生能源的开发利用列为能源发展的优先领域，通过制定可再生能源开发利用总量目标和采取相应措施，推动可再生能源市场的建立和发展。

国家鼓励各种所有制经济主体参与可再生能源的开发利用，依法保护可再生

能源开发利用者的合法权益。

第五条 国务院能源主管部门对全国可再生能源的开发利用实施统一管理。国务院有关部门在各自的职责范围内负责有关的可再生能源开发利用管理工作。

县级以上地方人民政府管理能源工作的部门负责本行政区域内可再生能源开发利用的管理工作。县级以上地方人民政府有关部门在各自的职责范围内负责有关的可再生能源开发利用管理工作。

第二章 资源调查与发展规划

第六条 国务院能源主管部门负责组织和协调全国可再生能源资源的调查，并会同国务院有关部门组织制定资源调查的技术规范。

国务院有关部门在各自的职责范围内负责相关可再生能源资源的调查，调查结果报国务院能源主管部门汇总。

可再生能源资源的调查结果应当公布；但是，国家规定需要保密的内容除外。

第七条 国务院能源主管部门根据全国能源需求与可再生能源资源实际状况，制定全国可再生能源开发利用中长期总量目标，报国务院批准后执行，并予公布。

国务院能源主管部门根据前款规定的总量目标和省、自治区、直辖市经济发展与可再生能源资源实际状况，会同省、自治区、直辖市人民政府确定各行政区域可再生能源开发利用中长期目标，并予公布。

第八条 国务院能源主管部门根据全国可再生能源开发利用中长期总量目标，会同国务院有关部门，编制全国可再生能源开发利用规划，报国务院批准后实施。

省、自治区、直辖市人民政府管理能源工作的部门根据本行政区域可再生能源开发利用中长期目标，会同本级人民政府有关部门编制本行政区域可再生能源开发利用规划，报本级人民政府批准后实施。

经批准的规划应当公布；但是，国家规定需要保密的内容除外。

经批准的规划需要修改的，须经原批准机关批准。

第九条 编制可再生能源开发利用规划，应当征求有关单位、专家和公众的意见，进行科学论证。

第三章 产业指导与技术支持

第十条 国务院能源主管部门根据全国可再生能源开发利用规划，制定、公布可再生能源产业发展指导目录。

第十一条 国务院标准化行政主管部门应当制定、公布国家可再生能源电力的并网技术标准和其他需要在全国范围内统一技术要求的有关可再生能源技术和产品的国家标准。

对前款规定的国家标准中未作规定的技术要求，国务院有关部门可以制定相关的行业标准，并报国务院标准化行政主管部门备案。

第十二条 国家将可再生能源开发利用的科学技术研究和产业化发展列为科技发展与高技术产业发展的优先领域，纳入国家科技发展规划和高技术产业发展规划，并安排资金支持可再生能源开发利用的科学技术研究、应用示范和产业化发展，促进可再生能源开发利用的技术进步，降低可再生能源产品的生产成本，提高产品质量。

国务院教育行政部门应当将可再生能源知识和技术纳入普通教育、职业教育课程。

第四章 推广与应用

第十三条 国家鼓励和支持可再生能源并网发电。

建设可再生能源并网发电项目，应当依照法律和国务院的规定取得行政许可或者报送备案。

建设应当取得行政许可的可再生能源并网发电项目，有多人申请同一项目许可的，应当依法通过招标确定被许可人。

第十四条 电网企业应当与依法取得行政许可或者报送备案的可再生能源发电企业签订并网协议，全额收购其电网覆盖范围内可再生能源并网发电项目的上网电量，并为可再生能源发电提供上网服务。

第十五条 国家扶持在电网未覆盖的地区建设可再生能源独立电力系统，为当地生产和生活提供电力服务。

第十六条 国家鼓励清洁、高效地开发利用生物质燃料，鼓励发展能源作物。

利用生物质资源生产的燃气和热力，符合城市燃气管网、热力管网的入网技术标准的，经营燃气管网、热力管网的企业应当接收其入网。

国家鼓励生产和利用生物液体燃料。石油销售企业应当按照国务院能源主管部门或者省级人民政府的规定，将符合国家标准的生物液体燃料纳入其燃料销售体系。

第十七条 国家鼓励单位和个人安装和使用太阳能热水系统、太阳能供热采暖和制冷系统、太阳能光伏发电系统等太阳能利用系统。

国务院建设行政主管部门会同国务院有关部门制定太阳能利用系统与建筑结合的技术经济政策和技术规范。

房地产开发企业应当根据前款规定的技术规范，在建筑物的设计和施工中，为太阳能利用提供必备条件。

对已建成的建筑物，住户可以在不影响其质量与安全的前提下安装符合技术规范和产品标准的太阳能利用系统；但是，当事人另有约定的除外。

第十八条 国家鼓励和支持农村地区的可再生能源开发利用。

县级以上地方人民政府管理能源工作的部门会同有关部门，根据当地经济社会发展、生态保护和卫生综合治理需要等实际情况，制定农村地区可再生能源发展规划，因地制宜地推广应用沼气等生物质资源转化、户用太阳能、小型风能、小型水能等技术。

县级以上人民政府应当对农村地区的可再生能源利用项目提供财政支持。

第五章 价格管理与费用分摊

第十九条 可再生能源发电项目的上网电价，由国务院价格主管部门根据不同类型可再生能源发电的特点和不同地区的情况，按照有利于促进可再生能源开发利用和经济合理的原则确定，并根据可再生能源开发利用技术的发展适时调整。上网电价应当公布。

依照本法第十三条第三款规定实行招标的可再生能源发电项目的上网电价，按照中标确定的价格执行；但是，不得高于依照前款规定确定的同类可再生能源发电项目的上网电价水平。

第二十条 电网企业依照本法第十九条规定确定的上网电价收购可再生能源电量所发生的费用，高于按照常规能源发电平均上网电价计算所发生费用之间的差额，附加在销售电价中分摊。具体办法由国务院价格主管部门制定。

第二十一条 电网企业为收购可再生能源电量而支付的合理的接网费用以及其他合理的相关费用，可以计入电网企业输电成本，并从销售电价中回收。

第二十二条 国家投资或者补贴建设的公共可再生能源独立电力系统的销售电价，执行同一地区分类销售电价，其合理的运行和管理费用超出销售电价的部分，依照本法第二十条规定的办法分摊。

第二十三条 进入城市管网的可再生能源热力和燃气的价格，按照有利于促进可再生能源开发利用和经济合理的原则，根据价格管理权限确定。

第六章 经济激励与监督措施

第二十四条 国家财政设立可再生能源发展专项资金，用于支持以下活动：

（一）可再生能源开发利用的科学技术研究、标准制定和示范工程；

（二）农村、牧区生活用能的可再生能源利用项目；

（三）偏远地区和海岛可再生能源独立电力系统建设；

（四）可再生能源的资源勘查、评价和相关信息系统建设；

（五）促进可再生能源开发利用设备的本地化生产。

第二十五条 对列入国家可再生能源产业发展指导目录、符合信贷条件的可再生能源开发利用项目，金融机构可以提供有财政贴息的优惠贷款。

第二十六条 国家对列入可再生能源产业发展指导目录的项目给予税收优惠。具体办法由国务院规定。

第二十七条 电力企业应当真实、完整地记载和保存可再生能源发电的有关资料，并接受电力监管机构的检查和监督。

电力监管机构进行检查时，应当依照规定的程序进行，并为被检查单位保守商业秘密和其他秘密。

第七章 法律责任

第二十八条 国务院能源主管部门和县级以上地方人民政府管理能源工作的部门和其他有关部门在可再生能源开发利用监督管理工作中，违反本法规定，有下列行为之一的，由本级人民政府或者上级人民政府有关部门责令改正，对负有责任的主管人员和其他直接责任人员依法给予行政处分；构成犯罪的，依法追究刑事责任：

（一）不依法作出行政许可决定的；

（二）发现违法行为不予查处的；

（三）有不依法履行监督管理职责的其他行为的。

第二十九条 违反本法第十四条规定，电网企业未全额收购可再生能源电量，造成可再生能源发电企业经济损失的，应当承担赔偿责任，并由国家电力监管机构责令限期改正；拒不改正的，处以可再生能源发电企业经济损失额一倍以下的罚款。

第三十条 违反本法第十六条第二款规定，经营燃气管网、热力管网的企业不准许符合入网技术标准的燃气、热力入网，造成燃气、热力生产企业经济损失的，应当承担赔偿责任，并由省级人民政府管理能源工作的部门责令限期改正；拒不改正的，处以燃气、热力生产企业经济损失额一倍以下的罚款。

第三十一条 违反本法第十六条第三款规定，石油销售企业未按照规定将符合国家标准的生物液体燃料纳入其燃料销售体系，造成生物液体燃料生产企业经济损失的，应当承担赔偿责任，并由国务院能源主管部门或者省级人民政府管理能源工作的部门责令限期改正；拒不改正的，处以生物液体燃料生产企业经济损失

额一倍以下的罚款。

第八章 附则

第三十二条 本法中下列用语的含义：

（一）生物质能，是指利用自然界的植物、粪便以及城乡有机废物转化成的能源。

（二）可再生能源独立电力系统，是指不与电网连接的单独运行的可再生能源电力系统。

（三）能源作物，是指经专门种植，用以提供能源原料的草本和木本植物。

（四）生物液体燃料，是指利用生物质资源生产的甲醇、乙醇和生物柴油等液体燃料。

第三十三条 本法自 2006 年 1 月 1 日起施行。

水产苗种管理办法

（2004 年 12 月 21 日农业部第 37 次常务会议修订通过，自 2005 年 4 月 1 日起施行。）

第一章　总则

第一条　为保护和合理利用水产种质资源，加强水产品种选育和苗种生产、经营、进出口管理，提高水产苗种质量，维护水产苗种生产者、经营者和使用者的合法权益，促进水产养殖业持续健康发展，根据《中华人民共和国渔业法》及有关法律法规，制定本办法。

第二条　本办法所称的水产苗种包括用于繁育、增养殖（栽培）生产和科研试验、观赏的水产动植物的亲本、稚体、幼体、受精卵、抱子及其遗传育种材料。

第三条　在中华人民共和国境内从事水产种质资源开发利用，品种选育、培育，水产苗种生产、经营、管理、进口、出口活动的单位和个人，应当遵守本办法。

珍稀、濒危水生野生动植物及其苗种的管理按有关法律法规的规定执行。

第四条　农业部负责全国水产种质资源和水产苗种管理工作。

县级以上地方人民政府渔业行政主管部门负责本行政区域内的水产种质资源和水产苗种管理工作。

第二章　种质资源保护和品种选育

第五条　国家有计划地搜集、整理、鉴定、保护、保存和合理利用水产种质资源。禁止任何单位和个人侵占和破坏水产种质资源。

第六条　国家保护水产种质资源及其生存环境，并在具有较高经济价值和遗传育种价值的水产种质资源的主要生长繁殖区域建立水产种质资源保护区。未经农业部批准，任何单位或者个人不得在水产种质资源保护区从事捕捞活动。

建设项目对水产种质资源产生不利影响的，依照《中华人民共和国渔业法》第三十五条的规定处理。

第七条　省级以上人民政府渔业行政主管部门根据水产增养殖生产发展的需要和自然条件及种质资源特点，合理布局和建设水产原、良种场。

国家级或省级原、良种场负责保存或选育种用遗传材料和亲本，向水产苗种繁育单位提供亲本。

第八条 用于杂交生产商品苗种的亲本必须是纯系群体。对可育的杂交种不得用作亲本繁育。

养殖可育的杂交个体和通过生物工程等技术改变遗传性状的个体及后代，其场所必须建立严格的隔离和防逃措施，禁止将其投放于河流、湖泊、水库、海域等自然水域。

第九条 国家鼓励和支持水产优良品种的选育、培育和推广。县级以上人民政府渔业行政主管部门应当有计划地组织科研、教学和生产单位选育、培育水产优良新品种。

第十条 农业部设立全国水产原种和良种审定委员会，对水产新品种进行审定。对审定合格的水产新品种，经农业部公告后方可推广。

第三章 生产经营管理

第十一条 单位和个人从事水产苗种生产，应当经县级以上地方人民政府渔业行政主管部门批准，取得水产苗种生产许可证。但是，渔业生产者自育、自用水产苗种的除外。

省级人民政府渔业行政主管部门负责水产原、良种场的水产苗种生产许可证的核发工作；其他水产苗种生产许可证发放权限由省级人民政府渔业行政主管部门规定。

水产苗种生产许可证由省级人民政府渔业行政主管部门统一印制。

第十二条 从事水产苗种生产的单位和个人应当具备下列条件：

（一）有固定的生产场地，水源充足，水质符合渔业用水标准；

（二）用于繁殖的亲本来源于原、良种场，质量符合种质标准；

（三）生产条件和设施符合水产苗种生产技术操作规程的要求；

（四）有与水产苗种生产和质量检验相适应的专业技术人员。

申请单位是水产原、良种场的，还应当符合农业部《水产原良种场生产管理规范》的要求。

第十三条 申请从事水产苗种生产的单位和个人应当填写水产苗种生产申请表，并提交证明其符合本办法第十二条规定条件的材料。

水产苗种生产申请表格式由省级人民政府渔业行政主管部门统一制订。

第十四条 县级以上地方人民政府渔业行政主管部门应当按照本办法第十一条第二款规定的审批权限，自受理申请之日起 20 日内对申请人提交的材料进行审查，并经现场考核后作出是否发放水产苗种生产许可证的决定。

第十五条 水产苗种生产单位和个人应当按照许可证规定的范围、种类等进行生产。需要变更生产范围、种类的，应当向原发证机关办理变更手续。

水产苗种生产许可证的许可有效期限为三年。期满需延期的，应当于期满三十日前向原发证机关提出申请，办理续展手续。

第十六条 水产苗种的生产应当遵守农业部制定的生产技术操作规程，保证苗种质量。

第十七条 县级以上人民政府渔业行政主管部门应当组织有关质量检验机构对辖区内苗种场的亲本和稚、幼体质量进行检验，检验不合格的，给予警告，限期整改；到期仍不合格的，由发证机关收回并注销水产苗种生产许可证。

第十八条 县级以上地方人民政府渔业行政主管部门应当加强对水产苗种的产地检疫。

国内异地引进水产苗种的，应当先到当地渔业行政主管部门办理检疫手续，经检疫合格后方可运输和销售。

检疫人员应当按照检疫规程实施检疫，对检疫合格的水产苗种出具检疫合格证明。

第十九条 禁止在水产苗种繁殖、栖息地从事采矿、挖沙、爆破、排放污水等破坏水域生态环境的活动。对水域环境造成污染的，依照《中华人民共和国水污染防治法》和《中华人民共和国海洋环境保护法》的有关规定处理。

在水生动物苗种主产区引水时，应当采取措施，保护苗种。

第四章 进出口管理

第二十条 单位和个人从事水产苗种进口和出口，应当经农业部或省级人民政府渔业行政主管部门批准。

第二十一条 农业部会同国务院有关部门制定水产苗种进口名录和出口名录，并定期公布。

水产苗种进口名录和出口名录分为Ⅰ、Ⅱ、Ⅲ类。列入进口名录Ⅰ类的水产苗种不得进口，列入出口名录Ⅰ类的水产苗种不得出口；列入名录Ⅱ类的水产苗种以及未列入名录的水产苗种的进口、出口由农业部审批，列入名录Ⅲ类的水产苗种的进口、出口由省级人民政府渔业行政主管部门审批。

第二十二条 申请进口水产苗种的单位和个人应当提交以下材料：

（一）水产苗种进口申请表；

（二）水产苗种进口安全影响报告（包括对引进地区水域生态环境、生物种类的影响，进口水产苗种可能携带的病虫害及危害性等）；

（三）与境外签订的意向书、赠送协议书复印件；

（四）进口水产苗种所在国（地区）主管部门出具的产地证明；

（五）营业执照复印件。

第二十三条 进口未列入水产苗种进口名录的水产苗种的单位应当具备以下条件：

（一）具有完整的防逃、隔离设施，试验池面积不少于 3 公顷；

（二）具备一定的科研力量，具有从事种质、疾病及生态研究的中高级技术人员；

（三）具备开展种质检测、疫病检疫以及水质检测工作的基本仪器设备。

进口未列入水产苗种进口名录的水产苗种的单位，除按第二十二条的规定提供材料外，还应当提供以下材料：

（一）进口水产苗种所在国家或地区的相关资料：包括进口水产苗种的分类地位、生物学性状、遗传特性、经济性状及开发利用现状，栖息水域及该地区的气候特点、水域生态条件等；

（二）进口水产苗种人工繁殖、养殖情况；

（三）进口国家或地区水产苗种疫病发生情况。

第二十四条 申请出口水产苗种的单位和个人应提交水产苗种出口申请表。

第二十五条 进出口水产苗种的单位和个人应当向省级人民政府渔业行政主管部门提出申请。省级人民政府渔业行政主管部门应当自申请受理之日起 15 日内对进出口水产苗种的申报材料进行审查核实，按审批权限直接审批或初步审查后将审查意见和全部材料报农业部审批。

省级人民政府渔业行政主管部门应当将其审批的水产苗种进出口情况，在每年年底前报农业部备案。

第二十六条 农业部收到省级人民政府渔业行政主管部门报送的材料后，对申请进口水产苗种的，在 5 日内委托全国水产原种和良种审定委员会组织专家对申请进口的水产苗种进行安全影响评估，并在收到安全影响评估报告后 15 日内作出是否同意进口的决定；对申请出口水产苗种的，应当在 10 日内作出是否同意出口的决定。

第二十七条 申请水产苗种进出口的单位或个人应当凭农业部或省级人民政府渔业行政主管部门批准的水产苗种进出口审批表办理进出口手续。

水产苗种进出口申请表、审批表格式由农业部统一制定。

第二十八条 进口、出口水产苗种应当实施检疫，防止病害传入境内和传出境外，具体检疫工作按照《中华人民共和国进出境动植物检疫法》等法律法规的规定执行。

第二十九条 水产苗种进口实行属地监管。

进口单位和个人在进口水产苗种经出入境检验检疫机构检疫合格后，应当立即向所在地省级人民政府渔业行政主管部门报告，由所在地省级人民政府渔业行

政主管部门或其委托的县级以上地方人民政府渔业行政主管部门具体负责入境后的监督检查。

第三十条 进口未列入水产苗种进口名录的水产苗种的，进口单位和个人应当在该水产苗种经出入境检验检疫机构检疫合格后，设置专门场所进行试养，特殊情况下应在农业部指定的场所进行。

试养期间一般为进口水产苗种的一个繁殖周期。试养期间，农业部不再批准该水产苗种的进口，进口单位不得向试养场所外扩散该试养苗种。

试养期满后的水产苗种应当经过全国水产原种和良种审定委员会审定、农业部公告后方可推广。

第三十一条 进口水产苗种投放于河流、湖泊、水库、海域等自然水域要严格遵守有关外来物种管理规定。

第五章 附则

第三十二条 本办法所用术语的含义：

（一）原种：指取自模式种采集水域或取自其他天然水域的野生水生动植物种，以及用于选育的原始亲体。

（二）良种：指生长快、品质好、抗逆性强、性状稳定和适应一定地区自然条件，并适用于增养殖（栽培）生产的水产动植物种。

（三）杂交种：指将不同种、亚种、品种的水产动植物进行杂交获得的后代。

（四）品种：指经人工选育成的，遗传性状稳定，并具有不同于原种或同种内其他群体的优良经济性状的水生动植物。

（五）稚、幼体：指从孵出后至性成熟之前这一阶段的个体。

（六）亲本：指已达性成熟年龄的个体。

第三十三条 违反本办法的规定应当给予处罚的，依照《中华人民共和国渔业法》等法律法规的有关规定给予处罚。

第三十四条 转基因水产苗种的选育、培育、生产、经营和进出口管理，应当同时遵守《农业转基因生物安全管理条例》及国家其他有关规定。

第三十五条 本办法自 2005 年 4 月 1 日起施行。

THE 2005 ROME DECLARATION ON ILLEGAL, UNREPORTED AND UNREGULATED FISHING

Adopted by the
FAO Ministerial Meeting on Fishers
Rome, 12 March 2005

We, the Ministers and Ministers' representatives, meeting in Rome at the FAO Ministerial Meeting on Fisheries on 12 March 2005,

Bearing in mind the principles and rules of international law as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (the 1982 UN Convention),

Noting with satisfaction the entry into force on 11 December 2001 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995 UN Fish Stocks Agreement) and the entry into force on 24 April 2003 of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993 FAO Compliance Agreement),

Recalling the relevant provisions of other international instruments, such as the 1992 Rio Declaration on Environment and Development and Chapter 17 of Agenda 21; the 2000 United Nations Millennium Declaration and Millennium Development Goals; and the 2002 Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation,

Reaffirming our commitment to the principles and standards contained in the FAO Code of Conduct for Responsible Fisheries,

Recalling the adoption on 11 March 1999 of the Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries at the FAO Ministerial Meeting on Fisheries, as well as the endorsement of the 2001 FAO

International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU),

Recalling as well the resolution on IUU fishing adopted by the FAO Conference in 2003,

Desiring to move from words to action through full implementation of various international instruments for sustainable fisheries adopted or enacted in the past decades,

Noting the harmful and worldwide consequences of IUU fishing on the sustainability of fisheries (ranging from large-scale high seas fisheries to small-scale artisanal fisheries), on the conservation of marine living resources and marine biodiversity as a whole and on the economies of developing countries and their efforts to develop sustainable fisheries management,

Recognizing that there is often a relationship between fleet overcapacity and IUU fishing and acknowledging the economic incentives that drive these phenomena,

Acknowledging the genuine development aspirations and legitimate efforts of developing countries, in particular small island developing States, toward the sustainable management and development of their fisheries sectors,

Emphasizing the responsibility of flag States under international law to effectively control and manage vessels flying their flags, as well as the responsibilities of port and coastal States in controlling IUU fishing,

Aware that effective fisheries monitoring, control and surveillance (MCS) is essential to combat IUU fishing and that integrated MCS, including vessel monitoring systems (VMS), as well as a comprehensive global record of fishing vessels within FAO, are key tools in this endeavour,

Recognizing the need to strengthen international co-operation for the development of VMS so as to implement the Code of Conduct for Responsible Fisheries, prevent, deter and eliminate IUU fishing and protect and assist fishermen in danger and the assistance that FAO may provide in harmonizing VMS to members who request it,

Recognizing the special requirements of developing countries in combating IUU fishing and, in particular, the need to strengthen their capacity for fisheries management, and

Reaffirming the commitment to enhance responsible and effective fisheries management, to prevent, deter and eliminate IUU fishing and to strengthen, improve, and where appropriate establish, MCS programmes including VMS,

We declare that:

1. We are committed to concentrating and intensifying our efforts to implement fully all the international instruments for the sustainable use of marine living resources.

2. We reaffirm the need for FAO to play a leading role in supporting the efforts of States to implement these instruments, with particular emphasis placed on assisting developing countries.

3. We will renew our efforts:

to develop and implement national and regional plans of action to combat IUUfishing,

to adopt, review and revise, as appropriate, relevant national legislation and regulations, in particular to ensure compliance with fisheries management measures and to provide sanctions of sufficient gravity as to deprive offenders of the benefits accruing from their illegal activities and to deter further IUU fishing,

to ensure effective implementation of catch certification schemes through their harmonization and improvement as necessary,

to adopt internationally agreed market-related measures in accordance with international law, including principles, rights, and obligations established in WTO agreements, as called for in the IPOA-IUU,

to ensure that all fisheries policy-makers and managers consider the full range of available MCS options, strategies and tools; take necessary actions to fully implement the IPOAs and any applicable MCS measures adopted by relevant regional fisheries management organizations (RFMOs); and that fishers have an understanding of their role in MCS,

to ensure that States, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing, and

to ensure that all large-scale fishing vessels operating on the high seas be required by their flag State to be fitted with VMS no later than December 2008, or earlier if so decided by their flag State or any relevant RFMO.

4. We call for the following new actions:

to identify, reduce and ultimately eliminate the economic incentives that lead to IUU fishing and the economic drivers that lead to fleet overcapacity, at the national, regional and global levels,

to ensure that measures to address IUU fishing or fleet overcapacity in one fishery or area do not result in the creation of fleet overcapacity in another fishery

or area or otherwise undermine the sustainability of fish stocks in another fishery or area, and that such measures do not prejudice the legitimate expansion of fleets in developing countries in a sustainable manner,

to develop a comprehensive global record of fishing vessels within FAO, including refrigerated transport vessels and supply vessels, that incorporates available information on beneficial ownership, subject to confidentiality requirements in accordance with national law,

to work within RFMOs to facilitate, where appropriate, the exchange of VMS and observer data, subject to confidentiality requirements in accordance with national law, and

to supplement existing MCS schemes through measures such as encouraging the fishing fleet to report any suspected IUU fishing activities they observe.

5. We agree upon the need:

for flag States, port States, coastal States and, where appropriate, RFMOs to effectively regulate transhipment in order to combat IUU fishing activities and to prevent laundering of illegal catches,

for States, as well as NGOs and members of the fishing industry, to exchange information on suspected IUU fishing, if possible on a real-time basis, in collaboration with FAO, RFMOs and other relevant arrangements, and by actively participating in the International MCS Network,

to develop and ensure effective implementation of national and, where appropriate, internationally agreed boarding and inspection regimes consistent with international law,

to strengthen coastal and port State measures for fishing vessels, consistent with international law, in order to prevent, deter, and eliminate IUU fishing,

for further international action to eliminate IUU fishing by vessels flying "flags of convenience" as well as to require that a "genuine link" be established between States and fishing vessels flying their flags,

to strengthen RFMOs to ensure that they are more effective in preventing, deterring and eliminating IUU fishing, and

to fully implement vessel marking requirements in accordance with the FAO Standard Specification and Guidelines for the Marking and Identification of Fishing Vessels and any applicable RFMO requirements.

6. We urge all States:

that have not yet done so to become parties to the 1982 UN Convention, the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement, and

abide by their provisions,

to ensure that they exercise full and effective control over fishing vessels flying their flag, in accordance with international law, to combat IUU fishing,

that are parties to the 1993 FAO Compliance Agreement to fulfil their obligations to submit to FAO, for inclusion in the High Seas Vessel Authorization Record, data on vessels entitled to fly their flags that are authorized to be used for fishing on the high seas, and those that are not yet parties to the 1993 FAO Compliance Agreement to submit such data on a voluntary basis, and

to supply detailed information on fishing vessels flying their flag to relevant RFMOs, in accordance with the requirements adopted by those RFMOs, and to establish such requirements within RFMOs where they do not yet exist.

7. We further urge additional research, as well as enhanced international co-operation including appropriate transfer of technology, in remote sensing and satellite surveillance of fishing vessels to prevent, deter and eliminate IUU fishing, particularly in remote areas with lack of deployment of MCS facilities.

8. We also urge:

the provision of additional assistance to developing countries to help them implement their commitments in preventing, deterring and eliminating IUUfishing, as well as to participate effectively in the development and implementation of fishery conservation and management measures by RFMOs, and

the provision of advice and training to promote the development of fisheries management regimes, at the national and local levels, to prevent, deter and eliminate IUU fishing, including community-based fisheries management in countries where such fisheries management is practiced, recognizing, where appropriate, the role of local coastal communities in the management of near-shore resources, particularly in developing countries.

9. We resolve to provide financial and technical assistance to developing countries in the implementation of MCS capabilities, including VMS, with the support of FAO and relevant international financial institutions and mechanisms, and to consider the establishment of a special voluntary fund for this purpose.

WE REQUEST that the Director-General of the Food and Agriculture Organization of the United Nations convey this Declaration to the Secretary-General of the United Nations for consideration by that organization.

《中国海洋法学评论》稿约

《中国海洋法学评论》(*China Oceans Law Review*, 以下简称《评论》) 是全国性的海洋法领域优秀学术著述的汇辑，着重研究与海洋相关的法律与政策，秉承“海纳百川，有容乃大”的精神，力求吸取国内外该领域的一切先进成果。同时在现有法学学科划分的基础上，打破学科藩篱，将视野拓展到一切关于海洋的法学理论、司法实践以及法律运作实务。本刊对于理论探索与实证究并重，以期推动海洋相关法律科学的发展，为各位专家学者提供学术研究和交流的平台。

《评论》由厦门大学法学院以及厦门大学海洋政策与法律中心（Xiamen University Center for Oceans Policy and Law, XMU-COPL）主办，由（香港）中国评论文化有限公司出版，每年两期。为此，热忱欢迎各位学界同仁及实务界人士不吝赐稿，并立稿约如下：

一、来稿形式不限，学术专论、评论、判解研究、译作等均可，篇幅长短不拘，语言限于中文或英文，且须同一语言下未曾在任何纸质和电子媒介上发表。

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三、来稿须严格遵守学术规范，来稿格式参见后附《〈中国海洋法学评论〉书写技术规范》。若文中引征网上文献资料，应将该页面另存为独立文档，发送至编辑部邮箱或者打印后寄送《评论》编辑部，以备查阅。

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《中国海洋法学评论》编辑部编订

On the Interpretative Declarations by the State Parties to United Nations Convention on the Law of the Sea concerning the Issue of Innocent Passage of Warships through the Territorial Sea

ZHAO Jianwen *

Abstract: On the issue of innocent passage of warships through the territorial sea, the Third United Nations Conference on the Law of the Sea did not reach an agreement, and United Nations Convention on the Law of the Sea (UNCLOS) has no explicit provisions. Since the entry into force of the Convention, a few States Parties have still been opposed to the right of innocent passage of warships in the territorial sea. Some advocate reserving the right to take measures to safeguard their security when warships pass through their territorial sea or requiring warships to pass through the territorial sea with prior notice or permission. Meanwhile, some State Parties still insist that warships enjoy the same right of innocent passage as merchant vessels in the territorial sea, deeming that the UNCLOS permits innocent passage of warships through the territorial sea, or UNLCOS has not authorized coastal States to require prior notification or permission, or warships unconditionally enjoy the same right of innocent passage as merchant vessels in the territorial sea. This paper argues that, according to UNCLOS and general international law, on the issue of warships' passage through the territorial sea, the States (including the States Parties to UNCLOS) shall have their own discretion. UNCLOS permits warships to innocently pass through the territorial sea and also permits coastal States to require prior notification or permission. Notification system is more favorable than permission system to the passage of foreign warships through the territorial sea, and it also takes coastal States' interests into account.

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Prior to the passage through the territorial sea of coastal States, foreign warships should find out the stances of these States. If the coastal States have laws or regulations requiring prior notice or permission, the States to which the warships belong shall abide by these laws or regulations. This is determined by the legal status of the territorial sea and the very nature of warships. If the coastal States hinder foreign warships carrying out missions in accordance with international laws from passing through their territorial sea or render such passage virtually impossible, the States to which the warships belong may take countermeasures to balance the interests.

Key Words: Warships' right of innocent passage through territorial sea; United Nations Convention on the Law of the Sea; Interpretative declaration

According to Article 309 of 1982 United Nations Convention on the Law of the Sea, State Parties may make no reservations or exceptions to this Convention, unless expressly permitted by the articles of this Convention. This is relevant to the characteristics of the package deal of UNCLOS and it would help to ensure the full implementation of this Convention. However, according to Article 310 of UNCLOS, a State when signing, ratifying or acceding to this Convention may make an interpretative declaration or statement with a view, *inter alia,* to the harmonization of its domestic laws and regulations with the provisions of the Convention,, but such declaration or statement should not exclude or modify the legal effect of the provisions of this Convention in their application to that State. Out of the existing 149 State Parties to UNCLOS (as of November 25, 2005, including 148 contracting States and the European Community), 71 contracting Parties to UNCLOS when signing, ratifying or succeeding the Convention have made interpretative declarations or statements, and such declarations or statements of 22 countries directly touch on the issue of the warships' passage through the territorial sea. In addition, two countries have made interpretative declarations in the form of bilateral agreement. These interpretative declarations or statements are very representative and studies on them are conducive to clarify the international practices as well as their trends of development concerning the issue of the warships' passage through the territorial sea since the adoption of UNCLOS.

I. The UNCLOS Provisions concerning the Innocent Passage of Foreign Vessels though the Territorial Sea

The interpretative declarations or statements of the States Parties to UNCLOS on the issue of the warships' passage through the territorial sea are directly associated with relevant provisions and negotiating history of UNCLOS; they also epitomize the long-term disputes of international community on this issue. In the late19th and early 20th centuries, the resolutions of the Institute of International Law were inconsistent with those of the International Law Association on this issue.[1] In 1930, at the Hague Conference for the Codification of International Law, the United States, Belgium, Bulgaria, Finland and other countries advocated that foreign warships shall obtain permission in advance for passage through their territorial seas, while the United Kingdom, Germany, Italy, Japan and other countries argued that warships shall enjoy the right of innocent passage. At the First United Nations Conference on the Law of the Sea in 1958, the U.S. government turned to assert that warships shall enjoy the right of innocent passage, while the former Soviet Union, Eastern European countries and some Asian and African countries held that permissions or notices shall be obtained or sent beforehand. The provision in Article 24 of the draft Convention on the Territorial Sea and the Contiguous Zone made by the United Nations International Law Commission, namely that foreign warships passing through the territorial sea shall obtain permission from or send notification to the relevant Coastal States in advance ,was adopted by the First Committee, but failed to pass at the General Assembly in that it did not win a two-thirds majority when put to vote.[2] Many countries made reservations on relevant provisions of the 1958 Convention on the Territorial Sea

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1 Article 5 of the resolution of International Law Association of 1894 states: "All ships shall indiscriminately enjoy the right of innocent passage through the territorial sea, but belligerent States have the right to manage this kind of passage"; however, Article 9 of the resolution points out: the above provision does not include "warships and warship-like ships". Articles adopted at the Conference of International Law Association in Vienna in 1926 believe that: "Ships of all states, including public and private vessels, have the right to freely pass through the territorial sea, subject to the limitations of the regulations of the States of the territorial waters, but this kind of regulations should not violate any provisions of this Convention." In 1928, the rules adopted at the Conference of International Law Association in Stockholm state that: "The free passage of warships may be restricted by the special rules of the territorial States." This shows that differences also exist among the academic community of international law on the issue of the passage of warships through the territorial sea. See Wei Min ed., *Law of the Sea*, Beijing: Law Press China, 1987, pp. 77~78. (in Chinese)

2 Chen Degong, *Modern International Law of the Sea*, Beijing: China Social Sciences Press, 1988 edition, p. 52. (in Chinese)

and the Contiguous Zone.[3] At the Third United Nations Conference on the Law of the Sea, the United States, Britain and other maritime powers advocated that warships in the territorial sea shall enjoy the right of innocent passage, and the former Soviet Union turned to support their position. Many developing countries insisted that foreign warships passing through their territorial seas shall send notice to or obtain permission from their competent authorities in advance. The provisions of the Convention on this issue are the results of compromise between the two sides.

A. On Article 17 of UNCLOS

The initial Informal Single Negotiating Text of the Third United Nations Conference on the Law of the Sea originally included specific provisions that warships also enjoy the right of innocent passage. Nonetheless, due to continuous oppositions, the Second Committee of the Conference decided to delete these contents.[4] At the same time, repeated efforts to specify in the Convention that in the territorial sea foreign warships do not enjoy the right of innocent passage and that foreign warships shall notify or obtain permission beforehand have not been successful either.[5] The provisions in the Convention are ambiguous, acceptable to both sides and open to more than one interpretation

Section 3 of Part II of UNCLOS makes provisions on "innocent passage through the territorial sea". Among them, Subsection A stipulates "rules applicable to all ships", Subsection B "rules applicable to merchant ships and government ships operated for commercial purposes", and Subsection C "rules applicable to warships and other government ships operated for non-commercial purposes". Among them the most critical one is the provision concerning "right of innocent

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3 For example, in its reservations concerning the relevant provisions of the "Convention on the Territorial Sea and Contiguous Zone," the former Soviet Union noted that: "The government of the Union of Soviet Socialist Republics believes that the coastal State has the right to adopt procedures of permitting foreign warships to pass through its territorial waters." Consistent with these reservations, the 1960 Boundary Act of the former Soviet Union stipulates that foreign ships passing through the territorial waters of the Soviet Union must submit a request 30 days in advance through diplomatic channels.

4 Budislav Vukas, *The Law of the Sea*: *Selected Writings*, Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 136~137.

5 Dong Shizhong, The Stance of China at the Third United Nations Conference on the Law of the Sea, in Zhao Lihai ed., *The Theory and Practice of Contemporary Law of the Sea*, Beijing: Law Press China, 1987, pp. 10~11. (in Chinese)

passage" in Article 17 of Subsection A (rules applicable to all ships), which provides that: "Subject to this Convention, ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

The above structure of Section 3 and the provision of Article 17 in UNCLOS are basically the same as the structure of Section 3 and the provision of Article 14 in the first part of the "Convention on the Territorial Sea and the Contiguous Zone" in 1958. Concerning Article 14 of the 1958 Convention, there are three viewpoints: (1) In the absence of contrary provisions, "all ships" include military vessels; (2) "all ships" only refer to merchant vessels in that if military vessels also enjoy this right, it should be specified; (3) the Convention has no provisions on the issue of warships passing through foreign territorial seas, and the issue is still subject to customary law. Concerning the interpretations on the relevant provisions of UNCLOS, there are mainly such three opinions too, since the UNCLOS provisions are ambiguous and doubtful, just like those in the 1958 Convention.[6]

B. With Regard to Article 19, Article 21 and Article 25 of UNCLOS

Article 21(1) of UNCLOS provides that the coastal States may, in accordance with the provisions of this Convention and other rules of international law, adopt laws and regulations concerning innocent passage through the territorial sea, in respect of all or any sub-paragraphs of this article, including Sub-paragraph (h): "the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State." At the 11th Session in 1982, 28 countries, including China, put forward a formal amendment to the Plenary Session.[7] The amendment requires to add the word "security" behind "immigration" in sub-paragraph (h) of Article 21(1) of the draft Convention, and thus the revised part would be that the coastal State may adopt laws or regulations … in respect of … (h) the prevention of infringement of the customs, fiscal, immigration, security

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6 *Oppenheim's International Law*, Sub-volume 2 of Volume I, Beijing: Encyclopedia of China Publishing House, 1998, pp. 35~36. (in Chinese)

7 The 28 co-sponsors are: Algeria, Bahrain, Benin, Cape Verde, China, Congo, Democratic Republic of Korea, Democratic Yemen, Djibouti, Egypt, Guinea-Bissau, Iran, Libya, Malta, Morocco, Oman, Pakistan, Papua New Guinea, the Philippines, Romania, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Suriname, Syria, Uruguay and Yemen. Out of the 28 States, "Democratic Yemen" and "Yemen" achieved the unification between the North and the South and established the Republic of Yemen

or sanitary laws and regulations of the coastal State".[8] The States that sponsored the amendment aimed to add grounds so that they may make provisions in their domestic laws that foreign warships passing through their territorial seas must give notice or obtain permission beforehand. In the debates of the Conference, 46 countries supported the amendment, 30 countries opposed to it and the other participating countries did not make clear their attitudes. Before putting the amendment to vote, in order to bridge differences and reach consensus, the President of the General Assembly called for not putting the proposal to vote. Subsequently, the President invited some of the sponsors including China, Romania, Morocco, Sierra Leone, and Uruguay to consult with the main opponents – United States and the former Soviet Union. They reached an understanding and the President of the General Assembly announced a statement at the Session, explaining the reasons why the States that had put forward the amendment no longer insisted on putting the amendment to vote as well as their principled stance on the issue. On April 26, 1982, the President of the General Assembly issued the following statement: "Although the co-sponsors of the amendment in File L117 put forward the amendment in order to clarify the text, they agreed not to insist on putting it to vote as a response to the appeal of the President. However, they are willing to reiterate that this does not impede the right of the coastal States to take measures to ensure their security interests in accordance with the provisions of Article 19 and Article 25 of the Convention."[9] The co-sponsors, including China, believed that the President's statement safeguarded the interests of the sponsors, and many sponsors, in their explanatory statements after the adoption of the draft Convention, mentioned the above statement of the General Assembly President and reiterated their principled stance that warships passing through the territorial sea should give notice or obtain permissions beforehand.[10] However, the United States believed that the above statement of the President had clearly confined the security interests of coastal States within the scope of Article 19 and Article 25 of the Convention and, accordingly coastal States should not impose the requirements

8 Third United Nations Conference on the Law of the Sea, Official Records, Vol. XVI, p. 225

9 Third United Nations Conference on the Law of the Sea, Official Records, Vol. XVI, p. 2, p. 132

10 Shen Weiliang and Xu Guangjian, The Third Conference on the Law of the Sea and the Convention on the Law of the Sea, *Chinese Yearbook of International Law*, 1983, p. 411. (in Chinese)

of prior notification or permission.[11]

Article 19 of UNCLOS sets a general standard for "innocent passage", namely, "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State," but it also stipulates that with regard to the 12 types of activities harmful to the coastal State during the passage, including any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations, the coastal State may take preventive measures against such activities. Article 25 of UNCLOS relates to the "rights of protection of the coastal State", and provides that the coastal State may take necessary steps in its territorial sea to prevent passage which is not innocent. Neither of these two articles has specified that foreign warships enjoy the right of innocent passage, or the coastal States are allowed to require that foreign warships passing through their territorial sea shall give notice to or obtain permission from them beforehand.

C. Concerning Article 30, Article 31 and Article 32 of the UNCLOS

Subsection C, Section 3 of Part II in UNCLOS sets out "the rules applicable to warships and other government ships operated for non-commercial purposes." Among them, Article 30 makes provisions on "non-compliance by warships with the laws and regulations of the coastal State": "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately". Article 31 makes stipulations on "the responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes". "The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law." Article 32 makes prescriptions on "immunities of warships and other government ships operated for non-

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11 Budislav Vukas, *The Law of the Sea: Selected Writings*, Leiden; Boston: Martinus Niihoff Publishers, 2004, pp. 136 ~137.

commercial purposes": "With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes." Article 23 of the 1958 "Convention on the Territorial Sea and the Contiguous Zone" is the same as Article 30 of UNCLOS.

Some people think that the above clause "implies" that warships enjoy the right of innocent passage. As a matter of fact, "the purpose of the above provisions is to deal with a situation, namely, when warships start to pass the territorial sea in compliance with international law, they should have abided by local laws and regulations but refuse to comply with them. The jurisdictional immunities of warships leave this Article necessary: the assumption upon which this Article is based does not preclude the controversy over the 'right' of passage. Furthermore, the argument about the text of the Convention contains such an assumption that is not guaranteed: problems with controversial backgrounds ultimately rely on inference for their solution. UNCLOS of 1982 (Article17 to Article 32) contains the same unresolved obscurities as the Convention of 1958."[12] By the same token, it cannot necessarily be concluded that warships enjoy the right of innocent passage, on the ground that "the harmful acts listed in Article 19 of Subsection A , Section 3 of Part II in the UNCLOS" (rules applicable to all ships) include threat or use of force--the acts only implementable by warships. That's because foreign warships, after having given notice beforehand or obtained the prior permission to enter into the territorial sea of a coastal State, are still likely to commit the above harmful acts.

From the foregoing, on the issue of warships' passage through the territorial sea, "at the First and Third United Nations Conferences on the Law of the Sea, no agreement was reached. Convention on the Territorial Sea and the Contiguous Zone and the United Nations Convention on the Law of the Sea do not directly deal with this matter either. Major maritime powers are in favor of the warships' right of innocent passage, while many smaller countries or those countries in the strategically sensitive locations are against the right."[13] "As for the right of the coastal State to require foreign warships to give notice or obtain permission before passage through the territorial sea, the Third United Nations Conference failed to

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12 Ian Brownlie, *Principles of Public International Law*, 5th edition, Oxford: Clarendon Press/ New York: Oxford University Press, 1998, p. 195.

13 Malcolm D. Evans ed., *International Law*, Oxford/New York: Oxford University Press, 2003, pp. 634~635

give a clear answer either, which was the result of the confrontation between two well-matched blocs of States. One bloc consists of the coastal States without a strong naval force but keen to protect their security, many of whom are non-aligned countries in favor of the provision that the coastal States should be allowed to require foreign warships to give notice or obtain permission in advance for passage through their territorial seas. The other bloc comprises maritime powers and the majority of their allies, who safeguard the warships' unconditional right of innocent passage."[14]

II. The Statements Made by the States against the Warships' Right of Innocent Passage through the Territorial Sea

A. The Statements by Sudan, Cape Verde, Sao Tome and Principe and Romania: Reserving the Right to Take Measures to Safeguard Their Security Interests on the Issue of the Warships' Passage through the Territorial Sea.

On June 23, 1985, when ratifying the UNCLOS, Sudan issued a statement that the Sudanese government considered it necessary, under Article 310 of UNCLOS, to make an announcement to present Sudan's positions on certain provisions of UNCLOS; what Sudan wanted to reiterate was the statement of the President of the Third United Nations Conference on the Law of the Sea delivered at the Plenary Session on April 26, 1982 concerning Article 21 of UNCLOS regarding the laws and regulations of the coastal State on innocent passage, namely, the fact that certain States withdrew their amendment submissions did not impair the rights of the coastal State to take all necessary measures, especially for the purpose of safeguarding their security, in accordance with Article 19 concerning the meaning of innocent passage and Article 25 regarding the rights of protection of the coastal

14 Budislav Vukas, *The Law of the Sea: Selected Writings*, Leiden/Boston: Martinus Niihoff Publishers, 2004, p. 136.

State.[15]

The statement made by Cape Verde On August 10, 1987 when ratifying UNCLOS pointed out that UNCLOS recognized the right of the coastal States to take measures to ensure their security interests, including the right to adopt relevant laws and regulations concerning the innocent passage of foreign warships through the territorial seas or archipelagic waters, which is fully consistent with Article 19 and Article 25 and which in fact is clearly stated in the statement of the Plenary Session delivered by the President of the Third Conference on the Law of the Sea on April 26, 1982. Article 6 and Article 9 of Law No. 60 / IV / 92 of 21 December 1992 of Cape Verde recognized the right of innocent passage of foreign vessels through its archipelagic waters and territorial sea respectively and rescinded its decree No.126/77 and other laws of Cape Verde that were in conflict with this Law, but the State did not withdraw the above statement. When interpretations are made with reference to the above statement together with the corresponding provisions of its domestic laws, it should be understood that Cape Verde conditionally recognizes the right of innocent passage of foreign warships.

The statement by Sao Tome and Principe on November 3, 1987 when ratifying UNCOLS noted that the Democratic Republic of Sao Tome and Principe reserved the right to adopt laws and regulations relating to innocent passage of foreign warships through its territorial sea or archipelagic waters and take other measures for the purpose of ensuring its security.

The statement by Romania on December 17, 1996 when ratifying the UNCLOS reaffirmed the right of coastal States to take measures to safeguard their security interests, including the right to adopt domestic laws and regulations relating to innocent passage of foreign warships through its territorial sea.

The above statements by the four States are all relevant to Article19, Article 21 and Article 25 of UNCLOS. Although these statements did not mention their specific domestic laws and regulations, nor did they enumerate safety measures to be taken or already taken, but their essence was to distinguish between warships and merchant vessels in the passage through their territorial seas. Maritime powers

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15 The statements or notes of the relevant States concerning the "United Nations Convention on the Law of the Sea" cited here and hereinafter in this article are all from: United Nations: Multilateral Treaties Deposited with the Secretary-General-Status as at 31 December 2002, Volume II, Part I, Chapters XXI, United Nations Publication, Sales No. E. 03. V. 3, pp. 230~265. In addition, these statements or notes, at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partl/chapterXXl/treaty6.asp, 25 November 2005.

tried their best to prevent the Third United Nations Conference on the Law of the Sea from adding in Article 21 of UNCLOS the provision that allows the coastal States to adopt laws or regulations concerning "security" issues with respect to the innocent passage of foreign ships. That's because the coastal State may make use of such laws or regulations to impose restrictions on warships' passage through its territorial sea, or even render the passage impossible. Some countries recognize "the right of innocent passage" of foreign warships under the premise of reserving the right to take security measures on such passage through their territorial sea; however, as a matter of fact, what they recognize is not the right of innocent passage advocated by the United States and other maritime powers.

B. The Statements by Egypt, Malta, Croatia, Finland, Sweden, Serbia and Montenegro, and Bangladesh: Requiring Warships to Give Notice before Passing through the Territorial Sea

Egypt's statement on August 26, 1983 with its ratification of UNCLOS, in its reference to UNCLOS provisions on the coastal State's regulation of the ships' innocent passage through the territorial sea, pointed out that the innocent passage of warships through its territorial sea would be guaranteed, provided that they give notice in advance.

On May 20, 1993, Malta made a statement when ratifying UNCLOS: "By the same token, it shall be realized that the right of innocent passage of a State's warships through the territorial sea of another State shall be exercised peacefully. Effective and rapid means of communication are easy to use; it is reasonable for warships to send a prior notice to the coastal State in order to exercise the right of innocent passage and this requirement is not contradictory with UNCLOS. Some countries have required such notice. Malta reserves the right to legislate on this."

The statement by the Republic of Croatia on April 5, 1995 when succeeding the UNCLOS indicated that under Article 53 of the Vienna Convention on the Law of Treaties adopted on May 29, 1969, there was no such peremptory norm of general international law: prohibiting the coastal States from requiring in accordance with their laws and regulations foreign warships to give notice of the intention of innocent passage through the territorial seas, and meanwhile limiting the number of warships passing simultaneously (Article17 to Article 32 of UNCLOS).

The statement by Finland on June 21, 1996 when ratifying UNCLOS noted

that with regard to the relevant part of UNCLOS on innocent passage through the territorial sea, the Finnish government's intention was that concerning foreign warships and other government ships operated for non-commercial purposes passing through Finland's territorial sea, the current system shall continue to be applicable and this system was entirely consistent with UNCLOS.

The statement by Sweden on June 25, 1996 when ratifying UNCLOS carried the same meaning as the above one by Finland on June 3, 1996. Article 4 of "Proclamation of 3 June 1966 concerning the Admission to Swedish Territory of Foreign Naval Vessels and Military Aircraft" provides that foreign warships entering the territorial waters of Sweden shall send a notice to Sweden in advance.

The statement by the Republic of Serbia and Montenegro on March 12, 2001 when succeeding the UNCLOS noted that the Yugoslav government believed that according to the right derived from Article 310 of UNCLOS, a State Party may, in accordance with its laws and regulations and on the basis of the provisions on the right of innocent passage in customary international law and UNCLOS (Article 17 to Article 32), require the foreign warships passing through its territorial sea to notify each coastal State concerned beforehand and limit the number of such vessels passing simultaneously.

The statement by Bangladesh on July 27, 2001 when ratifying UNCLOS carried the same meaning as the above one by Malta on May 20, 1993 when ratifying UNCLOS.

The above statements by the seven States required warships passing through their territorial seas to notify these States beforehand and clearly distinguished the passage of warships from that of merchant vessels. Merchant vessels passing through the territorial sea of a State do not need to send prior notice to this State. Judging from the syntax of the above statements, most of these States recognize warships' right of innocent passage in the territorial sea, and only require these warships to go through the formalities of "prior notice". Matters usually requiring prior notice include the names, types, and official numbers of warships as well as the purpose of the passage, routes and schedules. This means the warships' right of innocent passage is admitted conditionally and is different from the unconditional right of innocent passage advocated by the United States and other maritime powers.

In addition, although some States did not make a statement on the issue of warships passing through the territorial sea when they ratified, acceded to or succeeded UNCLOS, their domestic legislations explicitly require foreign warships

to send a prior notice for passage through the territorial sea. For example, Part 2 of Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace provides that when more than 3 foreign warships of the same nationality pass through certain waters of Danish territorial sea, they shall give prior notice through diplomatic channels.

C. The Statements by Iran, Oman, Yemen, China and Algeria: Requiring Warships to Pass through the Territorial Sea with Prior Permission

The statement by the Republic of Iran on October 10, 1982 when signing UNCLOS (Iran has not yet ratified the UNCLOS) held that, according to customary international law, and the provisions of Article 21, Article 19 (on the meaning of innocent passage) and Article 25 (on the right of coastal protection) of UNCLOS ,the right of coastal States to take measures to safeguard their security interests is recognized (implicitly), inter alia, including the right to adopt laws and regulations and the right to require foreign warships to obtain prior permission for innocent passage through their territorial seas. The provisions of "Decree of the Islamic Republic of Iran on the Marine Areas of Persian Gulf and the Sea of Oman promulgated on November 1994 are consistent with the stance of the above statement by Iran.

The statement by Oman on July 1, 1983 when signing UNCLOS noted that: The government Oman understands that the application of Article19, Article 25, Article34, Article 38 and Article 45 of UNCLOS does not exclude the right of the coastal State to take such appropriate measures when it is necessary to protect their peace and security interests. The statement by Oman on August 17, 1989 when ratifying the UNCLOS indicated that innocent passage of warships through Omani territorial waters is guaranteed, subject to prior permission. Provided that they sail on the surface of water and show their national flag, this is equally applicable to submarines.

The statement by Yemen on July 21, 1987 when ratifying the UNCLOS announced that People's Democratic Republic of Yemen would give priority to the implementation of its current domestic laws requiring foreign warships or submarines or nuclear power boats or ships carrying radioactive materials to obtain permission before they enter or pass through its waters.

In the Decision of the Standing Committee of National People's Congress on Ratifying United Nations Convention on the Law of the Sea on May 15,

1996, the People's Republic of China reaffirms that the provisions of the United Nations Convention on the Law of the Sea concerning innocent passage through the territorial sea shall not prejudice the right of a coastal State to request, in accordance with its laws and regulations, a foreign State to obtain advance approval from or give prior notification to the coastal State for the passage of its warships through the territorial sea of the coastal State. The above statement by China is consistent with the provisions of Chinese domestic laws.

The Statement by the Government of the People's Republic of China on the Territorial Sea on September 4, 1958 declares that: "All foreign aircrafts and military vessels, without the permission of the government of the People's Republic of China, shall not enter China's territorial sea and the air space over its territorial sea." Article 6 of the Law of the People's Republic of China on Territorial Sea and the Contiguous Zone of February 25, 1992 provides that: "Non-military foreign vessels are entitled to the right of innocent passage through the territorial sea of the People's Republic of China according to law. Foreign military vessels entering the territorial sea of the People's Republic of China are subject to the approval of the government of the People's Republic of China." China has also taken the same stance at the Third United Nations Conference on the Law of the Sea.[16]

16 At the Third United Nations Conference on the Law of the Sea, the Chinese delegation repeatedly stated their position. For example, on March 29, 1973, in the speech at the meeting of the Second Subcommittee of the Seabed Committee, Chinese representatives said that: "Article 14 of the Convention on the Territorial Sea and Contiguous Zone of 1958 generally provides that the ships of all States enjoy the right of innocent passage through the territorial sea. That is to say, foreign warships can also be interpreted as enjoying the same right. Obviously, this is unacceptable to many States. It is well- known that the legislations of many States expressly provide that foreign warships passing through the territorial sea must obtain permission from or give notice to the coastal States in advance. This is a sovereignty of the coastal States. Even the original draft proposed by the International Law Commission acknowledged this. However, as a matter of fact, the above article of the Convention has wiped out such legitimate right of the coastal States." See The Teaching and Research Office of the Department of International Law of Peking University ed., *Collected Materials on the Law of the Sea*, Beijing: People's Publishing House, 1974, p. 60 (in Chiense). On July 14, 1973, the Chinese delegation submitted the Work Document on the Waters within the jurisdiction of the State to the Second Subcommittee of the Seabed Committee. In such part relating to the passage of foreign ships through the territorial sea, the Chinese delegation suggested that "foreign non-military vessels may innocently pass through the territorial sea" and that "the coastal States may, in accordance with their laws and regulations, require foreign military vessels to give notice to or obtain permission from the competent authorities in advance for passage through the territorial sea of these States." See The Teaching and Research Office of the Department of International Law of Peking University ed., *Collected Materials on the Law of the Sea*, Beijing: People's Publishing House, 1974, p. 74 (in Chinese). On April 28, 1978, in the speech at an informal meeting

Many people have said that China's stance is relevant to its tragic history under the gunboat diplomacy of the imperialist countries as well as China's anxieties over its military security.[17]

Algeria declared on June 11, 1996 when ratifying the UNCLOS that in line with the provisions of Sub-section A and Sub-section C in Section 3, Part II of the UNCLOS, warships passing through Algerian territorial sea shall obtain permission 15 days in advance, but except the circumstances of force majeure provided in the UNCLOS.

These statements or domestic laws of the above five States all insist that warships shall obtain permission beforehand for the passage through their territorial

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of the Second Committee of the Third United Nations Conference on the Law of the Sea, the Chinese delegation expressed that: "Everyone knows that military vessels and general merchant ships are different in nature, and therefore whether or not to provide foreign military vessels with the convenience of innocent passage through the territorial sea should be decided by the coastal State in accordance with its own laws and regulations." "At present, the "Informal Composite Negotiating Text" does not distinguish between general ships and military vessels and this is totally unacceptable to the Chinese delegation." See *Collected Documents on Chinese delegations Attending Relevant United Nations Conferences (January to June 1978)*, Beijing: People's Publishing House, 1978, pp. 131~132 (in Chinese). On April 30, 1982, at the Plenary Session after the adoption of the Convention, the deputy head of the Chinese delegation reiterated that: "On the issue of the system of warships' passage through the territorial sea, at the Plenary Session of April 26, the co-sponsors of Document A/CONF,62/C.117 did not insist on putting the amendment to vote in response to the President's call so that the Conference could adopt by consensus the draft Convention and in view of the interpretative statement announced at the conference by the President on this issue. This does not affect the principled position of the co-sponsors. Here, I would like to reiterate that the provisions concerning the innocent passage through the territorial sea in this Convention shall not hinder the coastal States from requiring, in accordance with their own laws and regulations, foreign ships to obtain prior permission from or give notice in advance to the States for passage through their territorial seas. See *Collected Documents on Chinese Delegations Attending Relevant United Nations Conferences (January-June 1982)*, Beijing: World Knowledge Publishing House, 1983, p. 91 (in Chinese). On December 9, 1982, when signing the Convention at the final session of the Third Conference on the Law of the Sea, the Chinese delegation once again declared in their speech that: "At the past sessions, we have repeatedly noted that in the articles of the Convention relating to innocent passage through the territorial sea, there are no explicit provisions on the system governing the passage of warships through the territorial sea and many States, including China, have put forward the amendment many times. At a session in April this year, in order to respond to the president's call so that the Conference could adopt the draft Convention, the above co-sponsors did not insist on putting the amendment to vote. Nonetheless, the statement made by the then President of the Conference has shown that this does not affect the principled position of the co-sponsors requiring the protection of their national security." See *Selected Regulations on Territorial Sea and the Contiguous Zone*, Beijing: Law Press China, 1985, p. 195. (in Chinese)

17 Hyun-Soo Kim, The 1992 Chinese Territorial Sea Law in the Light of UN Convention, *International and Comparative Law Quarterly*, Vol. 43, 1994, p. 901.

seas, and disapprove of warships enjoying the right of innocent passage through their territorial seas. The innocent passage in its original meaning does not require prior permission. The United States and other maritime powers even did not accept such a generous procedural requirement of prior notice, nor would they accept such a requirement that foreign warships shall obtain prior permission, which contains a strict substantive review of foreign warships.

In addition, Antigua and Barbuda, the United Arab Emirates and other States have stipulated the requirements of prior permission in their domestic laws newly adopted or put into force since the adoption of the UNCLOS. Article 14 (2) of Maritime Areas Act, 1982, Act No. 18 of 17 August 1982 of Antigua and Barbuda, and Article 5(2) of Federal Law No. 19 of 1993 in respect of the Delimitation of the Maritime Zones of the United Arab Emirates, 17 October 1993 provide that foreign warships shall obtain prior permission for passage through the territorial seas. Nevertheless, the UNCLOS signed by United Arab Emirates in December, 10, 1982 has not been ratified as yet.

III. The Statements In Favor of Warships Enjoying the Right of Innocent Passage through the Territorial Sea

A. The Statements by Argentina, Netherlands and Chile State that the UNCLOS Permits Warships' Innocent Passage through the Territorial Sea

On December 1, 1995, when ratifying the UNCLOS, Argentina declared that with regard to the provisions of the UNCLOS relating to innocent passage through the territorial sea, the government of the Republic of Argentina intended that the existing system of Argentina should be applicable to foreign warships' passage through its territorial sea, because the system was completely consistent with the provisions of the UNCLOS. The Article 3(3) of Law No. 23.968 of 14 August 1991 had admitted that the vessels of third States should enjoy the right of innocent passage through Argentina's territorial sea provided that they comply with international law as well as the laws and regulations of Argentina.

The statement by Netherlands on June 28, 1996 when ratifying the UNCLOS indicated that "The 'Convention' permits innocent passage in the territorial sea for all ships, including foreign warships, nuclear-powered ships and ships carrying nuclear or hazardous waste, without any prior consent or notification, and with

due observance of special precautionary measures established for such ships by international agreements." The above statement by Netherlands believed that the Convention "permits" the innocent passage of warships through the territorial sea, rather than it was a mandatory requirement, and this was more in line with the original intent of the relevant provisions of the Convention .

The statement by Chile on August 25, 1997 when ratifying the UNCLOS pointed out that as for those States imposing restrictions on the innocent passage of foreign warships, the Republic of Chile reserved the right to impose similar restrictions. Like the statement by Chile, Legislation on the Territorial Sea of Lithuania of June 25, 1992 also provides that the innocent passage of warships should be treated on the basis of reciprocity. Lithuania joined the UNCLOS on November 12, 2003. Chile's statement and Lithuanian legislation show that on the issue of warships' passage through the territorial sea, even if the UNCLOS has relevant provisions, these provisions are not mandatory; instead this issue may be handled by the coastal States on the basis of reciprocity.

B. The Statements of Germany and Italy: the UNCLOS Does Not Authorize Coastal States to Require Prior Notification or Permission

In the statement when joining the UNCLOS on October 14, 1994, Germany noted that the provisions regarding the territorial sea were largely a set of harmonious rules on the reasonable wishes of the coastal States to protect their sovereignty and for the international community to exercise the right of passage. The right to extend territorial sea to 12 nautical miles offshore will greatly increase the importance of the right of innocent passage in the territorial sea for all types of vessels (including warships, merchant ships and fishing boats). This is a basic right of the nations in the international community. Any provisions of the UNCLOS reflecting the existing international law up to now should not be understood as authorizing the coastal States to require any kinds of foreign ships to obtain prior consent or notification for innocent passage.

The statement by Italy when ratifying the UNCLOS on June 12, 1995 announced that any of the provisions in the UNCLOS in line with customary international law should not be understood as authorizing the coastal States to require any kinds of foreign ships to obtain prior consent or notification for innocent passage.

The statements by both Germany and Italy held that the UNCLOS did not

"authorize" the coastal States to require foreign warships intending to pass through their territorial seas to send prior notice to or obtain permission from them. We can say, the view that there is no such explicit authorization in the UNCLOS, is in line with the Convention. However, it may be noted that there are either no provisions in the UNCLOS that authorize warships to disregard the coastal States' requirements on prior notification or permission and forcibly pass through their territorial seas.

It makes sense for Germany to mention in its statement that "the provisions regarding the territorial sea were largely a set of harmonious rules on the reasonable wishes of the coastal States to protect their sovereignty and for the international community to exercise the right of passage.". If warships have the right to disregard the coastal States' requirements on prior notification or permission and forcibly pass through their territorial seas, it would inevitably lead to discord in international relations, and even endanger international peace and security. The innocent passage of merchant vessels through the territorial sea is indeed "a fundamental right of the international community," just as Germany stated, but modern international law does not recognize that warships may enjoy such right.

C. The Joint Statement of the United States and the Former Soviet Union and the Statement by the United Kingdom: "According to the UNCLOS and General International Law, Warships Enjoy the Right of Innocent Passage through the Territorial Sea without Prior Notification or Permission."

U.S. did not sign the UNCLOS, nor has it joined the Convention so far. The statement by Russia on March 12, 1997 when ratifying the UNCLOS did not touch on the issue of warships 'passage through the territorial sea. Nevertheless, the United States and the former Soviet Union had reached an agreement on such issue.

After the UNCLOS was adopted, the former Soviet Union tried to change its stance of recognizing the warships' right of innocent passage through the territorial sea at the Third United Nations Conference on the Law of the Sea. On November 24, 1982, the State Border Act adopted by the Supreme Soviet of the USSR provided that: "Foreign warships … shall exercise their right of innocent passage through the Soviet territorial sea in the manner prescribed by Soviet Council of Ministers." On December 10, 1982, the former USSR signed the UNCLOS. Article 8 of " Rules for Navigation and Sojourn of Foreign Warships in the Territorial

Waters (Territorial Sea) and Internal Waters and Ports" confirmed by the Council of Ministers of USSR on April 18, 1983 stipulated that: " In the territorial sea of the USSR, foreign warships enjoy the right of innocent passage, provided that they abide by the existing laws and regulations relating to the territorial sea of USSR and the international treaties that USSR has joined." According to the Rules, passage for the purpose of entering or leaving the internal waters or ports of USSR is generally subject to prior permission and the sea lanes and traffic separation scheme should be applicable, which in fact does not recognize the warships' right of innocent passage. Only passing through Soviet territorial waters without entering the internal waters or ports of USSR does not need to obtain prior permission, but foreign warships shall pass along the routes normally used for international navigation in the Baltic Sea, Sea of Okhotsk and the Sea of Japan and in accordance with the designated traffic separation scheme. This is actually the recognition of conditional right of innocent passage. Believing that the above legislation of the former Soviet Union actually abolished the right of innocent passage, the United States expressed strong opposition to it and repeatedly sent warships to navigate in the territorial waters in Black Sea where the Soviet Union deemed that foreign warships had no right of innocent passage, resulting in the "Black Sea Incident" on February 12, 1988, when the warships of the two States collided.[18]

On December 27, 1988, the US President issued a proclamation with respect to the US territorial sea, declaring that "according to international law, as reflected in the applicable provisions of United Nations Convention on the Law of the Sea of 1982, the ships of all countries enjoy the right of innocent passage in the territorial waters of the United States."

On September 23, 1989, the United States and the former Soviet Union signed the Uniform Interpretation of the Rules of International Law Governing Innocent Passage through the Territorial Sea. The significance of this "uniform interpretation" lies not only in solving the previous disputes between the two countries, but also in avoiding the occurrence of similar conflicts thereafter. It bears the same significance as the interpretative declarations of the State Parties to UNCLOS, and some believe that the Soviet Union and the United States were the two superpowers at that time; consequently their interpretation carries more weight than other States and would have a greater impact on the evolution of the

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18 Li Hongyun, Discussion on the Right of Innocent Passage of Foreign Warships through the Territorial Sea, *Chinese and Foreign Law Science*, No. 4, 1998.

international law regarding the issue of warships' passage through the territorial sea.

The text of the document is as follows:

1. The relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea (Convention of 1982), particularly in Part II, Section 3.

2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.

7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.

8. Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed

means.[19]

After the document was signed, the Soviet Foreign Ministry noticed that no US warships entered the Soviet territorial waters in Black Sea. This should be interpreted as that both sides made concessions to the stance of the other side.

When studying the above "uniform Interpretation", we may also note that there are reversals in the stances of U.S.S.R on the issue of the warships' passage through the territorial sea, and the current Russian domestic laws governing the warships' passage through the territorial sea are different from the "Uniform Interpretation". According to Article 12 of Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation promulgated on July 16, 1998, "Foreign ships, foreign warships and other government vessels are entitled to the right of innocent passage through the territorial sea, according to this Act, generally accepted principles and rules of international law, as well as treaties to which Russia is a Party." Article 13 of the Act prescribes the " regulations on the innocent passage through the territorial sea of foreign ships, foreign warships and other government vessels" and Paragraph 2 of Article 13 states that:" except for treaties in which Russia is a State Party and special decisions made by the federal government of Russia on festivals or important dates, three or more than three foreign warships or other government vessels of the same nationality are not permitted to simultaneously pass through the Russian territorial sea for the purpose of entering Russian seaports." Accordingly, the right of innocent passage through the Russian territorial sea enjoyed by foreign warships and other government vessels is obviously different from that of the merchant vessels.

The statement by the United Kingdom when joining the Convention on July 25, 1997 was close to the position of the United States. United Kingdom believed that it could not accept any existing and future declarations or statements inconsistent with Article 309 and Article 310 of the UNCLOS. Article 309 of the UNCLOS prohibits any reservations or exceptions (except those expressly authorized in other articles of the Convention). According to Article 310 of the UNCLOS, the declarations or statements of a State Party should not exclude or modify the legal effects of the provisions of this Convention in their application to that State.. The United Kingdom held that such declarations or statements as

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19 The Geographer Office of the Geographer Bureau of Intelligence and Research, United States Responses to Excessive National Maritime Claims, Limits in the Seas, No. 112– March 9, 1992, Annex III, at http://www.law.fsu.edu/library/collection/LimitsinSeas/1s112.pdf, 5 October 2005.

follows were inconsistent with Article 309 and 310 of the UNCLOS, namely the declarations or statements claiming that warships or other ships shall give notice in any form or apply for permission before exercising the right of innocent passage or the right of free navigation,, or those declarations or statements limiting navigational rights in other manners not permitted by the UNCLOS.

France signed the UNCLOS on December 10, 1982, and ratified it on April 11, 1996. The statement by France when ratifying the UNCLOS did not directly touch on the issue on the warships' innocent passage through the territorial sea. However, according to the provisions of Decree No. 85/185 of 6 February1985 regulating the Passage of Foreign Ships through French Territorial Waters, Article 1 provides that all foreign ships enjoy the right of innocent passage in the territorial sea of France. This Decree, like the above announcement of US President, made no distinction between warships and merchant vessels.

IV. UNCLOS Permits Warships' Innocent Passage through the Territorial Sea and Also Allows Coastal States to Require Prior Notification or Permission

Viewed from the above statements of States Parties to the UNCLOS, at the Third United Nations Conference on the Law of the Sea, no consensus has really been reached on the issue of warships' passage through the territorial sea; the international community has remained divided on this issue since the adoption of the UNCLOS and the States Parties to the UNCLOS have not agreed on the interpretation of the articles with respect to innocent passage.[20] Nevertheless, in consideration of the negotiating history and relevant provisions of the UNCLOS as well as the interpretative statements of the State Parties concerning warships' passage through the territorial sea and the domestic laws of relevant States, we can draw the following three conclusions:

A. The UNCLOS and General International Law Permit Warships' Innocent Passage through the Territorial Sea.

There are no explicit provisions in the UNCLOS that warships enjoy the right

20 Hŭi-gwŏn Pak, *The Law of the Sea and Northeast Asia: A Challenge for Cooperation*, Boston: Kluwer Law International, 2000, p. 32.

of innocent passage, but it permits warships to enjoy the right of innocent passage in the territorial sea. The statement by Netherlands when ratifying the UNCLOS clearly noted that the Convention "permits" the innocent passage of all ships, including warships, through the territorial sea. There are a significant number of States in the international community permitting the innocent passage of foreign warships in their territorial seas. For example, since the adoption of the UNCLOS, the newly-formulated relevant laws of Vanuatu, Equatorial Guinea, Senegal, Mexico, Bulgaria, Mauritania, Poland, Belize, Brazil, Ukraine and other States have recognized the warships' right of innocent passage through the territorial sea. Among these States, Bulgaria and Brazil used to hold opposite positions. Article 19 of Act of 8 July 1987 Governing the Ocean Space of the People's Republic of Bulgaria and Article 3 of Brazil's Law No. 8617, 4 January, 1993, on the Territorial Sea and Adjacent Zone, the Exclusive Economic Zone and the Brazilian Continental Platform, recognize the right of innocent passage of all ships in the territorial sea.

The States that deal with the issue of foreign warships' passage through the territorial sea in such way include maritime powers and their allies, as well as the States whose sovereignty, territorial integrity and political independence are basically under no external threats. These states take this stance in light of their national conditions and policy considerations, rather than legal obligations under the UNCLOS or general international law. US turned to advocate that warships should enjoy the right of innocent passage in the territorial sea at the First United Nations Conference on the Law of the Sea in 1958 and the former Soviet Union also changed its position at the Third United Nations Conference on the Law of the Sea. None of these was due to changes in international law; instead, they were on account of the policy options. That is to say, it is only a "permissive rule" rather than a "mandatory rule" for the UNCLOS to permit the warships' innocent passage through the territorial seas of other States This kind of "permission" has not yet become a right in general international law or the Convention like the merchant vessels' right of innocent passage , and therefore in general international law or "the Convention" there are no provisions that the coastal States have the obligation to guarantee the foreign warships' right of innocent passage.

Advocating that warships enjoy the same right of innocent passage through the territorial sea as merchant vessels is incompatible with the nature of the territorial sea as a part of a State's territory, nor are there any grounds under general international law and the Convention. As mentioned earlier, Chile and Lithuania

treat the passage of warships through the territorial sea as a matter of reciprocity, which demonstrates that it is a matter that may be handled by the coastal States at their own discretion. In straits used for international navigation, the State Parties to the UNCLOS bordering the straits shall not require foreign warships to send a prior notice or obtain advance permission. However, in the territorial waters outside the straits used for international navigation, the coastal States may require foreign warships to do so. The implementation of transit passage regime or particular regime of innocent passage in the straits used for international navigation guarantees the major navigation interests of the States. In the territorial waters outside such strait waters, the convenience of passage and the security interests of coastal States should keep proper balance. Such balance may be embodied by the permission in the UNCLOS of warships' innocent passage through the territorial sea and the discretion which the coastal States may exercise to deal with the warships' passage through their territorial seas.

B. The UNCLOS and General International Law Allow the Coastal States to Require Prior Notification or Permission.

Similarly, there are no explicit provisions in the UNCLOS that recognize the right of coastal States to require foreign warships to pass through their territorial seas with prior notification or permission; nonetheless, the UNCLOS and general international law allow coastal States to do so. Merchant vessels and warships are two different types of ships and the territorial sea is part of a State's territory, therefore the coastal States may differentiate between warships and other government ships operated for non-commercial purposes and merchant vessels. Request for prior permission (permission system), or prior notification (notification system) is provided in the existing laws or regulations of the coastal States, and different from the right of innocent passage for merchant vessels.

When permission system is enforced, there are two possibilities, namely granting permission and refusing to grant permission. As a result, whether foreign warships can pass or not depends on the will of the coastal State. However, we cannot arbitrarily conclude that the permission system will definitely make the passage of warships virtually impossible; it would depend on the circumstances relating to the practices of relevant states. Nor can we believe that permission system is incompatible with the provisions of the UNCLOS. The Judge Budislav Vukas (Croatian, his term from 1996 to 2005) of International Tribunal for the

Law of the Sea believes that in view of the provisions and negotiating history of UNCLOS, no distinctions have been made between warships and other types of ships with respect to the exercise of the right of innocent passage. Therefore, after the entry into force of the UNCLOS, among the State Parties, no prior permission may be required for warships' passage through the territorial sea.[21] His view would not be accepted by each coastal State. Permission system exists much longer than the history of the UNCLOS. During the negotiations for the UNCLOS, some coastal States explicitly advocated the permission system. There are no provisions in the UNCLOS that prohibit the permission system. At least the provisions of the UNCLOS on the sovereignty of the territorial sea can be used as the general grounds for the permission system. The majority of the States implementing the permission system are those under serious external threats.

Judge Budislav Vukas also believes that the request of prior notification, the limit on the number of warships passing simultaneously and the similar preventive measures taken by the coastal States do not prejudice the right of innocent passage of warships, and therefore do not contradict the provisions of the UNCLOS on the right of innocent passage for all ships. All these measures are to ensure that this passage is innocent to the coastal States, rather than use this kind of requirement to virtually deny or impair the warships' right of innocent passage. As long as the above measures are applicable without discrimination to the ships of all States, they are not contradictory to the UNCLOS (Paragraph 1, Article 24 of Paragraph 1). It could be believed that the provisions of the UNCLOS itself permit the coastal States to take such measures. The legislations of the State Parties that request the innocent passage of foreign warships with prior notification or limit the number of warships passing simultaneously, are consistent with Article 21 of the UNCLOS, which permits the State Parties to adopt laws or regulations, inter alia, in respect of the safety of navigation and the regulation of maritime traffic (Subparagraph1 of Paragraph1), as well as the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof (Subparagraph 6 of Paragraph 1). In addition, due to the specific nature and purpose of warships, such measures can also be considered as "necessary steps" that the coastal States are permitted to take in the territorial sea to prevent passage which is not innocent

21 Budislav Vukas, *The Law of the Sea: Selected Writings*, Leiden/Boston: Martinus Niihoff Publishers, 2004, p. 140.

(Paragraph 1 of Article 25).[22] The above opinion of Judge Budislav Vukas that the request for "prior notification" is in line with the provisions of the UNCLOS governing innocent passage accords with the connotations of relevant clauses and the negotiating history of the UNCLOS. His opinion is close to the meaning expressed by the statements of Malta and Bangladesh that "a State's warships' right of innocent passage through the territorial seas of other States shall be exercised peacefully." and" it is reasonable and not contradictory to the UNCLOS for warships to make prior notification for exercising the right of innocent passage. The statement by the Republic of Croatia when ratifying the UNCLOS is in line with contemporary international law, which announced that: " there are no such general peremptory norms in international law that prohibit the coastal States from requiring foreign warships to notify them of the intention of innocent passage and from limiting the number of warships passing simultaneously in accordance with their own laws and regulations.

Compared with permission system, notification system is more conducive to the passage of foreign warships through the territorial sea and also takes into account the interests of the coastal States; thus it has more supporters. The request for prior notification does not make it impossible for foreign warships to pass through the territorial sea as it just requires the States to which the warships belong to give notice in certain way. On issues closely relevant to their security interests, the coastal States should have such "right to know", i.e. the right to require foreign warships to give prior notice.

C. Foreign Warships Should Respect the Requirement of the Coastal States on Prior Notification or Permission.

In light of the current situation, especially the interpretative statements concerning the passage of warships through the territorial sea made by the State Parties when ratifying, acceding to or succeeding the UNCLOS, the Convention permits the innocent passage of warships through the territorial sea, but the coastal States have no obligation for such permission; the Convention permits the coastal States to request prior notification or permission, and foreign warships intending to pass through the territorial seas of the coastal States have the obligation to comply

22 Budislav Vukas, *The Law of the Sea: Selected Writings*, Leiden/Boston: Martinus Niihoff Publishers, 2004, p. 141.

with such request of these States.

Article 19(1) of the UNCLOS clearly states: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law. "The provisions of the Convention on innocent passage through the territorial sea are dealt with in a rather ambiguous manner, and general international law should be applicable to matters not prescribed or unclear in the Convention. The preamble to the Convention confirms that: "matters not regulated by this Convention continue to be governed by the rules and principles of general international law.

There are neither concerted international practices on the issue of warships' passage through the territorial sea, nor rules admitting or denying the warships' right of innocent passage among the general rules of international law. However, according to general international law, foreign warships must abide by the laws and regulations of the coastal States, including the laws and regulations relating to national security.

As regards whether "the laws and regulations of the coastal States relating to innocent passage" referred to in Article 21 of UNCLOS include laws and regulations concerning the "security" matters, the UNCLOS does not make explicit provisions on permission or prohibition; and this belongs to the category of matters not regulated by this Convention. That a State has "the right to protect its security interests" mentioned in the relevant statements of the President of the Conference is definitely based on the customary international law. Because of the intricacies of international relations, the passage of warships through the territorial seas without prior notification or permission is not perceived to be minatory by some coastal States; however, it cannot be concluded that for all coastal States the passage does not pose a potential or actual threat. Whether a State is threatened or not usually may not be judged by other States, especially by those States with powerful fleets. Coastal States may derive legal provisions requiring prior notification or permission from the "right to protect security interests". From Article 19 and Article 25 of the UNCLOS, no conclusion can be reached that the coastal States are prohibited from adopting laws or regulations that require foreign warships to pass through their territorial seas with prior notification or permission.

Professor Zhao Lihai, the former judge of International Tribunal for the Law of the Sea, has pointed out in the entry of "territorial sea" written for "Encyclopedia of China" that: "In Convention on the Territorial Sea and Contiguous Zone of

1958 and UNCLOS of 1982, there are no provisions that warships are not entitled to the right of innocent passage or foreign warships should give notice to or obtain permission from by the coastal States in advance when passing through the territorial sea, and; they only provides that: 'If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately'." He also noted that: "Warships' right of innocent passage through the territorial sea is opposed by many international jurists, because warships pose a threat to the coastal States while merchant ships not. Of course, even if warships may exercise the right of innocent passage, it must abide by the laws and regulations adopted by the coastal Sates in accordance with international law, and such laws and regulations should include the procedural rules necessary for warships to enter the territorial seas."[23] Referring to relevant rules of customary international law governing the passage of warships through the territorial sea, Professor SHAO Jin said that: "The coastal State may permit foreign warships' innocent passage through the its territorial sea without adding special requirements, or stipulate that foreign warships are subject to prior notification or permission, or fulfill other requirements; foreign warships intending to make such passage should comply with the requirements stipulated in the laws and regulations of the coastal State ."[24]

According to the UNCLOS and general international law, whether to grant to warships the right of innocent passage through the territorial sea is a matter that may be handled at the discretion of each State (including the State Parties to the UNLCOS). Before warships pass through a foreign territorial sea, it should be ascertained that whether this State permits the innocent passage of warships or requires foreign warships to send prior notice or obtain permission. If there are laws or regulations requiring such notification or permission in the coastal State, the State to which the warships belong shall comply with these laws or regulations. This is determined by the legal status of the territorial sea and the particular nature of warships. If a coastal State hampers the passage of foreign warships carrying out missions in accordance with international law or renders such passage virtually

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23 At http://192.192.96.173:8080/web34m/Content.asp?ID=10227&.Query=, 25 November 2005.

24 Shao Jin, General Rules of International Law on the Innocent Passage of Foreign Warships through the Territorial Sea, *Chinese Yearbook of International Law*, 1989, p. 138. (in Chinese)

impossible, the State to which the warships belong may take countermeasures to balance the interests. Such an interpretation or understanding is in line with the purpose and aim of the UNCLOS and is conducive to international peace and security.

The differences among the States on the issue of warships' passage through the territorial sea would not be bridged within a short period of time. The resolution of these differences, of course, depends on the interpretations of the State Parties in the future and the interpretations of the International Court of Justice and the International Tribunal for the Law of the sea when encountering such cases, but they would ultimately lie on whether or not there are any changes to the root causes or conditions giving rise to these differences. If the international peace and security situations continue to improve, inter-state armed aggression and interference decrease and the passage of warships through the territorial sea can be as beneficial to the mankind as merchant vessels, there is no reason why the States would not unanimously recognize the warships' right of innocent passage through the territorial sea.

Translator: REN Defa

中国以协商方式解决海洋争端的基本立场

刘振民 *

尊敬的各位代表，女士们，先生们：

感谢你们邀请我参加此次会议，我非常荣幸能够在午宴上发表主题演讲。我也想借此机会，与各位分享中国在以协商方式解决海洋争端的基本立场。

中国是一个沿海国，有长达 1.8 万公里的海岸线，与黄海、东海、南海周边的 8 个国家毗邻或相对。这 8 个国家分别是朝鲜、韩国、日本、越南、菲律宾、马来西亚、文莱和印度尼西亚。众所周知，中国和日本在钓鱼岛上，中国和马来西亚、菲律宾、越南在南沙群岛上存在着主权争议。随着 1982 年《联合国海洋法公约》建立起的新海洋国际秩序，中国与这 8 个国家在专属经济区和大陆架上的争议不断。近年来，在积极捍卫海洋权益的同时，中国政府也始终致力于解决与其邻国间在岛屿和海域划界上的争议。我将就以下 3 点进行详细阐述。

1. 中国在管辖海域内为建立海洋法律制度所作的努力

1949 年中华人民共和国成立时，中国政府从前任政府手中继承了 3 海里的领海制度。基于维护沿海区域安全的需要，同时也是受到第一次联合国海洋法会议的鼓舞，1958 年中国政府发表领海声明，宣布中国的领海宽度为 12 海里。1982 年《联合国海洋法公约》通过后，中国政府签署公约并成功制定了一系列法律，包括《海洋环境保护法》、《渔业法》、《海上交通安全法》，开启了在领海之外扩展各个领域海洋管辖的历程。1992 年，为了迎接《联合国海洋法公约》的生效，中国制定了《领海和毗连区法》，确定中国的领海及毗连区宽度各为 12 海里。1994 年公约生效，中国随即于 1996 年批准加入该公约并宣布毗邻大陆、西沙群岛的部分领海基线。1998 年，中国制定《专属经济区和大陆架法》并建立相关法律制度。为了履行公约相关规定，中国政府还修订了包括《海洋环境保护法》、《渔业法》在内的众多法律，并制定了《海域使用管理法》、《涉外海洋科学研究管理规定》、《海洋自然保护区管理办法》。这些法律法规的颁布实施，有助于中国在自己的管辖海域内建立与《联合国海洋法公约》一致的海洋法律制度，同时也极大地促进了对海洋的探索开发和对海洋环境及资源的保护。

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* 刘振民，外交部条法司司长。本文是作者于 2005 年 3 月 10 日在厦门大学举办的“海洋法的新发展与中国”国际研讨会上发表的讲话，该研讨会由弗吉尼亚大学法学院海洋法律与政策中心、厦门大学海洋政策与法律中心共同举办。

2. 中国以协商方式解决钓鱼岛、南沙群岛争端的基本方针

中国政府始终坚持以和平方式协商解决国际争端。在这种精神的指引下，中国政府通过双边谈判，已经与 14 个陆上邻国中的 12 个解决了领土和陆地边界问题。这种立场也同样适用于解决钓鱼岛和南沙群岛争端。

在钓鱼岛问题上，中国政府一直强调钓鱼岛及其附属岛屿自古以来就是中国的领土，同时，提倡通过协商解决与日本的钓鱼岛问题。在没有彻底解决问题之前，双方或许可以搁置争议，共同开发。

在南沙群岛问题上，中国政府坚持对南沙群岛及其附近水域享有无可争议的主权，但中国也致力于在国际法框架下与有关国家通过和平谈判妥善解决争端。这一点被写进 1997 年中国—东盟非正式首脑会议上发表的联合声明中。中国政府提出“搁置争议，共同开发”的建议，并准备好与有关国家在解决争议前先搁置争议、展开合作。这并不只是中国的政策策略，也是中国的实际行动。不管是在与东盟的对话中，还是分别与马来西亚、菲律宾、越南的合作中，中国始终坚持推进共同开发。

3. 中国以协商方式解决海洋划界的政策与实践

中国政府始终坚持应遵守公平原则，以平等协商的方式解决与其他 8 个邻国间的重叠海域主张。如果争端暂时无法解决，有关各方可以走“搁置争议，共同开发”的路径。在这些原则的指引下，中国自 1996 年起就与邻国展开了关于海洋法或海洋划界问题的协商谈判。并取得了一些积极成果。

（1）通过多轮谈判，中越在 2000 年 12 月 25 日于北京签署了《北部湾划界协定》和《北部湾渔业合作协定》。这 2 个协定于 2004 年 6 月 30 日同时生效。北部湾是中越两国环绕的半闭海，面积达到 12.8 万平方公里。除了在衡平原则下实现了对北部湾领海、专属经济区和大陆架的划界，中越两国还就北部湾共同渔区渔业资源养护管理达成共识并签订了渔业合作协定。双方还同意在友好协商下，就目前尚不明确的、可能跨界的石油、天然气单一地质构造或其他矿藏进行合作开发。

《北部湾划界协定》的意义在于，其是中国与其邻国达成的第一份海洋划界协议。这一事实表明协议的签署是中越适应新的海洋法秩序，公平解决海洋划界的成功实践；表达了中国愿意以协商方式解决与其邻国海洋划界纠纷的立场；此外，还为中国未来以和平方式解决海洋争端提供了极佳范例。

（2）为了解决黄海和东海问题，中国与朝鲜、韩国、日本分别建立了海洋法问题双边协商机制。从 1996 年起，关于海洋划界和其他相关海洋法问题的谈判就已经启动。作为这些谈判的初步成果，中日于 1997 年签订渔业协定（2000 年生效），中韩于 2000 年签订渔业合作协定（2001 年生效）。这 2 份渔业协定是海洋划界前有关各方在渔业问题上的临时安排，为维护黄海和东海的渔业活动秩序发挥了重要作用。中国希望能通过持续的协商谈判分别解决与朝鲜、韩国和日本

的海洋划界问题。对于难以通过协商解决的争端，中国建议可以搁置争议、共同开发。

（3）对于南海问题，中国政府极其重视与南海周边国家的对话与合作。为了确保南海航行自由、促进海洋合作、便利共同开发，中国政府提倡增强各方合作，主要有以下几项活动：

首先，自 1991 年以来中国便积极参与印度尼西亚主办的处理南海潜在冲突的研讨会。在过去 14 年，研讨会每年如期举办，为南海周边国家提供了一个非正式但是重要的交换意见、促进合作与互信的平台。中国派出专家参与讨论，并主持了相关的工作会议和专家会议。中国也提供资金支持，并在保障研讨会顺利进行中发挥了重要作用。

第二，在地区合作上，中国在 2002 年与东盟签署了《南海各方行为宣言》。在 2004 年举办的中国—东盟落实《宣言》高官会议上，决定成立落实《宣言》工作小组，以研究未来合作的具体事宜。

第三，在双边合作上，中国坚持分别与马来西亚、菲律宾、越南就南海事宜进行协商谈判。中菲已经在建立信任措施工作组的框架下进行了磋商；中越已在海上事宜工作组中展开了沟通交流。中国也和希望共同开发南海资源的相关方进行了谈判。中国相信，在以协商方式达成南海争端协议之前，“搁置争议、共同开发”是现时解决南海争端、维护地区稳定的最好选择。

第四，前天晚上河内传来好消息，中国、菲律宾、越南的 3 家石油公司间已经草签了《在南中国海协议区三方联合海洋地震工作协议》。这是南海争端国以共同开发为目标进行的第一个合作项目，也将为其他合作起良好的示范作用。

总之，我想重申中国一贯坚持以和平方式解决与邻国海洋争端的政策。我们希望能继续进行这种对话与协商，并尽一切努力以协商方式解决海洋争端。我们认为任何一方都应该采取审慎的态度以防冲突发生。在争端解决前，有关各方都应努力制定合适的临时安排，搁置争议、开展合作，以共同维护黄海、东海和南海地区的和平与稳定。让我们为这个目标一起努力。

谢谢你们的耐心聆听。

（中译：杨佳莉）

Energy Security of China and Oil and Gas Development in Disputed Area of the South China Sea

WU Shicun* REN Huaifeng**

Abstract: With the sustainable economic development in China, energy security has become an increasingly prominent issue. The South China Sea is endowed with rich oil and gas resources, which is of great significance to its neighboring countries and regions. There exists a disputed area in the South China Sea, so the development of oil and gas is sensitive and tends to cause conflicts, with high risks and costs as well as difficulty in investment and cooperation. Therefore, an effective cooperative development model must be found to avoid conflicts and bring benefits to cooperation. Development model in the disputed area must be agreed on by all sides in terms of cooperative mechanism and conflict handling mechanism, and it should provide necessary political guarantee and financial support. It is not only feasible for all sides around the South China Sea to conduct oil and gas development, but also benign to jointly safeguard the actual interests of Chinese nation in the South China Sea.

Key Words: Oil and gas resources; Cooperative model; Conflict

Oil is hailed as the blood of industry and has direct bearing on national economic growth, political stability and national security. Energy experts around the world hold the common viewpoint that oil is still the major available energy source in the 21th century. To ensure economic and social sustainable development, most Countries will face a series of urgent issues such as increasing and stabilizing oil supply as soon as possible and guaranteeing oil resource safety before a new fuel comes up to replace oil. Scramble in the oil field is becoming increasingly

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fierce in international community in the 21st century. Growing intensity of such scramble may give rise to political and military conflicts.

The disputed area of the South China Sea is mainly located in the Spratly with rich oil and gas reserves. Here conflicts caused by fishery and oil and gas resources occur time and again. With the economic growth, neighboring countries and regions have been growingly eager to exploit oil and gas resources in the Spratly, and some nations have conducted unilateral exploitation in the disputed area, resulting in the actual monopolized exploitation status. They have also brought in external forces to conduct joint exploitation to internationalize the dispute of the Spratly. It is an urgent task for China to face the reality and realize cooperative exploitation of oil and gas resources in the disputed area. The paper starts from Chinese energy security situation, makes a discussion on cooperative models and conflicts of oil and gas resource development in the disputed area of the South China Sea, and explores the cooperation among all sides around the South China Sea to safeguard the interests of the Chinese people.

I. Energy Security Situation in China

Under the background of globalization, a nation's energy security is not only an economic issue but also a political and military issue. It is also not only related to the domestic imbalance between supply and demand as well as its foreign-trade dependence, but also connected to its diplomacy with other nations with rich resources as well as its military influence.[1] After its access to WTO, China has been dedicated to economic globalization and regional integration. China's production and consumption have participated in global energy allocation system, and its security has also been integrated into international security system. Now that Chinese energy security has become an integral part of global energy security system, its energy security will certainly interact with international energy security situation. According to the estimate made by American economists, once international oil price is doubled, GDP of the USA will decrease by around 2.5%; an increase of $10 per barrel of oil price will bring an annual $ 50 billion loss to American economy, with a decrease of about 0.5% in the economic growth rate. Moreover, the USA has the absolute political and military control over regions

1 Zhang Wenmu, Chinese Energy Security and Policy Choice, *World Economics and Politics*, 2003, No. 5. (in Chinese)

with energy abundance and over sea routes of transporting those energy resources to the USA. In contrast, Chinese Navy cannot ensure security of its marine energy traffic line, with comparatively obvious vulnerability of Chinese oil import due to overdependence on oil from the Middle East and Africa and the single marine transport route.

Great changes have taken place in Chinese energy structure with the advent of sustainable economic development since the reform and opening-up policy in 1978. Proportion of coal in energy consumption has decreased from 70% at the start of reform and opening-up policy to about 56% in 2000, while proportion of oil and gas has increased by 15% from 28% to 43% in the same period. Speeding up of energy structure optimization has promoted Chinese sustainable and stable economic growth. However, compared with other countries, China has an insufficient per capita recoverable conventional oil resource. Global per capita recoverable conventional oil resource is 53 tons per capita, but China has only 10 tons per capita, one fifth of the global average level. With the fast development of the national economy, China has seen a quick growth in oil consumption, but its oil production is far from meeting the demands of oil consumption. Since 1984, its crude oil output has an annual increase of 1.7%, while annual average growth of oil consumption in the same period is 4.9%, with a rapid growth in demand. Therefore, China is facing the security problem of oil and should ensure sufficient oil supply and safe oil to fulfill domestic oil consumption.

China is the fifth largest oil producer in the world, with an annual oil production of 0.167 billion tons in 2002. At present, Chinese oil production is one twelfth of its recoverable reserve and one forty fifth of global recoverable reserve. It is in a state of serious lack of oil reserve. There are no big oil fields in the proved oil and gas areas, though a great number of achievements have been made in oil and gas exploration in western region and marine areas in China in recent years. Moreover, no oil pipelines have been built between East and West China, which also restricts domestic oil supply in China. The rapid economic development has witnessed an increase in oil consumption in China. Therefore, oil of its own cannot meet such demand. China has become a net oil importer since 1993, with about 70 million tons of oil imported to China. At an authoritative estimate, Chinese oil production could increase to about 0.18 billion tons in 2005, still with a gap of about 90 million tons of oil.

Up until now, a full-fledged oil reserve system has not yet been established. Oil reserve system originated from the 1970s. Arabian states implemented oil embargo

over western countries in 1973 during the Middle East War, triggering the first oil crisis. Since then, the countries have begun to adopt oil reserve system one after another. A growing increase of annual oil import and lack of strategic oil reserve subject China to fluctuations of global crude oil price, threat of wars in the Middle East and the uncertainties of a fragile marine sea route. Once supply breaks down or rapid price rise occurs in the international market, a great impact will impinge on Chinese economy, society and national defense. In accordance with official statistics of Ministry of Finance of the People's Republic of China, China would consume 0.26 billion tons of oil every year until 2005, of which 48% would come from import. China would have to import more than half of its necessary crude oil in 2015. In a report published in September of 2002, IEA predicted that Chinese net oil import would increase from less than 2 million barrels to 9.8 million barrels every day by 2030. IEA reported that the growth of Chinese oil consumption had accounted for no less than one fourth of the world's growth in the past 10 years. In the coming years, China would become the consumer with the fastest demand growth. The ratio of imported oil would increase from 47% to 82% in China by 2030, which would cause intense government finance. Therefore, it is commonly agreed that China must establish strategic oil reserve and lessen independence on imported crude oil. China had an annual average growth in oil production of 1.7% but an annual average growth of oil consumption of 7.3% in 1990s.

Chinese energy security situation shows that China should not only change its original energy security policy, but also accelerate its exploration into the sea to vigorously develop marine oil and gas resources under a policy that is mainly featured by diversity of energy sources. The South China Sea is compared to the second Persian Gulf, which is not only rich in oil and gas resources but is also of vital significance to the Chinese national security and sustainable development. The oil and gas development in the disputed area has become a fact, so China must adopt specific development strategy to cope with status quo in line with national sovereignty and energy security.

II. Oil and Gas Resources and Its Development Status in the Disputed Area in the South China Sea

Decades of exploration shows that 13 medium and large sedimentary basins exist in the Spratly, covering an area of 0.6195 million square kilometers, of which 0.417 million square kilometers is endowed with oil and gas in the dotted line in

China, with about 23.5 billion tons of oil reserve and 10 trillion cubic meters of natural gas as per estimate. Besides oil and gas, the South China Sea has a very rich reserve of "natural gas hydrate". Natural gas hydrate is featured by high energy density, wide distribution, great scale and shallow burial, which is regarded as a kind of strategic resource with bright prospects for commercial development. Experts hold that its development and utilization in large scale may take place in the next 15 to 20 years. National Natural Science Foundation of China approved a series of "natural gas hydrate" funding programs in the late 1990s. Some scientific research departments conducted an investigation and survey of "Aquo-complex Prospecting Potential and Method in Western Pacific" in 1996, and accomplished "the Investigation and Survey of Gas Hydrate Exploration Research in the China Sea" in 1998. "863 Project" conducted a research of "the Key Technology of Gas Hydrate Exploration in Seabed" in China from 1998 to 1999. Guangzhou Marine Geology Survey Agency found "natural gas hydrate" in at least 130 kilometers of seismic section in the Xisha trough area of the South China Sea in 1999, and continued to do seismic measure targeted at "natural gas hydrate" in 2000. According to the preliminary investigation and survey on the South China Sea made by competent departments, there exists about 8000 square kilometers of "natural gas hydrate" reserve, with a total volume of nearly 80 billion tons of such resource, which amounts to about 50% of the gross oil reserve in China. At present, China is still in the preliminary stage of research and prospecting of "natural gas hydrate", and not yet involved in drilling, development exploration and research.

China started its oil and gas exploration in the Spratly islands in 1987, but confined its work only to physical geography, without drilling up to now. China National Offshore Oil Corporation and KRESTONE Energy Corporation signed a contract to jointly explore Wan-an Bank oil and gas resources. The project has been kept idle due to obstruction by Vietnam. China does not yet explore oil in the Spratly islands.

ASEAN countries have sped up the development and utilization of resources in the South China Sea, taking advantage of their proximity to the South China Sea, in a manner of attracting foreign firms, especially from the powerful western nations, with preemptive development to create an established fact as strategy.

Vietnam is one of the poorest countries in the Southeast Asia, and oil is a key factor to help it shake off poverty. In order to rebuild its economy from the destruction caused by 30 years of civil war, Vietnam has tried its best to develop terrestrial and marine oil resources as well as other resources since it lost oil aid

from the former Soviet Union. Vietnam has signed 33 joint operation contracts with over 50 foreign oil corporations since it opened its oil and gas resources development in 1992. Relevant data displays that Vietnam has an annual production of 11 million tons of oil in the continental shelf of the South China Sea, and its earnings of foreign exchange increased through oil and gas exports, with 12.1 million tons of exported crude oil in 1998 and 14.5 tons of exported crude oil in 1999 which amounted to $2 billion earnings of foreign exchange. The latest information from American Energy Information Administration in May of 2002, showed that Vietnam has a daily production of 0.356 million barrels of oil and 19 billion cubic feet of gas production every year in the South China Sea. Vietnam exported 0.133 million barrels oil every day in 2000, and oil has become the most important source of national foreign exchange for the country, most of which came from the South China Sea.

Philippines is depended on imports for 95% of its oil demand, and the discovery of oil in the South China Sea made it possible for the country to decrease its import ratio from 95% to 85%. The Philippines began to work together with foreign corporations to explore oil in Reed Tablemount in 1976. At present, the Philippines is trying to cooperate with Royal Dutch Shell to develop Malampaya gas field located in northwest of Palawan. It is estimated that the gas field will produce 0.12 billion barrels of gas condensate during the 20-year exploration period. According to the latest data from American Energy Information Administration in May of 2002, the Philippines will produce 9460 barrels of oil in the South China Sea every day and 1 billion cubic feet of gas every year. Newspapers from the Philippines disclosed that it would extend its continental shelf from 200 nautical miles to 350 nautical miles in order to divide up oil reserve in the South China Sea. To collect relevant justifications, Institute of International Law of the University of the Philippines has required the Philippine Senate to provide funding for the proposal.

Malaysia is constantly obtaining economic benefits while opposing outside forces from getting involved in the dispute of the South China Sea and discouraging internationalization of the South China Sea dispute. In recent years, Malaysia has built artificial equipments in the newly-occupied reefs in the name of constructing facilities for scientific research and survey, and accelerated oil exploration in the South China Sea. Currently, Malaysia has built 18 oil fields and 40 gas fields within the “dotted line” of China, of which many oil and gas wells have extended into 100 nautical miles of the dotted line of China. The total oil production was only 0.69

million barrels per day in Malaysia in 2000, but oil production reached only 0.668 million barrels in the South China Sea during 2001, accounting for 89.07% of the total oil output. According to the latest data from American Energy Information Administration in May of 2002, Malaysia is producing 0.75 million barrels of oil in the South China Sea every day and 1437 billion cubic feet of gas every year.

Indonesia is member of OPEC and the most important oil producer and exporter (except for the Middle East) in the world. Energy is the pillar industry of Indonesia, which has been afforded great importance by former and current governments at all levels. Energy and mineral resources play an important role in the whole economy of Indonesia, accounting for 25% to 30% national revenue. Indonesia is very competitive in liquefied natural gas export, which plays a dominant role in the world and accounts for one third market share in the Asia-Pacific region. At present, the development of Kaulauan Natuna Gas Field is the main interests of Indonesia in the disputed area of the South China Sea. Indonesia National Oil Company and American Exxon Corporation jointly develop Kaulauan Natuna Gas Field, which is located within the dotted line of China, with a recoverable reserve of 1.6 trillion cubic meters. The gigantic project worth $ 40 billion US dollars has gas transmission line up to 300 miles to Singapore, which was scheduled to be put in use with an annual output of 6 million tons of liquefied natural gas in 2004. The major concern of Indonesia is that China would claim its rights over Kaulauna Natuna archipelagic Sea, which would exert an influence on natural gas exploration project of Indonesia. Therefore, Indonesia voices concerns that its exclusive economic zone overlaps with partial waters within the dotted line of China. Indonesia had a daily output of 1.22 million barrels of oil in 2001, of which nearly 20% came from the South China Sea. Currently, Indonesia produces 0.215 million barrels of oil in the South China Sea every day and 12 billion cubic feet of natural gas every year.

Brunei is a major oil producer in the Asian-Pacific region and one of the biggest natural gas exporters in the world; its exploration activities currently focus on Brunei-Sabah basin. Oil exploration in the South China Sea is the major source of Brunei‘s national revenue. Current oil reserve is only exploitable for about 25 years in Brunei, so it is urgent to develop new off-shore oilfield to maintain existing national wealth. Nantong Jiao Reef is located within the dotted line of China, and occupation of the Reef means Brunei has the right to explore oil reserves in seabed continental shelf. Brunei produces 0.195 million barrels of oil in the South China

Sea every day and 334 billion cubic feet of natural gas every year.[2]

III. Cooperative Models and Conflicts

The disputed area has its own unique characteristics, which leads to the unavoidable conflicts in development activities in the disputed area. The existence of conflicts determines that the parties who claim rights and interests may conduct the following behaviors: firstly, unilateral behavior or behavior of conflict, that is to say, the party claiming rights and interests takes unilateral action under the existence of the dispute, regardless of the protests of other parties claiming rights and interests; secondly, bilateral cooperative behavior, which is applicable to avoid conflict and make cooperation for both parties involved in the dispute; thirdly, multilateral cooperative behavior, which is applicable to development activities in the multilateral disputed area; fourthly, freezing behavior, namely suspending dispute and jointly freezing development activities in the disputed area. There are several models for the development in the disputed area: 1. Supra-national management model such as joint development plan between Thailand and Malaysia; 2. Co-management model of both parties such as co-development plan between Australia and Indonesia; 3. Agency model such as agreement between Qatar and Abu Dhabi in 1965 and agreement between Saudi Arab and Bahrain; 4. Joint venture co-operation model such as development agreement of the East China continental shelf between Japan and South Korea in 1974. [3]

Regardless of the models in the disputed area, it is an arrangement of the interests based on existing disputes and conflicts. Both political entities realize cooperation by means of their mutual compromise. After the dispute is confirmed, both parties will conclude agreement by political negotiations to reach common ground in terms of division of interests. However, such temporary arrangement of interests tends to be extremely influenced by various factors. The Timor Gap Agreement concluded by Australia and Indonesia came to a halt due to independence of East Timor. In the geopolitics and economic security framework, which is featured by foremost importance of national interests, temporary

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2 Relevant oil and gas output data in the South China Sea, *BP Statistical Review of World Energy*, at http://www.eia.doe.gov/emeu/cabs/schi-natab.html, 15 June 2002.

3 Cai Penghong, *Management Model of Joint Development in Disputed Waters: Comparative Study*, Shanghai: Shanghai Academy of Social Science Press, 1998, pp. 2~3. (in Chinese)

arrangement of interests is not given priority, and it can be a safety valve and a blasting fuse. Furthermore, compared with bilateral cooperation, multilateral development is more difficult to achieve due to juxtaposition between interests division and political concession. Therefore, the development model in the disputed area must come to an agreement by relevant sides in terms of cooperative mechanism and conflict handling mechanism, and necessary political guarantee and financial support should be provided. Such model takes political agreement as precondition and guarantee on the basis of common interests, avoids conflicts by means of cooperation, and conducts development activities to realize benefit sharing and common security. China puts forward the concept of "setting aside dispute and pursuing joint development" in accordance with such purport.

Currently, unilateral behavior is the major model to develop oil and gas of the disputed area in the South China Sea. The dispute of the South China Sea caused by oil and gas resources has now existed for a long time. Chinese government has taken into consideration forming good-neighborly relationship and building secure neighboring environment, and has been dedicated to developing friendly and cooperative relationship with the countries of Southeast Asia to eliminate tension in the South China Sea, putting forward the initiative of "setting aside dispute and pursuing joint development". Such proper proposition not only provides beneficial thought for the final solution to the dispute of the South China Sea, but also fully considers the actual interests of all sides, demonstrating China's pragmatic spirit, cooperative willingness and sincere attitude in solving the issue of the South China Sea. China has cooperated with related countries in many fields such as oil and gas, forestry, marine environmental protection and marine meteorology, which will help China and related parties to seek dispute settlement model, eliminate differences, create the environment for further cooperation and co-development, and accumulate rewarding experiences.

At present, China and ASEAN have signed the Declaration on the Conduct of Parties in the South China Sea, the Joint Declaration on Cooperation in the Field of Non-traditional Security Issues, and the Treaty of Amity and Cooperation in Southeast Asia. With these signed, the political mutual trust of both sides are constantly strengthening. Moreover, China and ASEAN have taken the opportunity of constructing free trade zone to continue expanding the scale of bilateral economic and trade development. It is believed that "setting aside dispute and pursuing joint development" will certainly lead to a brighter future with the appearance and promotion of an increasing number of similar favorable factors.

Chinese Mainland and Taiwan have had difficulties in communication due to political differences. Though bilateral economic and trade development continues, fluctuating situation across the Taiwan Strait casts a shadow on economic and trade cooperation of both sides. Both sides have common interests in the South China Sea, and should understand and cooperate with each other to safeguard rights and interests of Chinese nation. Even though political differences exist between the two sides, a delightful step has been taken by both sides in oil and gas cooperation in the South China Sea. In 1997, CPC Corporation of Taiwan and CNOOC have signed a cooperative agreement to conduct physical prospecting of "Chaoshan Depression" located around Dongsha Island (Pratas Island), laying a foundation for further cooperation of both sides.

IV. Conclusion

Oil and gas development cooperation in the South China Sea lies in political understanding and cooperation of related sides. The other way round, focusing on developing economic relationship can create favorable atmosphere for diplomatic and military cooperation. In terms of China, since the Declaration on the Conduct of Parties in the South China Sea was signed, China has kept its promise, taken an active role, and continued advocating new security concepts dedicated to establishing common security of the South China Sea. Chinese leaders have paid many visits to Southeast Asia, signed a series of political declarations and agreements, and made use of various platforms to keep political dialogue and cooperative posture on different occasions. Moreover, China has taken substantive steps to promote the follow-up actions of the Declaration on the Conduct of Parties in the South China Sea, and made use of ASEAN Regional Forum to seek building trust measures of all sides.

Cooperation, development and win-win have become the consensus, but there exist some security issues in the South China Sea. Since the Declaration on the Conduct of Parties in the South China Sea was signed, there still have been some events that related countries, which by force maliciously drove, arrested and detained fishermen of other countries who did their normal work; and there are also forces within and outside the area combined to counterbalance Chinese strategic position. All these show that it is necessary for related sides to keep promise and take substantive measures to jointly safeguard the security of the South China Sea, thus creating a favorable international environment to promote regional economic

and social sustainable development.

China has made its due contributions to regional security. President Hu Jintao for the first time put forward the diplomatic guideline of "building a good-neighborly relationship and partnership with neighboring countries" in the 11th Informal APEC Summit, and called on carrying forward the spirit of "a big family" to realize common prosperity. Premier Wen Jiaobao pointed out that "peace, security, cooperation and prosperity are the Asian policy target of China. Dynamic China with prosperity and strength, dedicated to world peace and development and never to seek hegemony, will make new contributions to the rising and prosperity of Asia." He said this in his speech in Boao Forum for Asia on 2nd of November. This fully shows, in face of the trend of times featured by economic globalization and regional integration, China is trying its best to promote Asian economic, security and political cooperation to a greater degree by pragmatic diplomacy of bringing harmony, security and prosperity to neighbors. China is taking constructive policies putting national interests in the big environment of international community, instead of out of it, and handling matters in a responsible manner, which will definitely exert a profound influence on the settlement of the dispute and realization of permanent peace in the South China Sea.

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Literature and Arguments concerning Continental Shelf Delimitation in Japanese International Law Academia

ZHANG Xinjun *

Abstract: The paper makes a preliminary summary of Japanese theoretical and empirical research on maritime delimitation. Firstly, it introduces the ways to access the objects of the research, and the catalogue of literature. After preliminary reading of the literature, we can see that compared with introduction to and analysis of cases, there are relatively fewer works on the systematic summary of continental shelf delimitation by Japanese scholars, and very few of them dare to challenge the existing theories. This more or less has indicated the difficulty for the positivist school, who dominates Japanese international law academia, to identify and induce the rules for delimitation.

The Japan's international law academia denies the natural prolongation principle and underlines the "median line/special circumstances" as the rule for maritime delimitation. And this viewpoint has been based on variant arguments in different periods. The paper divides the formation of their denial of the natural prolongation principle into three phases, and identifies the theoretical bases in respective phases. The first phase would be the retreat from the natural prolongation theory (up to around the *Tunisia-Libya Case*). The second would be the opposition against the natural prolongation theory, represented by the dissenting opinions of the Judge Shigeru Oda and the Judge Evensen in the *Tunisia-Libya Case* and impacted by the regime of 200-nautial-mile exclusive economic zone created in the Third UN Conference on the Law of the Sea. The third would be the absolute denial of the natural prolongation theory in and after the *Libya-Malta Case*.

Key Words: Maritime delimitation; Japanese doctrines; Denial of the natural prolongation principle

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The international arbitrations and litigations on continental shelf delimitation have occurred quite frequently since the *North Sea Continental Shelf Cases* in 1969. Delimitation of continental shelf has become an important issue in international justice and arbitration. The reasons can be inferred to be: 1) there are abundant oil resources in the continental shelf and the delimitation of the continental shelf is highly relevant to vital national interests; 2) the entitlements regime to balance interests, including rules of international law for continental shelf delimitation and the origin-of-rights regime for continental shelf, is not clearly defined and lack of authoritative legal interpretations. For these reasons, it is hard for relevant States to compromise in their delimitation of continental shelf and they have to turn to the third party to solve their disputes. And that's mainly why China and Japan have disputes over the delimitation of the continental shelf in East China Sea. It is essential for China to know about the viewpoints of Japanese international law scholars concerning continental shelf delimitation.

I. A Collection of Literature in Japan's International Law Academia Concerning Continental Shelf Delimitation

The collection of the literature listed in the paper is made basically according to the catalogue of literature by members of Japanese Society of International Law published on the *Journal of International Law and Diplomacy* (generally the second issue every year) since 1969.[1] A preliminary reading of the research on continental shelf delimitation in Japan's international law academia, has left the author the impression: there are relatively fewer works on the systematic summary of the issue by Japanese scholars, compared with introduction to and analysis of the relevant cases and very few scholars dare to challenge the existing theories. The reasons may be: 1) the positivist school dominates the Japanese international

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1 Please refer to the annexed bibliography. The author hereby extends my gratitude to Professor Asada Masahiko in Tokyo University Law School, Professor Tanaka Norio in Ryukoku University Law School and Xin Fang, a student in Ryukoku University Law School, for their suggestions and help. It should be noted that the author should be responsible for any major omissions in the collection of the literature, if there is any. The author is a member of Japanese Society of International Law, and according to his knowledge of the Society's status in the academia, the author basically concludes that his annexed bibliography collected from such catalogue of literature mainly include the important works of the Japanese international law academia in continental shelf delimitation. But there still may be two possible omissions: 1) the catalogue only includes the works by members of Japanese Society of International Law; 2) the catalogue is based on the members' reporting.

law academia, and the interpretation of the "equitable principle"[2] under UNCLOS Art. 83 as the basis for delimitation, may go beyond the scope of understanding by the positivist school; 2) the irregularity of judicial and arbitration decisions may have made Schwarzenberger's inductive approach[3] impossible; or 3) judicial and arbitration decisions may have been away from "the application of law" and become a mere tool for solving disputes.[4] Although their works are small in number, Japanese scholars base their argumentations of the issue on the equitable principle inscribed in the UNCLOS Art. 83 and adopt the inductive approach to study the cases of International Court of Justice and arbitration decisions. They try to make clear the specific rules and applicable standards inherent in the equitable principle in Art. 83.[5] In view of their conclusions, the mainstream opinions in Japan's international law academia on continental shelf delimitation are consistent with the stance of the Japanese government on the delimitation of continental shelf in East China Sea (with South Korea and China respectively), namely adhering to the median line/special circumstances rule.

It is worthy of note that the authoritative scholars play an important role in the formation of mainstream opinions in Japan's international law academia, especially the influence of Tohoku University scholars represented by Professor Shigeru Oda, Professor Takane Sugihara and Professor Chiyuki Mizukami. Opposition against or denial of natural prolongation principle, by the mainstream opinions of Japan's

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2 UNCLOS, Art. 83(1) (the Convention was adopted on 30 April 1982 and opened for signing on 10 December 1982) provides that "the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

3 Georg Schwarzenberger, The Inductive Approach to International Law, *Harvard Law Review*, Vol. 60, 1946-1947, p. 562; Georg Schwarzenberger, *A Manual of International Law*, 5th ed., London: London Institute of World Affairs by Stevens, 1967, p. 21.

4 Just as the Judge Gross said in Gulf of Maine Case, "le resultat est equitable". See Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/ United States of America), *I. C. J. Reports* 1984, p. 383.

5 As to the essence of the equitable principle for continental shelf delimitation, Japanese scholars still tries to find out and generalize its rules through readings of the legal precedents. But the Japanese scholars emphasize that they have to base their analysis on the legal precedents instead of delimitation agreements between the States, mainly because the negotiating processes of these agreements are not made public and the standards or relevant factors they have adopted to reach their consensus on the delimitation are unknown. In this sense, these agreements would offer limited help to the research for summarizing the standards. Masahiro Miyoshi, A Study of the Rules for Delimiting Continental Shelf Boundary, in Hayashi Hisashige, Yamate Haruyuki and Kozai Shigeru ed., *New Order of the Law of the Sea* , Tokyo: Toshindo Publishing Co Ltd., 1993, p. 162. (in Japanese)

international law academia, are based on the dissenting opinions expressed by the Judge Shigeru Oda in the *Tunisia-Libya Case* before the International Court of Justice. As mentioned above, Professor Takane Sugihara has paid more attention to the analysis of individual cases and on this basis, proposed quite a few insightful and critical comments on judgments. But he seemingly had no intent to expound on the general rules of delimitation. In contrast, Professor Chiyuki Mizukami more proactively revolves around the general rules of delimitation and has tried to induce and sum up legal precedents.

Focusing on China's insistence on the natural prolongation principle and Japan's assertion of the median line principle to delimit the continental shelf in the East China Sea, the following part will discuss the Japanese scholars' denial of natural prolongation principle. Because of limited space, this paper mainly relates to the evolution of the viewpoints concerning general principles of continental shelf delimitation in Japan's international law academia. Comments on their opinions and on Sino-Japan continental shelf delimitation would be presented in other papers.

II. Summary of the Opinions Concerning Continental Shelf Delimitation in Japan's International Law Academia: Three Phases of the Evolution of the Denial of the Natural Prolongation Theory

The Japanese scholars are skeptical about and therefore deny the natural prolongation principle. The evolution of the denial of the natural prolongation theory involves three phases: 1) the retreat from the natural prolongation theory (up to around the *Tunisia-Libya Case*); 2) the opposition against the natural prolongation theory, represented by the dissenting opinions of the Judge Shigeru Oda and the Judge Evensen in the *Tunisia-Libya Case* and impacted by the regime of 200-nautial-mile exclusive economic zone created in the Third UN Conference on the Law of the Sea; and 3) the absolute denial of the natural prolongation principle in and after the *Libya-Malta Case*.

A. The Retreat from the Natural Prolongation Theory

According to the reading and analysis of the legal precedents, the logic of the

retreat from the natural prolongation theory is mainly manifested in two aspects. 1) The theory firstly depend on the establishment of the natural prolongation principle, which has been made clear in the 1969 *North Sea Continental Shelf Cases* and identified by Japanese scholars after careful reading.[6] 2) The theory is a misreading of the passive application of natural prolongation principle in the cases prior to the *Libya-Malta Case*. That means it neglects the Court's emphasis on the geological conditions of ocean troughs and continental shelves. For example, in the *United Kingdom-France Continental Shelf Arbitration Case*, the Tribunal of Arbitration held that the natural prolongation principle was not absolute, but should be subject to specific limitations; the principle only described the issue, rather than solve it.[7] Professor Koga believes that the application of customary law in the *United Kingdom-France Continental Shelf Arbitration Case* was actually

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6 The only exception is Professor Takabayashi Hideo. Although he does not object to establishing the natural prolongation principle as a rule of customary law, he is skeptical about the way of the Court in confirming the principle as such a rule. The Convention on Continental Shelf, Art. 1, Art. 2, Art. 3, which the Court adopted as the basis for its decision in *North Sea Continental Shelf Cases*, do not mention natural prolongation. The Court held that "the Truman Proclamation, on the basis of natural prolongation, has special status and could be regarded as a starting point of the positive law on the subject… reflected by Convention on Continental Shelf Article 2." (North Sea Continental Shelf Cases. *ICJ Report* 1969, para. 47). In this regard, Professor Takabayashi believes that the judgment identified the rule of customary international law on this subject on the basis of Truman Proclamation and the Convention on Continental Shelf. But he is skeptical about the Court's method in identifying the customary international law on this subject. The Court held that Art. 1, Art. 2, and Art. 3 of the Convention on Continental Shelf were not permitted to be retained, according to the fact that these three articles were codification of customary international law. Professor Takabayashi contends that the general way in identifying customary law, namely State practice and *opinio juris*, basically should be applicable to the assessment on the codification of customary law. The Court should not abandon this method and otherwise decide the codification of customary law according to whether the retention of the articles is permitted or not. If the former method is adopted for assessing the codification, Professor Takabayashi believes that up to the ratification of 1958 Convention on the Continental Shelf, actually, a broad consensus on Art. 1, Art. 2, and Art. 3 has not been reached by the States concerned. Moreover, it is difficult to summarize the concepts on law from these three articles. Professor Takabayashi has in His conclusion given important instructions on *North Sea Continental Shelf Cases* in terms of the geographical scope of the States' jurisdiction over continental shelf, considering the nature of continental shelf, and his ideas should be acclaimed. In terms of his skepticism on the method in identifying customary law, it can be said that he still has some doubts about natural prolongation principle. See Takabayashi Hideo, Takabayashi Hideo**,** Continental Shelf Regime and Customary International Law **-** Relating to the Judgment of North Sea Continental Shelf Cases, *Journal of Law and Politics Ryukoku University*, Vol. 2, Nos. 2~4, 1971, pp. 18, 19, 32. (in Japanese)

7 Court of Arbitration, The United Kingdom and the French Republic, Decisions in the Case Concerning Delimitation of the Continental Shelf, *International Legal Materials*, Vol. 18, 1979, p. 397, para. 91.

the application of the "equidistance + particular circumstances" principle; this principle, instead of the natural prolongation principle established according to the basic (physical) properties of continental shelf in the *North Sea Case*, should be the fundamental principle to be adopted by the countries involved to achieve equality and consensus.[8] Professor Ozaki also comments on the *United Kingdom-France Continental Shelf Arbitration Case*: "it can be said that the decision in this case has explicitly given a passive judgment on the natural prolongation principle, which was absolutely underlined in *North Sea Continental Shelf Cases*. According to the decision in this case, the natural prolongation principle is unable to solve the issues of continental shelf delimitation for good and all. [This case indicates that] although natural prolongation principle should not be ignored in the delimitation, it should either not be deemed as an absolute solution".[9]

However, some scholars are cautious in extracting the retreat from natural prolongation theory from the above-mentioned cases. Mikio Matsuda believed that in the *Libya-Malta Case*, the Court just failed to confirm the advantages of natural prolongation and therefore did not adopt the concept of natural prolongation contained in UNCLOS Art. 76(1); instead, the Court paid more attention to "equitable solution" provided under UNCLOS Art. 83.[10] Professor Serita also asserted that the equitable principle on the basis of natural prolongation, a traditional delimitation method established since 1969 *North Sea Continental Shelf Cases*, was suspended after the *Libya-Malta Case*; it was mainly because the Court took both parties' interests into consideration and dealt with the issue based on equitable principles.[11]

B. The Opposition against the Natural Prolongation Theory

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8 Mamoru Koga, United Kingdom-France Continental Shelf Case, in Shigejiro Tabata et al. eds., *Legal Precedents in International Law*, Tokyo: Toshindo Publishing Co., Ltd., 2002, p. 168. (in Japanese)

9 Ozaki Shigeyoshi, United Kingdom-France Continental Shelf Delimitation, in Hatano Ribo and Wakamizu Tsutsui eds., *Research on International Legal Precedents on Territorial Boundary Disputes,* Tokyo: Tokyo University Press, 1979, p. 285. (in Japanese)

10 Mikio Matsuda, Continental Shelf Case, in Hatano Ribo and Ozaki Shigeyoshi eds., *International Court of Justice Decisions and Opinions II*, Tokyo: Kokusai Shoin, 1996, p. 171. (in Japanese)

11 Kentaro Serita, Tunisia-Libya Continental Shelf Case, *Casebook of International Law (New Version)*, in Shigejiro Tabata and Kanae Taijudo eds., Tokyo: Yushindo sosho, 1987, p. 156. (in Japanese)

The main topics of denial of the natural prolongation theory are concerned with the interpretations to UNCLOS Art. 56(1)(a), Art. 56(3), Art. 57, Art. 76(1) and Art. 77(1). Professor Ko Nakamura, in his masterpiece - *Relations between Exclusive Economic Zone and Continental Shelf*, starts from the drafting process of relevant UNCLOS articles in the Third UN Conference on the Law of the Sea to identify their relations. His method to interpret the treaty indicates that the general rules of interpretation in Art. 31 of the Vienna Convention on the Law of Treaties have limitations in interpreting the articles concerning the relations between exclusive economic zone and continental shelf, so he endeavors to clarify these articles from the drafting process.[12] He also contends that the status of natural prolongation principle in continental shelf regime during the negotiating process is reflected in the current UNCLOS Art. 56(1)(a), Art. 56(3), Art. 57, Art. 76(1) and Art. 77(1). The exclusive economic zone/continental shelf regime in the law of the sea established on the basis of such provisions, has not made clear the status of continental shelf which is a natural prolongation of land mass in the exclusive economic zone (extending not beyond 200 nautical miles from the baselines), and therefore there is still lack of clarity on the provisions concerning this issue.[13]

As to the unclear provisions, Japanese scholars believe that the dissenting opinions of the Judge Shigeru Oda and the Judge Evensen in the *Tunisia-Libya Case* constitute the basis for such interpretation. The Judge Evensen, literally interprets some vaguely worded draft provisions without giving a reason. It can't be said that the Judge Evensen has solved the ambiguity of relevant provisions as indicated by Professor Nakamura in his research on the drafting process of the provisions. Problems still remain in the interpretation of the relations between exclusive economic zone and continental shelf and would not disappear even if we put emphasis on any of them. Correspondingly, the viewpoints of Judge Shigeru Oda mainly covered paragraphs 107, 126, 128, 129, 130 and 145 in the dissenting

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12 Vienna Convention on the Law of Treaties, Art. 32 (Supplementary means of interpretation): Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

13 Ko Nakamura, Relations between Exclusive Economic Zone and Continental Shelf, in Sōji Yamamoto and Takane Sugihara eds., *History and Prospects for the Law of the Sea: In Commemoration of Mr. Shigeru Oda's Sixtieth Birthday*, Tokyo: Yuhikaku Publishing Co., Ltd., 1986, pp. 43~44. (in Japanese)

opinions, especially the part "relations between exclusive economic zone and continental shelf" in paragraphs 126~130.[14] His conclusions are consistent with the Judge Evensen, that is, affirming that the regime of continental shelf within exclusive economic zone is integrated with the exclusive economic zone regime. However, Judge Shigeru Oda's method of interpretation is not limited to literal interpretation; he mainly adopts the elimination method to remove one of the two possible interpretations that may lead to unreasonable results and confirm the other interpretation.

C. The Denial of the Natural Prolongation Theory

The denial of the natural prolongation theory is manifested in the comments on *Libya-Malta Case* by the International Court of Justice. If we say that the monist interpretation on continental shelf and exclusive economic zone within 200 nautical miles was upheld by the minority in *Tunisia-Libya Case*, however, this interpretation was adopted by the Court in its judgment in *Libya-Malta Case*. The Japanese scholars argue that there are mainly two features in *Libya-Malta Case*: 1) it is the International Court of Justice's first case between States with opposite coasts; 2) it is the first case on continental shelf delimitation after the UNCLOS was approved.[15] After the reading of the judgment, it is generally believed that this case was based on the link of the law concerning continental shelf and exclusive economic zone in the 1982 UNCLOS; in areas within 200 nautical miles from the shore, geographic elements, which serve as the basis for the origin of rights, no longer bear any significance. This represents a great retreat from the natural prolongation theory on the issue concerning the origin-of-rights of continental shelf; instead, equidistance principle has obtained decisive importance.[16] For example, Professor Sugihara maintains that although natural prolongation principle

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14 Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Case, Judgment, *I. C. J. Reports* 1982, pp. 231~234.

15 Takane Sugihara, The International Court of Justice: Case Concerning the Continental Shelf (Libya-Malta), *Journal of International Law and Diplomacy*, Vol. 88, No. 1, 1989, p. 141. (in Japanese)

16 Takane Sugihara, The International Court of Justice: Case Concerning the Continental Shelf (Libya-Malta), *Journal of International Law and Diplomacy*, Vol. 88, No. 1, 1989, pp. 141~142 (in Japanese); Kiminobu Fukamachi, Lybia-Malta Continental Shelf Case, *Collection of a Hundred of Legal Precedents in International Law*, 2001, p. 87. (in Japanese)

has been identified by the previous cases as customary international law, the Court's judgments never stay unchanged and are influenced by the development of international law. And in the case of the areas within 200 nautical miles from the shore, the development of international law has resulted in the integration of continental shelf and exclusive economic zone under law and natural prolongation principle has failed to serve as the origin of rights.[17] The Japanese scholars, in their recent comments on 1969 *North Sea Continental Shelf Cases*, have held that it is groundless for natural prolongation principle to continue to be the only basis for the rights to continental shelf, due to the introduction of exclusive economic zone regime.[18]

The evolution process of the viewpoints concerning continental shelf delimitation by Japanese international law academia is consistent with that of the Japanese government's stance on its co-development agreement with South Korea on the East China Sea continental shelf between 30.462°N and 32.570°N. It would also be reflected in the undergoing Sino-Japanese continental shelf negotiations. As part of the empirical research on Japan's stance on East China Sea continental shelf delimitation, the paper summarizes the collected literature and the evolution of Japanese viewpoints in this regard, aiming to serve as a basis for my further research and also to provide some information for other researchers' analysis and review.

Annex: Catalogue of Literature on Continental Shelf Delimitation in Japan's International Law Academia

Papers on introduction to and/or analysis on cases

North Sea Continental Shelf Cases

1. Tanaka Norio, North Sea Continental Shelf Cases, in Shigejiro Tabata et al eds., *Legal Precedents in International Law,* Tokyo: Toshindo Publishing Co., Ltd.,

17 Takane Sugihara, The International Court of Justice: Case Concerning the Continental Shelf (Libya-Malta), *Journal of International Law and Diplomacy*, Vol. 88, No. 1, 1989, p. 144. (in Japanese)

18 Tanaka Norio, North Sea Continental Shelf Cases, in Shigejiro Tabata et al eds., *Legal Precedents in International Law*, Tokyo: Toshindo Publising Co., Ltd., 2002, p. 163 (in Japanese); Ozaki Shigeyoshi, North Sea Continental Shelf Cases, in Hatano Ribo and Ozaki Shigeyoshi eds., *International Court of Justice Decisions and Opinions II*, Tokyo: Kokusai Shoin, 1996, p. 50. (in Japanese)

2002, pp. 160~164. (in Japanese)

2. Ozaki Shigeyoshi: North Sea Continental Shelf Cases, in Hatano Ribo and Wakamizu Tsutsui ed., *Research on International Legal Precedents Territorial Boundary Disputes,* Tokyo University Press, 1979, pp. 347~371. (in Japanese)

3. Ozaki Shigeyoshi, North Sea Continental Shelf Cases, Hatano Ribo and Ozaki Shigeyoshi eds., *International Court of Justice Decisions and Opinions II,* Tokyo: Kokusai Shoin, 1996, pp. 37~56. (in Japanese)

4. Takabayashi Hideo, North Sea Continental Shelf Cases, in Shigejiro Tabata and Kanae Taijudo eds., *Casebook of International Law (New Version)*, Tokyo: Yushindo sosho, 1987, pp. 141~146. (in Japanese)

5. Takabayashi Hideo, Takabayashi Hideo, Continental Shelf Regime and Customary International Law - Relating to the Judgment of North Sea Continental Shelf Cases, *Journal of Law and Politics Ryukoku University*, Vol. 2, Nos. 2~4, 1971. (in Japanese)

6. North Sea Continental Shelf Cases, in Takeshi Minagawa ed., *A Collection of Legal Precedents in International Law,* Tokyo: Yushindo sosho, 1975, pp. 372~401. (in Japanese)

United Kingdom-France Continental Shelf Case

1. Iguchi Takeo, United Kingdom-France Continental Shelf Delimitation, *Collection of a Hundred of Legal Precedents in International Law*, 2001. (in Japanese)

2. Ozaki Shigeyoshi, United Kingdom- France Continental Shelf Delimitation, in Hatano Ribo and Wakamizu Tsutsui eds., *Research on International Legal Precedents Territorial Boundary Disputes,* Tokyo: Tokyo University Press, 1979, pp. 260~286. (in Japanese)

3. Serita Kentaro, United Kingdom-France Continental Shelf Case, in Shigejiro Tabata and Kanae Taijudo eds., *Casebook of International Law (New Version)*, Tokyo: Yushindo sosho (1987), pp. 146~151. (in Japanese)

4. Mamoru Koga, United Kingdom-France Continental Shelf Case, Shigejiro Tabata et al. ed., *Legal Precedents in International Law*, Tokyo: Toshindo Publishing Co Ltd., 2002, pp. 165~168. (in Japanese)

Tunisia-Libya Continental Shelf Case

1. Mikio Matsuda: Continental Shelf Case, Hatano Ribo and Ozaki Shigeyoshi eds., *International Court of Justice Decisions and Opinions II*, Tokyo: Kokusai

Shoin, 1996, pp. 160~180. (in Japanese)

2. Kentaro Serita, Tunisia-Libya Continental Shelf Case, in Shigejiro Tabata and Kanae Taijudo eds., *Casebook of International Law (New Version)*, Tokyo: Yushindo sosho, 1987, pp. 152~156. (in Japanese)

3. Mamoru Koga, Tunisia-Libya Continental Shelf Case, Shigejiro Tabata ed., *Legal Precedents in International Law*, Tokyo: Toshindo Publishing Co., Ltd., 2002, pp. 169~172. (in Japanese)

Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area

1. Higashizu Taro, Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, Hatano Ribo and Ozaki Shigeyoshi eds., *International Court of Justice Decisions and Opinions II,* Tokyo: Kokusai Shoin, 1996, pp. 221~235. (in Japanese)

2. Takabayashi Hideo, Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, in Shigejiro Tabata and Kanae Taijudo eds., *Casebook of International Law (New Version)*, Tokyo: Yushindo sosho, 1987, pp. 157~163. (in Japanese)

3. Takane Sugihara, Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, *Journal of International Law and Diplomacy*, Vol. 87, No. 4, 1988, pp. 36~67. (in Japanese)

Libya-Malta Continental Shelf Case

1. Kiminobu Fukamachi, Libya-Malta Continental Shelf Case, *Collection of a Hundred of Legal Precedents in International Law*, 2001. (in Japanese)

2. Ozaki Shigeyoshi, Libya-Malta Continental Shelf Case, in Hatano Ribo and Ozaki Shigeyoshi eds., *International Court of Justice Decisions and Opinions II,* Tokyo: Kokusai Shoin, 1996, pp. 181~220. (in Japanese)

3. Hiromi Ushio, Libya-Malta Continental Shelf Case, in Shigejiro Tabata ed., *Legal Precedents in International Law*, Tokyo: Toshindo Publishing Co Ltd., 2002, pp. 176~180. (in Japanese)

4. Takane Sugihara, The International Court of Justice: Case Concerning the Continental Shelf (Libya-Malta), *Journal of International Law and Diplomacy*, Vol. 88, No. 1, 1989, pp. 122~153. (in Japanese)

Guinea Bissau-Senegal Maritime Boundary Delimitation Case

1. Takane Sugihara, International Court of Justice: Case concerning the Arbitral Award of 31 July 1989, *Journal of International Law and Diplomacy*, Vol. 92, No. 3, pp. 64~79. (in Japanese)

2. Takane Sugihara, the Arbitral Award of 31 July 1989-Application of Provisional Measures, *Journal of International Law and Diplomacy*, Vol. 90, No. 5, pp. 61~67. (in Japanese)

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Takashi Aoki, Arbitration Judgment of Canada-France Maritime Delimitation Case, *The Seiwa Journal of Law & Politics*, Seiwa University, 1-1, pp. 291~319. (in Japanese)

Jan Mayen Maritime Boundary Delimitation Case

1. Jin Tomioka: Jan Mayen Maritime Boundary Delimitation Case, in Shigejiro Tabata et al eds., *Legal Precedents in International Law*, Tokyo: Toshindo Publishing Co Ltd., 2002, pp. 181~185. (in Japanese)

2. Mikio Matsuda: Jan Mayen Maritime Boundary Delimitation Case, in Ozaki Shigeyoshi ed., *International Court of Justice Decisions and Opinions II,* Tokyo: Kokusai Shoin, 1996, pp. 440~450. (in Japanese)

3. Study Group on Decisions of the International Court of Justice, The International Court of Justice: Case concerning Maritime Delimitation in the Area between Greenland and Yan Mayen, *Journal of International Law and Diplomacy*, Vol. 95, 1996, pp. 5~41 (579). (in Japanese)

Case Concerning Maritime Boundary Delimitation and Territorial Issues between Qatar and Bahrain

Study Group on Decisions of the International Court of Justice, The International Court of Justice: Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility), *Journal of International Law and Diplomacy*, Vol. 97, 1998, pp. 4~45 (395). (in Japanese)

Case Concerning the Disputes on Territory and Maritime Boundary between Cameroon and Nigeria

1. Study Group on Decisions of the International Court of Justice, International Court of Justice: Case Concerning Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections), *Journal of International Law and Diplomacy*, Vol. 102, No. 4, 2004, p. 103. (in Japanese)

2. Study Group on Decisions of the International Court of Justice, The International Court of Justice: Case concerning the Land and Maritime Boundary between Cameroon and Nigeria - Request for the Indication of Provisional Measures, *Journal of International Law and Diplomacy*, Vol. 97, 1998, pp. 6~34(626). (in Japanese)

3. Takane Sugihara, The International Court of Justice: Case Concerning the Land, Island and Maritime Frontier Dispute, *Journal of International Law and Diplomacy*, Vol. 95, 1996, pp. 1~92 (92). (in Japanese)

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2. Tanaka Norio, Information Review by United Nations Commission on the Limits of the Continental Shelf - Delimiting the Boundary by Scientific Knowledge, *Energy Review*, Vol. 288, 2005, p. 1. (in Japanese)

3. Masahiro Miyoshi, Maritime Boundary Delimitation, in Society of International Law ed., *Japan and International Law in a Century*, Tokyo: Sanseid, 2001, pp. 163~187. (in Japanese)

4. Tanaka Norio, Boundary Delimitation for Continental Shelf and Exclusive Economic Zone, in Kozai Shigeru, Masayuki Takemoto and Shigeki Sakamoto ed., *Practices in International Law*, Tokyo: Toshindo Publishing Co Ltd, 1998, pp. 81~83. (in Japanese)

5. Iguchi Takeo, Tendency of Recent Maritime Delimitation between States - the Significance of the Equity Principle, *Tokai Law Review*, No. 13, 1994, pp. 33~124. (in Japanese)

6. Masahiro Miyoshi, A Study of the Rules for Delimiting Continental Shelf Boundary, Hayashi Hisashige, Yamate Haruyuki and Kozai Shigeru ed., *New Order of the Law of the Sea*, Tokyo: Toshindo Publishing Co Ltd, 1993, pp. 162~195. (in Japanese)

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12. Takabayashi Hideo, Continental Shelf Regime and Customary International Law, *International Law on Marine Development*, Tokyo: Yushindo sosho, 1977, pp. 132~163. (in Japanese)

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Translator: YE Lin

First Steps in New Fishery Relationships between China and Its Maritime Neighbors

ZHANG Liangfu *

Abstract: Since its ratification of the United Nations Convention on the Law of the Sea (UNCLOS) in May 1996 and issuance of the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (hereinafter "the EEZ Law") in 1998, the Chinese government has used the UNCLOS as the basic legal foundation in its handling of the maritime fishery relationships between China and its neighbors. Based on the UNCLOS, China entered into the Sino-Japanese Fishery Agreement on November 11, 1997, the Sino-South Korean Fishery Agreement on August 3, 2000, and Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement on December 25, 2000. The signing and entry into force of these three fishery agreements marked the beginning of new models of fishery relationships between China and its neighbors, which have as a legal basis the regime of exclusive economic zones extending 200 nautical miles off coastlines and sustainable development as a goal. These are important steps for China as it abides by and implements the modern maritime law regime under the UNCLOS. They show that China is a peace-oriented, cooperative, and responsible State that observes international law. The new fishery relationships have significant geopolitical effects and promote peace and stability in the East Asian region and the entire Asia-Pacific region. These three fishery agreements are important examples and points of reference that play a positive role in the development of modern international maritime law.

Key Words: United Nations Convention on the Law of the Sea; Exclusive economic zone; Fishery agreement; Sea waters delimitation; East China Sea; Yellow Sea; South China Sea; Beibu Gulf

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China has both land and seas. It borders five seas, which from north to south are Bohai Sea, the Yellow Sea, the East China Sea, part of the Pacific Ocean east of China Taiwan, and the South China Sea. The mainland coastline extends about 18,400 kilometers from the estuary of Yalu River in the north to the estuary of Beilun River in the south, and there are an additional 14,000 kilometers of island coastline.[1] In May 1996, China ratified the United Nations Convention on the Law of the Sea (UNCLOS), on whose basis it entered into the Sino-Japanese Fishery Agreement, the Sino-South Korean Fishery Agreement, and the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement respectively on November 11, 1997, August 3, 2000, and December 25, 2000.

The execution and implementation of the Sino-Japanese, Sino-South Korean, and Sino-Vietnamese fishery agreements are major actions that China has taken as it begins to observe the new maritime law regime under the UNCLOS. They mark the establishment of new fishery relationships between China and its maritime neighbors on the basis of the UNCLOS, the realization of the exclusive economic zone regime in the waters bordering China, and fundamental changes to China's management of its marine fishery.

The execution and implementation of these fishery agreements also play a positive role in the development of international maritime law and are important examples and points of reference for Asia and other States and regions in the world in their handling of fishery relationships.

I. Basic Characteristics of the Maritime Fishery Relationships between China and Its Neighbors before the Mid-1990s: Fishing Freedom in the High Seas

Historically, the East China Sea and the Yellow Sea were shared by the fishermen of China, Japan, North Korea, and South Korea. Before the mid-1990s, this remained true despite the worldwide trend, since the 1970s, of coastal States' expanding the areas of their maritime interests by delineating fishery rights beyond their territorial seas or maritime interests covering 200 nautical miles, as well as the official establishment of the regime of exclusive economic zonesof200 nautical miles under the UNCLOS in 1982.

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1 *China Marine Statistical Yearbook (1991-1993)*, Beijing: China Ocean Press, 1994, p. 3. (in Chinese)

China and Japan have maintained a long-standing cooperative relationship on fishery in the East China Sea. In the early 1950s, Japanese fishing vessels entered China's coastal fishing grounds in large numbers. They pillaged aquatic resources and damaged Chinese fishing vessels and nets, which led to tensions. To settle these disputes, Chinese and Japanese nongovernmental fishery organizations initiated the first Sino-Japanese nongovernmental fishery negotiations in 1955 and entered into the Fishery Agreement for the Yellow Sea and the East China Sea between the China Fisheries Association and Japan's Sino-Japan Fisheries Association. The second and third nongovernmental fishery agreements were signed respectively in 1963 and 1965. In 1970, delegations from Chinese and Japanese fishery associations signed a communiqué of their talks to supplement these agreements. In December of the same year, they also signed provisions with respect to light purse seiner fishing, which were incorporated into the prior agreements. China and Japan have signed 12Sino-Japanese nongovernmental fishery agreements to coordinate fish production in the East China Sea and mediate their disputes. After the normalization of diplomatic relationships between China and Japan in 1972, the Chinese and Japanese governments executed the Fishery Agreement between the People's Republic of China and Japan on August 15, 1975 after negotiations. However, these nongovernmental and official agreements between China and Japan used the principles of traditional international law as their fundamental legal basis –fishing freedom on the high seas. At the time, the international community was in the process of adopting the legal regimes of 200-nautical mile fishing rights and exclusive economic zones, but both China and Japan continued to apply traditional international law: "the sea waters beyond their respective territorial seas were considered negotiated waters where flag State jurisdiction applied."[2]

Chinese and South Korean fishermen had fished in the Yellow Sea and the East China Sea for a long time under the custom of unregulated fishing in the high seas. Before China and South Korea established diplomatic ties, fishery disputes had been settled by nongovernmental organizations (*i.e.,* the China East China Sea and Yellow Sea Fisheries Association and the South Korea National Federation of Fisheries Cooperatives) through negotiations. After the establishment of diplomatic ties between China and South Korea in 1992, the governments of the two States

2 Speech by Qi Jingfa, Deputy Minister of the Ministry of Agriculture of the People's Republic of China, in press conference held on 23 March 23, 2000, at http://221.213.46.35/zcfg/rule_0042.htm, 22 November 2005. (in Chinese)

began to communicate and handle fishery issues.

Legally, before the mid-1970s, fishery relationships among China, Japan, and South Korea in the East China Sea and the Yellow Sea (especially those embodied by Sino-Japanese fishery agreements and 1965 Japanese-South Korean fishery agreement) were based on fishing freedom on the high seas under traditional international law. Politically and economically, China and South Korea concentrated their efforts in restricting the activities of Japanese fishing vessels and fishermen in the waters at their borders because Japan's fishing technology and power were both superior to those of China and South Korea before the mid-1970s. However, since that time, growth in Chinese and South Korean fishery production has brought about changes to the production capacities of all three that favor China and South Korea. In addition, the 200-nautical mile exclusive economic zone regime came into being. As a result, Japan began to pay more attention to the protection of its fishery interests and has taken the initiative to recalibrate its fishery relationships with China and South Korea. These efforts did not produce results until the 1990s.

Beibu Gulf had always been shared by fishermen from China and Vietnam. Historically, it was the custom for both States' fishing vessels to fish in offshore waters at their borders, and both States' fishermen enjoy the freedom of fishing in Beibu Gulf. In April 1957, China and Vietnam entered into the Sino-Vietnamese Beibu Gulf Sailing and Fishery Agreement, which prohibited the other State's fishermen from fishing in waters within 6 nautical miles off either State's coastline. This Agreement was amended in 1961 by extending the prohibition to12 nautical miles from the coastline. In 1963, the two States executed a new fishery cooperation agreement, which prohibited either State's fishing vessels from fishing in waters within 12 nautical miles of the other State's coastline. Since 1969, Vietnam has not negotiated with China on the issue of Chinese vessels fishing in Vietnamese territorial waters. However, before the mid-1970s, Chinese fishing vessels operated in the entire area of the gulf that was outside Vietnamese waters. From the mid-1970s to the mid-1990s, Sino-Vietnamese relationships deteriorated, and Vietnam detained and drove away Chinese fishing vessels operating in the western and middle part of Beibu Gulf. But legally, according to the principle of the freedom to fish on high seas under traditional international law, both States' fishermen had the right to fish in the Beibu Gulf.

II. China and Its Maritime Neighbors' Basic Attitudes and Positions on the 200-Nautical-Mile Exclusive Economic Zone Regime

Since the 1970s, China has made clear its support of Latin American States' proposed expansion of the 200-nautical mile maritime interests due to its support of third-world and the developing world's resistance against the maritime hegemony of maritime powers like the United States and the former Soviet Union. Together with other developing countries, China actively participated in the Third United Nations Conference on the Law of the Sea and the development of the UNCLOS, making important contributions to the drafting of the UNCLOS in 1982. China was one of the first signatories to the UNCLOS when it became available for execution on December 10, 1982.

However, in fact, China is at a great disadvantage in terms of its marine geography. The qualities of its useable sea areas are significantly inferior to those of its neighbors, including North Korea, Japan, South Korea, the Philippines, Vietnam, and Indonesia. According to the provisions of the UNCLOS on exclusive economic zones and continental shelves, China has about 3,000,000 square kilometers of sea areas under its jurisdiction, of which1,500,000 square kilometers are in dispute because of overlapping claims by its neighbors. From the point of view of China's fishery interests, Chinese fishermen's traditional fishing grounds are mostly located within the 200-nautical-mile exclusive economic zones of China's neighbors. The regime of exclusive economic zones ended the era of fishing freedom beyond the territorial seas, which has been extremely unfavorable to China's fishery resources and maritime interests and created severe challenges for China's traditional fishing industry. Therefore, China was very careful in the concrete implementation of the 200-nautical-mile exclusive economic zone regime in China's sea areas despite its active support for the regime in the international political arena. It did not approve its entry into the UNCLOS until May 15, 1996 and did not promulgate the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (hereinafter "the EEZ Law") until June 26, 1998.

Throughout the Third United Nations Conference on the Law of the Sea, Japan opposed the establishment of 200-nautical-mile exclusive economic zones. This was because, in the middle of the 1970s, nearly half of Japan's fishing catch came from waters within 200 nautical miles of other States. In order to protect its fishery

interests to the greatest extent, Japan made a large number of proposals aimed at rejecting or weakening the 200-nautical-mile exclusive economic zone regime in the United Nations Seabed Committee and the Third United Nations Conference on the Law of the Sea. However, in the mid- and late 1970s, more and more States declared their 200-nautical-mile fishery zones or exclusive economic zones and began to drive away Japanese fishermen. This situation aggravated the Japanese government considerably. It realized that, without its own fishing areas, its distant-water fishing industry would suffer losses as a result of others' 200-nautical-mile fishery zones. Foreign States' fishing vessels in the sea areas within 200 nautical miles of Japan would also have a significant impact on its coastal fishing industry. Therefore, Japan issued the Provisional Measures on Fishery Waters (Law No. 31) on May 2, 1977, claiming that the law was enacted to adapt to the rapidly-changing new maritime order in the international community and to protect and manage aquatic resources. It also established fishery zones that were 200 nautical miles wide. The nature of the rights claimed by Japan in the form of the 200-nautical-mile fishery waters were more similar to the fishery zones under traditional international law rather than the exclusive economic zones defined in the Third United Nations Conference on the Law of the Sea. This law can be considered a provisional or transitional measure before Japan officially established a 200-nautical-mile exclusive economic zone. However, when Japan announced these provisional measures, it also stated that its 200-nautical-mile fishery zone did not extend to the East China Sea or the western part of the Sea of Japan, and the main parts of this law were not applicable to its fishery relationships with China and South Korea; Chinese and South Korean fishermen would continue to be permitted to fish in the waters around Japan until Japan negotiated new fishery agreements with them. Japan's decision to make an exception for Chinese and South Korean fishermen stemmed from a desire to avoid tensions with China and South Korea and, more importantly, to reap very practical benefits: Japan permitted Chinese and South Korean fishermen to continue to fish in the waters around Japan on condition that Japanese fishermen were permitted to fish in the waters around China and South Korea.

In June 1996, Japan decided to approve the UNCLOS and establish a 200-nautical-mile exclusive economic zone. In order to avoid conflict with China and South Korea, Japan adopted a policy of "comprehensive establishment and partial application." While Japan had established its 200-nautical-mile economic zone in its surrounding waters for general purposes, it would allow Chinese and

South Korean fishing vessels to fish in the zone. It also decided to open negotiations with China and South Korea as soon as possible and sign new fishery agreements with them that would conform to the spirit of the UNCLOS.

South Korea was the first State in East Asia to expand the reach of its maritime jurisdiction. As early as 1952, it issued a Presidential Statement on Sovereignty over Contiguous Sea Waters. South Korea placed under its jurisdiction all living resources and mineral resources between about 20 nautical miles to 200 nautical miles from its coastline. This 200-nautical-mile line was called the "Syngman Rhee Line" (named after the president who issued the statement). At the time, neither Japan nor China recognized the line, and the line caused many fishing disputes. Japan and South Korea feuded for as long as 14 years until they executed a fishery agreement in 1965.The agreement was based on the principle of fishing freedom on the high seas. South Korea made a considerable concession to Japan in this agreement by largely giving up the Syngman Rhee Line as defined in the 1952 statement. The Japanese-South Korean fishery agreement also described South Korea's 12-nautical-mile fishery zone and recognized Japanese fishermen's right to fish beyond this zone. The agreement was effective until 1998, when Japan and South Korea signed a new fishery agreement.

Although South Korea participated in the Third United Nations Conference on the Law of the Sea and executed the UNCLOS on March 14, 1983, it did not declare a 200-nautical-mile exclusive economic zone until August 1996. The fundamental reason for the delay was South Korea's position as a major distant-water fishing State: its interests in distant-water fishing far exceeded the need to protect its coastal fishery resources. Another reason was its fear of provoking and creating conflicts with its neighbors with a claim to semi-enclosed seas in Northeast Asia under the circumstances at the time. In fact, only after Japan issued the Law of Exclusive Economic Zone and Continental Shelf in June 1996 did South Korea made official decision to respond with the Decree of Exclusive Economic Zone in August 1996.

In sum, as the 1982 UNCLOS began to go into effect around the world in the mid-1990s, China and its maritime neighbors (including Japan, South Korea, and Vietnam) also approved the UNCLOS one after another and established corresponding legal systems to manage their maritime interests. Vietnam made the Statement on Vietnamese Territorial Seas, Contiguous Zone, Exclusive Economic Zone and Continental Shelf on May 12, 1977 and the Statement on the Baselines of Vietnamese Territorial Seas on November 12, 1982, and approved the UNCLOS on

June 23, 1994. Japan approved the UNCLOS and issued the Law on the Exclusive Economic Zone and Continental Shelf officially in June 1996. South Korea approved the UNCLOS on January 29, 1996 and issued the Law on the Exclusive Economic Zone on August 8, 1996 and established its 200-nautical-mile exclusive economic zone. China approved its entry into the UNCLOS on May 15, 1996 and promulgated its EEZ Law on June 26, 1998.

These events turned the establishment of new fishery relationships on the basis of the UNCLOS into an international treaty obligation that China and its neighbors must fulfill. The UNCLOS also provided a common legal basis for the new fishery relationships between China and its maritime neighbors.

In the 1990s, as international and national maritime legal regimes underwent changes, China started to negotiate with Japan, South Korea, and Vietnam and executed agreements with them with respect to new fishery relationships based on the UNCLOS.

III. The Main Contents of the Sino-Japanese Fishery Agreement, the Sino-South Korean Fishery Agreement, and the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement

A. The Sino-Japanese Fishery Agreement

The UNCLOS officially went into effect on November 16, 1994.In 1996, China and Japan both approved it, so both became responsible for establishing and coordinating new fishery relationships in the East China Sea on the basis of the exclusive economic zone regime. To that end, China and Japan started unofficial negotiations on the delimitation of continental shelves and exclusive economic zones in 1995. Before the delimitation process of the East China Sea was completed, both States decided to open fishery negotiations first in order to ensure order on fishery matters in the East China Sea. In 1996, Sino-Japanese negotiations about maritime and fishery issues became official, and both parties concentrated on issues about fishery arrangements in the East China Sea before delimitation. Through eight rounds of official negotiations and many conferences between chiefs of mission and working groups, China and Japan reached agreements in principle on main issues regarding the new Fishery Agreement between the

People's Republic of China and Japan in early September 1997. The agreement was eventually executed by Xu Dunxin, the Chinese ambassador to Japan, and Keizo Obuchi, the Japanese foreign minister, in Tokyo on November 11, 1997 during the visit of Chinese premier Li Peng.

After the execution of the Sino-Japanese Fishery Agreement, both parties completed the formalities within their respective domestic legal structure to enact the agreement and started negotiations on the enactment of the agreement in the second half of 1998. On February 27,2000, the Chinese and Japanese delegations finally reached agreement on their main differences in Beijing. The Chinese Minister of Agriculture Chen Yaobang and the Japanese Minister of Agriculture, Forestry and Aquaculture Tamazawa Tokuichiro executed the meeting minutes and agreed that the new Sino-Japanese Fishery Agreement would take effect on June 1, 2000.

The Sino-Japanese Fishery Agreement consists of 14 articles, two annexes, records about the Agreement, and letters between the parties. Its main contents are as follows:

(1) Waters under Provisional Measures: Waters inder Provisional Measures are established in accordance with the Sino-Japanese Fishery Agreement beyond 52 nautical miles off the baselines of territorial seas of the two States between 27° N and 30°40' N in the majority of the areas in the East China Sea. These waters are to be jointly managed by the parties. In the event of any violation, China and Japan would deal with their own fishing vessels in accordance with their respective domestic laws.

(2) The existing fishery relationship remains unchanged in the southern part of the East China Sea (south of the Waters Under Provisional Measures), *i.e.,* the East China Sea south of 27° N and the waters south of the East China Sea and west of 125°30' E.

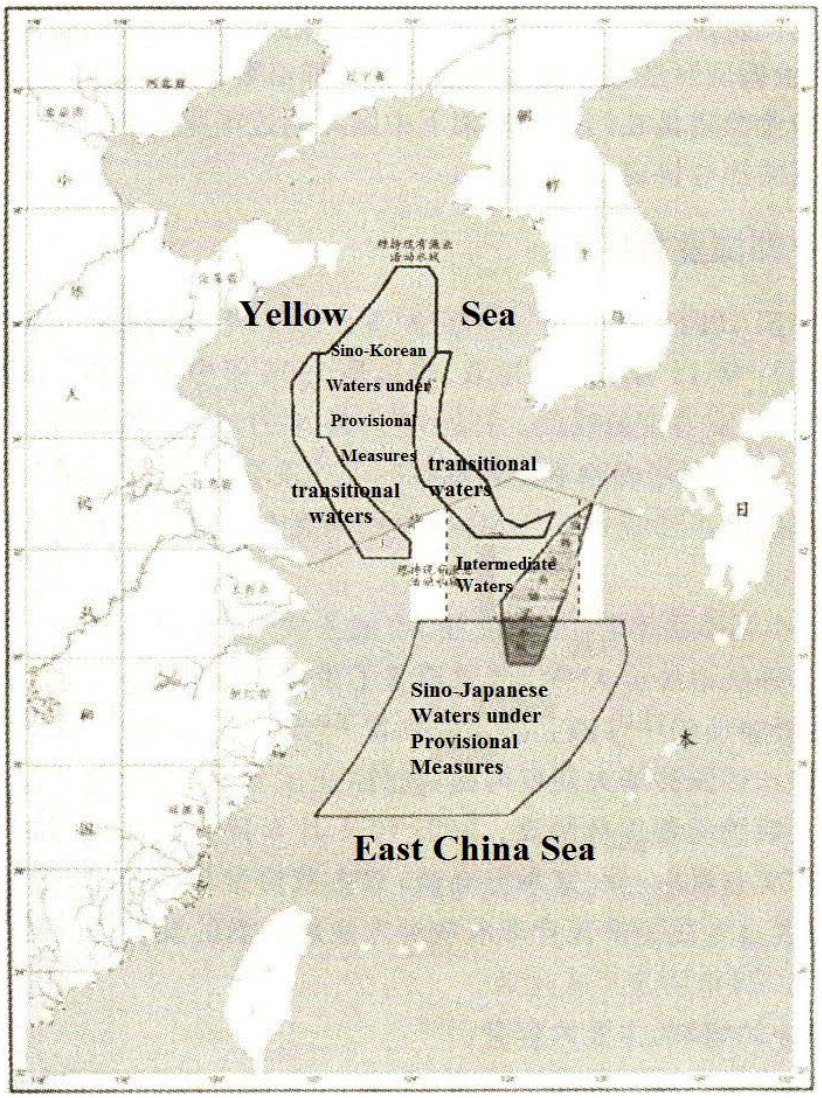

Fig. 1 Map of the Waters under the Sino-Japanese and Sino-South Korean Fishery Agreements

(3) Intermediate Waters: In the northern part of the East China Sea (north of the Waters under Provisional Measures), *i.e.,* waters north of 30°40' N, China advocated the maintenance of the status quo. Japan, on the other hand, requested the implementation of the exclusive economic zone regime and required Chinese fishing vessels operating in Japanese waters to apply for fishing permits from Japan and accept Japan's management. China and Japan failed to reach a consensus on

this issue after the nearly 20 rounds of negotiations that had taken place by the second half of 1998. On February 27, 2000, the Chinese Minister of Agriculture and the Japanese Minister of Agriculture, Forestry and Aquaculture held a ministerial meeting and finally decided to establish the "Intermediate Waters" between 124°45' E and 127°30' E, in which vessels could operate without permits from either party;[3] the status quo was largely maintained; although fishing vessels from both parties could operate without getting permits from the other party, both must control the number of their own fishing vessels and exchange information about catch quantities. Japan gave 900 fishing access permits to China on the east side of the Intermediate Waters, and China gave 317 fishing access permits to Japan on the west side.

(4) Waters under exclusive economic zone management: China and Japan decided to implement exclusive economic zone management in the waters that had no delimitation issues. These areas were located to the east and west of the Waters under Provisional Measures and the Intermediate Waters, *i.e.,* waters close to the outer limits of territorial seas of the two States, and they would come respectively under Chinese and Japanese management. On the basis of reciprocity and the relevant laws, China and Japan would allow each other's citizens and fishing vessels to fish in each other's exclusive economic zones. Both parties could take necessary actions in their own exclusive economic zones in accordance with international law to ensure that each other's citizens and fishing vessels abide by conservation measures for marine living resources and other conditions as provided by law.

The new Sino-Japanese Fishery Agreement was the first fishery agreement that China reached with a neighbor under the UNCLOS framework.

B. The Sino-South Korean Fishery Agreement

China officially established diplomatic relationships with South Korea in 1992. In 1993, the two States held the first round of negotiations about a possible bilateral fishery agreement. After the UNCLOS went into effect in November 1994 and China and South Korea approved the UNCLOS in 1996, the negotiations

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3 China and Japan Reach Agreements as New Fishery Agreement Takes Effect, *People's Daily*, 28 February 2000, at http://www.cfm.com.cn/20010804/ca2623.htm, 22 November 2005. (in Chinese)

accelerated. The two States held three intergovernmental fishery conferences in May, August, and November 1996. In 1997, China and South Korea held five meetings on fishery issues, in which they mainly discussed fishery arrangements in the Yellow Sea before delimitation was complete. In December 1997, South Korea agreed in principle to establish "waters under provisional measures" in some areas of the Yellow Sea.

On November 11, 1998, China and South Korea provisionally signed the Sino-South Korean Fishery Agreement during a visit by the South Korean President Kim Dae-Jung to China. This agreement was based on the guiding principles of mutual understanding, mutual accommodation, honesty, and pragmatism and was the fruit of 7 rounds of negotiations and nearly 20 rounds of working-level talks over 5 years.[4] On August 3, 2000, the Chinese foreign minister Tang Jiaxuan and the South Korean ambassador to China Kwon Byong-Hyon officially executed the Sino-South Korean Fishery Agreement in Beijing. Afterwards, the two States held negotiations on a few additional issues. On April 5, 2001, Qi Jingfa, the Chinese Deputy Minister of Agriculture and Hong Sung, South Korea's Undersecretary of the Ministry of Maritime Affairs and Fisheries, met in Beijing and reached agreement on issues like the areas in which existing fishery activities could continue and the scale of fishing activities that each other's fishing vessels could undertake in the waters under the other's exclusive economic zone management.[5] The agreement officially took effect on June 30, 2001.

The main contents of the Sino-South Korean Fishery Agreement are as follows:

(1) Waters under Provisional Measures: the area of the Yellow River between 32°11' N and 37° N would be managed under joint conservation and quantitative management measures as decided by a Sino-South Korean Joint Fishery Committee to be established by both China and South Korea. In the event of a violation, both States would deal with their own fishing vessels in accordance with their own domestic laws.

(2) Transitional Waters: these were established on both sides of the Waters

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4 Policy Research Office of the Ministry of Foreign Affairs of the People's Republic of China ed., *Chinese Diplomacy*, Beijing: World Knowledge Publishing House, 1999, p. 670. (in Chinese)

5 Exclusive Economic Zone Management to Heighten with Sino-South Korean Fishery Agreement's Imminent Implementation, *Guangming Daily*, 6 April 2001, at http://www.gmw.cn/0lgmrb/2001—04/06/GB/04-18743-0-GMA4-009.htm, 22 November 2005. (in Chinese)

under Provisional Measures. They include two parts, one outside the territorial sea of the two States (covering an area of 26,367 square kilometers on the Chinese side and 28,926 square meters on the South Korean side). They would exist for four years. As part of their efforts to implement the exclusive economic zone regime in these areas, both parties would take appropriate actions to gradually adjust and reduce their own citizens' fishery activities and fishing vessels in each other's portion of the Transitional Waters. At the end of the four-year period, the Transitional Waters would be managed as China's and South Korea's respective exclusive economic zones.

In essence, the Waters under Provisional Measures and the Transitional Waters do not differ qualitatively but in the length of their periods of validity. At the end of the four-year period (*i.e.,* as of June 30, 2005), both parts of the Transitional Waters would be managed as China's and South Korea's respective exclusive economic zones. The future of the Waters under Provisional Measures would be decided by both parties after the agreement expires.

Both parties would manage and take necessary actions with respect to their own citizens and fishing vessels in the Waters under Provisional Measures and the Transitional Waters; they would not take action with respect to the other party's citizens or fishing vessels. If one party finds that the other party's citizens or fishing vessels have violated a decision of the Sino-South Korean Joint Fishery Committee, it can warn the citizens and fishing vessels and report the violation to the other party. The other party should take the report seriously and inform its counterpart of the outcome after taking necessary actions. In the Transitional Waters, the parties can also take joint supervision and inspection measures, including joint boarding, stopping by order, onboard inspection, etc. In other words, in the Waters under Provisional Measures and the Transitional Waters, the parties would manage their own fishing vessels and fishermen.

(3) Waters in which existing fishery activities may continue: in certain waters north of the northern limit of the Waters under Provisional Measures and certain waters south of the Transitional Waters, existing fishery activities may continue. Unless otherwise agreed by the parties, domestic fishery laws and regulations are not applicable to the other party's citizens or fishing vessels.

(4) Waters under exclusive economic zone management: China and South Korea would consider the waters between their own territorial seas and their respective parts of the Transitional Waters as waters under their own exclusive economic zone management. In other words, these areas are their exclusive

economic zones. Taking into account the conditions of the marine living resources in their respective exclusive economic zones, their own fishing capabilities, traditional fishery activities, the status of fishing activities in each other's zones, and other relevant factors, China and South Korea would determine the catchable fish species, catch quota, operating time, operating area, and other operating conditions for the other party's citizens and fishing vessels in their own exclusive economic zones on an annual basis and report this information to the other party. When Chinese and South Korean citizens and fishing vessels go into each other's exclusive economic zones to fish, they shall adhere to each other's laws and regulations and the Sino-South Korean Fishery Agreement.

C. The Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement

The Sino-Vietnamese relationship was normalized in 1991. Afterwards, both parties considered it necessary to resolve the issues with regards to border areas, including Beibu Gulf, as soon as possible. Governmental delegations for border negotiations, consisting of the ministries of foreign affairs, national defense, fisheries, surveying, and local governments, were established, and the third round of Sino-Vietnamese delimitation negotiations began.[6] Throughout the negotiations, China insisted on several demands: its traditional right to fish in the Beibu Gulf, the simultaneous resolution of delimitation issues and fishing issues, and an appropriate arrangement for the traditional interests of China's fishermen in the coastal areas. After 20 rounds of consultations, the Chinese and Vietnamese foreign ministers executed the Sino-Vietnamese Agreement on the Delimitation of Territorial Seas, Exclusive Economic Zones, and Continental Shelves on December 25, 2000, at the same time when the Chinese minister of agriculture and the Vietnamese minister of aquaculture (Ta Quang Ngoc) executed the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement. Subsequently, in April 2001, fishery authorities from both parties also initiated what would become 20 rounds of consultations, lasting 3 years, on ancillary issues to the cooperation agreement. In April 2004, they finally reached agreement on these issues and executed the Supplementary Protocol to the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement. On June 30, 2004,

6 Sino-Vietnamese negotiations on the delimitation of Beibu Gulf lasted 27 years and included three stages: 1974, from 1977 to 1978, and from 1992 to 2000. Nothing resulted from the first two rounds of negotiations because of considerable differences between the parties.

the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement officially went into effect after the parties completed the formalities in their domestic laws.

The Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement established three types of waters in the Beibu Gulf: the Common Fishery Zone, Waters under Transitional Arrangement, and the Buffer Zone for Small Fishing Vessels.

(1) The Common Fishery Zone: The Common Fishery Zone is within both States' exclusive economic zones at 30.5 nautical miles off the respective delimitation lines defined in the Beibu Gulf delimitation agreement. It is north of the Beibu Gulf enclosure line and south of 20° N, covering an area of over 33,000 square kilometers. It would be valid for 12 years and extended for 3 additional years automatically upon expiration, for a total period of 15 years. Both parties would maintain a long-term cooperative fishery relationship in the Common Fishery Zone. In the zone, the conservation, management, and use of living resources would be governed by the Regulations on Conservation and Management of Fishery Resources, which would be jointly enacted by China and Vietnam. A fishing permit system and fishing moratorium system would be implemented, where all fishing ships would be required to apply to the authorities of their respective States for fishing permits before entering the zone for the purpose of fishing. The number of fishing vessels allowed to operate in the zone would be re-determined every year. Both Chinese and Vietnamese inspection authorities would have the right to supervise and inspect each other's fishing vessels and crew that enter each other's waters in the Common Fishery Zone.

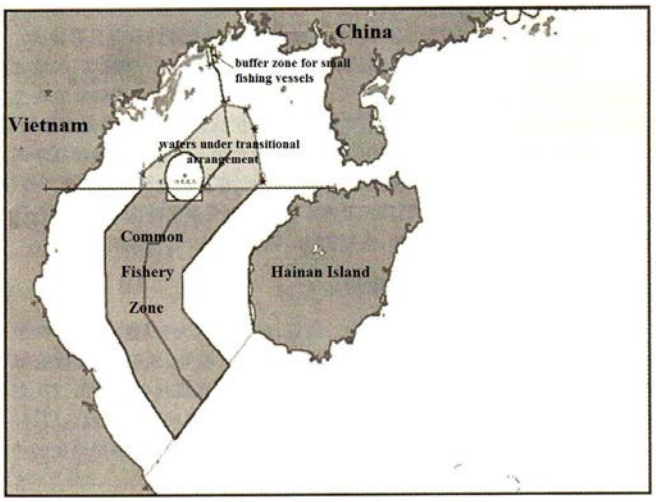

Fig. 2 Diagram of the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement

(2) Waters under Transitional Arrangement: China and Vietnam established the Waters under Transitional Arrangement north of the Common Fishery Zone (calculated from 20° N), covering an area of about 9,000 square kilometers. In the Waters under Transitional Arrangement, both parties would manage fishing vessels in their own waters consistent with the delimitation line in Beibu Gulf. Fishing vessels that operate in the other party's area of the Waters under Transitional Arrangement must adhere to the other's laws and regulations, and the number of fishing vessels must decrease year by year. The arrangements in these waters would only last 4 years, at the expiration of which these waters would become China's and Vietnam's respective exclusive economic zones.

(3) Buffer Zone for Small Fishing Vessels: The fishing vessels that operated in areas around the territorial seas of China and Vietnam were mainly small fishing vessels. Because they were poorly equipped, they could easily enter each other's waters by mistake after delimitation, leading to disputes. To address this issue, China and Vietnam decided through consultations to establish a Buffer Zone for Small Fishing Vessels in the areas around the two States' territorial seas (at the estuary of Beilun River). Covering an area of about 177 square kilometers, this zone would be permanent, extending southward for 10 nautical miles along the delimitation line from the first delimitation point to three nautical miles in each party's area from the delimitation line. In the Buffer Zone, if one party discovers that the other party's vessels are fishing in its waters, it can warn them and take necessary actions to make the other party leave the waters, but it must exercise restraint: no detention, no arrest, no punishments, and no use of force. Disputes should be reported to the Fishery Committee, which would coordinate their resolution.

(4) Water under Exclusive Economic Zone Management: according to the agreement, the waters north of the enclosure line of Beibu Gulf beyond the outer limits of the Common Fishery Zone and the Waters under Transitional Arrangement would be each party's exclusive economic zones. The Waters under Transitional Arrangement would become their respective exclusive economic zones in 4 years, which meant that China and Vietnam would govern their own respective areas north of 20° N in accordance with the delimitation line as defined.

IV. The Sino-Japanese and Sino-South Korean Fishery Agreements, and the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement Established New Fishery Relationships That Are Based on the Exclusive Economic Zone Regime

As discussed above, China and its maritime neighbors approved the UNCLOS and issued laws on their exclusive economic zones and continental shelves in the mid- and late 1990s.Thismeans that they now share a common legal basis – the UNCLOS – when negotiating their maritime relationships. At the same time, they share the same legal obligation to implement UNCLOS's new maritime law regime. It was only a matter of time that they would fulfill this obligation. The execution and implementation of the Sino-Japanese and Sino-South Korean Fishery Agreements and the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement are important parts of the Chinese government's policies as it handles maritime relationships with its neighbors in accordance with the UNCLOS.

1. In the Above Three Fishery Agreements, China, Japan, South Korea, and Vietnam Name the UNCLOS as a Guiding Principle for Their Fishery Relationships and Commit to Implementing the Exclusive Economic Zone Regime

The Sino-South Korean Fishery Agreement goes straight to the point in the beginning: the Chinese and South Korean governments "have reached agreement, through amicable consultations and in accordance with the relevant provisions of the December 10, 1982 UNCLOS to conserve and reasonably use marine living resources in which both parties have an interest, maintain normal operations and order at sea, and strengthen and develop mutual cooperation in the field of fishery." This agreement applies to China and South Korea's respective exclusive economic zones.

In the same unequivocal manner, the Sino-Japanese Fishery Agreement also provides that the Chinese and Japanese governments "have reached agreement, through amicable consultation, on the establishment of a new fishery order in accordance with the purposes of the December 10, 1982 UNCLOS, conserve and reasonably use marine living resources in which both parties have an interest, and maintain normal operations and order at sea." This agreement applies to China and Japan's respective exclusive economic zones.

2. The Terms of the Three Fishery Agreements Respect and Embody the UNCLOS's Provisions on Exclusive Economic Zones

The Sino-Japanese, Sino-South Korean, and Sino-Vietnamese fishery agreements affirm the commitment to implementing the exclusive economic zone regime, as well as the coastal States' sovereignty over living resources in their exclusive economic zones and their rights over and responsibility for the conservation, management, and use of marine living resources. In addition, the agreements also establish and concretely guarantee fishing rights in each other's exclusive economic zones. This fully comports with the UNCLOS's provisions on exclusive economic zones and other relevant provisions.

For example, the Sino-Japanese Fishery Agreement and Article 215 of the Sino-South Korean Fishery Agreement both state that:

(1) Each contracting party will allow the other party's citizens and fishing vessels to fish in its own exclusive economic zone on the basis of reciprocity and in accordance with the agreement and relevant domestic laws;

(2) Each party would issue fishing permits to the citizens and fishing vessels of the other contracting party and collect appropriate fees for the permits. The parties' citizens and fishing vessels shall abide by the agreement and each other's laws when they fish in each other's exclusive economic zones;

(3) Each contracting party would determine the catchable fish species, catch quota, operating area, and other operating conditions for the other party's citizens and fishing vessels in its own exclusive economic zone on an annual basis, taking into account the conditions of the resources in the zone, its own fishing capabilities, traditional fishery activities, the status of its fishing activities in the zones under the other party's jurisdiction, and other relevant factors;

(4) Each contracting party would take necessary actions to ensure that its citizens and fishing vessels comply with the agreement as well as the other party's marine living resource conservation measures and other conditions when they fish in the other contracting party's exclusive economic zone;

(5) Each contracting party would inform the other contracting party of its marine living resource conservation measures and other conditions under its own laws in a timely manner;

(6) Each contracting party may take necessary actions in its exclusive economic zone in accordance with international law in order to ensure that the other party's citizens and fishing vessels abide by its own marine living resource conservation measures and other conditions under its laws.

In addition to provisions on both parties' rights and responsibilities in using, conserving, and managing the resources in the "Common Fishery Zone," the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement also prescribes that China and Vietnam implement a fishing permit system for their own vessels that fish in the Common Fishery Zone, oversee and inspect both parties' citizens and fishing vessels that enter into their own areas of the Common Fishery Zone, and handle any violations, etc.

3. The Sino-Japanese, Sino-South Korean, and Sino-Vietnamese Fishery Relationships Have Been Handled in a Spirit of Understanding and Cooperation

The Sino-Japanese, Sino-South Korean, and Sino-Vietnamese fishery agreements have established a series of cooperative arrangements and provisions in the conservation, management, and use of marine living resources. These are enterprising and creative steps from China, Japan, South Korea, and Vietnam modeled on specific provisions of the UNCLOS as they follow and put into practice the purpose, principles, and spirit of the UNCLOS. They serve as examples and significant points of reference.

For instance, in these agreements, the parties commit to cooperating with each other with respect to fishery-related scientific research and the conservation of marine living resources. The agreements include concrete measures and arrangements, such as the Common Fishery Zone regime, as well as the joint conservation measures and quantitative management measures for the Waters under Provisional Measures. These efforts conform to the UNCLOS's recommendation of addressing all issues related to the convention in a spirit of mutual understanding and cooperation. This spirit can also be seen in the inclusion of concrete provisions on exclusive economic zones, enclosed and semi-enclosed seas, marine scientific research, marine environmental protection, etc. It should be noted that the arrangements for Waters Under Provisional Measures in the Sino-Japanese and Sino-South Korean Fishery Agreements are consistent with Article 74 of the UNCLOS, which states that "all parties concerned shall make every effort to make practical interim arrangements in the spirit of understanding and cooperation" before reaching a definitive agreement on the delimitation of exclusive economic zones. These designs show the creativity from China, Japan, and South Korea in their negotiations within the UNCLOS framework.

The Chinese government had the following comments on these three fishery agreements:

(1) The Sino-Japanese Fishery Agreement "is the first fishery agreement signed by China with a neighbor and to take effect as it transitions to the exclusive economic zone regime."It is also "a transitional fishery arrangement between China and Japan before they complete the delimitation of the waters delimitation between them in accordance with the UNCLOS."[7] The Ministry of Agriculture of China also issued a Notice on Issues in Relation to the Implementation of the Sino-Japanese Fishery Agreement to coastal provinces, autonomous regions, municipalities directly under the central government's jurisdiction, and municipalities with independent planning status. The notice emphasized that "the new Sino-Japanese Fishery Agreement is the first fishery agreement which China has executed with a neighbor after changes have occurred in the global maritime regime. It is an important event in the Sino-Japanese relationship. Whether the Agreement can take effect and be put into practice smoothly involves the establishment and development of bilateral fishery relationships between China and its neighbors and will affect the Sino-Japanese political relationship."

(2) "The Sino-South Korean Fishery Agreement is the second bilateral fishery agreement between China and a neighbor to take effect after the Sino-Japanese Fishery Agreement…[8] The signing of the Sino-South Korean Fishery Agreement is an important event and marks a new stage in the history of the Sino-South Korean fishery relationship. It is of great significance for protecting the fishery resources in the Yellow Sea and safeguarding the fishery interests of the two States. It also guarantees a normal and regulated fishery relationship before China and Korea completes the delimitation of the waters between them."[9]

(3) The signing and taking effect of the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement "marks the end of the era of complete fishing freedom by fishermen from China and Vietnam in the Beibu Gulf. From now on, fishery production in Beibu Gulf will be managed in accordance with international

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7 Speech by Qi Jingfa, Deputy Minister of the Ministry of Agriculture of the People's Republic of China, in press conference held on Mar. 23, 2000, at http://www.hgyy.org/old/hydd/zryyxd.htm, 16 November 2005. (in Chinese)

8 Speech by Qi Jingfa, Deputy Minister of the Ministry of Agriculture of the People's Republic of China, in ceremony on the day the Sino-South Korean Fishery Agreement and Sailing of Fishery Administration Patrol in the Exclusive Economic Zone took effect on 29 June 2001, at http://www.dayoo.com/content/2001-07/03/content_153772.htm, 16 November 2005. (in Chinese)

9 Policy Research Office of the Ministry of Foreign Affairs of the People's Republic of China ed., *Chinese Diplomacy*, Beijing: World Knowledge Publishing House, 2001, p. 665. (in Chinese)

conventions under the exclusive economic zone regime.

"With the execution and taking effect of the Sino-Japanese, Sino-South Korean, and Sino-Vietnamese fishery agreements, the marine fishing industry will begin their transition from fishing freedom beyond territorial seas to the exclusive economic zone regime."[10]

V. Noteworthy Features of the Sino-Japanese and Sino-South Korean Fishery Agreements and the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement

In the seas around China, there have always been a complex geopolitical environment, sovereignty disputes over islands and delimitation, traditional fishery relationships that have formed out of long-standing habits, and other complicating factors. In establishing new fishery relationships on the basis of the UNCLOS, China, Japan, South Korea, and Vietnam worked together in a neighborly and cooperative manner that respected each other's positions as equal sovereigns. They temporarily shelved their disputes, followed international law, took into account pragmatic political and economic considerations, and came up with unique ways to address the issues.

1. The Waters under Provisional Measures Appropriately Handles the Issues Surrounding Overlapping Exclusive Economic Zones

China and Japan's exclusive economic zones in the East China Sea overlap, as do China and South Korea's in the Yellow Sea. These seas have not been delimited. Against this backdrop, the Sino-Japanese and Sino-South Korean Fishery Agreements established Waters under Provisional Measures in which the parties would take joint conservation and management measures. The parties would deal with violations by their own fishing vessels in accordance with their respective domestic laws (Sino-Japanese Fishery Agreement, Art. 7, paras. 2 and 3; Sino-South Korean Fishery Agreement, Art. 7, paras. 2 and 3). Each party may apply its own domestic laws on the other party's citizens, the legislative power is jointly exercised by a Joint Fishery Committee, and law enforcement power is exercised

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10 Speech by Du Qinglin, Minister of Agriculture of China, in the Working Meeting on Changing Careers and Jobs for Coastal Fishermen (6 August 2002), *China Ocean Yearbook (2003)*, Beijing: China Ocean Press, 2003, p. 7. (in Chinese)

by flag States. China has chosen to abide by these special provisional arrangements before it completes the delimitation process for exclusive economic zones with Japan and South Korea. In these waters, the parties can exercise equal sovereignty rights.

2. Different Types of Special Water Areas Promotes the Gradual Transition from Traditional to New Forms of Fishery Relationships

Before the Sino-Japanese, Sino-South Korean, and Sino-Vietnamese fishery agreements, fishermen from China, Japan, South Korea and Vietnam had established traditional fishery relationships based on the principle of fishing freedom beyond territorial seas. These relationships were completely different from those under the exclusive economic zone regime. In order to ensure the smooth transition from traditional fishery relationships to new forms of fishery relationships, the Sino-Japanese, Sino-South Korean, and Sino-Vietnamese fishery agreements have made a series of special arrangements that are noted for their cordial spirit.

For example, China and Vietnam established the Waters under Transitional Arrangement in Beibu Gulf, which would exist for a period of four years. At the end of the transitional period, the area would become China and Vietnam's respective exclusive economic zones. Further, China and Vietnam also established a Common Fishery Zone in Beibu Gulf for a term of 12 years, which on expiration would extend for another three years. The term may continue to be extended upon expiration through negotiation, depending on the parties' intent. This practice of cooperating on fishery in the eventual exclusive economic zones and applying special fishery policies that differ from the exclusive economic zone regime is fundamentally aimed at helping fishermen from China and Vietnam transition gradually to the exclusive economic zone regime.

The Sino-South Korean Fishery Agreement established the Transitional Waters, which are located on the two sides of the Waters under Provisional Measures beyond their respective territorial seas and will exist for 4 years. Both China and South Korea agreed that, in order to phase the exclusive economic zone regime in the Transitional Waters, both parties would take appropriate action to gradually adjust and reduce their own citizens' and fishing vessels' fishery activities operating in the other party's area of the Transitional Waters. Upon expiration of the four-year period, both parties' areas in the Transitional Waters would be managed as their respective exclusive economic zones. (The Transitional Waters have been part of China and South Korea's exclusive economic zones since June

30, 2005.) As a buffer zone between the exclusive economic zones and the Waters under Provisional Measures, the Transitional Waters have since mitigated the direct impact of the new fishery management regime on Chinese and South Korean fishermen.

Moreover, the Waters under Provisional Measures defined in the Sino-Japanese and Sino-South Korean fishery agreements are relatively large. The basic purpose of these areas is not only to properly settle delimitation disputes, but also to promote the transition from traditional fishery relationships to new forms of fishery relationships.

In sum, the above-discussed special water areas and management methods differ from those in the exclusive economic zone regime because they aim, at a fundamental level, to promote the gradual transition from traditional fishery relationships to new forms of fishery relationships and mitigate the social and economic impact on China and its neighbors that come from changes to the fishery management system.

3. Common Fishery Zones: an Institutional Arrangement for the Joint Conservation, Management, and Sustainable Use of Fishery Resources

The Sino-Japanese, Sino-South Korean, and Sino-Vietnamese fishery agreements pay considerable attention to the conservation and reasonable use of fishery resources. These three agreements expressly indicate in their prefaces that one purpose of these agreements is to "conserve and reasonably use marine living resources in which they have a common interest" and set forth concrete provisions to put this purpose into practice. For instance, according to Article 7, Paragraph 2 of the Sino-Japanese Fishery Agreement and Article 7, Paragraph 2 of the Sino-South Korean Fishery Agreement, the contracting parties shall take joint conservation and quantitative management measures for marine living resources in the Waters under Provisional Measures. Article 10 of the Sino-Japanese Fishery Agreement and Article 12 of the Sino-South Korean Fishery Agreement prescribe that the contracting parties shall deepen their cooperation in the scientific research on the conservation and reasonable use of marine living resources. Article 4, Paragraph 1 of the Sino-Japanese Fishery Agreement and Article 4, Paragraph 2 of the Sino-South Korean Fishery Agreement both state that the contracting parties shall ensure that their respective citizens and fishing vessels comply with the other party's conservation measures for marine living resources and other conditions under the other party's laws as well as the agreements themselves when they fish in the other party's exclusive economic zone. The Sino-Vietnamese Beibu Gulf

Fishery Cooperation Agreement puts even more emphasis on better cooperation in the form of the joint conservation and management of fishery resources. In addition to the Agreement itself, China and Vietnam also developed the Regulations on the Conservation and Management of Fishery Resources in the Common Fishery Zone in Beibu Gulf to guide the conservation, management, and use of living resources in the Common Fishery Zone.

These three fishery agreements also established joint fishery committees to handle matters related to the conservation and reasonable use of fishery resources. The duties of these committees under the agreements cover almost all concrete matters and major issues related to the bilateral fishery relationships. Therefore, in a manner of speaking, the establishment of the Sino-Japanese, Sino-South Korean and Sino-Vietnamese bilateral fishery joint committees have standardized, institutionalized, and provided mechanisms for fishery management between China and Japan, South Korea, and Vietnam.

It is particularly worth noting that China, Japan, South Korea, and Vietnam designed Common Fishery Zones to promote the joint conservation and reasonable use of marine living resources.

China and Vietnam agreed to establish a Common Fishery Zone in their respective exclusive economic zones 30.5 nautical miles off the respective delimitation lines defined in the Beibu Gulf delimitation agreement, north of the enclosure line of Beibu Gulf and south of 20° N. They also set forth specific ways to jointly conserve and use the fishery resources in the Zone. The main features of the Common Fishery Zone in Beibu Gulf include:

(1) Both parties would cooperate on fishery issues in the Common Fishery Zone in the long term and in the spirit of reciprocity.

(2) Both parties would together develop and abide by measures for the conservation and management of fishery resources. According to the Agreement, both parties shall jointly develop measures on the conservation, management, and sustainable use of living resources in the Common Fishery Zone based on the conditions of the natural environment and the characteristics of living resources in the zone, the needs of sustainable development, environmental protection, and their effects on both parties' fishery activities. The contracting parties' own citizens and fishing vessels that fish in the zone shall adhere to the Regulations on Conservation and Management of Fishery Resources in the Common Fishery Zone in Beibu Gulf. Both parties are obligated to educate and train the fishermen fishing in the zone.

(3) A fishing permit system would be implemented, with permits issued by a flag State. Individuals and fishing vessels can only fish in the Common Fishery Zone if they have the permits for fishing in the Common Fishery Zone. China and Vietnam would implement the system for their own fishing vessels fishing in the zone. A vessel fishing in the zone must apply to the appropriate governmental authority in its State and obtain a permit before entering the Common Fishery Zone to fish.

(4) The parties would together determine the number of each party's operating vessels every year. They would do so through the Sino-Vietnamese Beibu Gulf Fishery Joint Committee on the basis of equality and reciprocity and take into account the quantity of allowable catch (determined on the basis of regular joint fishery research results), their effects on the contracting parties' fishery activities, and the needs of sustainable development.

(5) Each party would manage the waters on its side of the delimitation line in Beibu Gulf. The appropriate authority of each contracting party would oversee and inspect both parties' citizens and fishing vessels in the waters on its side in the Common Fishery Zone and handle any violations. Where necessary, these authorities could cooperate with each other in joint supervision and inspection activities. This means the management system of the Common Fishery Zone would operate under the exclusive economic zone regime, *i.e.,* by the jurisdiction of coastal States.

The above-described Common Fishery Zone system forms the core of the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement. China and Vietnam established it through consultations, by using the UNCLOS as the legal basis, and by taking into account the natural geographical characteristics and peculiarity of fishery resources of Beibu Gulf and the status of both parties' fishing industries and other conditions at the time.

The Waters under Provisional Measures between China and Japan and between China and South Korea can be considered pre-delimitation Common Fishery Zones. The Sino-Japanese Fishery Agreement and the Sino-South Korean Fishery Agreement prescribe that the contracting parties shall take joint conservation and quantity-control measures in the Waters Under Provisional Measures in accordance with decisions from the Joint Fishery Committees (the Sino-Japanese and Sino-South Korean committees) to protect marine living resources from the harm that may result from overdevelopment and to conserve and reasonably use these resources. Each contracting party would manage its own citizens and fishing

vessels and not those of the other party. As the Waters under Provisional Measures would be pre-delimitation arrangements, its management would be a little different from that of the Common Fishery Zone. For example, China, Japan, and South Korea would not need to issue special fishing permits to fishing vessels operating in these waters. So far, there has been no provision on the number of each party's fishing vessels operating in these waters; nor differentiations in the management or treatment of one party's own fishermen and vessels and those of the other party, *i.e.,* they would be under the jurisdiction of the flag States.

The Common Fishery Zone system in Beibu Gulf between China and Vietnam is a post-delimitation cooperative arrangement and resolves issues in the conservation, management, and sustainable use of fishery resources in an appropriate manner. This is the first Common Fishery Zone regime of its kind in East Asia. The pre-delimitation Waters under Provisional Measures between China and Japan and between China and South Korea would be the grounds for joint conservation and quantity-control measures. The establishment of these waters also tackles issues surrounding the conservation, management, and sustainable use of fishery resources in an appropriate manner. These two types of solutions can serve as examples in others' efforts to address similar issues.

4. Special Arrangements to Respect the Interests of a Third State

China, Japan, and South Korea's claims of exclusive economic zones overlap in the northern part of the East China Sea. These three States have not delimited these waters, and this issue was not settled by the Sino-Japanese and Sino-South Korean fishery agreements. To prevent the fishery agreements from affecting the interests of a third party, China proposed the maintenance of the status quoin these waters when it negotiated the fishery agreements with Japan and South Korea.

Therefore, the Sino-Japanese Fishery Agreement included the establishment of the Intermediate Waters in the northern part of the East China Sea (*i.e.,* north of the Waters under Provisional Measures), north of 30° 40' N and between 124° 45' E and 127° 30' E. Here, fishing operations coming from one side do not require a permit from the other party.[11]

The Sino-South Korean Fishery Agreement established a zone in which the status quo of existing fishery activities would be maintained. This zone is the

11 China and Japan Reach Agreements as New Fishery Agreement Takes Effect, *People's Daily*, 28 February 2000, at http://www.cfm.com.cn/20010804/ca2623.htm, 22 November 2005. (in Chinese)

south of the Waters under Provisional Measures and the Transitional Waters. Here, existing fishery activities would continue as before, and one party's domestic laws and regulations on fishery would not apply to the other party's citizens or fishing vessels.

North and South Korea had differences on the delimitation line in the areas on the border between them in the Yellow Sea. The Sino-South Korean Fishery Agreement avoided the issue by establishing the zone where the status quo of existing fishery activities would be maintained north of the latitude of the northern limit of the Waters under Provisional Measures. Here, existing fishery activities would continue as before, and one party's domestic laws and regulations on fishery would not apply to the other party's citizens or fishing vessels.

5. Disputes Over Island Sovereignty Are Shelved

China and Japan have a dispute on the sovereignty over the Diaoyu Islands, and the dispute could not have been settled through the Sino-Japanese Fishery Agreement. To avoid derailing the conclusion and implementation of the Sino-Japanese Fishery Agreement or affecting either of their positions on the islands, China and Japan sidestepped the islands and the waters around them in drawing the area of the Waters under Provisional Measures. The fishery agreement provided for the continuance of existing fishery relationships in the southern part of the East China Sea (south of 27° N and west of 125°30' E).

6. The Fishery Agreements Would Not Affect the Parties' Positions on Delimitation

The Sino-Japanese and Sino-South Korean Fishery Agreements were negotiated and executed before the delimitation of exclusive economic zones and continental shelves between China and Japan and between China and South Korea. These fishery agreements state explicitly that nothing in these agreements would affect the parties' positions on delimitation. For example, when signing the agreement, representatives from the Chinese and Japanese governments made the following note:"Representatives from both governments agree that the establishment of the 'Waters under Provisional Measures' under Article 7, Paragraph 1shall not be considered prejudicial to respective positions of the two States on the exclusive economic zones or continental shelves."Further, both governments also stated that they "would continue candid negotiations on issues surrounding the exclusive economic zones and continental shelves between the two States and try to reach an agreement that would be acceptable to both parties." Article 14 of the Sino-South Korean Fishery Agreement also states that "nothing in this Agreement shall

be deemed prejudicial to the respective position of either contracting party with respect to issues on maritime law."

In addition, Article 2 of the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement states that "both contracting parties will cooperate on fishery issues in the agreed waters on the basis of mutual respect of their sovereignty, sovereignty rights, and jurisdiction. Such fishery cooperation does not affect their sovereignty over their territorial seas or other interests thatthey enjoy in their own exclusive economic zones."

VI. The Future of Fishery Relationships between China and Its Maritime Neighbors

The execution and implementation of the Sino-Japanese and Sino-South Korean Fishery Agreements and Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement marked another step in the convergence between China's maritime fishery management system and international systems, as well as a new stage in the fishery relationships between China and its maritime neighbors. Managing these fishery relationships in a way that constantly strengthens, improves, and develops them on the basis of the exclusive economic zone regime is a major task for China in the future.

1. Fishery production in Beibu Gulf has begun to be managed in accordance with international conventions and under the exclusive economic zone regime, and the times when fishermen from China and Vietnam enjoyed complete fishing freedom in Beibu Gulf has ended. From now on, China and Vietnam will conserve and use the fishery resources of Beibu Gulf in a reasonable way and in compliance with the UNCLOS and the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement.

2. Fishery relationships in the East China Sea and the Yellow Sea have largely come to be managed under the exclusive economic zone regime, but there is still a need for further negotiations and cooperation between China and its neighbors.

The fishery relationships between China and Japan and between China and South Korea have also begun to be managed in accordance with laws and treaties. But in essence, the Sino-Japanese and Sino-South Korean Fishery Agreements are provisional arrangements for the transition to the exclusive economic zone regime. Therefore, China still needs to continue to explore new fishery relationships with Japan and South Korea.

a. Issues after the Expiration of the Sino-Japanese and Sino-South Korean Fishery Agreements

Accordance with Article 14 of the Sino-Japanese Fishery Agreement, the agreement is effective for 5 years. Moreover, "either contracting party may terminate this Agreement at any time by notifying the other contracting party in writing 6 months prior to the expiration of the first 5-year term or afterward." Article 16 of the Sino-South Korean Fishery Agreement states that it is effective for 5 years, and "either contracting party may terminate this Agreement at any time by notifying the other contracting party in writing 1 year prior to the expiration of the first 5-year term or afterward." The Sino-Japanese Fishery Agreement and the Sino-South Korean Fishery Agreement took effect respectively on June 1, 2000 and June 30, 2001. Both have a 5-year term of validity, which means that China, Japan, and South Korea need to plan for expiration before June 1, 2006 and June 30, 2007. China will probably need to address the following issues with Japan and South Korea: can the parties begin the process of delimiting exclusive economic zones in the East China Sea and the Yellow Sea and negotiate and sign the post-delimitation fishery agreements? If it remains difficult for the parties to reach agreements on the exclusive economic zones, can existing agreements continue to be renewed, or should new arrangements be made? How do they strengthen their efforts on the conservation and management of marine living resources?

The Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement can be a point of reference for China, Japan, and South Korea in this regard. In their future discussions on the delimitation of exclusive economic zones and continental shelves, fishery issues will be an important factor. The Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement took effect at the same time as the Sino-Vietnamese Agreement on the Delimitation of the Beibu Gulf Territorial Seas, Exclusive Economic Zones, and Continental Shelves. The enactment of these agreements set an example for fishery cooperation after the resolution of issues on delimitation.

b. Issues on the Areas at the Borders of China, Japan, and South Korea in the Northern Part of the East China Sea

With respect to these waters, the three States need to discuss delimitation issues as soon as possible. In addition, they also need to approach major issues like the Overlapping Waters under Agreement and the so-called Gray Waters with care during the implementation of fishery agreements.

The Overlapping Waters Under Agreement" refer to certain waters under

a fishery agreement signed by Japan and South Korea on November 28, 1998. Theyoverlappartially with waters under the Sino-Japanese Fishery Agreement in the northern part of the East China Sea. The Chinese government represented its position to Japan and South Korea: the Japanese-South Korean Fishery Agreement "infringed China's sovereignty over the exclusive economic zone in the waters on the borders between China, Japan, and South Korea in the East China Sea" and that "China's interests in the exclusive economic zones and fishery activities in the area [were] not subject to the agreement." China's Foreign Ministry spokesperson further stated that the Chinese government had always asserted that "issues surrounding maritime delimitation shall be resolved through negotiations among the three parties, and it is against international law to draw arbitrary delimitation lines and exclude any one of the parties."[12] Because the waters under the Japanese-South Korean Fishery Agreement and the Sino-Japanese Fishery Agreement overlap partially in the northern part of the East China Sea, disputes may occur if China, Japan, and South Korea implement their bilateral fishery agreements, which is an issue that should be approached carefully.

Some examples of the Gray Waters are certain areas in the East China Sea north of the Waters under Provisional Measures between China and Japan and south of the Waters under Provisional Measures between China and South Korea. These areas are defined by the agreements as the waters in which existing fishery activities may continue, which is a status similar to fishing freedom on the high seas, a zone under no sovereign jurisdiction. Fishermen from China, Japan and South Korea may still fish in these areas without regulation, and disputes are inevitable.

c. Issues Related to Multilateral Fishery Cooperation in the East China Sea and the Yellow Sea

Geographically, the East China Sea and the Yellow Sea are connected, so issues on the conservation, management, and use of resources in these two seas should be considered together. In particular, most fish species in these waters are straddling fish stocks or shared fish stocks, which migrate seasonally between the coastal waters of China, Japan and South Korea. Therefore, joint conservation and management efforts are necessary.

At present, China, Japan, and South Korea deal with the fishery relationships among themselves through bilateral agreements (Sino-Japanese, Sino-South Korean, and Japanese-South Korean fishery agreements), which is far from a

12 *People's Daily*, 23 January 1999, p. 2. (in Chinese)

satisfactory response to the needs of reality. China, Japan, South Korea, and even North Korea should be proactive in cooperating on fishery issues in the East China Sea and the Yellow Sea and consider establishing mechanisms for multilateral cooperation. This would address the demands of the UNCLOS's provisions on enclosed and semi-enclosed seas, the exclusive economic zone regime, the Code of Responsible Fishery developed under the auspices of the World Food and Agriculture Organization (FAO), the actual distribution and use of fishery resources in the East China Sea and the Yellow Sea, and the objective need to conserve and manage resources. Before the issues surrounding the delimitation of exclusive economic zones are resolved, China must consider a wide range of provisional or transitional cooperation methods with its neighbors. Even if the issues related to the Overlapping Waters under Agreement, Gray Waters, and the delimitation of exclusive economic zones among China, Japan, and South Korea are resolved, trilateral and multilateral fishery cooperation must occur in the East China Sea and the Yellow Sea, especially with regards to the conservation and management of fishery resources. It is not enough to depend on bilateral cooperation agreements.

China, Japan, and South Korea have begun to pay attention to mutual cooperation in fishery. Their leaders specifically promised in the Joint Declaration on Promoting Trilateral Cooperation between China, South Korea, and Japan (signed in Bali, Indonesia on October 7, 2003) that "the three States will promote the sustainable use and conservation of fishery resources through effective fishery management and bilateral or trilateral cooperation."To implement the promise, high-ranking fishery officials from China, South Korea, and Japan held the first high-level meeting on fishery among them on October 19, 2004 on Jeju Island, South Korea.

Additionally, in the northern parts of the Yellow Sea, China has not signed any fishery agreements with North Korea based on the exclusive economic zone regime. The establishment of a new fishery relationship between them is still a task for the future. The fishing rights of Taiwanese fishermen are also an issue in the East China Sea. China Taiwan has not delimitated its exclusive economic zone against Okinawa with Japan. Japan's unilateral decision to manage the area on the basis of the exclusive economic zone regime has seriously infringed the rights of Chinese fishermen, including Taiwanese fishermen. The governments on both sides of the Taiwan Strait should find a solution to the issue under the framework of the One China principle.

3. Fishery Relationships in the South China Sea Remain in a State of Unregulated Competition. Fishermen from China, Vietnam, the Philippines, Malaysia, Brunei, Indonesia, and other coastal States in the South China Sea fish largely follow the traditional custom of fishing freedom beyond territorial seas. Even fishermen from States that do not border the South China Sea, for example Japan, enjoy fishing freedom there. Since the 1970s and especially after sovereignty disputes erupted over the Nansha Islands, fishery relationships in the South China Sea have become more complicated. The South China Sea is the traditional fishing ground of Chinese fishermen and is mainly within China's traditional marine boundaries. These boundaries find their legal basis on China's sovereignty over the Nansha Islands and in tradition. In recent years, Vietnam, the Philippines, and Malaysia have poured efforts into developing fishery production in the South China Sea, a main objective of which is to assert their claims to their so-called "island sovereignty." Vietnam, the Philippines, and Malaysia declared their 200-nautical-mile exclusive economic zones, but they have not managed the zones strictly under the exclusive economic zone regime. At present, there are frequent fishery disputes in the South China Sea. It is worth noting that Chinese fishermen and fishing vessels are frequently pursued, driven away, bombarded, and vessels have even been destroyed and people killed. These disputes are not really about managing the 200-nautical-mile exclusive economic zones; rather, some are taking the opportunity to assert their so-called sovereignty claims over the islands.

Fishery production the South China Sea is basically in a state of undirected competition and development. Issues of environmental protection and the conservation and management of fishery resources in the South China Sea are becoming increasingly apparent. In the long run, it is only a matter of time when new fishery relationships based on the UNCLOS will materialize in the South China Sea, and multilateral fishery cooperation there will be on the agenda of States bordering the South China Sea sooner or later. The highest priority now is for the States bordering the South China Sea to work out provisional methods for fishery cooperation, the reasonable use and conservation of fishery resources, the reduction of fishery disputes, etc. to promote sustainable development and maintain peace and stability before the questions of sovereignty over islands and delimitation are resolved.

VII. Some Comments

The execution, taking effect, and implementation of the Sino-Japanese and Sino-South Korean Fishery Agreements and the Sino-Vietnamese Beibu Gulf Cooperation Agreement are major steps by the Chinese government as it begins to observe and put the UNCLOS into practice and comply with the requirements of the new global maritime law regime. They are milestone events in the history of fishery relationships between China and its maritime neighbors.

1. These agreements mark the formation of new fishery relationships that use the exclusive economic zone regime as their legal basis. From this point forward, fishery relationships between China and its maritime neighbors are no longer controlled by their overall political and economic relationships, but modern international maritime law, and in particular the exclusive economic zone regime under the UNCLOS. This also means that the fishery relationships between China and its maritime neighbors, including fishery cooperation relationships, have enter into an era of the rule of law, which is especially important for the stable development of the fishery relationships.

2. These agreements also signal the emergence of new fishery relationships that have sustainable development as their goal. They establish concrete provisions and arrangements on the joint conservation, management, and reasonable use of fishery resources. Since these fishery agreements have gone into effect, China has tightened restrictions to various degrees on the number of operating vessels, catch quota, catchable fish species, operating time, operating area and other operating conditions and adjusted them in accordance with the situation of fishery resources in the areas covered by the agreements. It can be said that the era of fishery with unrestricted and blind competition, over-fishing, and the absence of joint conservation and management measures has seen the beginning of the end, and the new fishery production model with sustainable development as a goal has taken shape. This is a milestone event not only for the maritime management between China and its maritime neighbors, but also for the entire East Asia region.

3. The geopolitical effects from these new fishery relationships cannot be ignored or underestimated. Without a doubt, these fishery agreements have a direct and positive impact on the protection of national fishery interests, the standardization of fishery management, the conservation of fishery resources, fishery cooperation, and stability in international fishery relationships. They even play an important and positive role in stabilizing international diplomatic relationships and promote regional peace and stability, steering maritime relationships from conflict to cooperation and promoting peace and stability in East

Asia and even the entire Asia-Pacific region.

4. These agreements also show that China is a responsible State that abides strictly by international law.

Although these agreements represent major steps in the Chinese government's efforts to observe and implement the UNCLOS, China suffers from certain is advantages in its marine geographical conditions. The new international maritime law regime under the UNCLOS has had considerable negative influences on China's marine fishery industry.

With the three agreements, China's marine fishery industry began to transition from operating with fishing freedom beyond territorial seas to the exclusive economic zone regime and has faced a new set of issues and conditions. In particular, the grounds available to China's marine fishing vessels shrank considerably, which included the loss of important traditional fishing grounds and high-quality and highly-productive areas. As a result, a large number of fishermen had to consider switching businesses and jobs. This had a severe impact on China's marine fishery industry, economic development in coastal areas, and even social stability. According to China's official preliminary statistics of these effects, after these three fishery agreements took effect, China has had to withdraw over 30,000 vessels from its traditional fishing grounds, or over 11% of its marine motor fishing vessels. There was a loss of 1.6 million tons in fishery production every year, accounting for over 10% of China's total marine catch. Direct economic loss exceeded RMB 8 billion. More than 300,000 people in the fishery labor force faced the prospect of having to change businesses and jobs, and the economic and social lives of nearly one million people engaged in fishery production were affected to different degrees. Industries related to marine fishery, such as the distribution, processing, refrigeration, and transportation of marine products, fishing vessel construction, net manufacturing, and port services also felt the consequences. Unemployment in fishing areas increased. The second noteworthy effect came as a large number of fishing vessels with-drew from China's traditional fishing grounds in the open seas and offshore fishery resources are increasingly squeezed. This has had a certain impact on the current system for protecting offshore fishery resources.[13] For instance, after the Sino-Vietnamese Beibu Gulf

13 Speech by Du Qinglin, Minister of Agriculture of China, in the Working Meeting on Changes in Careers and Jobs for Coastal Fishermen (6 August 2002), *China Ocean Yearbook (2003)*, Beijing: China Ocean Press, 2003, pp. 7~8. (in Chinese)

Fishery Cooperation Agreement took effect, nearly 10,000 fishing vessels and their personnel in Guangdong, Guangxi, and Hainan needed to change businesses and jobs.[14] After the Sino-South Korean Fishery Agreement went into effect, China withdrew nearly 3,500 fishing ships from the South Korean exclusive economic zone and the Transitional Waters under the agreement, resulting in the reduction of 300,000–400,000 tons in annual output and RMB 1.8–2 billion in production value.[15]

The Chinese government has made the work of implementing these three fishery agreements a priority. In its publicity and education efforts for Chinese fishermen, it explained the agreements in the following terms: "China is a great State that keeps its commitments; the implementation of the fishery agreements between China and its neighbors is a matter of national reputation and foreign relations as a whole. China's main tasks at the present stage of exclusive economic zone management are to implement these three fishery agreements, manage fishing vessels, guarantee normal fishery production and operations, protect fishery resources, and safeguard national maritime interests…[16] In the three years starting from 2002, the Central Government will arrange for RMB 270 million every year to fund career and job changes, which will mainly be subsidies to those affected by the reduced number of fishing vessels and need to change careers. Another RMB 30 million will be allocated for exclusive economic zone law enforcement. In order to guarantee smooth career and job changes for fishermen and the normal operations of law enforcement and fishery administration in the exclusive economic zone, the Central Government will offer more financial support as appropriate and extend the period of financial support."[17]

It is evident that the Chinese government is aware of its huge economic losses. However, it still complies with the trend of modern international maritime law and negotiated and signed new fishery agreements on the basis of the UNCLOS.

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14 Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement, *Guangxi Daily*, 1 July 2004, at http://www.gxnews.com.cn/news/20040701/gxzb/163536.htm, 22 November 2005. (in Chinese)

15 *China Maritime Daily*, 6 July 2001, p. A1. (in Chinese)

16 Speech by Du Qinglin, Minister of Agriculture of China, in the Working Meeting on Changes in Careers and Jobs for Coastal Fishermen (6 August 2002), *China Ocean Yearbook (2003)*, Beijing: China Ocean Press, 2003, p. 10 (in Chinese).

17 Speech by Du Qinglin, Minister of Agriculture of China, in the Working Meeting on Changes in Careers and Jobs for Coastal Fishermen (6 August 2002), *China Ocean Yearbook (2003)*, Beijing: China Ocean Press, 2003, p. 8. (in Chinese)

It has also implemented the new fishery agreements with a serious, diligent, and responsible attitude. Any intelligent person who is impartial, objective, and fair can see from these actions that the Chinese government treats international law, especially the UNCLOS, with a similar attitude and that China is an important player in the international arena that advocates neighborliness, peace, cooperation, and responsibility. These agreements refute the theory that China is a threat, which has been suggested by some States and politicians.

As is well-known, besides fishery issues, there are a lot of territorial and sovereignty disputes over islands and the delimitation of sea areas between China and its maritime neighbors. With respect to these disputes, the Chinese government has made the following statements: "China supports a resolution of the issues on overlapping claims for exclusive economic zones or continental shelves between States with adjacent or opposite coasts in accordance with recognized international law and the UNCLOS and through peaceful negotiations;"[18] "the Chinese government is focused on the overall situation based on peace and development, and supports resolving problems through amicable negotiations. If problems cannot be resolved for the time being, differences can be shelved in favor of actions to strengthen cooperation and joint development."[19] In view of the Chinese government's handling of the Sino-Japanese, Sino-South Korean, and Sino-Vietnamese fishery relationships, the Chinese government has honored its commitment. It can be reasonably expected that current disputes over island sovereignty and sea delimitation can be resolved in an appropriate manner through peaceful negotiations and in accordance with recognized international law and modern maritime law, including the fundamental principles and legal regimes under the UNCLOS. These issues will not become negative factors that undermine peace and stability in the Asia-Pacific Region.

5. China's actions in establishing new fishery relationships on the basis of the UNCLOS with its neighbors provide a good example for the rest of the world in their handling of similar issues.

The Sino-Japanese and Sino-South Korean Fishery Agreements are not only arrangements that enable Sino-Japanese and Sino-South Korean fishery relationships to transition from traditional relationships to the UNCLOS exclusive

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18 Wu Shicun ed., *Documents on Issues in the South China Sea*, Haikou: Hainan Publishing House, 2001, p. 182. (in Chinese)

19 *The Development of China's Marine Programs* (white paper), Government of the People's Republic of China, 28 May 1998.

economic zone regime, but are also provisional arrangements before the parties can finish delimiting exclusive economic zones in their opposite sea areas. These arrangements established the goals, principles, methods, and special measures in implementing the exclusive economic zone regime in the fishery area, but they do not have any impact on national positions on the delimitation of exclusive economic zones and continental shelves. In this manner, the Sino-Japanese and Sino-South Korean Fishery Agreements can be seen as examples for addressing their fishery relationships and cooperating on fishery issues before resolving the delimitation problem.

The Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement, a comprehensive institutional arrangement to implement the exclusive economic zone regime and develop along-term, stable fishery cooperation relationship, went into effect at the same time when China and Vietnam delimited their territorial seas, exclusive economic zones, and continental shelves in Beibu Gulf. Therefore, the Sino-Vietnamese Beibu Gulf Fishery Cooperation Agreement is an example of fishery cooperation that took place after sea delimitation.

These three fishery agreements detail a wide range of appropriate arrangements to integrate traditional fishery activities with the modern maritime law regime; transition traditional fishery relationships to new fishery relationships and reduce the subsequent impact on the economy and society; address fishery relationships before and after resolving delimitation disputes; handle fishery relationships with neighbors in a cooperative, practical, and amicable manner. These agreements are important examples for Asia and even other regions in the world.

In the process of China's negotiations, signing, and implementation of the agreements, its political intentions and decisions to act as a good neighbor, shelve differences, respect the sovereignty of others, and pursue cooperation played a notable role. Throughout the process, it approached fishery relationships in a spirit of understanding and cooperation. This is an even more significant point of reference for other States and regions in the world when dealing with similar issues.

6. The Sino-Japanese and Sino-South Korean Fishery Agreements and the Sino-Vietnamese Beibu Gulf Cooperation Agreement are important steps for China as it begins to put the UNCLOS into practice in its relationships with its neighbors and are very important for the development of international maritime law.

When China negotiated and executed the fishery agreements with its neighbors, it fully complied with the principles and provisions of the UNCLOS

in the following areas: the special arrangements on sea delimitation and fishery relationships; the transition from traditional fishery relationships to the exclusive economic zone regime; the joint conservation, management, and reasonable use of marine living (fishery) resources; the Common Fishery Zone system; the handling of third-party interests; allowing mutual access into each other's fishing grounds; and the coordination and balancing of rights and responsibilities with respect to other neighboring coastal States near their exclusive economic zones. These agreements also have many creative innovations that exert a significant positive influence in the development of international maritime law.

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Research on Regional Cooperation for Fishery Resources Management in the East China Sea

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Abstract: Over the years, the East China Sea has been a traditional marine fishing ground for China, Japan, and Republic of Korea. Due to the long-term overfishing, the main commercial fishes in this area suffer severe recessions and need an urgent and efficient conservation management. Most of the commercial fishes in the East China Sea migrate through inshore waters of China, Japan, and Republic of Korea, which highlights the joint efforts of three States in the conservation and management of fishery resources, and conforms to what the United Nations Convention on the Law of the Sea (UNCLOS) has regulated. China, Japan, and Republic of Korea have been in close cooperative relationships and have laid a good foundation for the co-management of fishery resources in the East China Sea. Currently, there are some challenges in facilitating the regional fishery management cooperation in the East China Sea. The paper will explore ways to facilitate both short-term and long-term regional cooperation. Short-term cooperation may take the form of fishing efforts control, while long-term cooperation may mainly involve the implementation of Total Allowable Catch (TAC) system.

Key Words: Fishery resources; Co-management; East China Sea

According to the division of fisheries areas in China, the East China Sea is connected to the west continent of China, the link line between Lanshantou of Jiangsu Province and Jeju of Republic of Korea (hereinafter "Korea") serving as

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the northwest boundary, with 9.0×10^4 km^2 waters in the southern Yellow Sea included; the link line (through Goto-retto) between Jeju and southern Nagasaki serves as the northeast boundary; with Kyushu island and Ryukyu Islands in-between, it is adjacent to Taiwan Island and the Pacific Ocean; the link line between Dongshan Island of Fujian province and Maobitou of China Taiwan serves as the southern boundary. The East China Sea is the semi-enclosed sea with an area of about 8.6×10^5 km^2.[1]

There are rich fishery resources in the East China Sea, with hairtail, horse mackerel, small yellow croaker, scomberomorus niphonius, acropoma japonicum, taius tumifrons, todarodes pacificus, silver pomfret, dovetail pomfret, decapterus maruadsi, anchovy, priacanthus and apogon being the main commercial fishes, and shrimp, crab and cephalopod in abundance.[2] The marine habitats surveys conducted from 1997 to 2001 in China's Exclusive Economic Zones (EEZs) and continental shelf give an estimate of biomass of main commercial fishes in the East China Sea (see Table 1). Most fishes in the East China Sea are shared straddling stocks migrating seasonally among three countries. China, Japan and Korea have had a long history of fishing in the East China Sea, a traditional fishing ground for these three States. Due to the long-term overfishing, most commercial fishes in the East China Sea are suffering severe recessions.

With the global fishery resources recessions in the late 1960s, much attention has been given to the conservation and management of fishery resources. The 1982 UN Convention on the Law of the Sea (UNCLOS) has brought about profound changes to marine fisheries management system. UNCLOS regulates that States enjoy both rights to exploit marine fishery resources and responsibilities to conserve and manage these resources. Different States have taken various measures to enhance the conservation and management of fishery resources, with cooperation among countries as one of the most efficient ways and promoted as one of the trends for international fishery management. International fishery management cooperation is mainly facilitated by the establishment of sub-regional, regional or global cooperation mechanism. Therefore, it is of practical significance to explore

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1 Editing Committee of Survey on Fishery Resources and Division of Fishing Area in China, *Marine Fishery Resources in China*, Hangzhou: Zhejiang Science and Technology Press, 1999, pp. 23~130. (in Chinese)

2 Compiling Committee for Specialized Comprehensive Report, *Specialized Comprehensive Report on Survey of EEZs and Continental Shelf of China*, Beijing: China Ocean Press, 2002, pp. 309~315. (in Chinese)

the mechanism of cooperation among China, Japan, and Korea in conservation and management of fishery resources in the East China Sea.

Table 1 Biomass of Main Commercial Fishes in the East China Sea Estimated via Acoustics

Unit: Ton

Species	Spring	Summer	Autumn	Winter
Horse mackerel	236,334.1	134,397.2	315,545.2	370,371.3
Hairtail	231,008.5	408,845.4	965,253.9	423,909.6
Small yellow croaker	106,377.4	105,647.3	218,018.1	61,199.2
Scomberomorus niphonius	205,295.1	2,806.3	12,780.6	26,438.4
Todarodes pacificus	208,362.1	143,619.2	595,916.7	136,520.4
Squid	1,124,712.6	220,336.9	395,652.4	65,192.4
Silver pomfret	105,777.4	105,454.5	400,108.1	18,703.4
Dovetail pomfret	38,488.0	173.5	204,032.0	5,900.3
Anchovy	132,003.2	5,815.7	634.9	91,827.6
Decapterus maruadsi	16,298.1	6,223.2	82,945.7	22.3
Acropoma japonicum	141,076.5	156,191.9	224,230.7	176,096.2
Taius tumifrons	92,851.0	24,508.6	30,713.0	73,049.9
Priacanthus	44,135.3	26,084.5	109,229.9	14,944.2
Apogon nigripes	40,633.4	1,939.0	435,614.5	75,741.9
Champsodon	29,468.0	8,312.2	72,995.3	46,678.0

Note: Survey sea area is 437,204 km^2. Data are sourced from Comprehensive Specialized Survey Report for Exclusive Economic Zone and Continental Shelf, China Ocean Press, 2002.

I. Current Situation for Fishery Resources Exploitation by China, Japan and Korea in the East China Sea

The East China Sea has long been the traditional fishing ground for China, Japan, and Korea, and fishing operations in this area are mainly completed in manners of trawling, seining, gill netting, angler stow net fishing or hooking, with trawl, seine and gill net as main fishing gears. As indicated in *China Fisheries*

Statistical Yearbook, China's fishing catches exceeded 1.00×10^6 t in the East China Sea from 1966 to 1967 and since 1971, with slight declines in-between. There is a steady growth in fishing catches since 1980s, with 1990s witnessing the rapid growth and record catches of 6.18×10^6 t in 1999. Japan's fishing catches in the East China Sea reached its peak in the 1960s, with an average annual catches of 3.28×10^5 t; the 1970s witnessed the declines; the 1980s witnessed further declines, with an average annual catches of only 1.43×10^5 t; since the 1990s, Japan has transferred its marine fishery policy from exploitation-oriented to conservation-oriented, with trawling prohibited in the East China Sea and Yellow Sea.[3] Korea's fishing grounds in the East China Sea were mainly distributed in the west of Jeju and the west coast before the 1970s; since then Korean's fishing grounds have gradually extended westward and southwestward to the open seas of Zhoushan and Lvsi of China, with catches of 5.77×10^5 t in the East China Sea in 1975; there has been a steady catches growth since the 1980s in the East China Sea, with a record of 7.03×10^5 t in 1994; however, the year of 1995 witnessed a decline to 5.21×10^5 t; since 1995, catches have been hovering around 4.50×10^5 t.[4]

Figure 1 describes the catches changes in China, Japan and Korea in the East China Sea from1960 to 1999. As indicated in Figure 1, the catches of China have been far more than that of Japan and Korea for a long time, making China a leading role in exploiting fishery resources in the East China Sea, which means that China should take up a main responsibility in the conservation and management of fishery resources in this area.

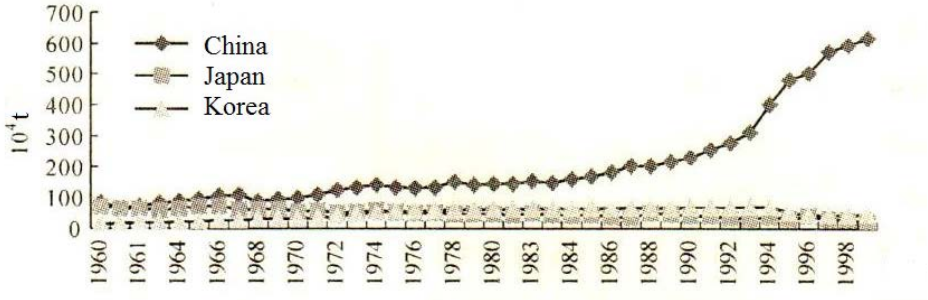

Fig. 1 Catches changes in China, Japan and Korea in the East China Sea from 1960 to 1999

3 Ling Lanying and Yu Lianfu, Japan's Exploitation of Fishery resources in East China Sea and Yellow Sea, *Marine Fisheries*, No. 1, 2002. (in Chinese)

4 Ministry of Maritime Affairs & Fisheries of Korea, Catches by Type Fishing Means and Value of Fish Catches by Type of Fishing area [EB/OL], at http://www.momaf.go.kr/momaf_eng/fisheries, 29 December 2002.

II. The Significance of Regional Cooperation for Fishery Resources Management in East China Sea

Joint exploitation and cooperation in the management of natural resources in the disputed waters are the general practice for the international community. Although the sovereignty over islands and jurisdiction over waters remain unsolved, States should cooperate in resources exploitation and management.[5] As a general practice, the cooperative exploitation takes two forms. Firstly, with islands sovereignty settled, States agree on the cooperative exploitation of resources. For example, as for Svalbard, it is decided that Norway has the sovereignty over Svalbard, while Norway, Sweden, Denmark, the former Soviet Union, the United Kingdom and the United States enjoy the privilege of exploiting natural resources at the Svalbard. Secondly, with the sovereignty dispute set aside, joint resources development is encouraged. For example, Iran and Sharjah Emirates (now merged into the United Arab Emirates) are involved in the joint development of Abu Musa Island whose sovereignty remains unsolved.[6]

Since the 1960s, due to the global fishery resources recessions as well as the expanded jurisdiction over marine waters and marine fisheries, the international community has attached greater importance to the sustainable development and exploitation of fishery resources. A number of States have been involved in reasonable exploitation, conservation and management of fishery resources jointly by signing agreements for regional cooperation.[7] The cooperation is facilitated by the establishment of sub-regional, regional and global cooperation mechanism, which has been the major development trend for international fishery management. Up till now, sub-regional, regional and international fishery management organizations have been set up for different oceans and marine waters. These organizations are either non-governmental or inter-governmental, either bilateral or multi-lateral.

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5 Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwing. *Sharing the Resources of the South China Sea*, Netherlands: Kluwer Law International, 1997, pp. 149~187.

6 Cai Penghong, *A Comparative Study on Management Mode for Co-exploitation of Disputed Waters*, Shanghai: Shanghai Social Science Press, 1998, pp. 63~84. (in Chinese)

7 Huang Shuolin, The Impact of EEZ System on Marine Fisheries in China, *Academic Journal for Shanghai Fisheries University*, No. 3, 1996 (in Chinese); Le Meilong, Impact of International Marine Fisheries Management Trend on Chinese Fisheries, *Research on Chinese Fisheries Economics*, No. 3, 1998. (in Chinese)

Due to the strong fishing capacities, fishing catches exceed fishes' regenerative capacities, leading to severe fishery resources recessions. It is generally agreed that, compared to the moderate-scale exploitation in the 1950s, the East China Sea is now experiencing over-exploitation, which has led to various disasters, including miniaturization of fish size, younger-age trend of fish catches, precocious puberty of fishes, decreasing ratio of traditional commercial fishes, juvenile fishes and fishes of low quality and trash fishes as the main fishing targets, decreased Catch Per Unit Effort (CPUE), the declined average trophic level of the catches, etc. Taking the hairtail and small yellow croaker, two main commercial fish species in the East China Sea, as an example, their body length at sexual maturity and the average body length of the catches have been constantly declining since the 1960s and 1970s. Table 2 and 3 give the illustration for biological changes of fishes at different times. It is urgent that efficient measures for conservation and management should be adopted to decline the exploitation intensity in the East China Sea. As the major players at the East China Sea, China, Japan, and Korea should assume responsibilities for the conservation and management of fishery resources in this area.

As semi-enclosed waters, the East China Sea has few resources exchanges with the outside area, and the environment and biological resources thereof are featured with independence and closeness, which means that the abundance of resources entirely depends on the primary productivity in the Sea, and the resources cannot be replenished through exchanges with the outside area.[8] Therefore, the conditions of fishery resources in the East China Sea totally rely on the efforts devoted to the fishery development and conservation by the surrounding States and regions. As most the fishes in the East China Sea migrate through the coastal waters of China, Japan and Korea, it is necessary for these three States to make joint efforts in the conservation and management of the fishery resources.

As for fish stocks occurring within the EEZs of two or more coastal States, Article 63(1) of UNCLOS regulates that "these States shall seek, either directly or through appropriate sub-regional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part." As for marine

8 Editing Committee of Survey on Fishery resources and Division of Fishing Area in China, *Marine Fishery resources in China*, Hangzhou: Zhejiang Science and Technology Press, 1999, pp. 23~130. (in Chinese)

resources in sovereign disputed waters, Articles 74 and 83 of UNCLOS regulate that before the agreement is reached on the delimitation of the EEZs or continental shelf between States with opposite or adjacent coasts, "the states concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation." One of the important missions for "provisional arrangements" is to make the rational exploitation and conservation of natural resources (including living resources) at disputed or overlapped waters. As for the cooperation of States bordering enclosed or semi-enclosed seas, Article 123 of UNCLOS regulates that "States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavor, directly or through an appropriate regional organization: (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (c) to coordinate their scientific research policies and undertake where appropriate joint programs of scientific research in the area; (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article." Obviously, to promote the most rational exploitation of fishery resources, UNCLOS encourages joint management and conservation. China, Japan and Korea ratified UNCLOS in 1996. As member states of UNCLOS, three countries should fulfill the obligations stipulated in UNCLOS.

Table 2 Biological Changes of Hairtails in the East China Sea

Year	Summer					Winter			
	Small-sized fishes (%)	Medium-sized fishes (%)	Large-sized fishes (%)	Average anal length (mm)	Minimum anal length at sexual maturity (mm)	Small-sized fishes (%)	Medium-sized fishes (%)	Large-sized fishes (%)	Average anal length (mm)
1960s	16.5	60.2	23.3	252.6	-	12.9	73.5	13.6	249.7
1970s	10.4	82.6	7.0	238.1	160~170	18.0	76.5	5.5	237.6
1980s	26.1	68.8	5.1	226.8	-	33.1	62.1	4.8	226.7
1990s	67.7	28.8	3.5	182.6	140~150	64.8	34.5	0.7	171.3

Source: Monitoring Network for Fishery resources Dynamics in the East China Sea (2000)

Table 3 Biological Changes of Small Yellow Croakers in the East China Sea

Year	Body length range (mm)	Average body length (mm)	Weight range (g)	Average weight (g)
1970s	-	191.89	-	133.36
1980s	100~270	139.39	10~360	83.96
1990s	90~250	144.33	10~300	46.95

Source: Monitoring Network for Fishery Resources Dynamics in the East China Sea (2000)

III. The Feasibility of Regional Cooperation for Fishery Resources Management in the East China Sea

During the period from the establishment of People's Republic of China to the resumption of diplomatic relations between China and Japan, two States had signed China-Japan Non-governmental Fisheries Agreements twelve times, with a view to coordinating fisheries production in the East China Sea and resolving disputes thereon. With the normalization of China-Japan relations, two States signed a bilateral inter-governmental fishery agreement in 1975 to facilitate cooperation in the fisheries production and resources conservation in the East China Sea, and in order to conform to requirements regulated in UNCLOS and solve new fisheries problems between them, a new China-Japan Fisheries Agreement was signed by the two States in 1997, which aimed at realizing the rational exploitation and conservation of marine fishery resources and safeguarding the sovereign rights they enjoyed in their own EEZs. The agreement came into effect on June 1, 2000. Article 7 of the Agreement regulates that "waters under provisional measures" should be designated by the two States for co-management, and China-Japan Fisheries Joint Committee established under the Agreement should be the authoritative body to make management regulations and policies, such as determination of the fishing methods, fishing efforts (i.e, vessel numbers, vessel types and vessel power, etc.) and catches of both States each year in "waters under provisional measures". In addition, the Agreement also encourages bilateral cooperation between the fisheries sectors to conduct joint guidance, monitoring and inspection over fishing in the East China Sea; meanwhile, two States will inform each other of the annual statistics for catches in the East China Sea.

China and Korea have long been engaged in fishing in the East China Sea, and cooperative in offering each other the rescue in case of emergency. Prior to the establishment of diplomatic relations between China and Korea, fisheries disputes were coordinated by non-governmental organizations (i.e, China Fisheries Association for East China Sea and Yellow Sea, National Federation of Fisheries Cooperatives of Republic of Korea). Since the establishment of diplomatic relations between the two States in 1992, their governmental sectors have taken up the mission to coordinate and solve fisheries problems between them. In 1998, China-ROK Fisheries Agreement was signed by the two States and came into effect on June 30, 2001, reaching an agreement on the conservation and management of fishery resources in the East China Sea and Yellow Sea. With this Agreement, China

and Korea agreed to designate "waters under provisional measures" and "transitional waters" on the left and right side of "waters under provisional measures" in the East China Sea and Yellow Sea. In addition, China-ROK Joint Fisheries Committee was set up to coordinate and solve fisheries problems in the above mentioned waters. Two States will negotiate and come to an agreement on the number of vessels, target species and catches of their own in "waters under interim measures"; the number of vessels fishing in each other's "transitional waters" should be decreased, and fishing license should be issued to vessels entering the other's "transitional waters", and exchange of fishing vessel information is also a must between two countries. In both the above mentioned waters, China and Korea may conduct joint monitoring and inspection in the forms of working on the same boat from both States, stopping the suspicious fishing vessels, and boarding for inspection, etc.

Japan and Korea signed Japan-Korea Fisheries Agreement in 1965 for the purpose of providing guidance for settlement of fisheries disputes between two States. The updated version of the Agreement was then signed in 1998 and came into effect on January 22, 1999, and its primary aim is to solve the fisheries problems emerging with the ratification of UNCLOS, and meanwhile to conduct rational exploitation of fishery resources in EEZs.

Since UNCLOS came into effect, China, Japan and Korea have taken various measures to enhance the conservation and management of fishery resources in the East China Sea and Yellow Sea. To make a rational exploitation and conservation of marine living resources in the surrounding waters, China has adopted a series of important actions and policies since 1980s, which are illustrated as follows: (1) to adjust national fisheries development policy. China has transformed its fisheries development policy in 1985 as "aquaculture-oriented policy with balanced priority to aquaculture, capture and processing industry"; localized fisheries policy for giving full play of local features and different priorities". During "the 9th Five-year Plan", China made a more explicit fisheries development policy as "speeding up the development of aquaculture, making a rational conservation and exploitation of inshore living resources, positively promoting deep-sea fisheries, strictly controlling the processing industry and logistics, etc."; (2) to enhance the fisheries legislation system. Fisheries Law of the People's Republic of China, a fisheries legislation framework in China updated and released in 2000, made an attempt to implement fishing quota system for inshore fishing in China and further set forth such conservation regulations as fishing licensing, fishing log, fishing season closure, fishing ground closure, standards for minimum size of catches, limitations

on minimum mesh size, etc.; (3) to set the standard for control on the number and power of motor fishing vessels; (4) to implement summer fishing moratorium and "zero-growth" policy for marine harvesting; (5) to conduct artificial release for fishery resources enhancement; (6) to implement specialized protection approaches for such important marine fishery resources as shrimp, larger yellow croaker, hairtail, and etc. To conform to international fisheries development trend, Japan has also adopted various fishery resources conservation measures since 1980s, which mainly involve: (1) enhancing legislation system for inshore fishery resources conservation. Fisheries Act of Japan was updated in 1985, and Coastal Fisheries Promotion Act and Act for Enhancement of Marine Fishery Resources Exploitation were also released to prioritize rational exploitation and conservation of fishery resources. Such conservative measures are listed in those regulations as exploratory fishing, fishing licensing, fishing quota, artificial release, restrictions for construction of marine engineering facilities, etc.; (2) adjusting government administrative sectors to conform to the transition from exploitation-oriented to management-oriented marine resources policy; (3) significantly reducing the number of fishing vessels; (4) implementing TAC system. Similarly, since the 1980s, Korea has taken a series of resources conservation and management measures as: (1) release of such regulations as Fisheries Act of ROK, Aquatic Resources Protection Law and Enforcement Order of Fisheries Law, etc.; (2) adjustment of its fisheries development policies, highlighting the conservation of inshore fishery resources, and adjustment of functions for marine and fisheries government sectors; (3) implementation of a 10-year plan to reduce fishing vessels since 1994; (4) implementation of TAC system.

To sum up, China, Japan, and Korea have long been fishing in the East China Sea, and preliminary bilateral cooperative and communicative mechanisms have been set up to solve fisheries disputes and conduct joint fishery resources conservation. Since China, Japan and Korea ratified UNCLOS in 1996, much importance has been attached to conservation of depleted fishery resources in the East China Sea and implementation of a series of conservation and management policies and measures. Located close to the East China Sea, China, Japan, and Korea surround the East China Sea to a semi-enclosed sea, making it a complete

ecosystem falling under the joint management of three countries.[9] In addition, Japan and Korea are increasingly concerned about the depletion of fishery resources in the East China Sea and Yellow Sea, and calling for cooperation among neighboring States to adopt consistent and coordinated measures to conserve and manage fishery resources. Therefore, it is highly feasible and urgent for China, Japan and Korea to cooperate in the rational development, exploitation and conservation of fishery resources in the East China Sea, and implement a number of common conservation programs.

IV. Regional Cooperation in Fishery Resources Management in the East China Sea

Currently, challenges in facilitating regional cooperation in the management and conservation of fishery resources in the East China Sea are listed as follows: (1) China, Japan and Korea have neither yet formed a unified understanding nor taken a unified action in the development and conservation of fishery resources; (2) Three States have conducted lots of investigation and assessment of fishery resources and fish stocks migration and distribution in the East China Sea. However, there is a lack of substantial and direct cooperation in the information exchange for current status of the fishery resources, fisheries statistics and standardization for fishing efforts; (3) Fisheries management capacities vary among these three States in the inspection and supervision of fishing vessels, catch statistics, etc.; (4) Although China boasts a huge labor force involving in fishing in the East China Sea, it remains as a challenge to diverse the fishing labor force and vessels and re-educate labor force for occupations other than fishing., which exerts pressure on monitoring and management, rendering joint management and conservation unfeasible. All the above challenges may adversely influence the successful implementation of cooperative projects of fishery resources management and conservation.

However, to conform to the development trend of international fisheries management and the international conventions, treaties and agreements, it is urgent for China, Japan, and Korea to collaborate with each other in the exploitation, conservation and management of fishery resources in the East China Sea. Taking

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9 Young-Tae Shin and Sung-Gwei Kim, Cooperation in Fisheries in Northeast Asia, *Proceedings of the 1st International Workshop on the Oceanography and Fishery in the East China Sea*., Vol. 1, 1997, pp. 248~254.

into account China's marine and fisheries interests and rights, as well as the claims made by Japan and Korea, the paper will put forward suggestions for short- and long-term cooperative projects for regional cooperation in the fishery resources management and conservation in the East China Sea.

A. Short-term Cooperative Projects

Projects with priority on fishing efforts control should be implemented. It is of the regular global practice to adopt fishing efforts control policy as the major measure for fisheries management. Currently countries surrounding the East China Sea have all established their own fishery license systems, been equipped with fisheries monitoring capabilities, and been aware of the necessity and urgency to decrease fishing efforts. Therefore, it is feasible and imperative to implement cooperative projects to control fishing efforts. In this case, it is of high value that China, Japan, and Korea should negotiate and agree on the number of fishing vessels, the overall vessel powers, the range for fishing waters and fishing methods, and modify regularly in the light of the fishery resources status. The cooperative projects can be conducted under the framework of China-Japan Fisheries Agreement and China-ROK Fisheries Agreement, and trialed in China-Japan and China-Korea "waters under provisional measures". Either joint fisheries committees established under Agreements or bilateral conferences may act as the coordinators to negotiate and agree on the fishing efforts. The current status of fishing industry in each State should be a key role in deciding the number of fishing vessels, thus to avoid a massive disastrous impact on fishing industries and social stabilities. With accumulated experience and good timing, China, Japan and Korea should be encouraged to participate in the trilateral cooperation and agree on the fishing efforts, fishing methods and fishing grounds in the light of regenerative capacity of fishery resources in the East China Sea.

In addition to the direct controls imposed on the fishing efforts of China, Japan and Korea, indirect fisheries management measures should also be adopted. China-Japan Fisheries Agreement signed in 1974 has provisions on indirect management measures, so does Japan-ROK Fisheries Agreement in 1965. With a good cooperative history in fisheries management, the three States should explore further to establish consistent standards as well as an indirect overarching fisheries management system. With the existing efficient measures to conserve marine living resources in each State, they should further unify the standards of fishery license

system, limitations on minimum catches size and mesh size.

Cooperation in fisheries research and exchanges in fisheries statistics data should be encouraged among the three States. Currently, it is important and urgent that three States should cooperate in investigating the distribution of migratory fish stocks in the East China Sea, assessing resources status, and standardizing fishing efforts; reporting systems should be set up to facilitate the exchanges of data including catches, fishing waters, fishing vessels, etc.

The above mentioned regional cooperative projects on management are supposed to achieve the following aims in 5-10 years: making the fishing efforts under rational control; optimizing the structure of fishing operations; improving the depleted fishery resources conditions and preliminarily restoring the severely depleted resources; creating a friendly cooperation environment among three States and establishing effective cooperation ways.

B. Long-term Cooperative Projects

TAC-oriented management should be implemented. TAC system is usually set up with considerations of regenerative capacities of fishery resources, social and economic factors, and others. Once the actual catches exceed TAC, a total ban on fishing should be implemented. As a management measure to impose direct control on catches, TAC system is adopted globally among developed countries on the assumption that catches control is more efficient than fishing efforts control. However, as mentioned above, to comprehensively implement TAC system in the East China Sea for regional cooperative management is confronted with great challenges. However, it is a must in the long run. For example, existing agreements such as China-Japan Fisheries Agreement, China-ROK Fisheries Agreement, and China-Vietnam Fisheries Agreement for Cooperation at Beibu Gulf all have provisions on quantitative management for catches.

Besides fish species for the trial implementation, TAC system may extend to other fish species in the East China Sea. As for the short-term cooperative projects, some species can be chosen for the TAC trial. Ideal species for trial can be those with huge catches, high economic value, or those whose resources are depleted and need timely conservation, or those whose resources we have a good knowledge of, or those shared fishing targets like straddling stocks by three States. Species for trial can be hairtail, big yellow croaker, small yellow croaker, pomfret, thamnaconus, chub mackerel scad, and shrimp. Fisheries under the management of either TAC

system or fishing-efforts-control system share something in common, that is, they are competing fisheries, which on the one hand decline the fisheries effectiveness, and on the other hand gives rise to overfishing. Therefore, fisheries management needs to be supplemented by other measures. The short-term cooperative projects need further implementation and improvement, among which the establishment of consistent fishery license system among three States is a good practice.

A regional cooperative management committee should be set up to develop the common fishery policies for three States, decide on species for trial of TAC system, catches and quota for each State, and establish other management measures. A permanent body maybe set up for this committee, which shall be responsible for the daily work, providing States with fishery consultations, collecting and analyzing such fisheries data as fishing efforts and catches.

What's more, the fishery scientific research cooperation agencies should be established, as well as systems for close cooperation. Theoretically speaking, TAC system is implemented based on the investigation and assessment of fishery resources and other reliable scientific evidences, which requires the regular monitoring on the resources status. Regional management cooperation is also facilitated by joint efforts in investigation, assessment and monitoring, thus to avoid divergence in the basic steps including determination of effects of TAC system and assessment.

With the implementation of long-term cooperative projects, the following achievements are expected: with such international agreements and regulations as UNCLOS and Code of Conduct for Responsible Fisheries, fisheries in the East China Sea will be developed into a sustainable and stable industry with optimized structure, and main commercial fish stocks can be restored, and common fisheries polices will be developed among three States with regional cooperation systems in management of shared fishery resources, science research, exchange of fisheries data, policy-making and monitoring established. However, it may take huge efforts and a long way to achieve these objectives.

Translator: ZOU Leilei

A Study on the Necessity of Legislation for Oceanic Islands in China

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Abstract: China, with a multitude of oceanic islands, shall develop the law on such islands to reflect its sovereignty over the islands under its jurisdiction. Such a law may specify the legal nature and status of such islands and some relevant legal issues, which will help to safeguard the national sovereignty and territorial integrity of China and strengthen its island management. In addition, it will promote the rational exploitation and utilization of island resources and the sustainable development of its economy. Furthermore, such a law will help China to be consistent with the United Nations Convention on the Law of the Sea, and bring the role of the islands into full play in maritime delimitation.

Key Words: Islands; Legislation; Necessity

"An island is a naturally formed area of land, surrounded by water, which is above water at high tide."[1] China has numerous oceanic islands, which constitute a coastline of over 14,000 kilometers and an area of approximately 80,000 km^2, accounting for 8% of China's land area.[2] However, only one regulation - Administrative Regulations on the Protection and Utilization of Uninhabited Islands[3] - was enacted in 2003, which enjoys a relatively low legislative status

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1 Article 121 of the UNCLOS.

2 Yang Wenhe et al. ed., *Oceanic Islands of China*, Beijing: China Ocean Press, 2000, p. 15. (in Chinese)

3 Policy and Regulation Division of the State Oceanic Administration ed., *A Collection of Management Documents for the Protection and Exploitation of Oceanic Islands*, Beijing: China Ocean Press, 2003, p. 13. (in Chinese)

and narrow scope of application. The law on oceanic islands shall be developed in view of safeguarding national sovereignty and territorial integrity, ensuring rational exploitation and utilization of island resources, and achieving sustainable economic development on the islands.

The law on oceanic islands is an integral part of the socialist legal system with Chinese characteristics, and its legislative necessity is mainly embodied in the following:

I. Oceanic Islands' Close Relation to National Sovereignty Requiring the Adoption of Legal Means to Safeguard Sovereignty over Them

Sovereignty refers to the sovereign powers enjoyed by a State to independently handle its internal and external affairs. It includes political, economic, territorial, external and personal sovereignty, etc.[4] Oceanic islands are a part of national territory. Therefore, the protection, exploitation, utilization and management of resources thereon involve not only the national sovereignty and territorial integrity, but also national defense and security. A State shall develop the law on oceanic islands to protect the resources on and safeguard its rights and interests over such islands, which reflects its exercise of sovereignty thereover.

1. Oceanic Islands, as an Integral Part of National Territory, Require Legislation at the National Level to Determine Their Legal Nature and Status

Widely distributed, the oceanic islands under Chinese jurisdiction are large in quantity and full of exploitation potential due to their abundant resources. As early as 1958, the Declaration of the Government of the People's Republic of China on China's Territorial Sea states that "the islands inside the baseline, including Tungyin Island, Kaoteng Island, the Matsu Islands, the Paichuan Islands, Wuchiu Island, the Grater And Lesser Quemoy Islands, Tatan Island, Erhtan Island and Tungting Island, are islands of the Chinese inland waters".[5] It is also provided in the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992 that "the land territory of the People's Republic of China includes the

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4 Zhang Youyu et al. eds., *Encyclopedia of China (Law)*, Beijing: Encyclopedia of China Publishing House, 1984, p. 814~816. (in Chinese)

5 Wang Huaian et al. eds., *Collection of the Laws of the People's Republic of China,* Changchun: Jilin People's Press, 1986, p. 1495. (in Chinese)

mainland of the People's Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands; the Penghu Islands; the Dongsha Islands; the Xisha Islands; the Zhongsha Islands and the Nansha Islands; as well as all the other islands belonging to the People's Republic of China."[6] All such provisions indicate that such oceanic islands are an integral part of China's territory. China, a major maritime State, should enact a special law on islands in order to clarify the legal nature and status of oceanic islands under its jurisdiction and provide a comprehensive reference for the solution of relevant legal issues.

2. Considering the Ceaseless Infringe on China's Oceanic Islands by Neighboring States, a Special Law on Such Islands Should Be Developed to Safeguard National Sovereignty and Territorial Integrity

Certain neighboring States have long been provoking disputes concerning sovereignty over the islands in the South China Sea, the Diaoyu Islands in the East China Sea, among others, for no reason.[7] China's exercise of sovereignty over the Nansha Islands as well as their surrounding waters has been repeatedly interfered or obstructed unlawfully by some neighboring States. In the meanwhile, some of the so-called international celebrities ballyhooed, on different occasions, to submit the disputes concerning the Nansha Islands to international conferences for discussion, in an attempt to internationalize such issues and finally legalize the aggression. China's claims would be affected by failure to develop a feasible legal regime for the management of its oceanic islands and conduct substantial management of them.

3. As Oceanic Islands Play a Pivotal Role in Maritime Delimitation, the Development of a Special Law on Such Islands Will Facilitate the Safeguarding of China's Maritime Rights and Interests

According to the United Nations Convention on the Law of the Sea (hereinafter referred to as the "UNCLOS"), coastal islands serve as an important basis for the delimitation of internal waters, territorial seas, contiguous zones, exclusive economic zones and continental shelves. It is estimated that an island or reef may claim an area of territorial waters covering up to 1,550 km^2, and an island that can sustain human habitation or economic life of its own may even have an exclusive economic zone of 430,000 km^2.

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6 Wang Huaian et al. eds., *Collection of the Laws of the People's Republic of China (Addendum)*, Changchun: Jilin People's Press, 1993, p. 34. (in Chinese)

7 State Oceanic Administration, *Memorabilia on the Interests of the Diaoyu Islands*, p. 4. (in Chinese)

According to the provisions under the UNCLOS, in the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.[8] In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.[9] The coastal State may determine baselines in turn by any of the methods provided for in the foregoing Articles to suit different conditions.[10] And where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.[11]

It is provided under the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone that "the method of straight baselines composed of all the straight lines joining the adjacent base points shall be employed in drawing the baselines of the territorial sea of the People's Republic of China." Immediately following the ratification of the UNCLOS by the Standing Committee of the National People's Congress on May 15, 1996, the Chinese government announced 77 territorial sea base points, including 49 for the Mainland and 28 for the Xisha Islands.[12] Of the said 49 base points for the Mainland, 11 are located on the continental edge, 36 on the oceanic islands, and two on low-tide elevations.[13]

At present, China's maritime boundaries with Japan, South Korea and other States have not yet been delimited. Therefore, it is in dire need to develop the law on oceanic islands, which help the islands fully play their roles in maritime delimitation.

4. Oceanic Islands Are China's Coastal Forefront, Hence the Development of a Special Law on Such Islands Will Be Beneficial to Safeguarding Chinese Coastal Defense and Security

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8 Article 6 of the UNCLOS.
9 Article 7(1) of the UNCLOS.
10 Article 14 of the UNCLOS.
11 Article 13(1) of the UNCLOS.
12 State Oceanic Administration, *A Collection of Laws and Regulations on the Management and Use of Sea Areas*, Beijing: China Ocean Press, 2003, pp. 266~270. (in Chinese)
13 State Oceanic Administration, *An Introduction to the Oceanic Islands of China*, p. 8. (in Chinese)

The island arc or chain along China's mainland coastline, comparable to the Great Wall on the sea, is not only a natural coastal defense outpost, but also an important shield for national security concerns. The stability and development of the entire nation rely on a strong and stable coastal defense. The United States, seeing China as a "potential adversary", is making continued efforts toward strengthening its military presence in the Asia-Pacific region, in an attempt to intervene in the affairs in association with the South China Sea and interfere with the disputes over the sovereignty of the South China Sea islands as well as resource exploitation there, among other issues. The rise of right-wing forces, coupled with the growing military strength of Japan, leads to Japan's invasion of the Diaoyu Islands. In brief, China's coastal defense and security are severely threatened. If the "Great Wall" on the sea is open to encroach and invasion by foreign hostile forces, there would be a gap directly impairing national security. In view of the maintenance of coastal defense and security, China should strengthen the management of its oceanic islands, eliminate unstable factors relating to such islands, prevent all kinds of invasion, and maintain the security of the country and its military islands.

II. Formulating a Law on Oceanic Islands is a Must for Guaranteeing Scientific Development and Promoting Sustainable Economic Development of the Islands

Ever since its establishment, the PRC has always been regarded oceanic islands as its defense front. However, it has invested little in their economic construction. As such islands are distant from the mainland, hardly accessible and short of fresh water resources, its economic and social development becomes retarded. Following the reform and opening up in China, it was nationwide encouraged to make greater efforts toward opening up and investment attraction. However, only the oceanic islands were excluded, which further widened the gap in living standards between the residents on such islands and those in adjacent coastal areas. The 16th National Congress of the CPC has given a great blueprint for an overall construction of a well off society, which naturally includes the oceanic islands. Therefore, China should promulgate the law on the protection and exploitation of oceanic islands as soon as possible, so as to facilitate the developments of proper zoning and development plans by relevant authorities in accordance with law. Additionally,

the promulgation of such a law will ensure the concerned developers will utilize and protect such islands in accordance with the law, creating a favorable legal environment for the economic development of islands.

The actual condition of protection and exploitation of uninhabited islands in China shows that inadequate protection, disordered and excessive exploitation, and severe destruction are obviously and widely notable. For example, Shijiutuo Island, located in Bohai Bay, west-south of Leting County, Hebei Province, with an area of 3,422 km^2, is a relic island formed by sea water intrusion at the Ancient Luan River delta after the Luan River changed its course, known as the largest island in North China. The agelong formation of the Shijiutuo Island contributes to its relatively stable ecological conditions and lush vegetation. The vegetation coverage rate there reaches 98%. Therefore, it becomes an important habitat for birds. It is a veritable "Bird Island", accommodating 19 orders of birds, which may be classified into 56 families or 408 kinds. Each year, a large number of domestic and foreign bird lovers and protectors are attracted to the island. Currently, villas, hotels, and other man-made tourist attractions are in place, and Leting drum, campfire and other entertainments are performed in peak tourist seasons. The maximum daily tourist receipts reach 1,000 people. Although a number of measures have been taken to control such receipts in view of protecting the local ecological environment, the impact of human intervention cannot be underestimated for the merely 3.422 km^2 bird habitat.[14]

72 Jing is another example. Located in the Qinzhou Port Economic Development Zone, it consists of over 100 islands that are scattered in the 36km^2 Qinzhou Bay and surrounded by 72 winding waterways. And that is exactly the reason why it is named as "72 Jing". A large number of mangroves grow on the mudflat of the islands. The sea, islands, mountains, reefs, beaches and other natural sceneries comprise a beautiful picture. Thus the 72 Jing is known as the "Southern Penglai Island". However, there was a time when the islands were plagued by warrantless or illegal use of the sea, and even 1~2 hectares of the mangrove forest were subject to inning for shrimp breeding. After repeated destruction, the originally famous 72 waterways were reduced to less than forty, which seriously affected the natural landscape and the development of scenic tourism. In the 72 Jing, Songfeilin Island is the largest one surrounded by deeper waters, with an area

14 State Oceanic Administration, *Cases and Analysis on Protection and Exploitation of Oceanic Islands*, p. 43. (in Chinese)

of 0.331 km^2. Its water depth is approximately 5 meters even at low tide. The 72 Jing Tourism Development Co., Ltd. is now engaged in the construction of a tourist pier on the south side of the island, as well as tunnels and artificial landscapes. The roads on the Songfeilin Island have destroyed a large area of vegetation, and the excavated bare hillsides are extremely unpleasant to the eye, in sharp contrast to the surrounding natural scenery, not to mention whether the development of the island is proper. The massive construction projects at the cost of destroying natural scenery are completely contrary to the concept of scientific development.[15]

III. The Particularities of Oceanic Islands Imply the Development of a Law on Such Islands Will Be Beneficial to Environmental Protection on the Whole

1. Particular Geographical Conditions

The vast majority or, specifically, 93% of the oceanic islands of China fall into the category of continental islands, which are extensions of the land into the sea above the water. Such islands separated from the mainland as a result of crustal subsidence or rise of the sea level, although they are originally a part of the latter. Therefore, they are basically similar to the neighboring mainland in terms of geological structure, lithology and topography, among others. As the separated forefront of the mainland surrounded by water, continental islands are particular in geographical conditions and thus play an extremely important role in the exploitation of oceanic islands.

2. Maritime Climate

China is a typical monsoon State. Thus the climate on oceanic islands is mainly controlled by the monsoon. It blows northerly winds in winter, when the strength of cold air diminishes continuously during the southward diffusion process of the high-pressure cold air mass; while southerly winds prevail in summer, when the warm and wet flow that contains plenty of moisture brings the precipitation peak in the year. Hot rainy season is a distinctive feature of the climate of Chinese oceanic islands. The spring and autumn provide a transition from the onshore climate to the maritime climate or vice versa. Coastal islands are located in the onshore-offshore transitional zone. Because of the "air conditioning" of the sea, the climate

15 State Oceanic Administration, *Cases and Analysis on Protection and Exploitation of Oceanic Islands*, p. 36. (in Chinese)

of islands is significantly different from that of the inland. On oceanic islands it is warm in winter and cool in summer, which is one of the typical characteristics of maritime climate.

However, oceanic islands and their surrounding waters are frequented by natural disasters, mainly including typhoons, gales and storm surges. Such islands are often subject to frequentation of storm surges and typhoons in summer and autumn, not to mention the impairment by great storms to different degrees recurring almost every year.

3. Full Range of Oceanic Islands with Various Geological Structure/Topography

The oceanic islands under China's jurisdiction are large in quantity, wide in distribution and full in range, including all the types that may be found in the world.

The vast majority or, specifically, 93% of China's continental islands are composed of bedrocks, which are scattered all over the sea waters. Such islands are distinguished with large area and high elevation. As the rocks and beaches surrounding the bedrock islands develop alternately, an ecological environment is created favorable to biodiversity. Moreover, the natural fish shelter formed by islands and reefs has become a good site for the conservation of biological resources.

Sand-mud islands that are formed by sediments of sand and mud as carried by river flows at the sea outfall are generally located in the estuary region. Flat and small as they are, such islands are usually the habitat of migratory birds or the spawning site of migratory marine fishes due to their fertile soil and favorable ecological environment. The waters of the alluvial island that is located in the estuary of the Yangtze River have provided an area to ensure high yield of valuable eel seedlings. Mud-sand islands account for approximately 6% of the total islands.

A coral island is composed of accumulated and solidified coral debris that rises above the sea water, usually with a submarine volcanic or rock substrate. There are altogether more than 60 coral islands in China, accounting for 1% of Chinese total islands. They are mainly located in Hainan, Taiwan, Guangdong, etc. With small areas and low elevation above the sea, the waters adjacent to such islands are of moderate temperature, offering them a high biodiversity index. In the waters surrounding the islands in the South China Sea, a large number of coral shoals and reefs, have become a large scale and high yield fishing zone sheltering various fishes. That is because such shoals and reefs, covering large areas, are near water

surface, and big waves often push the fishes to find shelter under such them. In addition, vigorous biotic communities on the coral reefs also attract the fishes. The fishing zone around the Zhongsha Islands in the middle of the South China Sea is one of the largest fishing grounds in China, with an area of up to 10,000 km^2. The semi-enclosed lagoons formed among the numerous coral reefs constitute a unique ecological environment that is suited for building marine ranches.

However, quite a number of bedrock islands include high mountains and steep slopes, which are usually subject to landslides and other disasters. Meanwhile, the rocks and gravels on bedrock islands, particularly suited for use in construction projects as they are, have long been exploited immoderately, resulting in reduced dimensions of the island, shrunk biological resources, and exacerbated marine disasters. Regarding alluvial islands in the estuaries, the lessened runoff and sand sediments, as well as enhanced ocean dynamic conditions, are accompanied by erosion, leading to increasingly smaller dimensions or even extinction of the island. Besides, the stability of coral reefs is also severely threatened because of excessive exploitation.

4. Independent Geographical Unit and Unique Natural Environment

Oceanic islands are surrounded by the sea and distant from the mainland. Different in cause of formation, morphology, climate, hydrology, biology, geology, topography, among other conditions, each oceanic island constitutes an independent geographical unit that offers a unique natural environment. Moreover, the small area, simple geographic structure, and limited origin of species and biological diversity have added to the specialty of biological communities and helped to preserve a number of rare species, thus contributing to the evolvement of inimitable ecosystems.

5. Fragile Ecosystem

The ecology of an island is an organic whole where biological communities and the surrounding environment rely on each other for harmonious co-existence in the long run. Mainly composed of soluble salt, the soil on Chinese oceanic islands is subject to gradual desalination by multiplying precipitation and thus provides conditions for the vigorous growth of herbs. However, the vegetation is severely destroyed as a result of the lack of attendance and management, disafforestation, and burning down, all adding to the widespread severe soil erosion as well as the reduction to merely regosols and rocky soil that are thin and extremely low in fertility.

Oceanic islands feature simple topography, harsh ecological environment,

limited species for vegetation establishment, and magnified presence of dominant species. In terms of species composition, the vegetation is most notable for the fact that there are a certain amount of coastal or oceanic island-specific dominant/ associated species on each layer of the communities, which corresponds to the richness of coastal flora. Coastal halophytic vegetation as included in a special ecological environment may be found all over costal tidal flat on oceanic islands with simple species composition (mostly single species communities), including highly salt tolerant halophytic herbosa (mostly the Suaeda community) and halophytic lignosa (including the most common Tamarix community growing in the North and mangroves in the South). Coastal psammo vegetation consists of psammophytes and psammophile that mainly grow on sandy beaches, which corresponds to their limited scope and area of distribution. Paludose and aquatic vegetation is mainly rooted in the mud in the intertidal zone or on the edges of waters that are adjacent to the islands, including the Phragmites community, Spartina anglica groups, etc. There are only a few islands on which large areas of aquatic vegetation grow, which mainly include the Trapa and duckweed community, etc.

In summary, oceanic islands are surrounded by the sea, and each island provides a relatively independent regional ecological environment unit, where the land, beaches, insular shelf, and the surrounding shallow sea constitute different types of marine environments for different biological communities. In this connection, a number of rare species has been preserved and independent ecosystems also have been established. On the other hand, because of their small size, barrenness, and simple geographic structure, coupled with their separation from the mainland, such oceanic islands entail restricted species origin, low biodiversity and stability, and extremely high vulnerability.

IV. The Strengthening of Management on the Oceanic Islands Calls for the Promulgation of the Law on Them

Based on the actual conditions of oceanic islands management, it has not yet been determined which special organ shall be responsible for their overall management. Although there are quite a quantity of provisions included in the relevant laws and regulations, problems will inevitably arise due to their differences in geographical location, natural environment, living conditions, exploitation methods and scale, etc., if different issues are required to be submitted to different authorities. And in particular, the small uninhabited oceanic islands can hardly

provide for forestry, land or other resources that may be needed by large scale exploitation. Their social and economic values can be maximized only by relying on the overall resources in the waters surrounding the islands. Therefore, it is necessary to establish an integrated management system for uninhabited oceanic islands so as to ensure that comprehensive consideration will be given on how to proceed with our work, which is also one of the goals of marine management development both at home and abroad. Meanwhile, as the oceanic islands are part of the State-owned resources, the property management system for State resource assets on such islands shall be established in order to implement unified management over the ownership of the islands. It is absolutely necessary to develop the law on islands, which shall further specify the competent authorities and their responsibilities and provide for specific management system on the whole.

V. Legislation on Oceanic Islands Is Imperative in China, as the Entire World Has Attached Great Importance to the Sustainable Development of Oceanic Islands, and Some Coastal States Have Even Completed the Law on Oceanic Islands

When it comes to the "sustainable development of small islands", UN Agenda 21 of 1992, as developed by the United Nations Conference on Environment and Development, provides that "States commit themselves to addressing the problems of sustainable development of small island developing States. To this end, it is necessary: (a) to adopt and implement plans and programmes to support the sustainable development and utilization of their marine and coastal resources, including meeting essential human needs, maintaining biodiversity and improving the quality of life for island people; (b) To adopt measures which will enable small island developing States to cope effectively, creatively and sustainably with environmental change and to mitigate impacts and reduce the threats posed to marine and coastal resources." And according to the provisions of the Programme of Action for Sustainable Development of Small Island Developing States of 1994, all States shall take effective measures to strengthen the management of resources exploitation, improve the infrastructure, expand the exchanges on the relevant information, and provide basic protection for the sustainable development of the islands.

Based on the aforementioned principles, coastal States have undertaken a variety of management activities. South Korea has developed the National Island Development Plan and promulgated the Law on Promotion of Island Development; Japan enacted the Law on Revitalization of Isolated Islands of Japan and Implementation Orders for the Law on Revitalization of Isolated Islands of Japan; and the United States, Canada, U.K., the Netherlands, France, Sweden, Australia and other States have also developed relevant regulations on the development and protection of islands.[16]

It follows from China's current legislation on oceanic islands that: (a) the existing special regulations for oceanic islands are limited to uninhabited ones, which enjoy a narrow application scope and low legislative status; and (b) many oceanic island-related provisions are included in different laws and regulations, entailing inefficient implementation; and the relevant management system is not as comprehensive, systematic, or specific as required. Therefore, a comprehensive law on oceanic islands shall be developed to avoid the absence of applicable laws.

Translator: TAN Shuangpeng

16 State Oceanic Administration, *A Collection of Foreign Legislation on Oceanic Islands*, p. 26~53. (in Chinese)

Several Issues of Legislation on Uninhabited Islands

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Abstract: This article provides an academic and legal understanding of uninhabited islands. It examines basic principles for legislation regarding the protection of the ecology, environment, and resources of uninhabited islands, and it offers suggestions for and thoughts on developing future legislation concerning uninhabited islands.

Key Words: Uninhabited islands; Island; Legislation; Environmental and natural resource law; Ecology

China has more than 6,500 islands and islets spanning over 500 square meters of ocean, of which only 433 are inhabited.[1] Enhancing the management of these uninhabited islands is essential for protecting the marine ecology, environment and natural resources of these islands as well as for safeguarding China's legal rights to these islands and their surrounding waters. Therefore it is necessary to conduct further research on legislative issues concerning the ecology and environment of these islands and to enhance the protection and management of these islands through legislation.

I. The Legal Definition and Features of Uninhabited Islands

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1 The above data are extracted from State Oceanic Administration of the People's Republic of China, *Several Comments on Enhancing the Management on Uninhabited Islands and Their Surrounding Sea Areas* (State Oceanic Administration [2001]29). (in Chinese)

Pursuant to Article 34 of China's Administrative Rules on the Protection and Exploitation of Uninhabited Islands, an uninhabited island is an island, cay or low-tide elevation that is located in waters that are subject to the jurisdiction of sovereignty of China and has no permanent residents. Article 121 of the United Nations Convention on the Law of the Sea defines an island as a naturally formed area of land, surrounded by water, which is above water at high tide. Generally, the land area of an island exceeds 500 m^2 while that of a cay is less than 500 m^2.[2]

The full value of uninhabited islands is composed of three parts: ecological, legal, and economic. The first and most important value of an island is its ecological value. Separated from other islands by the sea and often located far from the mainland, an island is a relatively unique, independent, integrated, ecological, environmental, and geographical system, yet it is also an important part of a larger oceanic ecosystem. Uninhabited islands are the habitats and breeding grounds for seabirds and marine animals, they also nourish many species of plants, and they shape ocean waves and currents. From a legal perspective, uninhabited islands provide great value by their being used as base points for drawing territorial seas, thus they can influence the measurements of a country's territorial sea, exclusive economic zone, and continental shelf. Furthermore, uninhabited islands constitute the important part of territorial resources of States. Finally, uninhabited islands provide economic value by acting as "bridges" connecting the mainland and the ocean. These islands can be used as a logistical and infrastructural hub for ocean exploitation, and combine land-related and ocean-related advantages in five parts, *i.e.*, mineral, oil, and gas extraction, port location and shipping facilities, land of these islands, aquaculture development, and tourism resources.[3]

Often the economic importance of uninhabited islands is overemphasized. As special composite areas of ecological, legal, and economic value, these islands must be managed holistically. If one of these three values is diminished, the overall value of the uninhabited island will decrease. The ecological value of an island is particularly important; not only is it the frailest part of an island, deterioration of an

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2 In a broad sense, an island may refer to an island, cay or low-tide elevation. In some circumstances, cays and low-tide elevations can also be the base points for drawing territorial sea and thus affect the measurements of the territorial sea, exclusive economic zone, and continental shelf, and thus they also have big significance as islands.

3 Han Limin and Wang Aixiang, Protection of Island Resources and Scientifically Development and Exploitation of Islands, *Ocean Development and Management*, No. 6, 2004. (in Chinese)

island's ecology will directly diminish the economic and legal value of the island. To avoid such losses, we need to update uninhabited island legislation to ensure that these islands are treated as an important but limited resource.

Uninhabited islands present several unique challenges for exploitation and utilization. The first challenge is their fragile ecosystem. The small size of most uninhabited islands results in their having a simple terrain structure, delicate ecosystem, and a low biodiversity index. The ecosystem of an uninhabited island is likely to be damaged if it is improperly exploited improperly. The second challenge is their simple economic structure. Most uninhabited islands are small, scattered geographical units usually having only a single resource. Overexploitation of that resource would not bring about high economic benefit, rather it would likely result in the deterioration of the island's ecology. The third challenge is infrastructure. Separated from the mainland, uninhabited islands often lack public infrastructure including transportation, energy, and water supply facilities.[4] These challenges were derived from interactions between and co-existences of various biological units and non-biological units of these islands as to their unique features. Consequently, current management regulations are not appropriate for managing uninhabited islands. Instead of simply using the current land legislation model, we should create regulations that follow ecological laws, giving sufficient consideration to an island's carrying capacity and carefully balancing developmental and ecological interests.

II. Basic Principles for Legislation on Uninhabited Island

There are two views of basic principles to balance ecological and economic interests of uninhabited island legislation. The first emphasizes protection first and strictly restricts exploitation. The second also emphasizes protection first but allows for some moderate exploitation. While both of these principles stress protection,

4 Han Limin and Wang Aixiang, Protection of Island Resources and Scientifically Development and Exploitation of Islands, Ocean Development and Management, NO. 6, 2004. (in Chinese)

they demonstrate quite different attitudes regarding exploitation.[5] These differences can be seen more clearly in local legislation. Some locations see uninhabited islands as new sources of investment, while other locations demand strict protection of uninhabited islands. Such differences directly relate to the specific conditions and circumstances of the uninhabited islands located in these jurisdictions. We need to overcome the fever brought by excessively pursuing economic growth and calmly give full consideration to the ecological, environmental, legal, social and economic values of uninhabited islands.

Not much time has passed since uninhabited islands were first brought into public view. Our understanding and knowledge of uninhabited islands and the marine ecosystem they inhabit is still far from being deep and comprehensive. Many factors of uninhabited islands need further research including the conditions of their ecology and the restoration, environment and resources, geology and waterways, climate, and mineral resources. Further research is also needed about the interaction between uninhabited islands and their surrounding sea areas.[6] As a limited resource, uninhabited islands are more vulnerable to geological and climate conditions than the mainland. If exploited rashly under immature conditions and leased out for several decades, uninhabited islands will be exposed to unpredictable changes. It will often take time for the effects of development projects to manifest themselves, thus increasing the risk posed by these projects. Public losses incurred

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5 Article 4 of Xiamen's Administrative Measures on the Protection and Exploitation of Uninhabited Islands provides that: "Uninhabited islands shall be managed with the principles of collective planning, comprehensive management and protection first and strictly-regulated exploitation." Article 6 of Ningbo Administrative Rules on Uninhabited Islands provides that: "Uninhabited islands shall be managed with the principles of collective planning, protection first and moderate exploitation." Xiamen has 17 uninhabited islands with an area of over 500 m^2 which are scattered in the vicinity of Xiamen Island and within the public view, also known as the "Mini-scape of Xiamen". Ningbo has 531 islands with an area of over 500 m^2, most of which sit far from the downtown and coast of Ningbo. The difference in the proximity to the public view of these uninhabited islands determines the different attitudes towards the protection, development and exploitation of these islands. Xiamen insists on protection while Ningbo focuses on development and exploitation, to some extent also reflecting the regional characteristics of local legislation.

6 On June 25, 2005, we inspected the "Jinsha Bay Island Hunt Resort" in Danmen Island, Xiangshan County, Ningbo City. This was a relatively mature tourism development project of uninhabited island. Investors of this project took two years to conduct a preliminary investigation of Danmen Island and for decades had hired boats to investigate the tidal, climate, flora and fauna, waterways, and water source conditions during different seasons and time periods before they had a preliminary knowledge of the island. Though the project was already put into operation and has delivered economic value, it will take some time to understand the ecological impact of this project on the island and its surrounding sea areas.

by poorly vetted development projects will outweigh their benefit over time, leaving nothing but regret.

Like most investment projects in China at present, the development and exploitation of uninhabited islands give no consideration to environmental and ecological costs. For investors, the only issue of concern is their rate of return. The environmental costs of development projects are instead borne by all of society. Decades of project operations and overflowing profits reaped by investors will likely result in turmoil. Royalties paid to the government for usage of these islands is a mere drop in an ocean when compared to the costs of environmental management and ecological restoration. The public receives minimal practical benefit from these development projects and instead often ends up shouldering their environmental costs. In this light, it is contrary to legal justice to potentially endanger the public interest and aggravate the public burden for the sake of a minority's economic benefit.

We can never be too cautious when considering the development and exploitation of uninhabited islands. Islands which we are unable to responsibly develop today should be left to a future generation, possessing better technology and information, to develop. In addition, particular attention should be given to uninhabited islands used for special purposes,[7] such as islands used for military purposes and islands which are used as base points for territorial seas. The exploitation of these types of islands should be prohibited. The protection and exploitation of uninhabited islands must be conducted with an eye toward the future and an eye toward the fundamental interest of the country, while upholding the principle of "protection first and use under strict conditions". This is the only way to protect the ecology and environment of uninhabited islands while also ensuring the sustainable use of their resources.

III. Preliminary Planning for the Exploitation and Development of Uninhabited Islands

Planning for the protection and exploitation of uninhabited islands is the

7 Rare natural landscapes or historical relics exist on some inhabited islands. For instance, the Changmen Rock Island, sitting in the proximity of waters surrounding Qingdao, nourishes the valuable plant "Naidong" (camellia), being a miracle of this plant living in such high latitude.

basis for scientific island management and fundamental for the protection and exploitation of uninhabited islands. Generally, this planning considers the characteristics of environment and resources of the island, land use, infrastructure, waterfront use, the function of the island, and protection of environment and resources as well as ways to improve the islands landscape and ecology.

The purpose of planning lies in obtaining the knowledge and understanding of the specific natural attributes, social function values, and appropriate ways of exploitation and development of the island while also providing standards for scientific and reasonable use. Due to each island's differences in geology, natural resources, and social functions, the current shortage of accurate data makes it impossible to conduct management activities and will lead to reckless development and exploitation. A plan for protecting and exploiting uninhabited island could provide objective standards and regulations. Furthermore, a plan would also serve as the basis for which the marine administrative authority approves applications for island use, thus regulating the behavior of administration approval on uninhabited islands and prohibiting unreasonable development and exploitation activities.[8]

As the ecosystem of an uninhabited island is very fragile, development and exploitation activities should be conducted with many precautions. Prior to development and exploitation, a plan with strong technical elements is required to divide the islands into two groups. The first group should include islands which are not suitable for development and exploitation at the current stage and require special protection; supervision and management of these types of islands should be strengthened. The other group is composed of islands suitable for exploitation and development. For these islands, their specific functions and features should be determined to guide development and exploitation, ensuring that they satisfy market conditions and preserve the ecological, environment, social, and economic value of these types of islands.

Prior to the enactment of a plan for the protection and exploitation of uninhabited islands, all activities concerning or in connection with the exploitation or development of an uninhabited island should be suspended. As for a completed

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8 Both Xiamen and Ningbo insist on the principle of preliminary planning in their uninhabited island legislation. Since 2003, the Ocean & Fisheries Bureau of Xiamen has organized relevant research institutions and experts to conduct on-site investigations of its islands one by one with high-tech means, and made the Xiamen Planning for the Protection and Exploitation of Uninhabited Islands as well as the Atlas. With the approval of Xiamen Government, it is now preparing detailed planning for each of the islands. Ningbo's planning for the protection and exploitation of uninhabited islands is under way.

or ongoing legal development project, standards and requirements of the plan should be applied to the development project and procedure set up in the plan should be completed as well; actions should be taken as much as possible to adjust the development project to conform to the protection and exploitation plan. If some part of the development project is unable to conform to meet the protection and exploitation plan, then that part should be halted.[9]

IV. Term and Aftermath Measures for the Exploitation and Development of Uninhabited Islands

Concerning allocation periods for usage rights to an uninhabited island, some regulations state that an allocation period may not exceed 50 years while others allow a maximum period of 40 years.[10] We believe that it will be to the detriment of the protection of uninhabited islands and increase the risks taken by exploiters and developers if the allocation period is too long.

Uninhabited islands are situated in a vast ocean. Compared to the mainland, the entire marine ecosystem is more inclined to change. Rises in sea levels, tsunamis taking place in East and South Asia, and frequent occurrences of El Niño have aggravated the unstable factors of the ecosystems of uninhabited islands. Given these circumstances, if the allocation period for using an uninhabited island is too long, development of the islands takes on a quality similar to long-term betting. In the event of a natural disaster, such as an earthquake, typhoon, or tsunami, the island's geology may experience radical change. Furthermore, if the development project upsets the ecological balance of the island, we will be left but regret. Therefore, we suggest giving development and exploitation projects up to 25 years to conduct their activities. Meteorological observation projects and other public welfare projects can be granted up to 40 years to conduct their activities. For

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9 Xiamen has initiated work on the preparation of planning for the protection and exploitation of uninhabited islands when it started legislation. At the same time, it has suspended all exploitation and development activities via the enactment of government documents according to the pre-planning principle, and carried out special inspection and law enforcement activities upon the completion of planning.

10 Article 15 of the Administrative Rules on the Protection and Exploitation of Uninhabited Islands provides that the exploitation period of an uninhabited island shall not exceed 50 years. Article 12 of Ningbo Administrative Rules on Uninhabited Islands provides that, for tourism and recreation projects, the period of the use right of uninhabited islands shall be 40 years at most, and for other projects, the period shall be 50 years at most.

projects requiring large permanent facilities, up to 50 years of usage rights can be considered.

What should we do when the assignment period expires? None of the available academic documents and legislative documents on uninhabited islands mentions what happens after the assignment period ends. This issue, however, is very important and desperately needs to be addressed via legislation. Exploitation and development of an island should leave the island's ecology as healthy as it was when the project started. Islands with lush woods and humming birds must not be deformed by the careless intervention of our generation, leaving our decedents with nothing but a devastated and lifeless wasteland.

To avoid this result, precautions should be taken from the very beginning. Either an uninhabited island is not to be exploited at all, or if any exploitation is to occur, projects must have the highest standards and involve considerable investment. Project investors must come from well-known enterprises with strong market capitalization and exceptional qualifications; they must have experience with island development in good credits, and the project must emphasize long-term investment and must pay a deposit for preserving ecology and environment before conducting activities on the island. It would be better to close the island to investment than hand it over to local farmers to dry kelp or to give it to Wenzhou merchants to engage in speculation.

Second, an annual inspection system should be established after the assignment of usage rights. Every year, the marine administrative authority should conduct an onsite inspection to evaluate whether the ecological environment of an island is damaged and whether the island is being used in accordance with the original purpose stated in the application materials. Serious failures should lead to the cancellation of usage rights. Partial failures should require rectification within a specific timeframe. In both cases, fines should be charged.

Finally, an uninhabited island should be thoroughly examined after the assignment period expires, assessing the impact of exploitation and development activities on the ecological environment of the island, and deciding whether or not to refund the deposit or to use it for restoring the island's ecological environment. Projects that have significant ecological, environmental, social, and economic benefits may have their usage rights extended. For projects that have negatively affected the island, extension of usage rights should be denied and the deposit should be used for restoring the island's ecology. For projects which have caused severe damage to an island's ecology, economic, administrative, and criminal

liability should be investigated.

Since uninhabited islands are not used for census registration and cannot be used for registering legal persons, it is improper to grant property rights to infrastructure built on these islands. It should be noted at the beginning of exploitation and development projects that the exploiter or developer has usage rights only and that any infrastructure built will be appropriated upon expiration of the allocation period. The government may consider to pay proper economic compensation to the exploiters or developers based on the project's economic contribution, or alternatively, on flexible measures such as BOT. Islands are state-owned resources and belong to the whole of society. Individuals should not be allowed to build villas on islands and pass them down through generations. Once an allocation period has ended, the island may be closed for protection, be used as a public place, or be continued to be developed by having its usage rights allocated by bidding, auctioning, or limited sale.

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Analysis of the Series of Cases concerning Oil Pollution Damage Provoked by the Collision of the *Tasman Sea* Ship with *Shunkai No. 1* Ship

CHEN Haibo *

Abstract: The series of cases of the *Tasman Sea* Ship were the first instance in China in which the International Convention on Civil Liability for Oil Pollution Damage of 1992 (hereinafter referred to the "CLC 1992") was applied in the civil liability case for oil pollution damage, as well as the first case in which the Chinese competent maritime administration claimed civil compensation for the environmental disaster caused by oil pollution since the implementation of the amended Maritime Environment Protection Law. The court correctly interpreted the relevant provisions and the legislative purpose of the applicable international conventions and domestic legislations in terms of arrest of vessels, their release and consolidated action on joint disputes. The application of the law of substantial dispute in the above mentioned case, on one hand deserves recognition, and on the other hand sparks further consideration. These cases also involve the legal liability of the other party in the vessel collision, which is to be studied and resolved.

Key Words: Series of cases of the *Tasman Sea* Ship; International Convention on Civil Liability for Oil Pollution Damage of 1992; Arrest and Release of Vessel; Subject; Qualifications; Damage; Scope of Compensation

I. Introduction

On December 24 and December 30, 2004, the Tianjin Maritime Court (herein-

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after "the Court", unless otherwise required by the context) successively made the judgments of first instance over the litigations filed by 10 groups of Plain-tiffs, including Tianjin Oceanic Administration (hereinafter "the Oceanic Administration"), Tianjin Administration of Fishery and Fishing Harbor Supervision (hereinafter "the Fishery Administration"), and about 1,500 fishermen and aquaculturists from Tianjin, against the Defendants, including Infinity Shipping Co., Ltd., The London Steam-Ship Owners' Mutual Insurance Association Ltd., and the *Tasman Sea* Ship (hereinafter "the Ship" unless for particular needs) respectively, for the compensation of oil pollution damages caused by vessel collision (hereinafter "series of cases of the *Tasman Sea* Ship"), ordering the owner of the incriminated vessel, Infinity Shipping Co., Ltd. and the insurer, The London Steam-Ship Owners' Mutual Insurance Association Ltd. (hereinafter collectively referred to as the "Defendants", or individually, as the "Defendant") jointly liable for indemnifying the Plaintiffs for the contamination of marine ecology, fishing resources, intertidal shellfish, nets, and the shut-down of marine fishing enterprise for a total sum of RMB 42,000,000.

Although the concerned parties have appealed, the appeal court has not made the second instance judgment yet. The series of cases were the first instance in China in which the International Convention on Civil Liability for Oil Pollution Damage of 1992 was applied in the civil liability case for oil pollution damage, since it has become binding towards China (Mainland China)[1]. It is also the first case of a Chinese competent maritime administration claiming for civil compensation for oil pollution damaging maritime ecological environment, ever since the implementation of the amended Maritime Environment Protection Law. The damage involved in the series of cases amounts to RMB 170 million, which is also the biggest claim for civil liability in the history of China. Therefore, this development is unprecedented for the Chinese maritime environment protection and the Chinese maritime trial and judgment under many aspects, drawing high attention from both domestic and international professional agencies, people, and

1 China Mainland, Hong Kong, and Macao are separate signatories to the CLC 1992. In addition, Hong Kong also acceded to the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

mass media.[2]

In addition to the several "primacies", the series of cases of the Ship deserve our attention in terms of law application and procedural arrangement. This article will briefly describe the oil pollution caused by the Ship and the first instance court judgments on the matter, then analyze the procedural arrangement and law application during the litigations, and finally discuss several issues involved (but not resolved) in the case.

II. Overview of the Oil Pollution Caused by the *Tasman Sea* Ship and the First Instance Judgments on the Series of Cases

At about 4:08 am, November 23, 2002, the *Tasman Sea* Ship, a Maltese oil tanker, owned by Infinity Shipping Co., Ltd., collided with *Shunkai No. 1* Ship (hereinafter "*Shunkai* Ship"), a cargo ship, owned by Dalian Lvshun Shunda Shipping Co. Ltd. in the east sea at about 23 nautical miles off Dagu Port, Tianjin (38°50.5' N, 118°26.6' E). The third cabinet on the right side of the Ship was damaged and 205.924 tons of light crude oil of Brunei contained in it spilled out into the sea, causing the pollution of the surrounding seas.

On November 28, 2002, the Oceanic Administration filed an application to the Court, claiming the arrest of the Ship and ordering the Respondent to provide a guarantee of USD 15 million in cash. After that, the Fishery Administration and Fishermen Association also filed applications to the court for the same reason. The court arrested the Ship in acceptance of the common applications of the Plaintiffs. On December 20, 2002, the court released the Ship after China International Reinsurance Co., Ltd. provided the tribunal with the credit guarantee of USD 3 million on behalf of The London Steam-Ship Owners' Mutual Insurance Co., Ltd. for the Respondent Infinity Shipping Co., Ltd. At about 2 am on the next day, the Ship left Tianjin Port.

On December 26, 2002, the Oceanic Administration filed a lawsuit against

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2 Zhang Xiaomin and Xu Xiao, After Oil Spill – Record on Judgment on the First Case of Foreign Claim for Marine Pollution, *People's Court Daily*, at http://rmfyb.chinacourt.org/public/detail.Php?id=80993, 1 November 2005 (in Chinese); Chen Jie, Tianjin: The First Case of Foreign Claim for the Pollution of Marine Ecological Environment, at http://www.people.com.cn/GB/shehui/1061/3090473.html, 1 November 2005. (in Chinese).

the two defendants, ordering the two defendants to jointly indemnify losses and assume relevant costs. In October, 2003, the Oceanic Administration lawfully changed the claim and raised the amount due, requesting the court to order both defendants to indemnify RMB 98,369,307 in total, in which RMB 36 million stood for the damaged marine environment, RMB 7,381,700 for the loss of functionality of marine ecological service, RMB 26.14 million for the restoration of marine sediments, RMB 13.06 million for the healing of intertidal biotic environment, RMB 608,400 for the revival of phytoplanktons, RMB 9,380,900 million for nektons, and RMB 5,798,307 for the research, monitoring, and assessment of biotic governance.

On December 31, 2002, the Fishery Administration filed a lawsuit to the court, claiming for ordering the Defendants to jointly indemnify RMB 17,828,000 for the loss of fishing resources and relevant interest accrued.

On January 10, 2003, Luannan Fishermen's Association of Hebei, in representation of 879 fishermen and 15 aquaculturists, Beitang Fishermen's Association of Tanggu, Tianjin, acting for 433 fishermen, and Dagu Fishermen's Association representing 129 local fishermen, individually filed lawsuits to the court, claiming for a compensation of RMB 21 million in total. On January 17, 2003, the representatives of 271 fishermen and aquaculturists from 8 villages, i.e. Caijiapu Village, Dashentang Village, Gaojiapu Village, Shuangqiao Village, Sajintuo Village, Hezhi Village, Huoshenmiao Village, and Tuqiaozi Village of Yingcheng Town, Hangu District, Tianjin respectively filed lawsuits to the court, claiming for a compensation of RMB 16.035 million in total.

So far, there were 10 groups of plaintiffs (including the Oceanic Administration, Fishery Administration, and about 1,500 fishermen and aquaculturists) who filed lawsuits to the Court, claiming for an indemnification of RMB 170 million in total for the damages caused by the oil spill provoked by the vessel collision of the Ship owned by the two defendants.

The court has convened pre-trial conferences attended by authorized persons from the Plaintiffs and the Defendants in 10 cases on June 14 and June 23, 2004. On June 24 and 25, 2004, the court made a consolidated trial on the common points of the 10 cases (concerning oil spillage, pollution area, scope and extent of oil pollution damage). In addition, it provided several separate open trials on the 10 cases at different times and finally made the first instance judgment, ordering both the defendants to jointly indemnify the plaintiffs of about RMB 42 million in total for the losses in terms of marine ecology, fishing resources, intertidal shellfish, nets,

and shut-down of marine fishing enterprises.

With regard to the claims made by the Oceanic Administration, the court ordered the defendants to jointly indemnify the plaintiff of RMB 7,505,800 for the capacity loss of marine environment and of RMB 2,452,284 for the cost of survey, monitoring, and assessment and its research of biotic restoration, as well as accrued interest of the foregoing, and rejected other claims made by the plaintiff.[3] For the claims made by the Fishery Administration, the court ordered the defendants to compensate the plaintiff of RMB 14.6542 million for the losses of fishing resources and RMB 480,000 for the cost of survey and assessment, as well as accrued interest of the foregoing, and rejected other claims made by the plaintiff.[4] For what concerns the claims made by the 114 plaintiff fishermen from Dagu, the court ordered the defendants to jointly indemnify the plaintiffs of RMB 571,313 for the loss incurred after the shut-down of marine fishing areas and relevant interest, and rejected other claims made by the plaintiffs.[5] Regarding the claims made by the 5 representatives (Yang Baosheng, Li Enqiu, Li Enmin, Yang Shiyong, and Liu Baozheng) of 879 fishermen and 15 aquaculturists, the court ordered the defendants to jointly indemnify the plaintiffs of RMB 15,134,370 for the loss of intertidal shellfish, nets, and shut-down of marine fishing and relevant interest, and rejected other claims made by the plaintiffs.[6]

III. Procedural Arrangement in the Proceeding of the *Tasman Sea* Ship Case

The complexity of the related proceedings can be imagined, since the Ship accident has involved many parties, huge compensation, and plenty of technical issues. The author believes that a great importance should be attached to the procedure and procedural arrangement, through which the court arrested the Ship and released it under guarantee and organized pre-trial conference to carry out the consolidated trial on the common points of dispute.

A. Arresting and Releasing Procedure of the Ship

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3 [2003] Jin Hai Fa Shi Chu Zi No. 183 (in Chinese).
4 [2003] Jin Hai Fa Shi Chu Zi No. 184 (in Chinese).
5 [2003] Jin Hai Fa Shi Chu Zi No. 185 (in Chinese).
6 [2003] Jin Hai Fa Shi Chu Zi No. 186 (in Chinese).

1. Arrest of the Ship and Review Application by the Respondent

As mentioned above, the Oceanic Administration filed an application to Tianjin Maritime Court on November 28, 2002 after the oil spill by the Ship, claimed for arresting the Ship and ordered the Respondent to provide a guarantee of USD 15 million in cash. After that, the Fishery Administration and Fishermen Association also filed applications to the court for arresting the Ship. The court arrested the Ship according to the common applications of the Plaintiffs.

During the detention of the ship, the respondent, owner of the Ship, applied to the court on December 3, 2002 for review, requesting the court to release the ship on the grounds that China, Malta, and the UK, which employed the applicant and respondent as well as the insurer for the oil pollution provoked by the Ship, the London Steam-Ship Owners' Mutual Insurance Association Ltd., are state members to the CLC since 1992.[7] Subject to the CLC 1992, the respondent provided liability insurance for the oil pollution and a certificate issued by the Maltese competent authority, certifying that the liability insurance is valid (unless otherwise specifically required in the context, hereinafter referred to as the "oil pollution insurance and certificate"); the oil pollution insurance of the respondent is a valid guarantee and, therefore, the applicant had no right to apply for arresting the ship in order to obtain other guarantee.

2. Legal Analysis of the Reasons for the Respondent's Review

As for the reasons for the review of the respondent, the author believes that it should be specifically determined arguing from the following three aspects: (1) correct understanding of the requirements of the CLC 1992 for not arresting vessels (or other properties, hereinafter omitted) or for releasing vessels under arrest; (2) obtaining of the oil pollution insurance and certificate deemed as oil pollution damage compensation fund; and (3) release of an oil pollution insurance and certificate considered as guarantee for the release of the vessel.

a. Requirements of the CLC 1992 to Avoid the Arrest of Vessels or for Releasing Those under Arrest

The CLC continues to use the principles adopted in the CLC 1969,

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7 The CLC 1992 is the protocol which amended provisions set forth in Articles 1 to Article 12 of the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1969). On 27 November 1992, the CLC 1992 was adopted in London and came into force as from 30 May 1996. On 6 September 1999, the Ministry of Transport of the People's Republic of China announced that the Protocol would come into force in China (Mainland) from 5 January 2000 in Jiao Guo Ji Fa [1999] No. 465 Notice (in Chinese).

International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, and Protocol of Signature of 1957, and the 1976 Convention on Limitation of Liability for Maritime Claims, which regards the establishment of a liability limitation fund in the court with jurisdiction (hereinafter referred to as the "liability fund") as the prerequisite for not exercising any right to other properties belonging to the owner in respect of relevant claim, for releasing any vessel or other property pertaining to the owner of the vessel under arrest in respect of relevant claim, or similarly for releasing any bail or other security furnished to avoid such arrest. This prerequisite is expressed in Article 6 of the CLC 1992, which reads as below:

> *1. Where the owner, after an incident, has constituted a fund in accordance with Article V, and is entitled to limit his liability,*
>
> *(a) no person having a claim for pollution damage arising out of that incident shall be entitled to exercise any right against any other assets of the owner in respect of such claim;*
>
> *(b) the Court or other competent authorities of any Contracting State shall order the release of any ship or other property belonging to the owner which has been arrested in respect of a claim for pollution damage arising out of that incident, and shall similarly release any bail or other security furnished to avoid such arrest.*
>
> *2. The foregoing shall, however, only apply if the claimant has access to the Court administering the fund and the fund is actually available in respect of his claim.*

Specifically, we have to consider two different circumstances: first, in the case that no property (other than the liability fund so established) of the owner of the incriminated ship has been claimed and/or arrested on the account of oil pollution damage, such property (other than liability fund so established) may not be arrested and/or claimed, if the owner has established a liability fund subject to the Convention; second, under the circumstance that any property (other than liability fund so established) has been claimed and/or arrested on the account of oil pollution damage, or that the owner has furnished any bail or other security to avoid the arrest of ship or property, the court or other competent authorities arresting the ship or other properties should release them and any bail or other security furnished to avoid such arrest, if the owner has established a liability fund subject to the

Convention. The prerequisite of both circumstances is the establishment of an oil pollution damage liability limitation fund.

b. Obtaining Oil Pollution Insurance and Certificate Should Not Be Deemed as the Establishment of a Liability Fund

To determine whether or not obtaining the oil insurance and certificate by the Ship under the CLC 1992 can be considered an "establishment of fund" as set forth in Article 6 of the CLC 1992, the provisions of Paragraph 3, Article 5 of the CLC 1992 should be understood correctly as a preliminary condition.

On the basis of Paragraph 3, Article 5 of the CLC 1969,[8] the content of the abstract " ... if no action is brought, with any Court or other competent authority in anyone of the Contracting States in which an action can be brought under Article IX" was added in Paragraph 3, Article 5 of the CLC 1992, namely:

> *For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX or, if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or another competent authority.*

The addition supplements the previous provisions, stressing the requirement that the owner should actively establish the fund, i.e., after the action, the owner should establish the fund within the court which accepted the action or other competent authority; before the commencement of action, the owner should establish the fund with the court or other competent authority of any one of the contracting states in which action may be brought under Article IX. The fund may

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8 The CLC 1969, Art. 5 (3) reads as follows: "For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or another competent authority."

be established in various forms, but should be established specifically and actively.

The CLC 1992 requires that the owner of a ship registered in a contracting state and carrying more than 2,000 tons of oil in bulk as a cargo shall maintain oil pollution liability insurance or other financial security.[9] The above mentioned is the fundamental condition and compulsory requirement for ships operating in the territories of all the contracting state to the CLC 1992, including China.[10] The oil pollution insurance or other financial security so maintained or obtained does not constitutes the actively established "specific liability limitation fund".

In addition, Paragraph 11, Article 5 of the CLC 1992 reads as follows: "The insurer or other person providing financial security shall be entitled to constitute a fund in accordance with this Article on the same conditions and having the same effect as if it were constituted by the owner." It can be seen that the nature of the maintenance or assumption of such oil pollution liability insurance or the liability of financial security by the insurer of oil pollution liability or other person providing financial security is not the same as that of the establishment of specific liability limitation fund under the CLC 1992.

According to the respondents in their application for review, no ship having maintained such oil pollution liability insurance or having obtained other financial security shall establish the liability limitation fund within the relevant court or other competent authority in accordance with the provisions set forth in Paragraph 3, Article 5 of the CLC 1992 before or during litigation concerning the oil pollution damage, if the maintenance of the insurance or other financial security is deemed as an establishment of a liability limitation fund by the owner . And there is not even the need to add a reference to the provision which states " ... if no action is brought, with any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX" in the CLC 1992. Even the previous provision that "the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority

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9 The CLC 1992, Art. 7(1) reads as follows: "The owner of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for pollution damage under this Convention."

10 The CLC 1992, Art. 7(10) reads as follows: "A Contracting State shall not permit a ship under its flag to which this Article applies to trade unless a certificate has been issued under paragraph 2 or 12 of this Article."

of any one of the Contracting States in which action is brought under Article IX" should be deleted because it is obviously in opposition to the real intention of the formulation and amendment of the Convention. Therefore, the CLC 1992 has not taken oil pollution liability insurance or other financial security as the specifically established liability limitation fund, and the owner cannot request the release of the arrested Ship for this reason.

c. Obtaining Oil Pollution Insurance and Certificate Should Not Be Deemed as a Guarantee Furnished by the Applicant for the Release of the Ship

The Procedures in this case should be governed by the laws of the jurisdiction of the court. Although China has not acceded to the International Convention on Arrest of the Ships of 1952 and the International Convention on Arrest of Ships of 1999, the Special Maritime Procedure Law of the People's Republic of China (hereinafter "the Maritime Procedure Law") provides for the security procedure of arrest of ships in detail.

Article 21 of the Maritime Procedure Law provides that the applicant may apply for pre-trial security and request the court to arrest the respondent's ship for such maritime claims as actual damage or potential damage caused by ships to environment, coasts, or relevant interested parties, measures taken for preventing, reducing or eliminating such damage, compensation paid for it, cost for reasonable measures actually taken, or to be taken for the restoration of the environment, and any loss sustained or potentially sustained by any third party due to such damage. The Oceanic Administration, Fishery Administration, and fishermen's associations made applications to the court for arresting the incriminated ship on the basis of the provisions as set forth in the Maritime Procedure Law. Article 18 of the Maritime Procedure Law reads as follows, "... if the respondent provides guarantee, the maritime court shall promptly release the security." Therefore, we should further study whether the oil pollution insurance and certificate of the Ship should be deemed as guarantee furnished by the respondent in the procedure of maritime security.

Articles 73 and 76 of the Maritime Procedure Law provide that, for security of maritime claim, the respondent may, at the request of the applicant, provide guarantee in the forms of cash, promise, pledge, or charge. The amount of guarantee to be provided by the respondent as requested by the applicant should be equal to the amount of the creditor's right, but in no way may exceed the value of the property in so doing preserved. The form and amount of guarantee to be provided by the respondent, however, should be determined through negotiations

between the applicant and the respondent in the context of a relevant maritime claim; in case of failure, they should be determined by maritime courts.

It can be seen that the oil pollution insurance and certificate are not a guarantee to be provided by the respondent at the request of the applicant to secure a maritime claim. The major reasons are shown below:

First, in the arresting of ships before trial, the purpose of the provision of a guarantee by the respondent is to get the arrested ship released. However, the purpose of the maintenance and acquisition of oil pollution insurance and certificate is to comply with the compulsory requirements provided for in the CLC 1992 so that the Ship could operate in all the contracting state to the CLC 1992, including China on one hand,[11] and to determine the insurer's liability so that the victims of oil pollution by then may directly claim for compensation against the insurer on the other hand.[12]

Second, when arresting ships, the amount of guarantee provided by the respondent should be equal to that of the maritime claim brought forth by the applicant, but in no way should exceed the value of the arrested Ship. When different creditors successively apply for the arrest of a ship on the basis of different maritime claims, the respondent should provide guarantee at the request of applicants respectively to release the arrested ship. Therefore, the guarantee provided each time should relate to the maritime claim on which the application for seizing the ship is based and should in no way exceed the value of the arrested ship. It is totally different for the determination of the amount of oil pollution insurance. Such amount is based on the liability limitation determined according to the tonnage of the insured ship, applicable to all claims for oil pollution incident as set forth in the CLC 1992,[13] and irrelevant to the amount of the creditor's right of the applicants for the arrest of a ship and its value.

Third, among the guarantees provided by the respondent, cash, charge, or

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11 For the CLC 1992, Art. 7(1), see note 10; the CLC 1992, Art. 7(2) reads as follows: "A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a Contracting State has determined that the requirements of paragraph 1 have been complied with"; for the CLC 1992, Art. 7(10), see note 10.

12 The CLC 1992, Art. 7(8) reads as follows: "Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage."

13 The CLC 1992, Art. 7(9) reads as follows: "Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 of this Article shall be available exclusively for the satisfaction of claims under this Convention."

pledge are enforceable and the general guarantee is the one provided by banks or insurance companies and/or insurance associations for releasing the arrested ship. Oil pollution insurance and certificate are neither enforceable nor specific guarantees.

Obviously, the certificate, attesting that the liability insurance is valid, as issued by the competent authority of the government of Malta, is a certification document, other than a liability insurance contract, a liability limitation fund, or a guarantee provided for releasing the arrested ship.

It can be seen that the guarantee provided by the respondent of the arrested ship at the requisition of the applicant is different from the oil pollution insurance and certificate to be maintained and obtained under the CLC 1992 in terms of nature, purpose, and content,[14] and these two may not be replaced or covered by each other. Therefore, the oil pollution insurance and certificate of the Ship cannot be deemed as the guarantee lawfully provided by the owner of the Ship at the request of the applicant for maritime claim for releasing the arrested Ship.

3. Examination on the Account of the Review Application

For the review of the application put forward by the applicant, the Court convened a hearing on December 7, 2002, at which both parties adduced adequate evidences and expressed their opinions. Based on that, the court believed that the application filed by the applicant for arresting the Ship complies with the civil laws of China. Firstly, according to the provisions set forth in the CLC 1992,[15] the prerequisite for the avoidance of the seizure of a ship or for releasing the arrested ship is that the owner of it has established the liability limitation fund within the court in which the action is brought. The respondent, however, has not established any liability limitation fund within any Chinese court, so the application filed by the applicant for arresting the ship complies with the civil laws of China and is not prohibited by the CLC 1992. The court should respect the election of the applicant for arresting the ship. The certificate furnished by the respondent is the compulsory requirement for a ship carrying more than 2,000 tons of oil in bulk as cargo and engaging in operation in a contracting state, as set forth in the Convention. Any

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14 The major differences are suggested as below: (1) the categories under which they are; (2) the procedures for their establishments; (3) the time for their conversion and execution; (4) the amounts of their guarantees; (5) the ways of their guarantees; and (6) the objects they guaranteed. See Xu Fubin, Study on Relevant Legal Issues of Compensation for Oil Pollution Damage, Thesis of Xiamen Seminar, August, 2005.

15 The CLC 1992, Art. 6(1).

ship not complying with such requirement may not operate in any contracting state, including China; therefore, the certificate is not the guarantee for releasing the ship. Secondly, on the basis of the Convention, any claim for pollution damage can be brought against the insurer of oil pollution or other person providing financial security. Therefore, the insurer or the other person providing financial security is the guarantor jointly and severally liable for indemnification with the owner of the ship. Finally, the plaintiff applied for arresting the ship under the Maritime Procedure Law and provision of guarantee so that the judgment can be enforced in the jurisdiction of the court. The certificate of the respondent, however, is not the guarantee for the enforcement of a valid judgment of the court. The applicant's request for the continuation of the state of arrest of the ship until adequate and reliable guarantee is provided for releasing it complies with the provisions set forth in the Maritime Procedure Law. Accordingly, the court rejected the respondent's review application.[16]

The author believes that the decision of the Court clarified the provisions and legislative purpose of the CLC 1992, which has great significance on the specific application of the CLC 1992.

4. Release of the Ship under Arrest

The joint application filed by the Oceanic Administration, Fishery Administration, and fishermen's associations to the court for arresting the Ship before trial was deemed to be one application. For that, the respondent should provide one guarantee only. It is different from the situation under which the applicants apply for arresting ship individually. In the latter situation, the applicants request the respondent to provide guarantees individually, and the respondent should provide guarantees at the amount corresponding to each maritime claim, but not exceeding the value of ship.

In the case we are analyzing, the respondent claimed that the current value of the Ship was USD 2.65 million. Therefore, the amount of guarantee to be provided by the respondent should be limited to the value of the ship, regardless of the huge amount claimed by those joint applicants. After assessment and negotiation by all parties and by taking into account factors such as service term, market, and interests of all parties, the court finalized the amount of guarantee at USD 3 million.

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16 Tianjin Maritime Court, Tianjin Maritime Court Rejected the Review Application Brought by the Owner of the *Tasman Sea* Ship under the CLC 1992, at http://www.ccmt.org.cn/hs/news/show.php?cId=2689, 1 November 2005. (in Chinese)

On December 20, 2002, the Court released the Ship after China International Reinsurance Co., Ltd. provided the court with a credit guarantee of USD 3 million on behalf of the insurer of oil pollution of the Ship.

B. Pre-trial Conference and Consolidated Trial on Common Dispute

In general, a "consolidated action" is mainly represented by two types of actions provided for in Articles 53 and 126 of the Civil Procedure Law of the People's Republic of China (hereinafter referred to as the "Civil Procedure Law"), featuring the consolidation of two or more actions into one for judgment.[17] In practice, the court generally conducts a consolidated action over the actions derived from the same cause and of the same type of subject-matter, in line with the principle of efficiency. For instance, the compensatory actions for personal injuries and deaths of sailors or requesting the payments of salaries of sailors should be consolidated into one action.

An ocean covers certain seas, their waters, biotic and non-biotic resources, and subsoil, which are able to realize different goals and to exhibit different value of use. Therefore, the interests of the owners and users of the seas are different. We can take the series of cases of the Ship as an example, although the damages caused by the incident of oil spill provoked by the collision of the Ship, involves different claims based on the distinct interests. The Oceanic Administration claimed on the basis of the pollution and damage caused to the oceanic environment and ecology and the costs of ecological restoration; the fishermen from Luannan of Heibei, Hangu, Beitang, and Dagu of Tianjin claimed for the loss caused by the shut-down of marine fishing, loss of nets, and loss of intertidal shellfish; and the Fishery Administration claimed for the loss of fishery resources. The Disputes peculiar to each case differ. In this sense, the court may not carry out consolidated action on these 10 cases as a whole.

Although the disputes of each case vary, the following issues are common: 1. information of the Ship; 2. oil spillage; 3. quality of the oil spilled by the Ship;

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17 The Civil Procedure Law, Art. 53 provided that if one party or both parties to an action consist of more than two persons and the subject matter is the same or is of the same kind, it shall be a concurrent action, provided that the people's court considers that they may be judged in a consolidated manner upon the consent of parties concerned. A concurrent action may be subject to consolidated judgment. The Civil Procedure Law, Art. 126 provides that if the plaintiff adds claims while the defendant brings counterclaim and a third party makes claims relating to the action, it may be judged in a consolidated manner.

4. collected amount and volatilized amount of the spilled oil; 5. polluted area; 6. amount of consumed oil dispersant and its effect; 7. environment quality before pollution; and 8. overall evaluation of environment after pollution. These issues are technically complicated and should be assessed by experts or professional agencies. If these issues should be specifically determined in each case, the efficiency will inevitably deteriorate and the cost of the action will be increased; the determination on the said issues will be affected by different adductions of evidence and confrontations of parties concerned and, therefore, the final judgment will be affected.

To this end, the Court convened pre-trial conferences attended by authorized persons chosen by the plaintiffs and the defendants in the 10 cases on June 14 and June 23, 2004. At the meeting, the parties concerned finalized the common disputes and agreed to be subject to the consolidated trial on the common elements shared by these 10 cases, with their highly technical requirements and substantial influences on the judgments. In addition to the common features mentioned above, others will be investigated and determined in the trial of each specific case, separately. The court has held an open trial on June 24, June 25, and September 27, 2004, settling these common disputes in a consolidated manner.

Since the said cumulative dispute involved many professional and technical issues, the court, upon the consent of both the plaintiffs and the defendants, authorized Shandong Maritime Judicial Authentication Center who has the qualification recognized by the Supreme People's Court, to identify the relevant professional and technical issues. After studying evidentiary materials furnished by both parties, field survey, scientific experiment, and analogue analysis, consulting documentation, and attending the trial as bystanders, the appraisers issued the Appraisal Report of the Common Disputes over the Incident of Oil Spill by the *Tasman Sea* Ship on August 26, 2004 and attended the trial on September 27, 2004. At the trial, the appraisers answered questions raised by the authorized persons and professionals of both the plaintiffs and the defendants of the 10 cases, which laid down solid foundation for the court to finalize the extent and area of the pollution caused by the incident and damage compensations of each case.

The Court carried out consolidated judgment, upon the consent of parties concerned, by organizing a pre-trial conference to determine the common features of the various disputes, and authorized the appraisers with qualifications to appraise relevant technical issues, upon the consent of the parties concerned, and to issue the appraisal report of common disputes after adequate inquiries by the court. The

author believes that such practice greatly reduced the litigation exhaustion and costs and enhanced the efficiency of litigation, ensured the conformity over the determination of common elements important to the trial of each case, and ensured a fair trial. Therefore, such practice should be encouraged. In addition, there are no specific provisions in the Civil Procedure Law on the consolidated actions on partial disputes. The author suggests that the legislation or judicial interpretation should provide specific legal ground.

IV. Application of the Law to the Substantial Dispute over the Damages Provoked by the Series of Cases of the *Tasman Sea* Ship

The Ship in the case we are analyzing is a Maltese vessel. The plaintiffs in this case were Chinese agencies, organizations, and individuals while the defendants were registered in Malta and the UK respectively. According to the provisions set forth in Article 146 of the General Principles of the Civil Law of the People's Republic of China (hereinafter "the General Principles of the Civil Law"), the substantial dispute of the series of cases of the Ship is a compensation of foreign-related maritime infringement in which both the nationalities and domiciles of the parties concerned are set in different countries and should be governed by the *lex loci delicti commissi* (law of the place where the tort was committed), *i.e.*, the Chinese laws.[18] Argumenting from the provisions set forth in Article 142 of the General Principles of the Civil Law, in the case of any discrepancy between international treaties to which China is a contracting state or acceded and the civil laws of the country, the international treaties should prevail, except in the declared clauses covered by the Chinese reserve of jurisdiction.[19]

China is a contracting state to the CLC 1992. Therefore, we should also study the application of the CLC 1992 and the domestic legislation relevant to the series of cases of the Ship. In addition, we should study the applicability of the CMI Guidelines on Oil Pollution Damage (hereinafter "the Guidelines on Oil Pollution")

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18 The General Principles of the Civil Law, Art. 146(1) provides that the compensation for infringement shall be governed by the *lex loci delicti commissi*. When both parties are of the same nationality or domiciled in the same country, the *lex patriae or lex domicilii* may also apply.

19 The Maritime Law of the People's Republic of China, Art. 268 sets forth the same provision.

and the International Oil Pollution Fund Claim Manual (hereinafter "the Claim Manual").

A. Applicability of the Guidelines to the Oil Pollution and the Claim Manual

The Comité Maritime International (CMI) formulated the Guidelines on Oil Pollution in 1994, whose purpose is to provide advisory opinions for dispute over the understanding of international conventions, but not to change the claim rights established by the existing legal system.[20]

In 1992, the International Oil Pollution Fund (hereinafter referred to as the "Fund") issued the Claim Manual on the basis of the summarization of the operation and practice of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (hereinafter referred to as the "Fund 1992"), aiming to provide operational guidelines for the parties concerned in claiming rights against the Fund.[21] Paragraph 2, Article 1 of the Fund 1992 reads as follows: "'Ship', 'Person', 'Owner', 'Oil', 'Pollution Damage', 'Preventive Measures', 'Incident', and 'Organization' have the same meaning as in Article I of the 1992 Liability Convention." Therefore, the explanation of the concepts mentioned above in the Claim Manual provides us with a valid reference for the understanding of the relevant provisions set forth in the CLC 1992.

It can be seen that neither the Guidelines on Oil Pollution nor the Claim Manual is an international convention, their formulation is merely purported to provide the parties concerned with practicing references and guidelines, rather than to be generally accepted by all countries around the world. As far as China is concerned, both the Guidelines on Oil Pollution and Claim Manual have not been enforced repeatedly, nor are generally accepted, and thus should not be deemed as international customs. In this regard, they should not serve as the legal basis of the trial concerning the series of cases of the Ship. It is correct that the Court held that neither the Guidelines on Oil Pollution nor the Claim Manual is applicable to the above mentioned cases.

Both the Guidelines on Oil Pollution and the Claim Manual prescribe relevant

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20 See the Introduction to the Guidelines on Oil Pollution.

21 See the Preamble of the Claim Manual, adopted by the Fund in October, 2004 and published in April, 2005.

issues regarding compensation for oil pollution damage in detail. In case of necessity, the court may properly refer to relevant understanding of the Guidelines on Oil Pollution and the Claim Manual in the judicial practice. Of course, these guidelines are for reference only and should not serve as the legal basis. In the future amendment to the Maritime Law of the People's Republic of China (hereinafter referred to as the "Maritime Law"), reasonable and practicable contents of the Guidelines on Oil Pollution and the Claim Manual may be adopted into the chapter of compensation for oil pollution damage.

B. Applicability of the Maritime Law

The Maritime Law has not specific legislative provisions on compensation for oil pollution damage, but provides dedicated clauses regarding ship collisions and liability limitation on maritime claim in Chapter 8 and Chapter 11 respectively.

In addition to pollution that harms on the oceanic environment, the collision of the incriminated vessel and the *Shunkai* Ship also caused other property damages. The latter is a Chinese costal cargo ship, not subject to the CLC 1992. If the parties concerned claim for compensation for property loss caused by the collision against the *Shunkai* Ship, the compensation liability of the owner of the *Shunkai* Ship should be determined under the relevant provisions of the Maritime Law regarding ship collision. For the owner of the cargo, these maritime claims are not the non-restrictive maritime claims set forth in Item 2, Article 208 of the Maritime Law.[22] Therefore, the owner of the *Shunkai* Ship may determine the liability limitation right and liability limitation for the property loss caused by the incident under the

22 The Maritime Law, Art. 208 reads as follows: "This Chapter shall not be applicable to: ... (b) the claim for the compensation for oil pollution damage as set forth in the CLC to which the People's Republic of China is a contracting state ... "

Maritime Law and relevant provisions.[23]

In the series of cases of the Ship, the plaintiffs, however, only claimed for the compensation for the oil pollution damage caused by the collision against the two defendants, without suing the owner of the *Shunkai* Ship, nor concurrently nor respectively.[24] Therefore, the said provisions of the Maritime Law should not apply.

In addition, China has acceded to the CLC 1992. According to the provisions set forth in Article 208 of the Maritime Law, the clauses on liability limitation on maritime claim as prescribed in Chapter 11 of the Maritime Law are not applicable to the claim for compensation for oil pollution damage as prescribed in the CLC 1992. In the series of cases of the Ship, the parties concerned appealed to the court for determining the liability for compensation for oil pollution damage only with regards to the principle of "polluter liable for compensation" under the CLC 1992,[25] other than the liability for default of the Ship in the collision. Therefore, the provisions of the Maritime Law concerning collision are not applicable to the cases in discussion.

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23 In terms of the liability limitation of the owner of the *Shunkai* Ship, it is prescribed in the Maritime Law, Art. 210(2) that the compensation limitation of ships engaging in coastal operation shall be established by the competent transport authority under the State Council and subject to the approval of the State Council prior to its application. It is prescribed in Article 4 of the Provisions on the Limitation of Maritime Compensation by Ships of Less than 300 Ton and Ships Transporting and Operating on Coast formulated by the Ministry of Transport in 1993 (to be implemented as from January 1, 1994) that, in the case of ships transporting cargo between ports of the People's Republic of China and operating on the coast, the limitation on maritime compensation shall be 50% of the compensation limitation set forth in Article 3 thereof, if the ship is less than 300 tons; and the limitation on maritime compensation shall be 50% of the compensation limitation set forth in the Maritime Law, Art. 210(1), if more than 300 tons.

24 On December 11, 2002, the Fishery Administration applied to the Court to arrest the *Shunkai* Ship before trial and requested the respondent to provide security. On the same day, the Court made a civil judgment under laws to arrest the *Shunkai* Ship anchored at Tianjin Port and ordered the respondent to provide RMB 10 million to the Court as security. The representative of the owner of the *Shunkai* Ship requested to reconcile with the Fishery Administration outside the court. After that, Dalian Lvshun Shunda Shipping Co., Ltd. compensated the Fishery Administration of RMB 500,000. In claiming for the compensation for damage against the owner and insurer of the *Tasman Sea* Ship, the Fishery Administration agreed to deduct RMB 500,000 from the total loss.

25 The CLC 1992 Art. 3(1) reads as follows: "Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident."

C. Application of the Law for the Determination of the Subjective Qualifications of the Plaintiffs

The court has determined the fact that the crude oil spill of the Ship caused pollution damage, through a consolidated trial on common disputes.

The CLC 1992, however, sets no limitations on the scope of the victims of oil pollution damage. According to the provisions set forth in Paragraphs 2 and 6, Article 1 of the Convention, any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions, who sustained "pollution damage"[26] may claim for compensation for oil pollution damage under this Convention.[27]

In terms of domestic laws, Paragraph 2, Article 117 of the General Principles of Civil Law prescribes that "anyone who damages national or collective property or others' property shall restore it into its original conditions or reimburse its estimated price"; Article 124 of the same law prescribes that "anyone who pollutes environment, causing impairment on others, in violation of State provisions on prevention of environment pollution, shall assume civil liability under the laws." Paragraph 2, Article 90 of the Maritime Environment Protection Law prescribes that "in the case of gross material loss to the State caused by damage of maritime ecology, maritime aquatic resources, and maritime protected area, the authority with the power of supervision and administration of maritime environment under this Law may, on behalf of the State, claim for damage compensation against the person

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26 Subject to the provisions set forth in the CLC 1992 Art. 1(6), "Pollution damage" means: (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement; and (b) the costs of preventive measures and further loss or damage caused by preventive measures.

27 Subject to the provisions set forth in the CLC 1992 Art. 1(2), "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

liable therefor."[28] It can be seen that the victims of maritime pollution damage are entitled to claim for damage compensation against the state with the sovereignty of relevant seas, or their natural resources and economic development; and against any individuals legally utilizing the ocean and its environment resources. Victims (including any state and individual) of the oil pollution damage caused by the Ship are entitled to claim for damage compensation against any person liable, but the legal basis of the domestic laws will be different.

1. Determination of the State about the Subject Liable for Compensation for Oil Pollution Damage on Maritime Environment and Resources

Since a State has the sovereignty of the pertinent seas, as well as their natural resources and economic exploitations, it is entitled to claim for damage compensation against the person liable for maritime pollution damage. In China, however, it has been the focus issue of the academic, judicial, and practice communities that have the prerogative to claim for damage compensation on behalf of the state against the person liable for oil pollution damage.

Generally, subject to the provisions set forth in Paragraph 2, Article 90 and Article 5 of the Maritime Environment Protection Law, in China, there are several authorities in charge of the supervision and administration on maritime environment, and therefore, authorities claiming for oil pollution damage on behalf of the state against the liable person should be specifically classified. For instance, the competent environment protection administrative authority in charge of supervision and administration on maritime environment; the competent state maritime affair administrative authority in charge of supervision and administration of the pollution to maritime environment of its waters by non-military ships and outside of port waters by non-fishing and/or non-military ships; the competent state

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28 In addition, the Law of the People's Republic of China on the Administration of the Use of Sea Areas, Art. 44 prescribes that, "In the case of any hindrance of the lawful use of sea areas by the holder of right of use of the sea areas in violation of Article 23 hereof, such holder may either apply to the competent oceanic administration for eliminating such hindrance, or bring a lawsuit to the people's court; in the case of any loss, such holder may also claim for damage compensation under laws." The Fisheries Law, Art. 36(2) prescribes that "the supervision and administration of ecological environment of fishing waters and investigation and handling on fishery pollution accident shall be subject to relevant provisions of the Maritime Environment Protection Law and the Law of the People's Republic of China on Prevention and Control of Water Pollution." The Fisheries Law, Art. 47 prescribes that "anyone who damaged the ecological environment of fishing waters or caused fishery pollution accident shall be charged of legal liabilities under relevant provisions of the Maritime Environment Protection Law and the Law of the People's Republic of China on Prevention and Control of Water Pollution".

fishery administrative authority in charge of supervision and administration on the pollution to maritime environment in fishery port waters by non-military ships and outside of fishery port waters by fishing ships and in charge of protection on ecological environment of fishing waters; and the competent military environment protection authority in charge of supervision and administration on pollution to maritime environment by military ships.[29] Within their competence, these authorities have the right to claim for damage compensation against liable person

29 The Maritime Environment Protection Law, Art. 90(2) prescribes that "in the case of great loss to the State caused by damage of maritime ecology, maritime aquatic resources, and maritime protected area, the authority with the power of supervision and administration of maritime environment under this Law may, on behalf of the State, claim for damage compensation against the person liable therefor." The Maritime Environment Protection Law, Art. 5 reads as follows: "As the centralized supervision and administration authority in charge of national environment protection, the competent environment protection administrative authority under the State Council shall be responsible for guiding, coordinating, and supervising the national protection on maritime environment and for environment protection of preventing and controlling maritime pollution damage caused by land-based pollutants and coastal engineering projects. The state maritime administrative authority shall be responsible for the supervision and administration on maritime environment, organizing activities of survey, monitoring, evaluation, and scientific study, and for environment protection of preventing and controlling maritime pollution damage caused by maritime engineering construction projects and dumping wastes into seas. The state maritime affair administrative authority shall be responsible for the supervision and administration on pollution of maritime environment by non-military ships in port waters under its jurisdiction and by non-fishing, non-military ships outside the port waters, for investigation and handling on pollution accident, and for on-board investigation and handling on pollution accident caused by foreign ships going, anchoring, and/or operating in the seas of the People's Republic of China. In the case of damage on fishery caused by pollution accident of ships, competent fishery authority should participate in investigation and handling. The state fishery administrative authority shall be responsible for the supervision and administration on pollution of maritime environment in port waters by non-military ships and outside port waters by fishing ships, for the protection of ecological environment of fishing waters, and for the investigation and handling on fishery pollution accidents other than those set forth in the preceding paragraph. The military environment protection authority shall be responsible for the supervision and administration on pollution of maritime environment by military ships and investigation and handling on pollution accidents. Local people's governments at county level and above shall perform duties of supervision and administration of maritime environment, which shall be determined by the governments of provinces, autonomous regions, and municipalities under the Central Government in accordance with this Law and relevant provisions of the State Council."

on behalf of the state.[30] Because of the broad sense of the concepts of "environment" and "natural resources", it is hard to clear the terms of reference of each authority involved in maritime affairs. Therefore, the issue concerning who has the right to claim for compensation for a damage or expenditure on behalf of the state occurs frequently in practice. If there are two or more maritime authorities claiming for compensation against the liable person separately, it may cause overlapped claims among those authorities (in particular, claim for damage on natural resources and restoration of the same).

In the series of cases of the Ship, the Oceanic Administration brought Jin Hai Fa Shi Chu Zi [2003] No. 183 Action under authorization of the State Oceanic Administration on behalf of the state and the Fishery Administration brought Jin Hai Fa Shi Chu Zi [2003] No. 184 Action under the authorization of the Ministry of Agriculture on behalf of the state. Since the Oceanic Administration and the Fishery Administration claimed for damage compensation on behalf of the Chinese government for the same oil pollution accident in different cases, the defendants have claimed that the claims of the Fishery Administration, the Oceanic Administration and relevant fishermen and aquaculturists were overlapped. So, the Court held that the Oceanic Administration claimed for the pollution and damage of oceanic environment and ecology and ecological restoration; the fishermen from Luannan of Heibei, and Hangu, Beitang, and Dagu of Tianjin claimed for the loss caused by shut-down of marine fishing, loss of nets, and loss of intertidal shellfish; and the Fishery Administration claimed for the loss of fishery resources. Therefore, the scope and content of the claims of each party is defined and independent from one another, without overlapping.[31]

Although the court held that these claims were not overlapped, the judgment has not specified the reasons for such decision. It also reveals the confusion brought to the judicial practice by an unclear legislation. As mentioned above, under the circumstance that the administrative terms of reference of each maritime authority

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30 Someone believes that under any circumstance there should be only one authority to exercise the right of supervision and administration and, therefore, there should be only one authority to claim for compensation on behalf of the state. In the case of oil spill event caused by ordinary commercial oil tanker, the qualified subject "having the right to claim for damage compensation on behalf of the state" should generally be the state maritime administrative authority, instead of other authorities. See Zhao Jinsong, Discussion of Practical Issues regarding Compensation for Oil Pollution Damage, at http://www.cpiweb.org/showonenews.Isp?news_id=217, 1 November 2005 (in Chinese).

31 [2003] Jin Hai Fa Shi Chu Zi No. 184 Judgment(in Chinese).

and, in particular, the terms of reference of claiming for compensation for maritime pollution damage on behalf of the state, are unclear, the claims made by several maritime authorities on behalf of the state may be not only overlapped, but also omitted, and, therefore, it may leave hidden problems for the overall restoration of the national maritime environment. The author believes that China should establish a clear, unified, coordinated, and specific legal mechanism of pollution damage on maritime environment. In the relevant legislation, an authority should be instituted to claim against the liable person on behalf of the state in a unified manner by reference of relevant provisions of the USA Oil Pollution Act of 1990 (hereinafter referred to as the "OPA 1990"), with the assistance of relevant authorities, especially for data support.[32] The determination of a unified authority to claim for damages on behalf of the state does not violate the CLC 1992 and General Principles of Civil Law and complies with the legislative purposes of the Maritime Environment Protection Law and relevant laws.

2. Determination of the Subject of Compensation for Oil Pollution Damage on Fishery Production

Spill of crude oil will not only impair the rights of a state to maritime environment and resources, but also bring various economic losses to relevant entities and individuals. In the series of cases of the Ship, there were 8 actions brought forth by fishermen, aquaculturists, and fishermen's associations.

Subject to the Fishery Law of the People's Republic of China (hereinafter referred to as the "Fishery Law"), aquaculturing and fishing are two kinds of major fishery production activities.[33]

The fishing area polluted by the oil spill of the Ship has been the traditional fishing area of the fishermen in these cases. It was polluted by crude oil and those fishermen were forced not to fish in specific zones for a period. As we have known, fishermen do not have the title to maritime organisms before getting them. When fishermen cease fishing, they are not suffering property loss of maritime organisms

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32 The OPA 1990 lists "natural resources" into "environment" and prescribes that if any natural resources belong to the federal, state or local government or Indian clans, or owned, administered, in the trusteeship of, possessed, or controlled by foreign governments, the trustee of the U.S government, state, Indian clans, or foreign government may claim for damage on natural resources (including relevant land, fishes, wild plants and animals, organisms, air, water, underground water, drinking water supply, and other resources of the same kind) caused by oil pollution against the liable person. See the U.S. Code, Art. 1001(20) and Art. 1002(2)(2)(2).

33 See the Fishery Law, Art. 2.

and may not request the liable person for restoration to original conditions or reimburse its estimated price in accordance with Paragraph 2, Article 117 of the General Principles of Civil Law.[34] The purpose of fishing is to capture maritime organisms and obtain the ownership of such organisms so as to get corresponding economic benefits through sale or processing. Therefore, in the case of economic loss caused by the shut-down of fishing areas, fishermen may request the liable persons for oil pollution damage to assume civil liabilities under Article 124 of the General Principles of Civil Law.[35] Of course, if the production tools used for fishing are damaged by pollution, the affected fishermen may also claim for restoration of original condition or reimburse its estimated price for such damage, pursuant to Paragraph 2, Article 117 of the General Principles of Civil Law.

The shoal polluted by the oil spilled from the Ship is the area where relevant aquaculturists operated. In those dwellings, these aquaculturists had to invest a great amount of funds to purchase seedlings and other production materials and obtain economic income by selling aquatic products. Therefore, they had the ownership of these seedlings, production materials, and aquatic products. The aquaculture area was polluted by crude oil, resulting in the death of aquatic products and the damage to relevant production tools and materials. These aquaculturists may claim for compensation against persons liable for oil pollution damage in accordance with the provisions set forth in Paragraph 2, Article 117 and Article 124 of the General Principles of Civil Law.

According to the provisions set forth in the Civil Procedure Law, representatives may be elected under laws for the proceedings in the case of there

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34 The General Principles of Civil Law, Art. 117(2) prescribes that "anyone who damages national or collective property or others' property shall restore such property into its original conditions or reimburse the estimated value".

35 The General Principles of Civil Law, Art. 124 prescribes that "anyone who pollutes environment, causing impairment on others, in violation of State provisions on prevention of environment pollution, shall assume civil liability under laws".

are many fishermen and aquaculturists.[36] The representatives' participation in the proceedings does not nullify the positions of the fishermen and aquaculturists they represented as subjects of compensation, but it is not clear how this legislative principle is expressed in the procedural operation.

For the series of cases of the Ship, the procedural operations were different in their forms. Some were brought forth by fishermen and aquaculturists, and participated in by representatives so elected and others were brought directly by the relevant fishermen's association on behalf of fishermen and participated by representatives so elected. It should be pointed out that, in [2003] Jin Hai Fa Shi Chu Zi No. 186 Case, the Fishermen's Association, after having brought a lawsuit against the two defendants on behalf of relevant fishermen and aquaculturists, filed an application to the court for considering those fishermen and aquaculturists as joint plaintiffs. Among the Fishermen's Association, fishermen and aquaculturists irrevocably committed to the court that they would not claim again for any right separately against the two defendants. Although the defendants put forward different opinions, the court still agreed that the Fishermen's Association, fishermen and aquaculturists may participate in the proceedings as joint plaintiffs, with Yang Baosheng and other four persons as the representatives, and ruled that the two defendants should jointly and severally be liable for the compensation for the oil pollution damage to those fishermen and aquaculturists.[37]

The court's judgment reflects the legislative principles mentioned above that

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36 The Civil Procedure Law, Art. 54 provides that in case of concurrent actions with numerous plaintiffs or defendants involved in, representatives may be elected by parties concerned for proceedings. The proceeding acts conducted by the representatives are binding parties they represented, but the alteration, waiver of claim, conceding to actions by the other party, or reconciliation of the action should be subject to the consent of the parties they represented. Art. 55 provides that if the subject matter of an action is of the same kind or a party consisting of numerous persons of which the number has not been fixed at proceeding, the people's court may publish an announcement, stating the case information and claim, and inform the right holders to register with the people's court within certain term. The right holders so registered may elect representatives for proceedings; if no representative so elected, the people's court may negotiate with such right holders to determine the representative. The proceeding acts conducted by the representatives are binding parties they represented, but the alteration and waiver of claim, conceding to actions by the other party, or reconciliation of the action should be subject to the consent of the parties they represented. The judgment and award of the people's court are binding all right holders so registered. The judgment and award mentioned above should be applied to the actions brought by the right holders not so registered during litigation term.

37 Not including another plaintiff - The Fishermen's Association. See [2003] Jin Hai Fa Shi Chu Zi No. 186 Judgment.

although the Fishermen's Association was a joint plaintiff, with representatives such as Yang Baosheng, participating in the proceedings, the fishermen and aquaculturists they represented were the real victims and their qualifications and positions as beneficiaries of the compensation had not been affected. At the same time, it also can be seen from the different operational forms of the series of cases of the Ship and from the different opinions put forward by the defendants that the domestic legislation should make more specific and easy-to-operate provisions on how to identify plaintiffs and participants to the proceedings and how to connect relevant procedures to reflect the fundamental principles of proceedings, in the circumstance that there are many parties involved.

D. Application of the Law for the Determination of the Scope of the Damage Compensation

1. Relevant Provisions of Domestic Laws and International Conventions

Paragraph 2, Article 117 and Article 124 of the General Principles of Civil Law and Article 90 of the Maritime Environment Protection Law specifically establish the principles of compensation for oil pollution damage, but there are no specific provisions regulating the scope of damage compensation. Therefore, in ruling the series of cases of the Ship, the CLC 1992 was the significant legal basis for determining it. In the case that there are no specific provisions set forth in the CLC 1992, the principles established in the General Principles of Civil Law, the Maritime Environment Protection Law, and the CLC 1992 should be followed to determine the scope of damage compensation by taking into account the peculiarities of the case concerned. Since the CLC 1992 has been widely accepted by many countries around the world, the application of the provisions set forth in Paragraph 6, Article 1 of the CLC 1992 between the contracting states provides the Chinese courts with enough references for the application of such provisions.

According to the provisions set forth in Paragraph 6, Article 1 of the CLC 1992, "'Pollution damage' means: (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ships, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement; and (b) the costs of preventive measures and further loss or damage caused by preventive measures."

The "Pollution Damage" mainly includes: (1) expenses for cleaning and

preventive measures; (2) property loss and subsequent deprivations; (3) economic loss (including economic losses in terms of fishing and tourism industries) and expenses related to preventive measures; (4) environment damage; and (5) cost for relevant study and survey after pollution accidents.

In the series of cases of the Ship, the parties concerned had a heated debate on the question if property loss such as net loss, economic loss of fishing, environment damage, and relevant cost for study and survey after the pollution accident, as well as damage on fishing resources fall or not under the scope of "pollution damage" set forth in Paragraph 6, Article 1 of the CLC 1992.

2. Net Losses and Economic Losses of Fishing Production

As for the claim made by fishermen and aquaculturists, the defendants contested that the claim for the loss derived from a reduced fishing was overlapped with those made by the Oceanic Administration and the Fishery Administration. The evidences suggested that there was not the reduced fishing claimed by the plaintiffs. Subject to the CLC 1992, the plaintiffs may claim for the loss of net profit only, with the cost for fishing production deducted in the calculation of loss.

The court held that loss derived from the shut-down of marine fishing enterprises was the direct loss caused by pollution, which was different from that claimed by the Fishery Administration and the Oceanic Administration. So, it was not an overlapped claim. The seas were materially polluted by the oil spilled by the Ship, causing shut-down of marine fishing enterprises, death of many cultured shellfish, and inability to use fixed nets which were not removed promptly. Therefore, there was a clear cause and effect relation and those harms constituted pollution damage as prescribed in the CLC 1992. Both the defendants should reasonably indemnify plaintiffs, but the plaintiffs were obliged to mitigate the loss derived from the shut-down of marine fishing enterprises, under either the CLC 1992 or Chinese law. There might be many reasons for further loss of reduced fishing in addition to those caused by the shut-down. Oil pollution might be one of the factors, but it is hard to quantify it relevance. Thus, the loss should not be entirely attributed to oil pollution. The author agrees with the court on the point.

3. Damage on Environment and Ecology, Costs for Study and Survey

As for the claim made by the Oceanic Administration, both defendants sustained that the oil spill accident had not caused a long-term or mid-term impact on the maritime ecological environment, that there were no such losses of environment capacity and ecological service function as pretended by the plaintiff and finally that the claimed loss was not the "pollution damage" recognized by the

CLC 1992; moreover the expense for the environment restoration claimed by the plaintiff cannot be indemnified under the CLC 1992, even if the oil spill accident caused damage on the maritime ecological environment; and the plaintiff's claim for the cost related to the restoration of maritime organisms and assessment held no ground.

The Court stated that Bohai is a semi-enclosed sea, with a very long time period necessary for the circulation of waters and with a weak self-purification.[38] Although the water quality in the polluted seas recovered to its original condition 4 months after the pollution accident, this result was realized mainly through an increase of the polluted area due to the physical functions of seawater, including dilution, mixture, proliferation, elution, vaporization, and deposition. Therefore, the spill of light crude oil, regardless of the area of pollution, incremented the content of light crude oil into Bohai Bay, causing loss of environment capacity of the latter. To deal with such consequences, the authorities made the "Bohai Blue Sea Action Plans". They are measures taken and to be taken to reduce the oil pollution and restore the environment of Bohai (which constitutes the pollution damage described in Item (1), Paragraph 6, Article 1 of the CLC 1992.) The expenses of survey, examination, and assessment on the degree and area of pollution caused by the oil spill of the Ship as well as the reasonable costs for studying the restoration of polluted maritime environment paid by the plaintiff do not exceed the reasonable costs prescribed in CLC 1992. Although the deposited oil pollutants under the seas where the accident occurred reduced to the standard for Class I of sediments after one year, the average content of oil pollutant was still not restored to the original level and was 0.68 times higher than the one before the accident. Therefore, it needs to be restored, but the plaintiff was unable to prove that his technical plan could meet the wanted effect; the loss of nektons exists, but the species indicated by the plaintiff were not suitable for culturing; the area where the concentration of oil was higher than 50μg/L was about 2,195 km^2, so the loss of maritime ecological service function should be indemnified, but the basis of loss calculation was not sufficient; the loss of intertidal shellfishes was not well supported by data. In addition, the polluted sea is near to the estuary, with abundant nutrient salt. It is favorable for the reproduction of phytoplanktons and so is possible to restore it naturally. Finally, the court supported the partial claims of the plaintiff and ordered the defendants to jointly and severally indemnify the plaintiff of RMB 7.5058

38 [2003] Jin Hai Fa Shi Chu Zi No. 183 Judgment.

million for the capacity loss of the marine environment and RMB 2,452,284 for the cost of survey, monitoring, assessment and its research of biotic restoration.

The major reason why the claims for compensation such as the expense for the restoration of the maritime sediments, the intertidal biotic environment, and nektons, made by the Oceanic Administration were rejected was not that those claims were not within the scope of "pollution damage" prescribed in the CLC 1992 or not protected by domestic laws such as the General Principles of Civil Law, in terms of their nature, but that the plaintiff was unable to prove the existence of such damages and respective amounts with strong evidences. LI Bohua, chief judge and president of Tianjin Maritime Court, declared: "it is hard to quantify the pollution damage caused by the oil spill of the Ship, since there is no information on the previous condition of the environment of Bohai Sea, which will directly affect the determination of the facts."[39] In addition, the technologies for taking evidence in the field were not sophisticated, including the cover rate, monitoring means, and technical standards.

The action brought forth by the Oceanic Administration against the two defendants for compensation for the oil pollution damage caused by the collision represents the first case in which a Chinese competent maritime administrative authority took the matter to a maritime court for maritime environment pollution damage on behalf of the state. It can be seen that it is very important for the administrative authority to exercise the right of supervising and administering the maritime environment to have the basic information on maritime environment and relevant technical means to claim against persons liable for maritime pollution on behalf of the state in the future.

It can be seen from the judgment, that the court supported the capacity loss of maritime environment and the relevant expenses of survey, monitoring, assessment, and biotic restoration, and also supported the loss of maritime ecological service function in principle. The attorney of the defendants put forward at a relevant meeting that the claims for the losses of maritime environment resources such as the "loss of environment capacity" and the "loss of ecological service functions" were not indemnified pollution damages.[40] Some scholars believe that "environment"

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39 Li Mingchun and Yang Wei, The *Tasman Sea* Ship Case Were Puzzled by Two Issues, at http://www.univs.cn/univs/ouc/hyzc/ info_display.php?id=104161, 1 November 2005.

40 Yang Wengui, Tong Mei and Jin Cong, The Scope of Compensation for Environmental Damage in Ship's Oil Spill, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 357~377.

should include "natural resources". The Chinese legislation, however, should classify the above mentioned damage in connection with compensation for oil pollution damage as damage on natural resources other than environment in the future to facilitate the determination of claim subject, compensation scope and evaluation of damage.[41] The author believes that the explanation of "environmental damage" of the Claim Manual on which the defendants' attorney is based does not totally rule out the damage on natural resources.[42] It can be imagined that the continuous attentions of legislative, judicial, academic, and practice communities will be attached to the specific meaning and nature of concepts such as "loss of environment capacity" and "loss of ecological service functions" (and "long-term or mid-term loss of fishing resources" below) and whether they fall into the scope of "pollution damage" prescribed by the CLC 1992 or "environment damage" prescribed by Chinese domestic laws.

It should be noted that the OPA 1990 specifically incorporates "natural resources" into "environment", prescribing that claims for damage on natural resources (including relevant lands, fishes, wild plants and animals, organisms, air, water, underground water, drinking water supply, and other resources of the same kind) caused by oil pollution may be made against the liable person.[43] The U.S. is not a contracting state to the CLC 1969, the CLC 1992, the Fund 1971, and the Fund 1992, so we cannot comprehend the definition of "pollution damage" prescribed in the CLC 1992 by reference of American domestic legislation. China, however, may take into account relevant contents of American legislation to a certain extent, in establishing and improving the legal mechanism of compensation for pollution damage on maritime environment.

4. Cost for the Loss of Fishing Resources and Relevant Investigations

As for the claim made by the Fishery Administration, the defendants argued that the fishing resources in the damaged seas were totally restored 11 months after the accident, that the oil spill accident had not caused long-term or mid-term impact on the maritime environment and fishing resources, and that the plaintiff's claim held no grounds under the CLC 1992, the Guidelines on Oil Pollution, and the Claim Manual.

Neither the CLC 1992 nor the General Principles of Civil Law, nor the

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41 Xu Guoping, Paper on Mid-term or Long-term Oil Pollution Damage from Ships, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 345~356.

42 The Claim Manual (April, 2005 Edition), p. 31.

43 The U.S. Code, Art. 1001(20) and Art. 1002(2)(2)(2).

Maritime Environment Protection Law, nor the Fishing Law contains any specific provisions on the loss of fishing resources and its scope. Relevant provisions and applicability of the Provisions on Calculation of Fishing Loss Caused by Pollution Accident formulated by the Ministry of Agriculture (Issued on October 8, 1996, hereinafter referred to as the "Calculation Provisions") become the focuses of the dispute and the court made a detailed explanation.

In particular, the tribunal held, that the loss of fishing resources caused by pollution accident includes direct economic loss and loss of natural fishing resources under the Calculation Provisions, and that they are interrelated when determining the amount of loss of fishing resources caused by pollution.[44] The long-term loss of fishing resources claimed by the defendants referred to the loss of natural fishing resources as mentioned above. The sudden oil spill accident obviously contributed to the chronic poisoning of maritime biotic resources and loss of species. This damage will not only abruptly reduce the fishing resources, but also cause an irreversible damage to the fishing resources, of which the consequence might directly affect the replenishment of fishing resources and the restoration of species in the coming years. Although the water quality was restored to the original condition 4 months after the accident, that fact did not mean the restoration of the fishing resources, which was sufficiently supported by the investigation of the defendants. The Calculation Provisions has been repeatedly reviewed and demonstrated by experts after actual investigations over the years. Taking into account a huge set of cases, it specifies that the economic loss of natural fishing resources should not be less than 3 times the amount of the directly economic losses of fishing resources in the form of state normative. These provisions have been implemented in China for many years, which is the sole normative document for calculating the loss of fishing resources at present. The calculation of the loss of fishing resources under these provisions is not purely theoretical, but it is an objective evaluation made on the economic loss of natural fishing resources caused by pollution on the basis of a field investigation and dynamic monitoring data of natural fishing resources by expert evaluation. The conclusion is based on both facts and laws. Item (1), Paragraph 6, Article 1 of the CLC 1992 does not prescribe that no compensation shall be made for pollution damage that has caused long-term or mid-term loss of fishing resources. Article 124 and Paragraph 2, Article 117 of the General Provisions of Civil Law state

44 See [2003] Jin Hai Fa Shi Chu Zi No. 184 Judgment.

that compensation must be made for the pollution damage on environment and do not exempts the liabilities of compensating the economic loss of natural fishing resources. Therefore, in the absence of specific provisions in the CLC 1992, the calculation and compensation for the loss of natural fishing resources should be made on the basis of the monitoring results of the Huanghai and Bohai Monitoring Center under the Calculation Provisions, which complies with the existing Chinese laws and does not violate the provisions of the CLC 1992. The expense of survey, examination, and assessment on the pollution degree and area of pollution caused by the oil spill of the Ship and the expenses sustained for studying the restoration of polluted maritime environment paid by the plaintiff constitute the reasonable costs prescribed in CLC 1992 and should be assumed by the defendants.

The author believes that it should be explained from the following two aspects.

First, in terms of the existing laws, and in the absence of special provisions of the CLC 1992 and the General Principles of Civil Law on the compensation for "loss of fishing resources", the court may apply for the Calculation Provisions to determine the amount of compensation for the economic losses of fishing resources, without prejudice to the principles set forth in the Conventions and domestic laws mentioned above.[45]

Second, in terms of fishing resources, the expenses incurred by initializing the measures specifically taken to restore the fishing resources should be indemnified. It is prescribed in the Calculation Provisions that the compensation for the loss of natural fishing resources should be used for proliferation, improvement, protection, and administration of fishing environment. The purpose of restoring and improving the fishing ecological environment and restoring the natural fishing resources through restoring the proliferation capability complies with the provisions set forth in Paragraph 6, Article 1 of the CLC 1992. Of course, since the Calculation Provision was formulated in 1996, the author believes that whether these provisions comply with the purposes of existing international conventions and domestic

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45 Someone believes that the Calculation Provisions are ordinances of Department of State Council, without general binding force; the compensation is punitive, on the contrary to the principles established by the General Principles of Civil Law; the conclusion is adductive, without certainty, quantitativeness, and predictability, on the contrary to the principles established by the General Principles of Civil Law. Therefore, they should not serve as the basis of calculating the long-term or mid-term loss. See Yang Yunfu and Lin Cuizhu, Scope of Losses of Compensation for Damages Due to Oil Pollution of Ships in Chinese Waters, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 312~313.

legislations should not be simply accepted or denied and should be objectively determined on the basis of a specific demonstration.

At present, wide attention has been paid on whether the long-term or mid-term loss of fishing resources falls under the scope of compensation for pollution damage on environment.[46] The author believes that the continuous attentions of legislative, judicial, academic, and practice communities will be attached to the specific meaning and nature of the "long-term or mid-term loss" and whether it falls into the scope of "damage on environment" prescribed by the CLC 1992 or "environment damage" prescribed by Chinese domestic laws. OPA 1990, in prescribing that the claims for damage against natural resources (including relevant lands, fishes, wild plants and animals, organisms, air, water, underground water, drinking water supply, and other resources of the same kind) caused by oil pollution may be made against the liable person should also be taken as reference.[47]

V. Conclusion for the Rest of Issues

The maritime environment pollution caused by vessel collisions frequently triggers many legal and practice issues. So is this Ship accident. Some of those issues were reflected in the series of cases of the Ship, while others were not eminent in our trial, but are still closely related to the oil pollution damage, which makes them worthy of attention.

A. Legal Liabilities of the Other Party in the Collision

This oil pollution damage was caused by the collision between the *Tasman Sea* vessel and the *Shunkai* Ship, a Chinese coastal cargo. In the accident, the crude oil carried by the Ship was spilled into the sea.

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46 Yang Yunfu and Lin Cuizhu, Scope of Losses of Compensation for Damages Due to Oil Pollution of Ships in Chinese Waters, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 311~314; Xu Guoping, Paper on Mid-term or Long-term Oil Pollution Damage from Ships, in *The Sixth International Conference on Maritime Law Papers Collection*, 2005, pp. 345~356; Zhao Jinsong, On Compensation for Oil Pollution Damage Caused by Ship, at http://www.cpiweb.org/showonenews.jsp?news_id=217, 1 November 2005 (in Chinese); and Zhao Hong, Legal Issues on Trial of Compensation for Oil Pollution Damage Caused by Ship, in *The Paper Collection of the Maritime Law Seminar 2005 of China Lawyers*, 2005. (in Chinese)

47 The U.S. Code, Art. 1001(20) and Art. 1002(2)(2)(2).

At present, there are no specific legal provisions in international conventions or domestic legislation on the determination of the liabilities under the circumstance that both ships are liable for the collision which causes the oil spill. There are four standpoints among the judicial and academic communities: (1) the ship spilling oil should be the sole liable for compensation, in accordance with the principle of "polluters should compensate" as prescribed in the CLC 1992 and the principle of liability without fault as prescribed in the Maritime Environment Protection Law; (2) the ship spilling oil should be first liable for compensation and then could get recovery from the owner of the other ship; (3) both parties should be held jointly and severally liable for compensation under Article 130 of the General Provisions of Civil Law as the joint tortfeasors; and (4) both parties should be liable for compensation in accordance with their proportions of respective liability for the collision; since the Maritime Law is a special law to the civil law and Article 169 of the Maritime Law should apply first.

In the series of cases of the Ship, the plaintiffs sued both the defendants except the owner of the *Shunkai* Ship. It should be noted that the Fishery Administration applied to the Court for arresting the *Shunkai* Ship before trial, claiming that the crude oil pollution was caused by the collision between the vessel and the *Shunkai* Ship and both owners should jointly and severally be liable for the pollution damage to compensate the loss of fishing resources. The court ruled to arrest the *Shunkai* Ship and order the respondent to provide RMB 10 million as security. After that, the owner of the *Shunkai* Ship indemnified the Fishery Administration of RMB 500,000 and the Fishery Administration did not sue the owner of the *Shunkai* Ship. Therefore, many issues about the liability of the other ship in the collision were not involved in this case. These issues are mainly the following:

1. Should the court accept the case if the plaintiffs file another lawsuit against the owner of the *Shunkai* Ship for compensation?

2. If the plaintiffs concurrently sue the owner of the *Shunkai* Ship in the series of cases of the Ship, should the owner of the *Shunkai* Ship be jointly and severally liable for compensation? What is the legal basis of the liability?

3. If the owner of the *Shunkai* Ship is sued and liable for compensation, should the owner be jointly and severally liable for compensation with the owner of the Ship, or liable for compensation by their respective fault?

4. If the owner of the *Shunkai* Ship is liable for compensation, can the owner limit his liability of compensation under the Maritime Law?

5. If the damage amount exceeds the oil pollution liability limit of the Ship and

the liability limit of maritime claim of the *Shunkai* Ship, should the procedure of liability limit of maritime claim be initiated?

6. Do the defendants in the series of cases of the Ship have the right to file a lawsuit to the court against the owner of the *Shunkai* Ship for recovery while concurrently responding to the lawsuit? Do the defendants have the right to take the owner of the *Shunkai* Ship as the third party?

7. If the claim for recovery is so filed, can the court consolidate these cases before the trial?

The trial and judgment of the series of cases of the Ship at first instance has not put forward or demonstrated these questions. We cannot expect that a case or a series of cases may determine all the issues mentioned above. These issues should be further studied and discussed, with definite demonstration in future cases. The author will discuss these issues in other articles.

B. Applicability of the Law of the People's Republic of China on the Administration of the Use of Sea Areas in Compensation for Maritime Pollution Damage

Articles 2 and 3 of the Law of the People's Republic of China on the Administration of the Use of Sea Areas (hereinafter referred to as the "Sea Areas Law"), which entered into force on January 1, 2002, prescribe that sea areas are owned solely by the state and that entities and/or individuals with the exclusive usage of specific sea zones for more than 3 months shall have obtained the related right. In fishing production, therefore, the aquaculturing in specific seas should have obtained the right to use of sea areas. Article 11 of the Fishing Law prescribes that the entity or individual using the waters and shoals owned by all the people as planned by the state for culturing industry shall have obtained culturing permit, allowing the use of such waters or shoals for culturing. Waters and/or shoals used by agricultural collective economic organizations as collectively owned or owned by all the people may be contracted by any individual or collective for culturing industry. Therefore, after the implementation of the Sea Areas Law, maritime courts should examine whether the concerned party has obtained a legal and valid permit over the use of the seas, a culturing permit, or has contracted an agreement in hearing compensation cases for damage on aquaculturists so as to determine whether they have a lawful right of culturing.

In the serial cases of the Ship, some aquaculturists claimed for damage

compensation against the two defendants through their representatives and/or fishermen's association respectively. In [2003] Jin Hai Fa Shi Chu Zi No. 191, the court held that the oil pollution had not affected the culturing area of the plaintiffs, without causing any culturing loss to them and, therefore, the court denied such claim. In [2003] Jin Hai Fa Shi Chu Zi No. 186 Judgment, the court affirmed the identification of affected aquaculturists verified by Hebei Luannan Fishing Supervision and held that 15 aquaculturists have the lawful culturing right and ruled the defendants to compensate the loss of the plaintiffs sustained from this accident.

Unfortunately, the judgment has not mentioned the examination of the permit of use of seas as prescribed in the Sea Areas Law. By the occurrence of the accident, the Sea Areas Law had been implemented for less than one year and the issuance of the permit of the use of seas had not ben formalized. For this reason it was not an easy task to determine whether the plaintiffs had the lawful right of culturing by such permit. Therefore, it can be understood that the judgment has not mentioned the examination.

With the formalization and generalization of the issuance of the permit, maritime courts should pay attention to the examination of such permit in subsequent pollution cases. In the recently closed series of cases of compensation for pollution damage over fishing resources by Guangxi Hepu Xichang Yongxin Sugar Industrial Co., Ltd. (hereafter referred to as the "Sugar Co."), the Beihai Maritime Court held on October 15, 2005 that the plaintiffs, SU Chongjun, HONG Jijun and HUANG Hua De, all had permits within the period of validity issued by the local people's government, so they had the lawful rights of use and culturing in the seas and should be protected by laws. Since the Sugar Co., Ltd. caused the death of the clams cultured by the plaintiffs on account of emission of pollutants exceeding the standard, it should compensate the plaintiffs of RMB 128,331.[48] At the same time, the court held that HONG Jiling and other plaintiffs, had not obtained the right of use and culturing in the seas and had exercised that activity without permission and thus violated the compulsory provisions of the Sea Areas Law and the Fishing Law, so they should assume major liability themselves for the death of clams. The court, however, held that these plaintiffs have the lawful property right of the purchased clams and finally ruled that the defendant, the Sugar Co., Ltd., should properly compensate these plaintiffs.

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48 [2005] Hai Shi Chu Zi No. 028 Judgment of Beihai Maritime Court.

C. Compensation for the Cost of Cleaning-up

In case of occurrence of maritime environment pollution accidents, the competent maritime authorities usually take compulsory measures for avoiding or minimizing the pollution damage within their terms of reference under Article 71 of the Maritime Environment Protection Law. The maritime authority may take such measures at its own discretion or organize relevant entities or individuals to do so. The cost for such measures is usually called "cost of cleaning-up". It is set forth in Article 90 of the Maritime Environment Protection Law that the person causing maritime environment pollution damage should eliminate such consequence and compensate the loss. Therefore, it should be identified whether the cost of cleaning-up caused by the measures taken by or taken under the organization by the maritime authority within its terms of reference is a civil claim or not. The mainstream holds that these measures taken by a maritime authority are for the purpose of eliminating a maritime environment pollution damage, with the characteristics of civil acts, and that the person liable for pollution damage should compensate, under the provisions set forth in Paragraph 6, Article 1 of the CLC 1992 and the General Principles of Civil Law in respect of civil liability.

After the accident of oil pollution provoked by the Ship, the Tianjin Maritime Bureau immediately initiated the emergency plan to minimize the pollution of Tianjin's waters and mobilized all the cleaning equipment and staffs to eliminate the crude oil pollution and investigate the accident. After investigation, the Tianjin Maritime Bureau found out that the Ship had violated the provisions set forth in Articles 62 and 65 of the Maritime Environment Protection Law and fined the Ship of RMB 200,000 as administrative punishment. On January 8, 2003, the attorney accepted the decision of administrative punishment on behalf of the owner of the Ship.

Unfortunately, the Tianjin Maritime Bureau has not claimed for the cost of cleaning-up against the two defendants. Therefore, we cannot find clear answers to the questions mentioned above in the series of cases of the Ship.

In addition, it should be further discussed whether the Maritime Bureau may claim for the cost of cleaning-up against the ship which has not spilled oil (the one which collided with the vessel spilling oil). Related questions include:

1. If the ship having not spilled oil is also the "ship" as set forth in Paragraph 1, Article 1 of the CLC 1992, should the claim be adjusted by the CLC 1992? If the ship having not spilled oil is not the "ship" as set forth in Paragraph 1, Article 1 of

the CLC 1992, should the claim be adjusted by the CLC 1992?

2. If the claim is not subject to the CLC 1992, will its legal nature be changed?

3. If the claim is not subject to the CLC 1992, is it a limited creditor's right as prescribed in Chapter 11 of the Maritime Law so that it may be indemnified from the liability limitation fund of maritime compensation from the other party? Or, is it a non-limited creditor's right and the liable person should compensate separately from the fund?

4. If the claim can be indemnified from the fund of the other party, what is the order of indemnification and can it be indemnified with priority?

These issues should be further studied and discussed. Since Tianjin Maritime Bureau has not claimed for the cost of cleaning-up against the owner of the *Shunkai* Ship, these questions should be answered in future cases of compensation for oil pollution damage caused by ship collision. The author will discuss these issues in other articles.

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Research on a Legal Regime for China's Vessel-Induced Oil Pollution Compensation Fund

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Abstract: China is currently crafting measures for establishing and managing an oil pollution fund. This paper addresses the major legal issues that building such an oil pollution fund regime faces. The study finds that requesting ship owners to maintain compulsory liability insurance is a prerequisite for creating an oil pollution fund regime. Furthermore, the analysis of fund contributors, fund managers, and oil pollution victims indicates that a trust relationship exists among these parties. Thus the authors propose that trust theory form the legal basis underpinning China's oil pollution fund. A design for the oil pollution fund's organizational structure, legal status, supervision, and operations then is proposed in accordance with China's Marine Environmental Protection Law, China's Trust Law, and other relevant Chinese legal regulations.

Key Words: Oil pollution; Damage compensation; China trust fund

I. Introduction

China's long coastline, excellent harbors, and economic development have been enabling strong growth in the shipping and oil import sectors. But this growth also poses a threat to China's marine environment. Vessel-induced oil spills have been increasing as a share of total oil pollution accidents. From 1976 to 1986, 386 oil spills occurred in China's coastal areas – an average of 35 per year. During the following decade at least another 1,856 accidents occurred – the equivalent of one

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oil spill occurring every two days.[1] The potential for a major oil spill to occur off China's coast is high. Two reasons can account for this risk.[2] The first reason is that the volume of oil transported to China by sea has been increasing year after year; this amount continued to increase after China became a net oil importer in 1993. During 2004, 110 million tons were imported into China. The remaining 200 million tons passed through China's coastal waters en route to other locations. China's oil imports will continue to increase as China implements a strategic oil reserve. The second reason for the high risk of a major spill stems from the complicated situation surrounding oil tankers in China. Currently, China has 111 oil tankers for international transportation – a gross dead weight tonnage of about 3.5 million tons. China has another 676 oil tankers involved in domestic operation – a gross dead weight tonnage of 2.7 million tons. China's international transportation capacity is unable to satisfy demand, attracting many foreign oil tankers to the market. Furthermore, the existence of single-hull oil tankers and low-quality oil tankers in China's coastal waters increases the risk of an oil spill occurring.

On the international level, China has already taken steps toward developing a legal regime for compensating oil pollution damage. China has been a contracting State to the 1992 International Convention on Civil Liability for Oil Pollution Damage (hereinafter "the Convention on Civil Liability") and the 1992 International Fund for Compensation for Oil Pollution Damage (hereinafter "the Fund Convention"). The Fund Convention does not apply to China Mainland; it only applies to the Hong Kong Special Administration Region. This situation exists because the contribution amount for China Mainland is too high and that claims for oil pollution damages have already been met under the liability limit of the 1992 Convention on Civil Liability.[3] Currently, there is no legislation directly aimed at providing compensation for oil pollution damage at the domestic level. Compulsory insurance is only imposed on oil tankers with a load of over 2,000 tons, as stipulated by the 1992 Convention on Civil Liability. No such insurance is imposed on oil tankers with loads under 2,000 tons. Furthermore, China has yet to develop a fund regime to compensate victims of oil pollution damage.

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1 Si Yuzhuo ed., *The Research on Legislation Trend and Countermeasures of International Maritime*, Beijing: Law Press China, 2002, p. 236. (in Chinese)

2 Liu Gongchen, The Establishment of Vessel-induced Oil Damage Compensation Regime According to China's Actual Conditions, in *2005 Shanghai International Maritime Forum Proceedings*, p. 2. (in Chinese)

3 Si Yuzhuo ed., *The Research on Legislation Trend and Countermeasures of International Maritime*, Beijing: Law Press China, 2002, pp. 237~241. (in Chinese)

China's incomplete legal regime for compensating oil pollution damage leads to victims of oil pollution to experience difficulties in receiving compensation. Worse still, the current regime does not guarantee compensation for clean-up costs, leading to an inadequate recovery and clean-up response to oil spills. From 1987 to 1996, only 131 of 1,748 oil spill accidents entailed a clean-up response – a rate of only 7 percent. Twenty-six of these accidents involved national ships and docks, spilling over 50 tons of oil. Of these 26 cases, only 7 were cleaned up, accounting for 26% of the total. During this period, 8,346 tons of 10,172 tons of spilled oil flowed directly into the ocean without any treatment. Even when attempts were made to clean up oil spills, the quality of the response was low.[4] Due to a lack of stable funding set aside for oil spill clean-up, the China Maritime Safety Administration orders clean-up teams to respond to oil spills while sometimes lacking the ability to pay the team afterwards. The uncertainty of receiving payment severely reduces the clean-up team's motivation and morale. Of the more than 50 tons of oil spilled from 1973 to 2000, a clean-up rate of only 41% was reached. In recent years, joint efforts between the central and local governments, including the Ministry of Communication, have been able to clean up all recent oil spill accidents, boosting the clean-up rate to 44%.[5]

According to Article 66 of the Marine Environmental Protection Law of the People's Republic of China (hereinafter "the Marine Environmental Protection Law"), the State shall perfect and put into practice the civil liability regime of compensation for vessel-reduced oil pollution, and shall establish a fund regime for vessel-induced oil pollution insurance and oil pollution compensation based on the principle of the ship owners and cargo owners jointly undertaking the risks of any vessel-induced oil pollution compensation liability. Specific measures for the implementation of the vessel-induced oil pollution insurance and oil pollution compensation fund regime shall be formulated by the State Council. This law gave the Ministry of Finance and the Ministry of Communications the authority to jointly draft the Administrative Measures for the Collection and Use of Compensation Funds for Vessel-Induced Oil Pollution (hereinafter "the Administrative Measures for the Funds"). This draft has already been submitted three times for comments and revisions. It is now before the State Council awaiting approval.

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4 Si Yuzhuo ed., *The Research on Legislation Trend and Countermeasures of International Maritime*, Beijing: Law Press China, 2002, p. 236. (in Chinese)

5 Liu Hong, National Conditions Shall Be Considered in the Oil Pollution Compensation, *China Ship Survey*, July 2005. (in Chinese)

In terms of legislative preparation, the specific policies for an oil pollution compensation fund have been fully researched and discussed.[6] However, little research and discussion has been done regarding the legal issues facing this fund. Yet a nearly perfect legal regime is necessary for the fund to operate effectively. This paper attempts to study the major legal issues facing the fund and puts forward legislative proposals helpful for formulating the Administrative Measures for the Funds.

II. Prerequisites for Effective Fund Operation

The compensation fund for vessel-induced oil pollution damage is a regime that requires cargo owners to bear primary responsibility for damage compensation. According to Article 66 of the Marine Environmental Protection Law, liability shall be borne by both ship owners and cargo owners. Ship owners shall bear primary responsibility due to their role in the cause of oil pollution damage. Therefore, establishing a civil liability regime for ship owners is the premise for effectively operating the fund.

A. Theoretical Analysis of the Liability Relationship between Ship Owner and Cargo Owner

In the process of transporting oil by sea, oil tankers are occupied and controlled occupation by ship managers, who are directly responsible for causing oil pollution, regardless of whether the damage is caused deliberately or negligently. According to the "self-liability" principle, ship owners are liable for pollution damage resulting from accidents. Although the oil cargo itself is the source of oil pollution and oil spill accidents can be avoided by not transporting oil, according to tort law, the oil cargo is the condition rather than the cause of oil pollution accidents, and thus liability cannot be attributed to cargo owners.[7]

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6 In July 2005, the Maritime Safety Administration of the People's Republic of China held the 2005 Shanghai International Maritime Forum where experts who took part in formulating the Administrative Measures for the Funds spoke about the progress of the current legislation. See more in *2005 Shanghai International Maritime Forum Proceedings*.

7 For the analysis of cause and condition, please see Wang Yang, Theoretical Study on the Cause-and-effect Relationship in Tort Law, *Civil and Commercial Law Review*, Vol. 11, 1999, pp. 462, 466~470. (in Chinese)

As oil tanker transportation capacity has increased, so has the potential amount of oil spilled during an accident. Were an accident to occur, the amount of oil spilled could be huge. Waves and ocean currents easily spread crude oil, contaminating a wide area and making clean-up and recovery difficult. Oil spills not only cause huge economic losses for fishermen, aquaculture producers, and those dependent on seaside tourism, but they also result in ecological disaster. Faced with huge damages caused, ship owners only have the ability to compensate for part of the costs. Who then should bear the remainder? Only cargo owners and victims are left. It is obviously against the principle of social justice for oil cargo owners, the direct beneficiaries of maritime transport, to refuse to bear any costs, thus forcing the victims to cover the costs instead. Oil owners thus should bear part responsibility.[8] This method of sharing responsibility is widely accepted and is known as "beneficiary pays."[9]

The above analysis shows that oil companies take a secondary position for providing oil pollution damage compensation. Oil companies should help compensate victims only when ship owners are unable to fully compensate victims. It would be upside down to force oil companies to accept primary responsibility for providing compensation.

B. Examining Primary-Secondary Liability of Ship Owners and Cargo Owners as Practiced

The compensation fund's premise of ship owners bearing responsibility for compensation not only conforms to the legal theory, but is also internationally accepted and practiced.

1. International Civil Liability Regime of Oil Pollution

The oil pollution damage compensation regime originates in the 1969 Convention on Civil Liability and the 1971 Fund Convention. These conventions assigned primary liability to ship owners and secondary liability to cargo owners.

In 1967, the Liberian oil tanker *Torry Canyon* hit a submerged reef in the

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8 "Environmental Protection Administration, Executive Yuan" of China Taiwan, The Final Report on Relevant Specification on Severe Marine Pollution Compensation (90A270), 26 December 2001.

9 Environmental law in China has a similar "user pays" model of compensation. See the 1996 Decision on Issues of Environmental Protection (No. [1996]31 issued by the State Council); Han Depei ed., *A Course in the Law of Environmental Protection,* 4th ed., Beijing: Law Press China, 2003, pp. 72~75. (in Chinese)

English Channel. 120 thousand tons of crude oil spilled into the ocean, causing great economic loss and ecological damage.[10] This accident prompted the international community to build an international legal regime of compensation for oil pollution damage that would enable victims to receive more than token compensation. In 1969, the international community signed the Convention on Civil Liability. As stipulated in the Convention, ship owners took primary liability in accordance with the principle of strict liability.[11] The Convention also provided for a compulsory insurance regime in order to guarantee that ship owners would have sufficient financial ability to pay out potential claims.[12] Moreover, it regulated the liability limit regime of vessel-induced oil pollution compensation in view of the financial capacity of the international shipping insurance market.[13] The Fund Convention was concluded in 1971 and subsequently brought oil cargo owners into the compensation liability mechanism for the first time.[14]

The 1969 Convention on Civil Liability created oil pollution liability limits which drew liability boundaries between ship owners and cargo owners. If oil pollution damages exceed the established limit or if ship owners, due to statutory exemption, are not responsible for providing compensation, then the International Oil Pollution Compensation Fund (IOPCF), which was established by the Fund Convention, will provide compensation.[15] Oil companies in countries contracting to the Fund Convention contribute funds to IOPCF. IOPCF in turn is responsible for providing compensation on behalf of those oil companies.[16]

This mechanism continued to exist in the revised 1992 Convention on Civil Liability and the 1992 Fund Convention. As of November 1, 2005, a total of 96 States around the world have joined these two conventions.[17]

2. The Domestic Civil Liability Regimes of Oil Pollution Damage in United States and Canada

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10 At http://www itopf.com/torreycanyon/, 4 October 2005.
11 1969 CLC Convention, Art. 3.
12 1969 CLC Convention, Art. 7.
13 1969 CLC Convention, Art. 5.
14 See Thomas A. Mensah, Civil Liability and Compensation for Vessel-Source Pollution of the Marine Environment and the United Nations Convention on the Law of the Sea (1982), in N. Ando et al. eds., *Liber Amicorum Judge Shigeru Oda*, Netherlands: Kluwer Law International, 2002, pp. 1398~1401.
15 1971 Fund Convention, Art. 3.
16 1971 Fund Convention, Art. 10.
17 International Oil Pollution Compensation Funds (IOPCF), at http://www.iopcfund.org/92members.htm, 5 November 2005.

In 1989, the *Exxon Valdez* oil tanker hit a submerged reef in the waters of Alaska, spilling approximately 37 thousand tons of crude oil.[18] This accident made the United States believe that the international oil pollution convention regime could not truly protect the marine environment. In 1990 the United States passed the stringent Oil Pollution Act which regulated that ship owners accept primary responsibility in accordance with the strict liability principle. Based on Article 9509 of the Internal Revenue Code of 1986, the US Treasury Department set up the Oil Spill Liability Trust Fund (OSLTF) with $1 billion USD to provide supplementary compensation liability.

Canada's approach was more proactive. It not only joined the international convention system, but also established its own domestic compensation fund for oil pollution damage. In 1971, besides establishing ship owners' liability, the Canada Shipping Act (CSA) also established the Maritime Pollution Claims Fund (MPCF). The creation of a domestic two-tier regime of responsibility between ship owners and cargo owners was set up 7 years before the Fund Convention took effect.[19]

C. The Establishment of the Legal Regime of Ship Owner's Liability in China

China is a contracting party to the 1992 Convention on Civil Liability. It applies the rules of this convention to cases of oil pollution concerning foreign interests. Since there is no specific legislation providing compensation for oil pollution damage in China, the Maritime Code of the People's Republic of China and the Marine Environmental Protection Law are applied to cases of domestic oil pollution.[20] Nevertheless, the current system of domestic laws still has many problems with actually holding ship owners responsible.

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18 At http://www.itopf.com/casehistories.html #exxonvaldez, 1 November 2005.

19 Canada's Ship-source Oil Pollution Fund, at http://www.epa.gov/oilspill/pdfs/macinnispaper.pdf, 5 November 2005.

20 Whether domestic vessel-induced oil pollution damage compensation cases shall comply with the international convention or domestic law once aroused long-term controversy. In 2002, the Supreme People's Court confirmed this kind of case conformed to Maritime Code of the People's Republic of China and the Marine Environmental Protection Law through the vessel-induced oil pollution damage compensation disputes over Yantai Salvage and Rongcheng Fenggang Fishery Company heard by High People's Court of Shandong. See Zhao Hong, Legal Issues on Trying Vessel-induced Oil Pollution Damage Compensation Cases, in *2005 Shanghai International Maritime Forum Proceedings*, pp. 63~64. (in Chinese)

First, the liability of ship owners is limited to a relatively narrow range. According to the relevant laws and regulations in China, the principle of no-fault liability can apply to cases of environmental pollution.[21] Compared with the strict liability principle established under the 1992 Convention on Civil Liability, China's domestic laws require ship owners to take responsibility in a fewer number of situations. For instance, the 1992 Convention on Civil Liability stipulates that the ship owner can only be exempt from liability when the damage is thoroughly and deliberately caused by a third party. However, according to China's Marine Environmental Protection Law, ship owners can be exempt if a third-party is at fault.[22]

Second, from the standpoint of the solvency of ship owners, a compulsory insurance regime for oil tankers has not been established, except for the compulsory insurance imposed on international navigation tankers with loads of over 2,000 tons, which was stipulated by the 1992 Convention on Civil Liability. Reality is that in China many oil tankers are small; these small tankers are responsible for many accidents and their solvency capability is weak. 71% of all China's coastal tankers are less than 1,000 gross tons (tankers with 1,000 gross tons can carry up to 2,000 tons). These small tankers accounted for 66% of the 50 tons of oil spilled during major oil spill accidents occurring between 1973 and 2003. In some accidents-prone areas such as Guangdong, accidents caused by small tankers reach up to 78% of the total amount. However, only 5.2% of China's small coastal tankers have oil pollution insurance, account for 5.3% of total tonnage. Coverage is even worse for tankers operating in China's internal waterways. Only 2.2% of tankers operating in China's rivers and waterways have insurance; this insurance only covers 0.7% of total tonnage. These numerous small tankers typically belong to single-ship companies or individual owners; these types of businesses have poor operation procedures, no insurance, and no solvency ability.[23]

Furthermore, in terms of liability limits, there is no ship liability limit specifically aimed at oil pollution accidents, except for a general maritime liability limit established under Article 210 of China's Maritime Code which sets a limit

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21 General Principles of the Civil Law, Art. 124; Marine Environmental Protection Law, Art. 90; Some Provisions of the Supreme People's Court on Evidence in Civil Procedure, Art. 4(3).

22 1969 CLC Convention, Art. 3 (2); Marine Environmental Protection Law, Art. 90.

23 Liu Hong, National Conditions Shall Be Considered in the Oil Pollution Compensation, *China Ship Survey*, July 2005. (in Chinese)

far lower than the standard regulated by the 1992 Convention on Civil Liability. According to damage claims in recent years, this liability limit is too low for small tankers; this amount is not even enough to cover clean-up costs.[24] Although tankers with comparably larger tonnage can satisfy claim demands under the liability limit for now, it is doubtful whether they can adapt and keep up with developments in the economy and oil transportation sector.

Faced with these problems, the Chinese government has begun developing relevant legislation. According to E Hailiang, Deputy Director of China's Maritime Safety Administration's Ship Survey Department, the mandatory insurance regime for oil tankers will be implemented with the issuance of the revised Prevention and Control of Pollution to the Marine Environment by Vessels.[25] This regulation was approved by the Department of Transportation on June 3, 2005 and has been submitted to the State Council for approval. China should establish a compulsory domestic insurance market that has low rates, low insurance limits, and widespread adoption. All tankers operating in domestic waters, whether big or small, should be required to pay oil pollution insurance. There is an urgent need to revise the Maritime Code of the People's Republic of China or to adopt a judicial interpretation regarding oil pollution liability, so as to specifically clarify the strict liability regime and raise the liability limit.

In short, as China develops its fund regime, it should also adopt appropriate legislative procedures that would require compulsory insurance for ship owners, impose strict liability on ship owners, raise the liability limit, and require ship owners to bear primary responsibility for oil pollution damages. Only through these measures can the fund, which is a secondary compensation mechanism, can effectively operate.

III. Using Trust Theory to Establish China's Oil Pollution Fund

The oil pollution fund is a form for oil companies to bear compensation liability in accordance with the "beneficiary pays" principle. As part of the civil law

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24 Liu Hong, National Conditions Shall Be Considered in the Oil Pollution Compensation, *China Ship Survey*, July 2005. (in Chinese)

25 It is the revision of Regulations on Prevention of Marine Pollution from Ships enacted by the State Council in 1983.

regime, the fund's legal nature should be clear and should correspond to existing legal principles and rules. By analyzing the fund's purpose, functions, and legal relationships, we find that the fund's nature is that of a trust fund. The relationship existing among the fund, fund contributors, and oil pollution victims is essentially one of trust. Therefore, the fund's legal regime should be designed in accordance with trust law.

A. An Overview of Trust Theory

The trust regime originates from the common law legal regime and is now accepted by many civil law countries. The Trust Law of the People's Republic of China (hereinafter "the Trust Law") was enacted in 2001. According to Article 2, trust refers to the settlor, based on his faith in the trustee, entrusts his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property for the benefit of the beneficiary or for other designated purposes. Japan's Trust Law, *Black's Law Dictionary* and the American Law Institute's Restatement of the Trust Law give similar definitions.[26]

The features of the trust are as follows.[27]

First, the trust is a property-centered legal relationship. The trust is established by the settlor transferring property to the trustee for the purpose of receiving effective management of the property to provide the maximal benefit to the beneficiary. The rights and obligations of the trust parties are represented by their rights and obligations to the trust property.

Second, the trust is a legal relationship among three parties: the settlor, the trustee, and the beneficiary. The settlor is the owner of the trust property and the party established the trust, the trustee is the party which administers the trust on behalf of the beneficiary, the beneficiary is the party which is entitled to the benefits of the trust property.

Third, the trustee does not enjoy full ownership of the trust property, but only has certain disposal rights. Although the settlor transfers the trust property

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26 Trust Law of Japan, Art. 1; Bryan A. Garner ed., *Black's Law Dictionary*, 7th edition, ST. Paul: West Publishing Co., 1999, p. 1513.

27 Qi Shujie and Peng Jinping, The Research on Several Legal Issues of Contractual Type Investment Trust, *Tribune of Political Science and Law (Journal of CUPL)*, No. 2, 1995. (in Chinese)

to the trustee, the trustee cannot manage or dispose of it as if the trust were its own property. The disposal of the property is restricted by the trust's purpose and the interests of the beneficiary. Therefore, the trustee has incomplete and limited ownership of the property.

Lastly, the trust is a legal relationship based on trust. The trust takes effect on the condition that the settlor transfers one certain part of his or her own property to the trustee, not to give the trustee the property, but to have the trustee properly manage it. Thus, mutual trust between the settlor and the trustee is the foundation of the trust relationship.

B. An Analysis of Legal Relationships of Each Party in Oil Pollution Fund

The oil pollution fund is formed using capital contributions from oil companies for the purpose of compensating eligible victims of oil pollution damage. Three parties are involved, the oil companies that contribute money, the fund itself, and the victims. The relationship can be briefly explained as follows: oil companies contribute money to the fund, the fund meets the claims of victims under certain conditions, and the victims receive compensation from the fund; there is no direct relationship between contributors and victims.

As far as the authors are concerned, this legal relationship conforms to the basic elements and characteristics of a legal trust relationship.

First, from the point of the legal relationship between oil companies and the oil pollution fund, oil companies are responsible for contributing money to the fund, which means they transfer their own property to the fund; this meets the formal requirement of a trust relationship. Furthermore, the money they contribute is to ensure the victims receive proper compensation, which is in line with the principle that the property be used "for the benefit of the beneficiary".

Second, the oil pollution fund has two roles. The first role is to collect funds from the oil companies. The second role is to manage the fund. In terms of the relationship between the manager and the fund, the fund is administered but not owned by managers; it has no right to freely dispose of this fund as if it were its own property. Instead, the fund can only compensate victims after an oil pollution accident occurs, which is according to the fund's establishment purpose and consistent with the rights and obligations of the settlor.

Lastly, the legal relationship between the fund and oil pollution victims

indicates that the oil pollution fund is not the tortfeasor in the accident; it has no legal responsibility to the victims under tort law, nor do contracts or previous legal relationships exist between these two parties. Nevertheless, victims can make claims to oil pollution fund on the basis that the fund is established to benefit victims by ensuring they receive reasonable compensation for losses due to oil pollution. Therefore, the victims of oil pollution accidents are essentially the beneficiaries of the trust relationship.

C. The Value Analysis of Trust Law

Basing the oil pollution fund on trust law has a number of distinct advantages.

First, in regard to managing assets, a trust can protect the property entrusted to it. When a creditor of the trustee makes a request to the trustee, the trust property should not be considered the personal property of the trustee. In addition to serving the beneficiary, the trust property can only be used to pay debts incurred while managing the trust property or to pay debts incurred when the trustee is performing his rights and duties as a trustee.[28] The trustee shall separate the trust property from its own property and properly manage it.[29] Therefore, as a trust property, the oil pollution fund must designate the capital contributed by the oil companies and distinguish it from the manager's own assets to ensure the safety of the fund. After designation, if reasonable and prudential investment is allowed, then any value-added benefits from investments should automatically flow back to the oil pollution fund so as maximize the benefit to the beneficiary.

Second, regarding the rights enjoyed by the beneficiary: the beneficiary is empowered to force the trustee to perform its obligations under the trust relationship. According to the rules of the Anglo-American law regime, the settlor divides ownership into two parts, nominal ownership is enjoyed by trustee (legal ownership), but virtual ownership belongs to the beneficiary (equitable ownership). As for the trust property, the rights of the beneficiary outweigh those of the trustee, allowing the beneficiary to use legal means to require the trustee to perform its

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28 D. J. Hayton, translated by Zhou Yi and Wang Hao, *The Trust Law*, Beijing: Law Press China, 2004, Preface. (in Chinese)

29 Zhang Chun, *The Trust Law Theory*, Nanjing: Nanjing University Press, 1994, pp. 150~152. (in Chinese)

obligations.[30] The continental legal regime adopts the unitary ownership principle, making dual ownership theory inapplicable. Civil law jurists of the continental legal regime define a legal trust relationship using various theories. No matter under which theory or practice, the right of the beneficiary to the benefit is respected and regarded as the essential element of trust law.[31]

With regard to establishing the oil pollution fund regime, the right of oil pollution victims to receive compensation is decided by the courts and implemented by means of litigation, effectively strengthening victim protection. These substantial rights not only entitle them to receive compensation, but it also allows them to request enforcement of trust obligations. Fund managers have no right to decide whether victims can be compensated, but can only perform their compulsory obligations of compensation. In addition, the public may supervise the oil fund's operations through judicial means, which is also conducive to ensuring proper compensation.

Lastly, under domestic law, the settlor's establishment of the oil pollution fund is not entirely voluntarily but is based on its responsibility according to environmental laws, thus making the trust statutory. Therefore, oil companies have a statutory responsibility to contribute capital and the government has the power to collect the funds from the companies. If this capital is not separated from government property, the government will eventually bear responsibility for compensating oil pollution victims; the compensation regime for oil pollution damage would be based on State administrative actions. Under such an act, the victim could be granted particular benefit by the government, but cannot receive compensation based on fault or statutory responsibility of the State, thus victims would not achieve their claims through litigation; this regime fails to adequately protect victims. Moreover, because the State is also the public settlor/trustee and owner of natural resources, it also can claim damages.[32] Its legal status is equivalent to that of other pollution victims. If the State were to directly compensate oil pollution victims while also being a victim and making its own claims for

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30 Fang Jialin, *The Theory and Practice of The Trust Law*, Beijing: China University of Political Science and Law Press, 2004, p. 2; D. J. Hayton, translated by Zhou Yi and Wang Hao, *The Trust Law*, Beijing: Law Press China, 2004, pp. 10~14. (in Chinese)

31 Zhang Yue, *Reconstruction of the Trust by Civil Law Legal System* (Master Dissertation), Xiamen: Xiamen University 2003, pp. 32~35. (in Chinese)

32 Zhang Xiangla and Xu Guoping, Compensation of Natural Resources Damage due to Vessel-induced Oil Pollution: Cross the Legal Regime Barrier, *International Law Review of Wuhan University*, Vol. 2, 2004, pp. 43~46. (in Chinese)

compensation, a confusing situation would emerge, unfavorable for resolving the original problem.

D. Examples of International Practices

First, in the United States, the Oil Spill Liability Trust Fund (OSLTF) was established by the Oil Pollution Act of 1990; the inclusion of trust fund in the name of this organization makes its legal nature clear.

Second, due to its status as an international organization under the Fund Convention of 1992, the International Oil Pollution Fund was not directly named as a trust fund. Neverthless, its institutions and operations were designed according to trust theory. The International Oil Pollution Fund creates a trust-based relationship between oil company contributors and oil pollution victims. The Oil Pollution Fund transfers and manages the contributions in its own name, but only for the benefit of pollution victims, which conforms with the purpose of the Fund Convention. All of these features support our analysis that oil pollution funds are trust funds.

In conclusion, oil pollution funds can and should be operate according to trust theory and should be built upon a scientific legal foundation to effectively and practically compensate oil pollution victims.

IV. The Legal Design of China's Oil Pollution Fund

A. The Purpose of the Oil Pollution Fund

The purpose of the oil pollution fund should be explicitly stipulated so as to compensate victims of pollution accidents and to protect China's marine ecological environment.

As stipulated in Article 6 of the Trust Law, trusts must be created for lawful trust purposes. The domestic oil fund is a statutory fund established by the Marine Environment Protection Law and its activities must comply with this law. According to Article 66, the fund is set up for the sake of sharing liability between ship owners and cargo owners. Article 90(2) of the Marine Environment Protection Law gives the State the right to claim any damages caused to marine ecosystems, marine aquatic resources or marine protected areas that result in heavy losses to the State. Thus the fund has two indispensable purposes: compensating victims and protecting the marine ecological environment. The trust is invalid if it lacks one of

these two purposes, according to Article 11(1) of the Trust Law.

B. The Establishment of the Normative Regime for Property Definition

As regulated by Article 7 and Article 11 of the Trust Law, to establish a trust, there must be certain trust properties and those properties must be lawfully owned by the settlor, otherwise the trust will be invalid. Therefore, it is essential to a legislatively establish a clear, stable, and diversified mechanism for securing enough contributions to meet the practical needs of the oil pollution fund and the nation.

1. Legislating the Statutory Scope of Contributing Oil Cargo Owners

At present, there are two major proposals for defining the scope of contributing oil cargo owners. The first proposal is that owners of persistent oil should contribute to the fund. As Deputy Director of Ship Survey Department of the Maritime Safety Administration of China E Hailiang said that persistent oil cargo owners and agents transporting oil in China's ports should contribute to the oil pollution fund, but that contributions will not be imposed on oil that is waiting for transit. Contributions would only be imposed once the owner accepts transit transport.[33] The other major proposal is that all owners contribute to the fund.[34] In the authors' opinion, the contribution standard and who should contribute are linked together. A lower contribution standard should correspond with a wider scope of contributing owners and *vice versa*. Under current circumstances, the domestic price of oil is set by the government. While domestic oil prices remain fixed, the solvency of oil companies, which will fully bear the contribution of oil pollution fund, should be considered. Given that the formation mechanism of oil price is difficult to completely introduce the market mechanism and international oil prices continue to rise, it is not feasible to set a high contribution standard at present. Thus the alternative should be implemented: a lower contribution standard with all crude and fuel cargo owners contributing to the fund.

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33 E Hailiang, The Establishment and Development of China's Vessel-induced Oil Pollution Compensation Mechanism, in *2005 Shanghai International Maritime Forum Proceedings*, p. 118. (in Chinese)

34 Hu Zhengliang, Several Legal Issues on Establishing Vessel-induced Oil Pollution Compensation Fund, in *2005 Shanghai International Maritime Forum Proceedings*, p. 94 (in Chinese); Chen Bowei, The Establishment of China's Vessel-induced Oil Pollution Compensation Fund Regime Based on the Management Experience of International Oil Pollution Fund, *2005 International Maritime Forum Proceedings*, p. 52. (in Chinese)

2. Regular Assessment of Contribution Standard and Legalization of Assessment Procedures

Setting a low contribution standard at the present stage seems relatively reasonable, but as China accelerates the marketization of its domestic oil prices, and as oil imports continue to increase, the risk of oil pollution will also increase. Eventually the contribution standard will need to be adjusted. In order to avoid instability and unnecessary costs and confusion caused by frequent standard adjustments, the law should clearly state that the contribution standard will be evaluated and adjusted every two years.

The contribution standard can be set as follows: half a year before assessing the new standard, the fund management organization should draw up a written proposal which explains the basis for adjusting (or not adjusting) the standard and the effect of the proposal on the business operations of owners. Then the fund should modify the proposal after hearing opinions from the relevant departments of the State Council and from oil cargo owners. Then the fund should complete a formal written proposal and submit the proposal to the fund authority for a vote. After the proposal is passed, it should be submitted to the State Council for additional approval. If the opinion of a majority of owners is not accepted by the fund, then it should state the reasons why that opinion was not accepted. If a majority of owners have serious concerns with the proposed standard, the fund should hold hearings and revise the draft accordingly before submitting the formal written proposal to the authority for a vote.

3. The Establishment of Other Diversified Sources for the Fund

In addition to receiving cargo owner contributions, the fund should also be clearly defined so as to receive the following sources of funds.

a. Income from Investment and Interest

Due to the fund's nature as a trust property, the earnings obtained from the management, disposal, or other activities of the fund shall be incorporated into the trust property according to Article 14(2) of the Trust Law. Therefore, interest income gained from depositing the fund and income gained from investments should belong to the fund.

b. Income from Fines and Seizure

According to Article 76 and Article 88 of the Marine Environmental Protection Law, marine management departments must fine any entity which violates the law and thereby causes damage to marine ecological resources and any entity operating a ship which does not meet environmental standards or lacks proper certification.

Marine management departments may also seize unlawful income. The capital from these fines and seizures should flow into the fund for the specific purpose of protecting the marine ecological environment.

c. Marine Ecological Resources Damage Receivables

According to Article 90(2) of Marine Environmental Protection Law, the State is entitled to claim damages from responsible person who causes heavy losses to the State. The State is authorized to demand compensation when the oil pollution accidents occur. The capital the State receives from compensation should flow back to the fund for the specific purpose of protecting the marine ecological environment.

d. Donations for the Protection of the Marine Environment

In order to expand the sources of the fund, legal persons or natural persons should also be encouraged to donate to the fund.

4. The Establishment of a High-efficiency and Low-cost Oil Fund Collection Regime

According to trust theory and the Trust Law, trust property is transferred to the trustee by the settlor.[35] As a trust property, the oil pollution fund's property is derived from the four sources listed above, plus oil cargo owners. Contributions from oil cargo owner are the main source of funding for the trust, thus ensuring timely payment is essential for effectively operating the fund with low coast. Mandatory measures should be taken to prevent oil companies from shirking their obligations. For example, in the United States a federal gas tax is levied on consumers. The U.S. Internal Revenue Service has relatively comprehensive tax information and advanced management technology, thereby significantly reducing its management costs and increasing its efficiency.[36] Given China's situation, fund contributions are derived only from maritime transport. China cannot copy the regime used by United States for the reason that the Chinese tax authority lacks the necessary data and information concerning the means and origins of oil transportation, thus increasing the difficulty and cost of enforcement. In accordance with the Marine Environmental Protection Law and duty divisions, the maritime safety departments are responsible for supervising and managing dangerous goods (including crude oil and bunker oil); it requires ships carrying crude and bunker

35 The Trust Law of People's Republic of China, Art. 14

36 Hu Zhengliang, Several Legal Issues on Establishing Vessel-induced Oil Pollution Compensation Fund, in *2005 Shanghai International Maritime Forum Proceedings*, p. 93. (in Chinese)

oil to apply for entering and port visa, or to accept import inspection. Therefore, having the maritime safety departments collect contributions from oil companies is a better choice, given its comprehensive access to information and its relative convenience in collecting contributions.[37]

C. The Design of Management Organization of Oil Pollution Fund

The oil pollution fund's managing organization is the trustee and the executor of trust affairs. The Trust Law stipulates that the basic obligations of the trustee are to abide by the purposes of the trust and to be faithful to the beneficiary. The obligations of the trustee pursuant to the Trust Law includes concepts such as "loyally perform the obligation", "shall not use trust property for its own profit", "manage the trust property and their own property respectively", "perform the obligation personally" and "compensate the damage."[38] There are similar regulations on the rights and obligations of the trustee in Article 5 of the Principles of European Trust Law. The most important obligation of the trustee is to strictly abide by the provisions of the trust, to take proper care of the trust property, and to act for the beneficiary's maximum benefit or for the trust's designated purpose.

As the trustee, the fund management organization is assigned the fundamental task of managing the fund efficiently and loyally. In order to guarantee that the fund management regime enables the organization to properly perform its obligations to its upmost ability, the following items should be specifically legislated.

1. The Legal Status of the Management Organization

China's Oil Pollution Fund Council shall be established by and affiliated to the State Council. It shall be a public institution with legal person status.

As mentioned above, the oil pollution fund is built both for protecting the marine environment and for compensating oil pollution victims. So it has a dual nature of providing both a public and a private service. The management organization can neither be composed of pure public welfare institutions under chapter 6 of the Trust Law nor of other organizations or individuals appointed by the settlor based on trust in the general trust relationship. It must be the specific trust institute according to Article 4 of the Trust Law. The fund's structure and

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37 Chen Bowei, The Establishment of China's Vessel-induced Oil Pollution Compensation Fund Regime Based on the Management Experience of International Oil Pollution Fund, *2005 International Maritime Forum Proceedings*, p. 53. (in Chinese)

38 The Trust Law of People's Republic of China. Arts. 25~30.

institutions should be formulated by the State Council, which is consistent with Article 66 of the Marine Environmental Protection Law. As a result, it is legally feasible to set up China's Oil Pollution Fund Council.

China's Oil Pollution Fund Council is specifically set up to manage the oil fund. It controls the oil pollution fund as its own property and it takes independent responsibility for dealing with oil pollution accidents, which is completely in line with the requirements of a legal person. At the same time, the Council does not manage the fund for profit, so it is a public institution with legal person status.

In practice, the Council's nature as a public institution with legal person status makes the fund's property independent and separate from that of department collecting contributions and national finances; this arrangement provides the most effective guarantee for meeting the independence requirement under the Trust Law. Meanwhile, when litigation occurs between the fund and victims, or when the victim is the State, the independent legal person status of the Council can avoid improper administrative intervention by the State, thereby guaranteeing civil relations between the oil pollution fund and claimants.

Existing international practices show that the International Oil Pollution Fund itself should be recognized as an independent legal person by the contracting parties of the Fund Convention.[39]

2. Fund Management Institutions and Their Duties

China's Oil Pollution Fund Council should have a complete governance structure as a legal person to ensure it performs its trustee obligations. We suggest that fund management institutions and their duties be designed on the basis of the corporate internal governance model because this type of structure is stricter than those of others.

Corporate governance structure commonly consists of three institutions: the shareholders meeting, the board of directors, and the board of supervisors. Composed of all investors, the shareholders meeting is the supreme organ of authority and is responsible for the company's major decisions. The board of directors is elected by the shareholders meeting, thus forming a trust relationship. The board of directors is in charge of the trust property and is responsible for providing loyal and prudential management.[40] The board of directors is the

39 1992 Fund Convention, Art. 2.

40 Dong Xueli ed., *Business Organization Law*, Beijing: Peking University Press, 2004, pp. 251, 255, 258. (in Chinese)

company's authority on management and other decisions. The board of supervisors is also elected by shareholders and is responsible for supervising the operation and management of the company. Some large companies may hire professional managers to be in charge of daily management affairs. Small companies generally do not employ professional managers; one or more members of the board of directors will instead be in charge of daily affairs.

On the basis of the structure outline above, and in view of the relationships among the trust, oil cargo owners, and shareholders, and learning from international experiences, China's Oil Pollution Fund Council should set up a tripart regime of organizations, each with specific duties. These organizations include: the Assembly, which represents the government and the contributors; the Fund Management Center, which is in charge of making decisions and day-to-day operations; and the Supervision Department, which monitors and supervisors the fund.

a. The Duties and Composition of the Assembly

The Assembly consists of 12 to 13 members. 7 persons are respectively from the General Office of the State Council, National Development and Reform Commission, Ministry of Finance, Ministry of Communications, Ministry of Agriculture, the State Oceanic Administration, and the State Environmental Protection Administration; 4 are from China Petroleum, China Petrochemical, China Fuel Corporation, and China Electric Power Corporation; and 1 to 2 are representatives of small and medium-sized oil owners. Because the Assembly is entitled to propose the contribution standard, it can significantly affect the national economy, so the main economic managers, including the State Council, the National Development and Reform Commission, and the Ministry of Finance, should be incorporated into the Assembly to perform their statutory duties.[41] As the largest oil cargo owners, China Petroleum, China Petrochemical, China Fuel Corporation and China Electric Power Corporation are also qualified to be included in the Assembly.[42] In order to improve management efficiency, not all the numerous small and medium-sized oil owners are able to be included in the Assembly, but they do have the right to send delegates. The assembly should meet at least once a year.

The Assembly shall exercise the following duties.

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41 Marine Environmental Protection Law, Art. 5.

42 Liu Hong, The Discussion on Several Issues on the Establishment of China's Vessel-induced Oil Pollution Compensation Regime, in *2005 Shanghai International Maritime Forum Proceedings*, p. 125. (in Chinese)

First, it should propose the fund's contribution rate, liability limit, and president to the State Council for approval.

Second, it should review and vote on the president's proposal regarding the establishment of any temporary or permanent subsidiaries, and if approved, it should submit it to the State Council for further approval.

Third, it should confirm appointments and dismissals of Fund Management Center leaders. Leaders are nominated by the president, who is also the Director of the Center.

Fourth, it should set rules for procedures of the meeting of the Assembly.

Fifth, it should review and vote on key documents including claim guides, claim procedures, and financial management.

Sixth, it should review and vote on the fund's annual budget.

Seventh, it should review and vote on compensation for major damage claims.

Oil owner representatives should be elected as members of the Fund Supervision Department because, despite contributing money, they are not a beneficiary, which means they are different from shareholders who can enjoy the benefits arising from the company's business. The oil owners are most likely to abuse their voting rights for the benefit of their group, contrary to the purpose of the fund. Therefore, having fewer than 50% of oil owners in the Assembly can both guarantee their legitimate rights as main contributors to the fund while also avoiding a situation where they might make decisions or proposals detrimental to the purpose of maximizing the benefit of victim.

At the same time, since matters such as the contribution rate can have an importance effect on the macro economy, Assembly decisions must also be approved by the State Council.

b. Duties and Composition of the Fund Management Center

The Center is constituted of a director, 2 to 3 deputy directors and 5 offices: the Clean-up Department, Damage Claim Department, Research and Development Department, Policy and Law Department, and Financial Administrative Department. The president of the fund is the Director of the Center.

Based on the provisions of relevant laws and regulations in China, the national maritime administrative department (Maritime Safety Administration

of the People's Republic of China) is responsible for regulating ship pollution.[43] Therefore, in order to improve efficiency and reduce costs, the Fund Management Center should cooperate with the Maritime Safety Administration to fully utilize existing resources.

The Fund Management Center shall exercise the following duties.

First, take all kinds of appropriate measures in accordance with laws and regulations to handle claims for damages.

Second, draw up a comprehensive compensation plan for damage claims.

Third, draw up plans including: claim guidelines, financial management, and claim procedures, and submit them to the Assembly for review and approval.

Fourth, present an evaluation plan for deciding contribution rates.

Fifth, engage legal, financial, and other experts to meet the needs of damage claims and other tasks.

Sixth, draw up financial reports for the previous year and annual budget and submit them to the Assembly for review and approval.

Seventh, compile the previous year's report on the activities of the fund.

Eighth, adopt all appropriate measures for properly managing fund property.

Ninth, complete other jobs assigned by the Assembly.

The Director of the Center is empowered with the rights of nominating candidates, appointing department leaders, and approving payments for general damage claims.

The above design of the institutions and duties of China's Oil Pollution Fund Council is informed by the International Oil Fund Organization and the American Oil Pollution Fund Center. The International Oil Fund Organization contains a General Assembly of all member states. The supreme authority is the Executive Committee and it is composed of 15 member states and is in charge of decision-making and management. It has similar duties.[44] The American "National Pollution Fund Center" is a comprehensive management institution rather than a single fund manager. It is not only responsible for the management of "OSLTF," it is also responsible for approving Certificates of Financial Responsibility (COFR). Furthermore, it can make natural resource damage claims due to oil pollution accidents on behalf of the American government. Its responsibility even involves

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43 Marine Environmental Protection Law, Art. 5(3); Maritime Traffic Safety Law, Art. 3; Regulations on the Prevention of Marine Pollution from Ships, Prevention of Marine Pollution Management Regulations of the People's Republic of China, Art. 3 and Art.7.

44 IOPCF, at http://www.iopcfund.org/staff.htm, 8 November 2005.

internal and external training for the coast guard and IT system maintenance of subsidiaries and users. This center consists of eight branches, the Ship Certificate Department, Case Management Department, Claim Determinations Department, Natural Resource Damage Claim Department, Financial Management Department, Customer Service Department, Information Technology Department, and Law Department.[45]

c. The Composition and Duties of Fund Supervision Department

The Supervision Department is composed of 3 to 5 oil owner representatives.

The duties of the Supervision Department are as follows.

First, supervise fund collection, management, and use.

Second, audit, or entrust certified public accountants to audit, the use of funds and financial management activities.

Third, report to the Assembly any violations of fund management provisions. If it believes that the Council is not properly exercising its duties, the Supervision Department has the right to file a lawsuit to the People's Court and call for the revocation of the activities that violate regulations.

Fourth, put forward proposals to the Assembly for the dismissal of personnel below the deputy director level.

Fifth, put forward proposals for improving management mechanisms and other features of the fund.

As the primary contributors to the fund, oil owners are most concerned about the use of their contributions. Although their rights in the Assembly must be properly restricted, its right to supervise the management and use of contributions cannot be deprived. Their inclusion can enhance both the supervision of fund contributions and the management and use of those contributions. Their inclusion can also help ensure that the fund acts legally and that a more harmonious relationship with the victims exists. This regime is not only reflective of corporate governance structure; it is also consistent with the regulations in the Trust Law.

According to the trust law of the continental law regime, the settlor is identified as one of the interested parties based on the fact that a trust relationship is established by the settlor for a certain purpose that this purpose should be achieved by the activities of the trustee.[46] The Trust Law of China regulates that the settlor

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45 The USA coast guard "national pollution fund center" website, at http://www.uscg.mil/hq/npfc/About%20Us/ index.htm #organization, 8 November 2005.

46 Zhang Chun, *The Trust Law Theory*, Nanjing: Nanjing University Press, 1994, p. 173. (in Chinese)

is entitled with rights such as knowledge of fund management, adjustment of management methods, revocation of behaviors in violation of obligations, damage claims and dismissal of the trustee.[47]

D. The Legal Regime of the Use of Oil Pollution Fund

As mentioned above, the establishment of a compensation fund for China's oil pollution damage is to compensate the losses caused by oil accidents in domestic waters, including interior waterways, territorial seas, and the exclusive economic zone. Oil accidents may be caused either by crude oil or bunker oil, but the compensation of the fund is only to supplement ship owners' compensation liability. The fund's legal regime should clarify these issues. For instance, the regime should specify the application scope and the beneficiary of the fund. Since oil pollution accident has not actually happened when the fund is set up, and the accident victim is not certain, the conditions that a victim should meet in order to get compensated should be specified in advance. By doing so, the beneficiary may secure his beneficiary right, and the purposes of setting up the trust may be achieved. On the other hand, due to the various damages caused by oil pollution accidents, the sum of damages may be huge while the fund's capacity to compensate victims is limited; the fund may be unable to fully compensate all losses. Therefore, the scope of compensation must be made clear. According to our analysis of the trust relationship, it is essentially an issue of how to realize the right of the beneficiary. Since this trust is a statutory trust, the content and acquisition of the beneficiary's right cannot be obtained from trust documents but rather from laws and regulations.

1. The Legal Regime for the Scope of Application

a. Definition of the Applicable Scope of Oil Pollution Accidents

First, in terms of space, the fund is applicable to all domestic waters, namely interior waterways, territorial seas, and the exclusive economic zone in order to fully protect oil pollution victims in China.

Second, in terms of time, the valid period is 3 years. That means victims may make claims to the oil pollution fund within 3 valid years after an oil pollution accident occurs. They will lose their beneficiary rights if their claims are overdue. The same is true of the International Oil Pollution Fund.

Third, in terms of types and ranges of accidents, the fund shall apply to all

47 Trust Law of the People's Republic of China, Arts. 20~23.

crude oil and bunker oil pollution damages, including transport ships and spilled oil. As discussed above, all ship owners of crude oil and bunker oil shall contribute money.

b. Definition of the Conditions of Compensation Liability

In the oil pollution damage compensation regime, the ship owner bears primary compensation responsibility; the fund's compensation liability is secondary. Only after the ship owner has borne or is unable to bear further compensation responsibility will the secondary compensation mechanism be initiated. Therefore, it should be specified that the fund shall bear liability for compensating losses under one or more of the following conditions.[48]

First, the oil pollution damage occurs in waters under the jurisdiction of China, but according to the law, the ship owner or other party is not liable for compensation.

Second, although the ship owners shall bear the liability for compensation in accordance with the law, they are unable to fully compensate losses, and liability insurance or other financial guarantees are unable to fully compensate victims.

Third, the compensation amount exceeds the compensation liability limit of ship owners or others.

At the same time, the fund is exempt from providing compensation explicitly under one or more the following conditions.

First, the claimant fails to prove that the damage is caused by a marine oil pollution incident.

Second, if all or part of the damage is caused by the victims, either intentionally or negligently, then the fund shall be exempted wholly or partially from providing compensation, except for the cost associated with preventive measures and additional damages.

Third, if the oil pollution damage is caused by an oil spill or discharge from ships used for military or public service.

c. The Scope of Compensation

Because China joined the Convention on Civil Liability in 1992, it has an obligation to provide compensation for oil pollution accidents with foreign elements. China's regulations on the scope of compensation should be in line with

48 Hu Zhengliang, Several Legal Issues on Establishing Vessel-induced Oil Pollution Compensation Fund, in *2005 International Maritime Forum Proceedings*, pp. 97~98. (in Chinese)

1992 Convention on Civil Liability to maintain unity within the legal regime and provide for the convenient administration of justice.[49]

According to the regulations on the scope of compensation under the 1992 Convention on Civil Liability and the newly issued 1992 Fund Claim Manual, issued in 2005, along with other claim practices concerned national oil pollution accidents, the following can be incorporated into the compensation scope.[50]

First, the clean-up costs. According to experiences with oil pollution accidents in recent years, the biggest problem that there is no guaranteed repayment for clean-up and recovery costs, leading to the situation where no one is motivated to quickly respond to oil spills.

Clean-up occurs before the full outcome of the oil spill damage is realized. Clean-up costs are usually proportional to its effect. Greater investment in clean-up will bring about a better effect, decreasing the amount of oil flowing into the sea and reducing overall damages and losses. If clean-up costs are not provided in a timely manner, it will be difficult to effectively respond oil spills, thereby increasing total losses. Therefore, it is important to adopt emergency measures and quickly provide clean-up funds. For this reason, the domestic oil funds in the United States and Canada regard prepaying for the cost of clean-up as one of their core functions. However, the fund does not fully pay for all clean-up expenditures; it needs those funds to be reimbursed. After prepaying, the fund obtains the right of subrogation and claims compensation from the ship owner, who takes primary responsibility for paying for the clean-up. When the ship owner cannot satisfy the compensation requirement because of financial constraints or liability limits, the

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49 In 1992 Convention on Civil Liability, the compensation scope is defined by "pollution damage", which refers to (a) loss or damage caused outside the ship by contamination resulting from the spill or discharge of oil from the ship, wherever such spill or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of recovery measures actually taken or to be taken; (b) the costs of prevention measures and further loss or damage caused by prevention measures. See 1992 CLC Convention, Art. 1(6).

50 In view of the wide scope of compensation in 1992 Convention on Civil Liability, the International Oil Pollution Fund listed the items in their own compensation manual for the convenience of claim for compensation and the relevant regulations of items to be compensated are revised every year. Because they are not laws, China can use these items for reference. The newly issued 1992 Fund Claim Manual in 2005 divided the vessel-induced oil pollution accidents into six categories, 1. cost of clean-up and pollution prevention measures, 2. Property damage, 3. Consequential damage, 4. Pure economical loss, 5.Environmental damage and post-spill study, and 6. Use of advisers (see Claims Manual, the IOPC Fund 1992, 2005 edition, pp. 10~11, 19~30.)

fund will bear the clean-up costs.

In many compensation cases in China, clean-up costs only account for a small proportion of total costs. Losses to the marine environment and long-term fishery resources make up the greatest proportion. Some scholars and officials worry that oil spills will cause a great of a loss for marine environment and long-term fishery resources,[51] so they have put forward the proposal that paying for clean-up costs should be prioritized.[52] But we do not think it is necessary to prioritize paying for clean-up costs.

The proposal for prioritizing clean-up costs has a dual meaning: whether paying for clean-up costs is prioritized under ship owners responsibility and whether paying for clean-up costs is prioritized when the fund covers liability. Regardless of whether paying for the clean-up cost is be prioritized under the owners responsibility or not, it will be incorporated into the compensation scope of the fund, together with other losses, as long as it is unpaid. Thus, if paying for clean-up costs is prioritized, it will be offset by the compensation part borne by the fund and other losses will be paid on a sliding scale under the rest limit. If the clean-up cost is not prioritized, they will be proportionately compensated under the fund limits, together with other losses. Therefore, whether paying for clean-up cost is prioritized or not differs only in the debt limits set by the fund. If prioritized, more compensation will go to creditors and less will be paid to victims. As a result, the problem of whether of paying for clean-up costs will be transferred from a problem of administrative funding to an internal capital problem. Under this arrangement, the oil pollution fund actually bears relatively less liability. However, it should be considered that prepaying for clean-up costs is a public service function while compensating victims is a private service function. It is not proper that capital spent on providing public service functions is taken away from providing compensation to victims, a private service function.

Whether the payment of clean-up costs is prioritized only affects the compensation liability borne by the oil pollution fund; it can and should be determined by the financial capacity of the fund. Compensation liability is restricted by the

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51 Liu Hong, National Conditions Shall Be Considered in the Oil Pollution Compensation, *China Ship Survey*, July 2005. (in Chinese)

52 Liu Gongchen, The Establishment of Vessel-induced Oil Pollution Damage Compensation Regime According to the National Condition, in *2005 International Maritime Forum Proceedings*, p. 5 (in Chinese); Liu Hong, The Discussion on Several Issues on the Establishment of China's Vessel-induced Oil Pollution Compensation Regime, in *2005 Shanghai International Maritime Forum Proceedings*, pp. 129~190. (in Chinese)

compensation limit, so it will not have a significant influence on the fund's financial ability.

Second, property damage. Property damage means public or private property that suffers damage due to an oil accident and includes contamination of fishing ships and equipment, and other property.[53]

Third, direct economic loss. Direct economic loss means income loss caused by property pollution, such as the income lost by fishermen due to the contamination of their fishing nets.[54]

Fourth, pure economical loss and environmental damage.

Pure economical loss refers to a loss of income, regardless of whether the property of an owner or user is not polluted. For example, fishing boats and fishing nets of fishermen are not polluted, but the fishing waters are polluted, leading to a loss of revenue for the fishermen. Similarly, it also refers to the loss of hotel or restaurant owners near public beaches caused by a decrease in customers during the oil pollution period.[55] In the Convention on Civil Liability of 1992, there is no definition of environmental damage but only the statement that pollution damage includes environmental damage. Both of these two types of losses are vague, uncertain, and huge.

In the juridical practices of oil pollution accidents, the most common loss is the loss of middle and long-term fishery resources, which can be listed as pure economic damage suffered by fishermen or ecological environment damage.

In China's judicial community, there exists great controversy on whether the losses of middle and long-term fishery resources should be included in the scope of damage compensation. Because potential losses are huge, if included, various claims of this type will produce a crowding-out effect for other types of compensation, leading to less compensation available for clean-up costs and direct economic losses, which will dissatisfy victims. Judges and scholars hold contrary views regarding this controversial issue. According to the court, the current law has no limit regulation. As a type of oil pollution damage, the loss of middle and long-term natural fishery resources is equivalent to "environmental damage" in

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53 Mans Jacobsson, The International Compensation Regimes and the Activities of the International Oil Pollution Compensation Funds, in *2005 International Maritime Forum Proceedings*, pp. 35~36.

54 Zhao Hong, Legal Issues on Trying Vessel-induced Oil Pollution Damage Compensation Cases, in *2005 Shanghai International Maritime Forum Proceedings*, p. 68. (in Chinese)

55 Claims Manual, the IOPC Fund 1992, 2005 ed., pp. 10~11.

"CLC1992," so it should be included in the scope of compensation. The fact that under this arrangement claimants who suffer losses will be paid less cannot be the reason to exclude the claims of middle and long-term natural fishery resources.[56] The scholars of the Ministry of Communications believe that middle and long-term fishery losses can be calculated on the basis of a formula, but this formula only for only 70% of the total sum. If allowed, the potentially huge amount of losses of this type will lead to an inadequacy of compensation in other areas. Therefore, this type of claim should not be accepted at the present stage.[57]

In fact, both sides have reasonable arguments. We assert that the losses of middle and long-term fishery resources should be included in the scope of damage compensation. Given this situation, the Assembly should be authorized to adopt strict standards for damage certificates and compensation sums, and to establish specific claim guidelines which should be revised every 2 years. According to Article 90(2) of the Marine Environmental Protection Law, whoever damages the marine ecology, marine aquatic resources, and marine protected areas must pay compensation. However, the losses of middle and long-term fishery resources cannot be directly measured. China lacks reliable data to measure and predict the losses of middle and long-term fishery resources. At the initial stage, the financial capacity of the oil pollution fund will be limited. If funds are to be used for covering damages to middle and long-term fishery resources, the fund will quickly become bankrupt. However, lowering the liability limit to prevent this situation will make the claims for losses of fishery resources less effective. At the same time, too high of a compensation limit will generate a crowding-out effect on other claims, leading to the result that fishermen and coastal aquaculture producers receive only symbolic and limited compensation, which is not in line with the purpose of the fund. So, strict control of compensation is essential. The Assembly can set the guidelines based on the experience of the international fund so as to ensure the legitimacy and flexibility of a legal regime which conforms to the needs of China.

d. Compensation Liability Limits

The damages caused by oil pollution accidents are extremely large; a legal regime for liability limits must be established in order to avoid the oil fund being

56 Zhao Hong, Legal Issues on Trying Vessel-induced Oil Pollution Damage Compensation Cases, in *2005 Shanghai International Maritime Forum Proceedings*, p. 68. (in Chinese)

57 Liu Hong, The Discussion on Several Issues on the Establishment of China's Vessel-induced Oil Pollution Compensation Regime, in *2005 Shanghai International Maritime Forum Proceedings*, p. 131. (in Chinese)

bankrupted by a single major oil spill. The limit is mainly dependent on the fund's financial capacity and actual compensation needs. Like the fund and contribution limit, the liability limit belongs to important matters of the use and management of the fund; it also has a significant influence on social and economic development, so it should be periodically adjusted to meet the needs and circumstances of the national economy. The Assembly should propose amendments to the State Council for approval.

Liability limits are stipulated by both the International Oil Pollution Fund and the U.S. Oil Fund.[58]

e. Other Expenditures of the Fund

One of the purposes for establishing the fund is to compensate for damage to marine ecology, resources and environment; these activities require advanced technology and trained experts, so it should be stated that a certain amount of the fund can be used for hiring and training experts in this field as well as researching and developing oil pollution prevention technology, especially clean-up technology. The similar is true of the International Oil Pollution Fund and the U.S. Oil Fund.

F. Fund Supervision Regime

Composed of oil owner contributions, government fines and seizures, and private donations, the fund is large enough that in addition to the internal supervision of the Supervision Department, an external supervision mechanism should also be established to ensure the legitimate operation of the fund. Specifically, the following three supervision regimes should be set up.

1. Fund Information Disclosure Regime

It shall be regulated that the fund Management Center shall submit written reports on how to deal with cases of compensation of over RMB 9 million to oil owners, the marine environmental protection supervision agency, and auditing organizations within one month after the completion of the cases, to ensure each relevant departments right to know.[59]

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58 Claims Manual, the IOPC Fund 1992, 2005 edition, pp.10~11, 19~30; Hu Zhengliang, Several Legal Issues on Establishing Vessel-induced Oil Pollution Compensation Fund, in *2005 Shanghai International Maritime Forum Proceedings*, p. 98. (in Chinese)

59 The average oil pollution damage is RMB 8.96 million. Quoted from Hu Zhengliang, Several Legal Issues on Establishing Vessel-induced Oil Pollution Compensation Fund, in *2005 Shanghai International Maritime Forum Proceedings*, p. 101. (in Chinese)

2. The Mandatory Audit Regime

Fund management reports made by the Management Center at the end of each year must be audited by an auditing firm and then submitted to the Assembly. It shall also be audited by the national auditing authority if necessary.[60] Meanwhile, the auditing firm shall be legally responsible for ensuring the authenticity of audit reports. A corresponding punishment shall be regulated in response to problems found in the audit report. The report shall be transmitted to the relevant authority when a violation is committed.

3. The Judicial Supervision Regime

Victims may have different understandings of the damage facts, relevant laws, and personnel behaviors, so it should be stated that either party may file a suit in a competent people's court if the victims and the Council have a dispute over damage compensation. The introduction of judicial supervision into the oil pollution legal regime makes the operations of oil fund open to judicial and public supervision. The parties should the right to have the procuratorial organs expediently address illegal activities, including the dereliction of duty, abuse of authority, or misappropriation of funds.

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60 Audit Law of the People's Republic of China, Art. 14.

Scope of Compensation for Vessel-induced Oil Pollution Damage Occurring in China's Waters

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Abstract: Compensation for vessel-induced oil pollution damage occurring in China's waters usually covers personal injury, losses to aquaculture and fisheries, onshore and environmental losses as well as pollution eliminating costs. Medium and long term losses to fishery resources caused by vessel-induced oil pollution should be compensable, but the difficulty lies in arriving at a fixed criterion for determining the rationality of such claims that is agreeable to all. Costs arising from mandatory pollution elimination are a matter of civil liability. The responsible person is entitled to bear limited liability, but the pollution eliminating costs should have priority of repayment. The pollution eliminating costs resulting from a collision should be borne by the parties in proportion to their respective contributions in causing the collision. Compulsory insurance and establishment of an oil pollution fund are effective ways to settle disputes related to pollution eliminating costs.

Key Words: Vessel-induced; Oil pollution; Scope of damage

For years, accidents resulting in vessel-induced oil pollution have been occurring frequently in China's waters. Statistics show that, from 1976 to 2000, a total of 2353 vessel-induced oil spills happened in the coastal areas of China, i.e., an average rate of one accident every four days and a total of about 30,000 tons of

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oil spill.[1] Vessel-induced oil pollution often results in huge economic losses and serious environmental damage.

Defining the scope of compensation for vessel-induced oil pollution damage has always been disputed. The authors hereby put forward some of their own views to help solve this problem.

I. Overview

The scope of compensation for vessel-induced oil pollution damage refers to the scope of compensation for losses that the victim may claim from the person responsible for the pollution after the marine environment is polluted due to oils, fuel and other substances spilled out of or discharged from a vessel.[2] It is directly related to the vital interests of the responsible person as well as the victim.

Under China's current laws and regulations, there are no provisions defining the scope of compensation for vessel-induced oil pollution damage, such as the Maritime Law of the People's Republic of China (hereinafter "the Maritime Law"), the Marine Environment Protection Law of the People's Republic of China (hereinafter "the Marine Environment Protection Law") , the Regulations of the People's Republic of China on the Prevention and Control of Vessel-Induced Marine Environment Pollution (hereinafter "the Regulations on the Prevention and Control of Vessel-Induced Marine Environment Pollution"), and so on. The General Principles of the Civil Law of the People's Republic of China (hereinafter "the General Principles of the Civil Law") only stipulate some principles for compensating for pollution damage.[3]

With reference to provisions[4] on the scope of compensation in the 1969 International Convention on Civil Liability for Oil Pollution Damage (hereinafter "the 1969 CLC Convention") and its related protocols, the 1996 International Convention on Liability and Compensation for Damage in Connection with the

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1 Liu Hong, To Establish and Implement China's Mechanisms for Compensating Oil Pollution Damage As Soon As Possible, *2002 Shenzhen Maritime Forum Proceedings*, p. 22. (in Chinese)

2 Si Yuzhuo, *Special Research on Maritime Law*, Dalian: Dalian Maritime University Press, 2002, p. 410. (in Chinese)

3 Article 117 and Article 124 of the General Principles of the Civil Law of the People's Republic of China.

4 Article 1 of the 1969 CLC Convention, the 1992 Protocol to the 1969 CLC Convention, Article 1(6) of the 1996 HNS Convention, and Article 1(9) of the 2001 Bunker Convention.

Carriage of Hazardous and Noxious Substances by Sea (hereinafter "the HNS Convention"), and the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (hereinafter "the Bunker Convention"), along with China's judicial practices, the authors believe that the scope of compensation for vessel-induced oil pollution damage occurring in China's waters usually falls into the following categories:

1. Personal Injury: Personal injury includes medical expenses, travelling expenses, lost income and other losses incurred by any damage to the life or physical health of a natural person due to environmental pollution.

2. Losses to Aquaculture and Fisheries: Losses to aquaculture and fisheries include direct losses to aquaculture and fisheries as well as medium and long term losses to fishery resources arising from pollution, such as death or reduction in catch of fish, shrimp, shellfish, etc. in aquaculture areas and fisheries areas, death or reduction of marine organisms in marine nature reserves and marine protected areas (MPAs) of rare marine organisms, etc. There isn't much dispute when it comes to compensation for direct losses, but any claim of compensation for medium and long term losses to fishery resources is always highly controversial and will be examined in depth in the following pages.

3. Onshore and Environmental Losses: Onshore and environmental losses include death of coastal flora and fauna, reduction in the production of sea salt and adverse impacts on the food processing and catering industry, transportation and production sectors, sea water desalination industry, etc., reduction in income from sea sports, destruction of recreation areas and scenic spots, damage to port waters and areas of water for general industrial use, damage to marine development zones and marine engineering operating areas, etc.

4. Pollution Eliminating Costs: Pollution eliminating cost means the cost of cleaning and treating the pollution, as will be illustrated in the following pages.

II. Medium and Long Term Losses to Fishery Resources

A. Controversy over Medium and Long Term Losses to Fishery Resources

In China's jurisprudential discourse as well as judicial practices, any claim of compensation for medium and long term losses to fishery resources caused by vessel-induced oil pollution occurring in China's waters is always highly controversial and bitterly disputed. There are two opposing views in this regard,

one of which is that the medium and long term losses to fishery resources caused by vessel-induced oil pollution falls within the scope of compensation for oil pollution damage, and the other is just the opposite.

On March 24, 1999, two shipping vessels operating in the coastal areas of China, Vessel *Donghai 209* and Vessel *Minrangong 2*, collided on the Ling-Ding Waterway of the Pearl River Estuary and caused a devastating oil spill. Later, Administration of Ocean and Fisheries of Guangdong Province filed a lawsuit of first instance before Guangzhou Maritime Court. In the trial of first instance, Guangzhou Maritime Court did not grant compensation for medium and long term losses to fishery resources. Subsequently, Administration of Ocean and Fisheries of Guangdong Province instituted an appeal.[5] In the trial of second instance, Guangdong Province Higher People's Court approved compensation for medium and long term losses to fishery resources.[6]

B. The Authors' Opinions on Compensation for Medium and Long Term Losses to Fishery Resources

The authors believe that the medium and long term losses to fishery resources caused by vessel-induced oil pollution occurring in China's waters should be compensated if the claims for such compensations are supported by sufficient evidence and if they are reasonable; but the difficulty lies in arriving at a fixed criterion for determining the rationality of such claims that is agreeable to all.

In compensating the foregoing medium and long term losses, the key is to identify the existence and value of such losses, which are usually expected ones and not the present or existing ones. Such losses are neither definable nor quantifiable. They are usually notional and huge sums that may be calculated solely on theoretical bases. Currently, in disputes regarding the compensation for oil pollution damage, most of the formulas applied by the parties or the relevant departments to investigate, estimate and predict the foregoing medium and long term losses are unscientific and questionable and most of the survey results are inaccurate. In addition, there is never sufficient factual evidence for most of the claims for compensation for medium and long term losses that are filed.

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5 Guangzhou Maritime Court (1999) Guangzhou Maritime Court No. 150 Paper of Civil Judgment, pp. 14, 15, 17.

6 Guangdong Province Higher People's Court (2000) Guangdong Higher People's Court Final Judgment of Second Instance No. 328 Paper of Civil Judgment, pp. 26, 27, 29.

Currently, the main basis for calculating the foregoing medium and long term losses is the Calculating Methods on the Economic Loss of Fishery Pollution Accidents (hereinafter "the Calculating Methods") released by China's Ministry of Agriculture in October 1996. These Calculating Methods stipulated:

> *Loss of natural fishery resources shall be calculated by local supervisory authorities based on the local resources, but shall not be less than three times the loss of aquatic products in direct economic losses.*[7]

Loss of marine fishery resources is one of the possible losses caused by oil pollution, which is a kind of direct damage in terms of marine ecology; however it may be regarded as an indirect loss in terms of fishery production.

The authors believe that the Calculating Methods belong to the category of departmental regulations and are not universally binding. Moreover, the compensation stipulated in the Calculating Methods is punitive in nature and is inconsistent with the principle established in the General Principles of the Civil Law whereby the infringer must compensate for the loss or restore the property to its original condition; the conclusions derived from such methods are through reasoning, which are not definable, quantifiable or predictable, and contrary to the principle of compensating for actually incurred losses established in the General Principles of the Civil Law. Therefore, the Calculating Methods should not be used as the basis for calculating the foregoing medium and long term losses.

When trying the lawsuit filed by Administration of Ocean and Fisheries of Guangdong Province against Nantong Tianshun Shipping Co., Ltd. and Tianshen International Marine Shipping Co. Ltd. concerning the compensation for vessel collision-induced oil pollution damage, based on the evidence and material facts of the case, Guangzhou Maritime Court held that the oil pollution in the case had not caused medium and long term losses to marine fishery resources.[8] The Court believed that loss of natural fishery resources should be compensated for only if such loss actually exists and is calculated reasonably. Therefore, to find out

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7 Article 2(2) of the Calculating Methods on the Economic Loss of Fishery Pollution Accidents released by China's Ministry of Agriculture.

8 Zhan Simin and Song Weili, The Lawsuit Filed by Administration of Ocean and Fisheries of Guangdong Province against Nantong Tianshun Shipping Co. Ltd., Tianshen International Marine Shipping Co. Ltd., et al. concerning the Compensation for Vessel-induced Oil Pollution Damage, *2004 Jiangsu Maritime Senior International Forum Proceedings (II)*, p. 5. (in Chinese)

whether the oil pollution in the case had caused medium and long term loss to the marine environment and resources should have priority over how to identify the medium and long term loss. According to the survey report prepared by the monitoring center and submitted by the plaintiff, the oil pollution in the case was serious and had caused medium and long term loss to natural fishery resources, which was calculated by multiplying the direct economic loss of natural aquatic products by three based on the formula prescribed by the Ministry of Agriculture. However, in accordance with the investigation report of Shantou Maritime Bureau, the analysis and views of the authentication center commissioned by the Court, the opinions of the experts commissioned by the defendants, etc., only a small amount of oil had been spilled in the case and the oil pollution had not spread. In addition, the pollution eliminating effect was not bad and the pollution was not serious. Moreover, based on the Environment Monitoring Report issued by the authentication center in the following year, the vessel-induced oil pollution in the case had not caused damage to the local marine environment and the catch rate in the fishery industry had increased over previous years. These materials facts constituted strong counterevidence against the assertion of the monitoring center that the pollution in the case was serious and that it would take 3 years to restore the marine environment. Therefore, according to the rule of "preponderance of evidence" (or balance of probabilities), the Court found that the vessel-induced oil pollution in the case was mild and it was more likely that the oil pollution in the case had not caused medium and long term harm to the marine environment. Finally, the Court ruled that the oil pollution in the case had not caused medium and long term loss to natural fishery resources in question.

The authors note that it is a common problem for the survey reports on medium and long term losses to be inaccurate and often the evidence presented is not sufficient to support a claim for compensation for such losses. When settling disputes related to compensation for medium and long term losses, it is necessary to apply scientific formulas and techniques for investigating, estimating and predicting medium and long term losses, and to set proper standards of admitted evidence in survey reports.

III. Pollution Eliminating Costs

A. Liability Attribution of Pollution Eliminating Cost

After a vessel-induced oil spill occurs in China's waters, the pollution will usually be eliminated or cleaned up by the ship owner(s) (or other person(s) responsible for the oil pollution) itself or other personnel commissioned thereby, or be eliminated mandatorily by the maritime administrative departments (or maritime bureaus). For the former case of pollution elimination, the pollution eliminating cost is a matter of civil liability and the responsible person(s) may enjoy limited liability, over which there is essentially no controversy in Chinese jurisprudential discourse and practices. However, in the latter case of pollution elimination, there is much controversy over whether the pollution eliminating cost arising therefrom is a matter of civil liability or administrative liability and whether the responsible person(s) may enjoy limited liability.

For the liability attribution of the pollution eliminating cost arising from mandatory pollution elimination organized by the maritime administrative departments, there exist mainly the following two views:

1. The Pollution Eliminating Cost Arising from Mandatory Pollution Elimination is a Matter of Administrative Liability

Some people think that since mandatory pollution elimination is an administrative enforcement action, the cost arising therefrom, of course, is a matter of administrative liability. The maritime administrative department may order the responsible person(s) to pay such costs and the responsible person(s) shall not enjoy limited liability.

2. The Pollution Eliminating Cost Arising from Mandatory Pollution Elimination is a Matter of Civil Liability

It is stipulated in Article 41 of the 1982 Marine Environment Protection Law that:

> *In the case of a violation of this Law that has caused or is likely to cause pollution damage to the marine environment, the competent authorities ... may order the violator to remedy the pollution damage within a definite time, pay a pollutant discharge fee, pay the cost for eliminating the pollution and compensate for the losses sustained by the State.*

It is stipulated in Article 39 of the Regulations on the Prevention and Control of Vessel-Induced Marine Environment Pollution that:

> *In case of violation by vessels of the Marine Environment Protection Law of the People's Republic of China and these Regulations that has caused pollution damage to the marine environment, the harbor superintendents may order the payment of a fee for eliminating the pollution, and compensation for the State's losses.*

Based on these, the pollution eliminating cost is a matter of administrative liability.

However, Article 73 of the Marine Environment Protection Law revised in 1999 stipulated that:

> *Whoever, in violation of the provisions of this law, commits any of the following acts, shall be ordered to remedy the damage within a certain period of time and be fined by the competent department invested by law with power to conduct marine environment supervision and administration in accordance with the provisions of this law…*

Article 90 of the Marine Environment Protection Law stipulated that:

> *Whoever causes pollution damage to the marine environment shall remove the pollution and compensate the losses; in case of pollution damage to the marine environment resulting entirely from the intentional act or fault of a third party, that third party shall remove the pollution and be liable for the compensation.*

The foregoing Article 73 and Article 90 stipulate administrative liability and civil liability respectively. China's lawmakers have classified pollution eliminating costs under civil liability, which is consistent with the provisions of the 1969 CLC Convention and the 1992 Protocol to the CLC Convention (hereinafter "the 1992 CLC"). Therefore, the Marine Environment Protection Law revised in 1999 has stipulated administrative liability and civil liability expressly in two separate articles. Pollution eliminating costs have been excluded from the scope of administrative liability. As a result, there will be no legal basis for

classifying pollution eliminating cost as administrative liability. Moreover, it is an internationally common practice to include pollution eliminating costs within the scope of civil compensation for damages. Under the regime of the CLC Convention and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (hereinafter "the 1971 Fund Convention"), pollution eliminating costs have not been listed separately. Therefore, the costs arising from mandatory pollution elimination are a matter of civil liability.

Hence, the authors believe that in case of the costs arising from mandatory pollution elimination organized by maritime administrative departments, due to the following reasons, the responsible person(s) should be civilly liable and bear the pollution eliminating costs within the limits of liability:

1. It is the Civil Liability of the Responsible Person(S) to Bear the Mandatory Pollution Eliminating Cost

The mandatory pollution eliminating cost is incurred for the purpose of preventing or alleviating pollution damage and is part of the damages in the tort of oil pollution. In addition, there is a causal relationship between the two. The responsible person(s) bearing the mandatory pollution eliminating cost is in line with the compositional elements of civil liability for tort. Therefore, there is a legal basis for the person(s) responsible for the oil pollution to bear such civil liability for the pollution eliminating cost.

According to Article 134 of the General Principles of the Civil Law, the main sanctions in case of civil liability include cessation of infringements, removal of obstacles, elimination of dangers, return of property, restoration of original condition, repair, reworking or replacement, compensation for losses, payment of breach of contract damages, elimination of ill effects and rehabilitation of reputation and extension of apology. It is stipulated in Article 90 of the Marine Environment Protection Law that:

> *Whoever causes pollution damage to the marine environment shall remove the pollution and compensate the losses ...*

Therefore, removal/alleviation of damage and compensation for losses are two forms of civil liability for tort of causing damage to the marine environment. Way for removing the pollution damage actually includes such three methods of bearing civil liability as cessation of infringements, removal of obstacles and elimination

of dangers. The responsible person(s) should be liable for removal/alleviation of damage and paying for the expenses for removing obstacles. In essence, removing the damage of oil pollution means that the victim requires the person(s) responsible for the pollution to stop and remove existing pollution damage or to prevent or mitigate imminent pollution damage immediately. Therefore, this method of bearing liability is an effective means to prevent and mitigate pollution damage. Although mandatory pollution elimination itself is an administrative enforcement action, it is conducted not to perform the duties of the administrative departments to manage and supervise the marine environment, but to prevent and alleviate oil pollution damage to the marine environment. Therefore, mandatory pollution elimination is actually a measure taken by the maritime bureau, instead of the person(s) responsible for the oil pollution, to relieve the pollution damage and the expenses in this regard, namely, the pollution eliminating costs, are borne by the person(s) responsible for the oil pollution. Therefore, the liability for the pollution eliminating cost lying on the person(s) responsible for the oil pollution is in essence a civil liability for compensation. Pollution eliminating costs, spent for taking precautionary measures, should belong to the scope of compensation for damages. Under Article 21, Paragraph 4 of the Special Maritime Procedure Law of the People's Republic of China (hereinafter "the Special Maritime Procedure Law"), the expenses arising from any measure taken to prevent, reduce or eliminate oil pollution damage has been listed as a maritime claim. Therefore, from a procedural point of view, pollution eliminating costs are within the scope of civil liability.

2. For Mandatory Pollution Eliminating Costs, the Responsible Person(s) may enjoy limited liability

Because mandatory pollution eliminating costs fall within the scope of civil liability, the responsible person(s) may enjoy limited liability for the same.

B. Should Pollution Eliminating Costs Have Priority of Repayment

After a vessel-induced oil pollution accident occurs in China's waters, the pollution eliminating costs incurred by the ship owner(s) (or other person(s) responsible for the oil pollution) itself or other personnel commissioned thereby, do not have priority of repayment and this is incontrovertible in China's jurisprudential discourse and practices; however, there is much controversy over whether the pollution eliminating costs incurred during the mandatory pollution elimination organized by the maritime administrative departments should have priority of

repayment. There are two main views:

1. Mandatory Pollution Eliminating Costs Should Have Priority of Repayment

Mandatory pollution elimination is classified as an administrative enforcement action and the expenses arising therefrom, of course, are an administrative liability, so mandatory pollution eliminating costs should have priority of repayment.

2. Mandatory Pollution Eliminating Costs Should Not Have Priority of Repayment

Mandatory pollution eliminating costs are a matter of civil liability, not administrative liability. So far, no law has granted priority of repayment to pollution eliminating costs. Therefore, it is inconsistent with common legal practice to grant priority of repayment to pollution eliminating costs.

The authors believe that due to the following reasons, mandatory pollution eliminating costs should have priority of repayment, although it is a matter of civil liability: mandatory pollution elimination is usually organized by maritime administrative departments. After the pollution damage is eliminated, because of economic difficulties of the responsible person(s) and many other reasons, the pollution eliminating costs cannot be fully repaid. In most cases, the maritime administrative departments have to persuade the units engaged in pollution elimination or parties benefiting from pollution elimination to advance the pollution eliminating costs for the responsible person(s), with their limited administrative powers. Currently, because the funds advanced as mentioned above often cannot be fully repaid, the enthusiasm for pollution elimination from various units engaged in pollution elimination is frustrated. They even dawdle in their efforts towards pollution elimination or request the maritime administrative departments to provide high security for pollution eliminating costs by reason of deficiency of funds. Objectively speaking, the problem of funds advanced for the pollution eliminating costs has affected the results and rate of success of pollution elimination. If the results of pollution elimination are good, pollution damage will certainly be reduced; if the results of pollution elimination are bad, pollution damage will certainly be aggravated. So far, China has not established a system of oil pollution damage compensation fund, so pollution eliminating costs cannot be repaid through fund. In this situation, the authors believe that before the oil pollution damage compensation fund system is established in China, we should refer to the relevant provisions in the Maritime Law and the Enterprise Bankruptcy Law of the People's Republic of China (hereinafter "the Bankruptcy Law"), deem

the mandatory pollution eliminating costs arising from vessel-induced oil pollution accidents in China's waters as priority debt and reimburse such costs first with the fund for limited liability for oil pollution established by the ship owners. After the oil pollution damage compensation fund is established in the future, priority of repayment shall be granted to mandatory pollution eliminating costs through legislation.

C. Bearing the Pollution Eliminating Costs arising from Oil Pollution caused by Collision of Vessels

In China's jurisprudential discourse as well as judicial practices, there are mainly three views on how the pollution eliminating costs arising from oil pollution caused by collision of vessels occurring in China's waters should be borne: (1) Such costs should be borne by the owner of the vessel that spilled the oil and caused pollution; (2) Such costs should be borne by the owners of both the vessels that collided with each other in proportion to their respective contributions in causing the collision; (3) The two vessels colliding with each other should be severally liable for such costs.

Due to the following two reasons, the authors believe that the second view is most reasonable: firstly, the pollution eliminating cost of the efforts of the responsible person itself or any other person commissioned thereby or the cost of mandatory pollution elimination is a matter of civil liability. Therefore, it should be borne by the owners of the two vessels colliding with each other in proportion to their respective contributions in causing the collision in accordance with the provisions of Article 169 of the Maritime Law; secondly, it is stipulated in Article 90 of the Marine Environment Protection Law revised in 1999 that:

> *Whoever causes pollution damage to the marine environment shall remove the pollution and compensate the losses; in case of pollution damage to the marine environment resulting entirely from the intentional act or fault of a third party, that third party shall remove the pollution and be liable for the compensation.*

D. Composition of Pollution Eliminating Costs

The pollution eliminating cost of tackling vessel induced oil pollution damage in China's waters mainly covers the following aspects:

1. Onshore and Offshore Pollution Eliminating Operations and Loss of Property

If reasonable measures are taken to remove offshore oil spills, to protect natural resources that are vulnerable to pollution, and to clean up the shoreline and coastal facilities, the fees for pollution eliminating operations, including the prices or rent of equipment and materials, the fees for cleaning up or repairing pollution eliminating equipment, the fees for disposal of recovered objects, etc., shall be compensated for. For the equipment purchased, the remaining value thereof should be deducted when the amount of compensation is being calculated.

2. Relief and Precautionary Measures

The main requirement is to classify the expenses of "relief operations" as "pollution eliminating cost" and then claim compensation.

3. Processing Recyclables

Often, during pollution eliminating operations, large amounts of oil and oil waste can be recycled. The reasonable costs arising from efforts of disposal of these recyclables should also be compensated for. However, if the claimant receives any benefit by dealing in the recovered oil, such benefits should be deducted from the compensation payable from the fund.

E. Recommendations for Solving the Problem of Pollution Eliminating Cost

The authors believe that implementing a compulsory vessel-induced oil pollution insurance and establishing an oil pollution compensation fund system are effective ways for settling the disputes of pollution eliminating costs resulting from vessel-induced oil pollution in China's coastal areas.

It is stipulated in Article 66 of the Marine Environment Protection Law that:

> *The State shall make perfect and put into practice responsibility system of civil liability compensation for vessel-induced oil pollution, and shall establish vessel-induced oil pollution insurance, oil pollution compensation fund system in accordance with the principles of owners of the vessel and the cargoes jointly undertaking liabilities for vessel-induced oil pollution compensations.*
>
> *Specific measures for the implementation of vessel-induced oil pollution insurance and oil pollution compensation fund system shall be formulated by the State Council.*

This provision provides a legal basis for China to implement compulsory vessel-induced oil pollution insurance and to establish an oil pollution compensation fund system. In accordance with this provision, compulsory insurance and the compensation fund system are an indispensable part of the legal mechanisms for compensating for vessel-induced oil pollution damage in the coastal areas of China and also improve the soundness of the compensation system.

It is suggested that a compulsory insurance system for oil pollution induced by vessels in China's coastal areas be implemented and the pollution eliminating costs be borne by the insurers. It is stipulated in the 1969 CLC Convention that the owner of a ship carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance.[9] In accordance with No. 1600 Document (transportation supervision) of China's Ministry of Transportation (80), a ship operating along international routes and carrying more than 2,000 tons of oil in bulk as cargo is required to "maintain insurance on civil liability for oil pollution damage or other certificates of financial security".[10] However, there are still no express provisions concerning oil pollution insurance for the vessels operating in China's coastal areas. Therefore, compulsory insurance should be expressly prescribed in the system of civil liability compensation for oil pollution damage induced by vessels operating in China's coastal areas and the insurance policy should cover pollution eliminating costs and other related fees. The pollution eliminating costs (if any) arising from vessel-induced oil pollution can then be borne by the insurer.

It is also suggested that the vessel-induced oil pollution damage compensation fund be established in China. The pollution eliminating costs going beyond the limited liability of the responsible person(s) or the insurer or the capacity of the responsible person(s), or for which no responsible person(s) can be identified, may be paid for through the fund, so as to increase the efficacy of pollution elimination and reduce the pollution damage.

Therefore, it is suggested that a policy of compulsory insurance for vessel-induced oil pollution in the coastal areas be implemented and the compensation fund for oil pollution damage in the coastal areas be established in China as soon as

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9 Article 7(1) of the 1969 International Convention on Civil Liability for Oil Pollution Damage.

10 Document of China's Ministry of Transportation (80) (Jiao Gang Jian Zi No. 1600): Circular Concerning Serious Implementation of the 1969 International Convention on Civil Liability for Oil Pollution Damage.

possible, so as to settle issues related to pollution eliminating costs arising from oil pollution caused by vessels in China's coastal areas.

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南非处理油类污染预防和需要救助的船舶的实践方法

Patrick Holloway*

内容摘要: 本文综合分析了南非在油类污染预防领域的法律体系及实践方法。至于“避难所”这个新问题，作者提供了南非有关部门在该问题上的态度及可适用政策。

关键词: 南非　油类污染　预防　避难所

一、南非——海洋污染高风险区域

连接东西方经济的大量船舶运输主要集中在非洲的最南端。许多绕行好望角的船舶都是因为船体过大而无法通过苏伊士运河，包括了现有的最大的油轮和散装船。这个庞大的交通流（尤其在一年中的某些特定时期）受天气系统和东南海岸异常波浪的综合影响：前者会引起强风和激流，当逆流航行时，会产生极大的波浪反应；后者可导致船舶的结构性损害。此外，西海岸弥漫的雾，向东行驶的船舶为了躲避西南向的快速海流而近岸行驶，以及未受分道通航规制的繁忙海运航线等，均增加了海难的风险。

尽管南非有约3000公里的海岸线，却仅设置了7个商业港口。除了理查兹湾，其他港口均不是可以容纳巨型船舶的深水港。对于遇难船舶的船长而言，可供其选择的避难所更是被进一步缩减至3个，即位于萨尔达尼亚湾北部西海岸的圣赫勒拿湾，以及开普敦半岛两边的塔布尔湾和福尔斯湾，这3个港湾均位于南非的内水。其中一个使用较少的避难所是位于东海岸的阿尔哥亚湾。在一年当中的某些特定时期，由于天气因素，这些可供选择的避难所会被进一步限制使用。比如，考虑到主导风向，人们在冬天一般会选择福尔斯湾作为避难所，而在夏天则选择塔布尔湾和圣赫勒拿湾。

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这些非正式的避难所和南非的港口不仅属于环境敏感区域，同时也是南非人口较为密集的区域和蓬勃发展的旅游业中心，因此，在这些区域内的任何海洋污染都可能导致大量的损失和损害。捕鱼业是南非经济的重要组成部分，在国家港口以及其他沿岸渔港驻扎了国家舰队。在塔布尔湾北部，还设有科贝赫核电站。

每一年，南非当局都必须处理与遇难船舶有关的事务。南非历史上曾有 20 起大规模石油泄露事件，其中就有 4 起是最近发生的。[1]

数据显示，多年来南非海事安全局 [2] 处理了大量的遇难船只，因此，海事安全局的主要官员是当今世界上在救助及处理遇难船舶领域经验最为丰富的人员。

二、有效的预防及干预

20 世纪 70 年代早期发生了一系列备受瞩目的事故，南非的海岸线因此遭受了大量污染。

受这些事故的影响，南非交通运输部与当时的国家航运公司——南非航运订立《预防油污服务协议》。南非航运订购建造了 2 艘强大的远洋救助拖轮和 5 艘油污处理船。

2003 年，该订购合同进行了招标，合同期限为 5 年；该份合同名为《南非海岸污染预防及应急计划备用拖船协议》。

这种政府与私营企业之间的独特关系已经作为一种模式被应用于其他国家，包括英国、美国、荷兰、法国和德国。

从 1976 年至今，有 412 艘超过 1250 万载重吨的船舶被救，其中包括 46 艘散货船，51 艘货物 / 集装箱船，以及 124 艘油轮。

三、《南非宪法》[3]

《南非宪法》规定，每个人都有权生活于一个无害于他们健康或者福祉的环境中，并有权为了当代和后代人的利益而保护环境。该宪法允许采取立法或者其他措施防止污染和生态退化，促进保护和保障生态的可持续发展。

宪法鼓励在解释立法的时候应用国际法；[4] 规定除非法律有相反的规定，习惯

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1 1977 年的 Venpet 号和 Venoil 号碰撞事故；1983 年 Castello De Bellver 号事故；1988 年的 World Glogy 号事故；1992 年的 Katina P 事故；1994 年的 Apollo Sea 号事故；此外，还有 Treasure 号散装船事故，2000 年，该船在距离北开普敦约 15 英里的地方沉没。

2 A juristic person established in terms of the South African Maritime Safety Authority Act 5 of 1998.

3 Act 108 of 1996.

4 Act 108 of 1996, section 233.

国际法自动成为南非法律的一部分；[5] 并规定了采用国际公约的程序。[6]

四、预防和干预的立法措施

南非于 1997 年批准了《联合国海洋法公约》（以下简称“《公约》”）。根据《公约》规定，南非作为沿海国家，可以对其专属经济区“……制定法律和规章，以防止、减少和控制来自船只的污染……”[7] 南非法律和规章的解释需要以《公约》为背景。

海事安全局的工作人员作出的与遇难船只有关的决定，以及是否允许其进入南非内水避难的决定，都是以一系列为了防止和限制海洋污染（尤其是油类污染）而制定的法律和规章为背景。承担海洋污染问题责任的 2 个主要机关为海事安全局和南非环境事务与旅游部。

与海洋油类污染有关的法律法规中，最重要的是：

- 《海上倾倒管制法》；[8]
- 《海洋污染（污染控制和民事责任）法》；[9]
- 《海洋污染（预防船舶污染）法》；[10] 以及
- 《海洋污染（干预）法》。[11]

（一）《海上倾倒管制法》

该法为执行《1972 年伦敦倾倒公约》而颁布，并由南非环境事务与旅游部执行。该法对未经许可向海洋倾倒物质和构筑物的行为采取刑事制裁。南非是《伦敦倾倒公约 1996 年议定书》的签署国，该议定书将在适当的时候取代《1972 年伦敦倾倒公约》。

（二）《海洋污染（控制和民事责任）法》

该法的目的如下：

- 规定保护海洋环境免受油类及其他有害物质的污染，并为此目的规定预防

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5 Act 108 of 1996, section 232.
6 Act 108 of 1996, section 231.
7 LOSC, Art. 211(5).
8 Act 73 of 1980, as amended by the Dumping at Sea Control Amendment Act (No. 73 of 1995).
9 Act 6 of 1981.
10 Act 2 of 1986.
11 Act 64 of 1987.

及应对海上油类和其他有害物质污染。

• 确定由船舶、油轮和海上设施排放油类而造成的损失或损害所需要承担的责任；以及

• 规定与之相联系的问题。

该法由海事安全局执行。

海事安全局的目标是：

• 确保海上生命及财产安全；

• 预防和应对由船舶造成的海洋环境污染；以及

• 促进南非共和国的海上利益。[12]

1. 刑事责任及免责条款

该法禁止排放油料，且规定除非证明有规定的例外情况存在，如果船舶、油轮或海上设施排放油料，其船长和船东属犯罪。

证明例外存在的责任归被告承担。

该法同时规定，任何排放行为都应尽快向“主要官员”报告，即主管最近港口海事安全局的官员。任何未能遵守规定的行为均属犯罪。

2. 预防

该法授权海事安全局采取各种可能的步骤以防止正在排放的或者可能排放的有害物质对海洋造成的污染。[13]

例如，海事安全局可以要求船舶或者油轮的船长或船东：

• 从船上或者船上的某一个指定位置卸下有害物质；[14] 或

• 将有害物质从船上的某一个指定位置移到另一个指定位置；[15] 或

• 根据指示的方式，在规定的时间内处理有害物质；[16] 或

• 将船舶移动到某一个指定的地点，[17] 或不得将船舶从某一指定地点移开，除非根据相关条件获得批准；[18] 或

• 不得卸载货物或者有害物质，除非根据相关条件获得有关部门批准；[19] 或

• 根据规定操作，击沉、摧毁船舶或船舶的任何部分，摧毁船上有害物质或一些有害物质。[20]

为了防止污染，海事安全局被授权在某一有害物质有可能被排放的情况下采

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12 Act 5 of 1998, section 3.
13 Act 6 of 1981, section 4.
14 Act 6 of 1981, section 4(1)(a)(i).
15 Act 6 of 1981, section 4(1)(a)(ii).
16 Act 6 of 1981, section 4(1)(a)(iii).
17 Act 6 of 1981, section 4(1)(b).
18 Act 6 of 1981, section 4(1)(c).
19 Act 6 of 1981, section 4(1)(d).
20 Act 6 of 1981, section 4(1)(e).

取措施，包括：

- 只要认为是适合防范或防止海洋免受有害物质污染，可采取摧毁、焚烧或其他任何方式处置该种有害物质；[21]
- 按照规定的航线驾驶；[22]
- 让 1 艘或者多艘条件适合的船舶在某一特定的时间内，在这艘船舶附近服务；[23]
- 采取规定的其他措施，以防止从船舶排放或者进一步排放任何有害物质。[24]

如果海事安全局认为，问题船舶的船长和船东不能遵守海事安全局作出的要求，其可以采取上述措施，因为海事安全局有权力这样要求，该种权力包括要求不采取某一措施。[25] 上述规定对执行与问题船舶有关的打捞作业的打捞人员同样具有约束力。[26]

海事安全局可以移除任何海上污染。[27]

海事安全局可以命令任何有能力提供防治污染所需货物或者服务的人员如此做，而且法律有关于向这类人员支付补偿的规定。[28]

3. 国家责任

《海洋污染（控制和民事责任）法》赋予海事安全局的权力在行使中也受到某些规定的限制，如果船东在遵守海事安全局的要求时，因全部或部分海事安全局过错导致任何费用、有害物质的排放或排放的可能，那么，由此产生的全部或部分费用将由国家支付给船东。[29]

另一个预防条款允许任何由海事安全局授权的人均可登临位于南非专属经济区中的船舶，以确定该该船是否持有《海洋污染（预防船舶污染）法》中要求的相关文件。[30] 该法采用了与《国际防止船舶造成污染公约》相同的规定。该条款规定的权力范围包括有权搜查并复制有关文件或记录；取样和探测；测试船上的任何设备。[31]

（三）《海洋污染（预防船舶污染）法》

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21 Act 6 of 1981, section 5(1).
22 Act 6 of 1981, section 4(1)(f).
23 Act 6 of 1981, section 4(1)(g).
24 Act 6 of 1981, section 4(1)(h).
25 Act 6 of 1981, section 4(2)(a) and (b).
26 Act 6 of 1981, section 4(2)(c).
27 Act 6 of 1981, section 5(2).
28 Act 6 of 1981, section 5(3) to section 5(8).
29 Act 6 of 1981, section 4(3).
30 Act 2 of 1986 and MARPOL 73/78 means the convention contained in the schedule to that Act.
31 Act 2 of 1986, section 7.

经 1978 年议定书修改的《国际防止船舶造成污染公约》以附录的形式被纳入了南非的法律，即《海洋污染（预防船舶污染）法》。[32]《海洋污染（预防船舶污染）法》规定，根据《国际防止船舶造成污染公约》（操作性排放），保护海洋免受来自船舶排放的油类或者其他有害物质的污染；[33] 任何违反《海洋污染（预防船舶污染）法》规定的人，将受到不超过 50 万南非兰特（约 77000 美元）的罚款、5 年以下的有期徒刑或者与有期徒刑等价的罚款。[34]

（四）《海洋污染（干预）法》

《海洋污染（干预）法》[35] 是为使《1969 年国际干预公海油污事故公约》和《1973 年国际干预公海非油污类物质污染议定书》生效而颁布。

公约允许采取“……例外性措施……”，以保护各缔约国的“利益”“……免受海洋事故造成的海洋和海岸污染危险的严重后果。”

公约规定，缔约国“在发生海上事故或者与此事故有关的行为之后，如能有根据地预计到会造成很大危害后果，则可在公海上采取必要的措施，以防止、减轻或者消除由于油类对海洋的污染或者污染威胁而对其海岸或者有关利益产生的严重而紧迫的危险。”[36] 该公约适用于“任何类型的海船”。[37]

采取的措施应当与实际造成的损害或者可能将发生的损害相当。[38]

此外，1973 年议定书将 1969 年公约规定的措施扩大到包括针对非油类物质所造成的污染或者污染威胁。[39]

《海洋污染（干预）法》规定，对于违反交通运输部部长为执行 1969 年公约和 1973 年议定书而作出的任何规定的行为人，将受到的不超过 50 万南非兰特的罚款或少于 5 年的有期徒刑，或二者并用。[40]

其他相关的南非国内立法

其他授权保护措施的南非立法包括：

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32 Act 2 of 1986.
33 Act 2 of 1986, section 3A(1)(a).
34 Act 2 of 1986, section 3A(4).
35 Act 64 of 1987.
36 The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Article I.
37 The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Article II section 2.
38 The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Article V section 1.
39 Protocol Relating To Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil 1973, Article I.
40 Act 64 of 1987,section 3(2)(a).

- 《海洋区域法》;[41]《沉船及救助法》;[42]《海上交通法》;[43]
- 《国家环境管理法》;[44]《环境保护法》;[45]《国家水法》;[46]《灾难管理法》[47]

（五）《海洋区域法》[48]

《海洋区域法》在“海难”一条下规定，在发生海上事故或者与此事故有关的作为与不作为时，且能有根据地预计到会造成较大的有害后果，交通运输部部长可以对该船采取必要措施，以保护南非海岸免受污染或者污染威胁。[49]

（六）《沉船及救助法》[50]

《沉船及救助法》授权海事安全局指示船长或船东在船舶已经失事、搁浅或者遇难时将船舶移到海事安全局指定的位置，或者按照安全局的规定对船舶采取一定的措施。[51] 如果没有遵守海事安全局的指示，海事安全局可以强制执行该措施。[52] 该法进一步规定，任何失事、搁浅或者被遗弃的船舶应当被捞起、转移、摧毁或者以其他可行的措施处理。由于上述行为而引起的费用可由船东支付；如果有必要的话，海事安全局可以将船舶残骸或者船只出售，以支付因其产生的开销。[53]

《沉船及救助法》纳入利润《1989 年国际救助公约》（以下简称“《救助公约》”）的规定，以附件的形式出现。南非并不是《救助公约》的缔约国，因此，南非并没有任何公约下的国际义务。《救助公约》承认，海上事故发生后，沿海国可以采取适当措施保护海岸及相关利益免受由此产生的污染或者污染威胁；该公约规定，沿海国可以给出打捞作业的相关指示。[54]

（七）《海上交通法》

41 Act 15 of 1994.
42 Act 94 of 1996.
43 Act 2 of 1991.
44 Act 107 of 1998.
45 Act 73 of 1989.
46 Act 36 of 1998.
47 Act 57 of 2002.
48 Act 15 of 1994.
49 Act 15 of 1994, section 10.
50 Act 94 of 1996.
51 Act 94 of 1996, section 18(1)(a).
52 Act 94 of 1996, section 18(1)(b).
53 Act 94 of 1996, section 18(3), (4) and (5).
54 Article 9 of the International Convention on Salvage, 1989.

《海上交通法》对《沉船及救助法》做了相应的补充。[55]《海上交通法》禁止故意沉没、丢弃或者处理船舶、船舶残骸或者船体，除非该种行为发生在海事安全局同意的地点；禁止丢弃可能影响航行的未遇难船舶、船舶残骸、船体或者物件。[56]违反上述规定构成犯罪。

（八）《国家环境管理法》[57]

《国家环境管理法》由南非环境事务与旅游部执行；该法的目的是：建立对影响环境的事务做决策所依据的原则，进而实现合作环境治理；在政府机构之间寻求合作；协调各类职能所需要的程序。该法规定了一般性的国家环境管理，值得注意的是，其规定了对于事故（被定义为“意想不到的突然事件，立即或延时地给公众带来严重危险或给环境带来潜在严重污染或者损害”）的控制。[58]

该法规定了紧急情况发生时“责任人”和“有关部门”的责任。“责任人”包括任何对事故有责任的人，事故中任何有害物质的所有者，或者控制任何上述有害物质的人。[59]

该法规定，责任人应当采取合理措施控制、减小由于事故带来的影响，包括对环境可能造成的影响，以及给个人健康、安全和财产带来的风险。此外，责任人的义务和责任还包括执行清理程序及补救事故带来的影响。[60]

（九）《环境保护法》[61]

《环境保护法》赋予环境事务与旅游部部长深远而广泛的权力，可命令任何由于作为或不作为而造成环境破坏、危险的个人尽力避免此事，并恢复被损害的环境。

（十）《国家水法》[62]

《国家水法》保护南非的淡水资源，认为任何污染或者可能污染淡水资源的物质的所有人有责任采取一切措施控制或者减少因事故造成的影响。

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55 Act 2 of 1991.
56 Act 2 of 1981,section 6(1).
57 Act 107 of 1998.
58 Act 107 of 1998, section 30.
59 Act 107 of 1998, section 30(1)(b).
60 Act 107 of 1998, section 28(1)(a), (b) and (c).
61 Act 73 of 1989.
62 Act 36 of 1988.

五、预防和应对来自船舶污染的南非国家应急计划

海事安全局曾发布一个草案计划供各方讨论。该草案计划的目的是概述为防止、应对以及打击有害物质泄漏到海洋及沿海环境中的国家安排。草案计划首要关注油类泄漏，描述了国家防备、应对系统中各方的责任，包括公共部门和私人部门。在应对油类泄漏或者油类泄露危险的过程中，保护和优先权应当按照下列顺序:人类健康和安全、自然环境、商业资源和设施。

六、国际公约

（一）《1990 年油污防备、应对和合作国际公约》

《1990 年油污防备、应对和合作国际公约》规定，缔约各国应当采取一切适当措施防备和应对油污事故。

南非并不是该公约的缔约国，然而，南非正考虑加入该公约。实际上，南非遵守了公约的大部分要求，且其正考虑构建一个全国的应急系统。

（二）《2001 年燃油污染损害民事责任国际公约》

考虑到南非海岸一系列由于燃油泄漏事故而导致的海洋污染，南非是《2001 年燃油污染损害民事责任国际公约》的支持者这一点并不奇怪。

当前，《海洋污染（控制与民事责任）法》对燃油泄漏造成的污染进行了规制。

七、避难所政策

下述摘录来自英国海事法协会 2004 年 3 月 30 日的一个会议记录，摘录标题为“避难所”，是以独立第三方视角对南非处境所作的有趣观察。

> 对于该问题，一些国家采取了强有力且积极的措施。
>
> 南非在该问题的处理上走在前列。20 世纪 70 年代中期，南非已让拖船随时待命，并对进入沿岸少数几个避难所的请求采取合理的回应。
>
> 南非要求专业的打捞人员根据合同规定从事打捞船舶和货物的事宜。
>
> 船东应当有必要的污染责任。

打捞计划应当是切实可行的。

船舶应当受到有关部门的检查。

打捞人员应当确定其会遵守有关部门给出的所有命令。

多年来，面对一系列巨型油轮 / 超巨型油船事故，该应急系统一直运作良好。然而，不幸的是，从允许散装船 Treasure 号进入塔布尔泽开始，这一应急系统的运作出现了一些问题；Treasure 号进入塔布尔泽湾的时候有着结构性损害。

Treasure 号船东没有及时作出海难救助的决定，该船被命令驶出塔布尔泽湾。Treasure 号在被拖出港口的时候断成两半，并于距离南非海岸 6 英里的地方沉没，燃油泄漏造成了这一海域的大量污染。

从 Treasure 号事故之后，南非便不愿意让受损船舶进入其海域，如 Bismihita La 号案和 Ikan Tanda 号案。

需要纠正的是，Treasure 号事故之后，南非海事安全局不是不愿让遇难船进入南非海域，而是有充分的理由不让 Bismihita La 号和 Ikan Tanda 号进入南非港口。

在 Bismihita La 号案中，船东明确表明拒绝与海事安全局进行任何合作，也不会让海事安全局的人员与船长和船员有任何联系。在这种情况下，海事安全局无法获得关于导致船舶遇难原因的信息，所以无法评估当时的情况。

在 Ikan Tanda 号案中，Ikan Tanda 号依靠油罐顶盖漂浮于海上，船底敞开，南非安全局准备让其进入港口，但条件是为船舶在南非港口沉没的所有预估潜在成本提供担保。然而，船东显然只打算根据南非法律中规定的责任限额提供保证，这显然不够。Bismihita La 号和 Ikan Tanda 号这 2 艘船的价值又都相当低。

根据预防和应对来自船舶污染的国家应急计划，“海事安全局对事故反应所采取的策略属于‘基于风险的事故管理’”，[63] 即随着事件的发展，基于利益和风险的有效实时评估而进行的管理，当情况必须且有可能的情况下，可以积极干预。

海事安全局在管理海上事故时的优先顺序：

（1）海上生命安全（拯救船上或者受到海难事故威胁的人员生命）；

（2）保存船舶，或者为防止污染将船舶撤出海岸，并使有害物质得到控制、保持原样；

（3）如果上述第（2）项失败，应当采用最有效的方法，将油类或者其他有害物质从船上移除，防止污染发生；

63 Draft South African National Plan for Prevention and Combating Pollution of the Sea by Oil, Chemical and Other Noxious and Hazardous Substances, p.18.

(4) 保护财产（包括近海岸财产，货物以及 / 或者船舶）;和

(5) 移除船舶残骸。

国家应急计划进一步规定如下：

在（尤其）考虑了污染风险及任何破损船舶所带来的经费负担之后，南非海事安全局构思并具体实践如下：允许船舶在南非领海内进行修补，甚至允许船舶在指定的港湾内（受海事安全局监管）进行货物转移。这种实践所带来的效益远远大于风险。

在此，效益也指当有机会和措施的情况下，不应任其在没有同样机会、甚至没有任何措施的邻国任意发展，而应当援助事故船舶。邻国的严重污染事故经过一段时间之后，有可能同时也几乎必然会影响到南非。

当存在急迫的污染或者污染威胁时，南非海洋安全局将与环境事务与旅游部和其他有关部门一起，对风险预测进行评估。如果必要的话，这种评估将通过联合反应委员会进行。[64]

因此，海事安全局的策略是，保证南非国内立法中规定的各类责任和义务都得到了履行。这实际上意味着，当有油类或者其他有害物质从船上、海上设施上泄漏时，海事安全局均应当确保：

(1) 做出有效的最初反应，包括与南非环境事务与旅游部联系；

(2) 通过联合反应委员会，与各部门和事故各方之间有效联系和合作；

(3) 应对污染事故的方法和成本应与国际实践和《1999 年公共财政管理法》相一致；

(4) 应对污染事故的成本与费用应当全程受审计，以保证根据 1981 年《海洋污染（控制和民事责任）法》第 6 条加快任何后续索赔；以及

(5) 船东以最快的方式支付由于应对污染事故而产生的国家支出。

（一）《南非关于无害通过、锚定或停泊在领海、内水和海湾法》

根据《公约》、《海上交通法》[65] 及其修正案，领海内的无害通过权适用于所有的船舶。根据《公约》第 21 条的规定，南非已经制定了关于无害通过的法律和规定。然而，根据《海上交通法》对于内水的定义，无害通过权并不适用于内水。南非提供的避难所却都位于海湾，即内水的一部分。

64 Draft South African National Plan for Prevention and Combating Pollution of the Sea by Oil, Chemical and Other Noxious and Hazardous Substances, p.19.

65 Act 2 of 1981.

进入或离开内水受《海上交通法》和《海上交通规章》管制。[66] 除了某些类别的船舶，即南非渔船、体育船、从事体育或娱乐活动的外国船只、南非国家公用船只和经授权可在南非内水内作业的外国渔船，任何船舶的船长在没有法律规定的情况下，不得擅自进入或者离开不是海湾和渔港的内水区域。[67]

《海上交通规章》规定，非特定种类船舶的船长有义务在船舶进入南非内水之前，向最近海湾的主要官员申请许可，并提供有关进入南非内水的理由、船舶的目的地、航行路线和停留时间等特定信息。[68] 主要官员可以授予许可，但应当受到减少船舶搁浅风险和防止污染的条件的制约；如若发生，船东将付出代价。[69] 船东或船长也可能被要求向海事安全局提供担保。[70] 在这种情况下，最重要的一个条款规定是船舶可为修理目的而停泊或者锚定在南非的领海或内水，但当其主要发动机无法随时使用时，便不可如此。[71]

根据国际法的规定，南非承认遇难船舶可以进入其内水。

这些情况受法律规制并要求船东或船长在船舶未经许可进入南非领海或内水，且在该区域停留，和 / 或者锚定，或者固定不动时，及时通告最近海湾的主要官员。[72]

理论上，我们希望主要官员遵守《海上交通法》和《海上交通规章》的规定，然而实践中，海事安全局关于避难港口的政策一直是按照 E. Van Hooydonk 教授推荐的第四种也是最复杂的方法进行处理，[73] 即法“以知情权为基础的良好管理”。[74]

每种情况均考虑了其实际。于 2003 年 12 月 5 日通过的《国际海事组织关于需要援助船舶的避难所的指导方针》在精神上得到了严格的遵守，尽管这不是公开的事实，且指导方针并不是南非法律的一部分。

南非海事安全局、环境事务与旅游部以及其他的政府部门有着全面的行动计划和事故反应措施。通过联合反应委员会，不同部门及有关利益方可以在事故初始采取有效的初始反应和交流合作。实施策略的方法和费用与国际实践相一致，其中包括对成本和费用的持续审计。

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66 The Marine Traffic Regulations promulgated in terms of the Marine Traffic Act under Government Gazette 9575 of I February 1985.

67 Section 4(1) of the Marine Traffic Act 2 of 1981.

68 Section 5(1) of the Marine Traffic Act 2 of 1981 and Regulation 13(1) of the Marine Traffic Regulations.

69 Regulation 14(1) of the Marine Traffic Regulations.

70 Section 5(2) of the Marine Traffic Act.

71 Section 5(3) of the Marine Traffic Act.

72 Regulation 16(1) of the Marine Traffic Regulations.

73 E. Van Hooydonk, The Obligation to Offer a Place of Refuge to Ships, *Distress CMI Handbook*, 2003, p. 403.

74 E. Van Hooydonk, The Obligation to Offer a Place of Refuge to Ships, *Distress CMI Handbook*, 2003, p. 432.

为了处理污染风险和决定是否让一艘船进入避难所，海事安全局向其工作人员提供了一系列全面的指导方针，然而这些指导方针并不会被公布。

预防和应对来自船舶污染的国家应急计划为油类污染预防和管理的全面战略提供了指导方针，包括海事安全局的行动计划，事故反应单位，整体反应政策，优先顺序等。

（二）关于避难所的政策应用

实践中，关于避难所的政策应用情况如下：

只要发现有遇难船舶，海事安全局应向船长和 / 或船东请求必要的信息，对船舶的情况作出初步评估。船舶被要求停留在某一位置，大约是离海岸线 20 至 120 海里范围内，这取决于威胁的规模和对主风及海流的实时评估。海事安全局将派一名测量员到船上，与船长和船员协商，实施检查并向海事安全局报告全部情况。

就海事安全局而言，首要法则是船长和船东必须及时充分的披露相关事实，同时以任何可能的方式合作，以便海事安全局可以对当时的情况作出恰当的评估。

正如 Bismihita La 号船东所发现的，如果没有这种初步的合作，那么船舶被允许进入避难所的可能性微乎其微。

如果初步评估显示，由于明显的船体结构损害而使船员处于危险之中，那么应当安排将船员撤离船舶。在这种情况下，且假设该船舶处于危险之中，海事安全局仍会坚持任命打捞人员。

初步评估的一个重要方面是根据南非法律计算船东的责任限度，同时确认有何种类型的责任保险。保险金额是一个先决条件，是污染损害和移除船舶残骸所需成本的担保。如果根据国家港口管理局的许可而决定让船舶入港，那么情况肯定如上所述。国家港口管理局有权拒绝船舶的进入。

如果对海洋环境有任何的威胁，那么油类货物和 / 或者燃料必须被转运，密封污油罐。

在确定是否向遇难船舶提供避难所以及提供哪里的避难所前，海事安全局会咨询环境事务和旅游部、环保人士和其他专家。

正如先前所讨论的，南非的避难所数量有限。若将所有的因素考虑在内，比如对人民安全和环境的威胁；船舶类型、大小以及吃水量；当时的主风和海洋状况；当地处理转运货物或者船舶的能力等，可以得出一个显而易见的结论，南非在当前情况下，其不可能提前确定并指定避难所，这在海事安全局的方法中便有所体现。每个实例都必须根据其实际特殊情况处理。

从政策观点出发，南非有关部门并不会指定避难所。

就非官方指定的避难所而言，已存在一个对各避难所进行选择的深思熟虑的决策决策机制。

南非海事安全局会联合所有的主要机关及利益方建立联合反应委员会，委员会将定期会面商议和交换信息。

南非环境事务与旅游部会及时采取保护和 / 或者清除措施。

南非海事安全局的工作人员和决策者是专业的，技术能力强且经验丰富。面对会造成油污损害威胁的遇难船舶，南非当局一系列成功的操作便是最好的印证。

总而言之，南非有关部门仍在采取客观有效且符合情理的措施，这些措施与最先进的国际思维相一致且采用了国际性建议，包括国际海事组织的指导方针。

（中译：林洁）

On the Legal System of Environment and Resources

WEN Boping *

Abstract: This paper starts with an overview of the science of legal system, providing correct jurisprudential basis for the study of issues in relation to China's legal system and expounding the great theoretical and practical significance of the establishment of scientific legal system theory in China. The paper then recounts the brief history of China's legislation in respect of environment and resources as well as the origin, concept, structure, connotation, denotation, characteristics of the legal system concerning environment and resources and its status in China's legal system. At the end, the paper makes a comparative study between the law of environment and resources and economic law, stressing that the law of environment and resources is not a component of economic law, but a first-level departmental law in parallel with other departmental laws, such as criminal law, civil law and executive law.

Key Words: Environment; Resources; Legal system

I. Overview of the Science of Legal System

Legal system is also known as the system of law. The discipline focusing on the study on legal system is called the science of legal system. It is a comprehensive jurisprudential discipline specialized in the study of the legal system of a country or region consisting of all of its legal norms in effect which are interconnected and unified in an associated way through categorization and combination. This discipline reflects not only the state of completeness and adequacy of national

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legal regime, but also the maturity and level of the country in terms of legislative awareness, legal basis, legislative techniques, and other aspects to certain extent. If a country's legal system is not unified, with each region implementing different acts and legislations, this will lead to a disorder, making people confused about how to make and implement law, as well as which law to observe. Therefore, it is of great significance to research the discipline of legal system. With different characteristics, each country has its own way to establish and develop its science of legal system based on its distinct historical traditions, national customs as well as economic, political and cultural development levels.[1]

Looking at the evolution history and tendency of the science of legal system in the world, one can find there are two types of science of legal system:

A. Theory of Legal System in Capitalist Countries

1. Public and Private Laws Are the Basic Structure of Legal System

Generally, the jurisprudential community in capitalist countries classifies law into public law and private law, which was firstly proposed by Roman jurist Ulpian and followed by jurists of later generations. Western jurists have different views on the criteria of the classification of public and private laws. Typical theories include interest-based theory, subject-based theory, power-based theory and relationship-based theory. The scholars supporting the interest-based theory assert that any law in respect of public interest, i.e., any law which protects national and collective interests directly, is a public law; any law in respect of private interest, i.e., any law which protects private interest, is a private law. The scholars defending the subject-based theory hold that any law which considers one party or both parties of the State or public organization as the subject of a legal relationship is a public law, and any law under which both parties of a legal relationship are individual citizens is a private law. The scholars backing the power-based theory consider that any law which provides for power obedience relationship between the State and a citizen (also known as "longitudinal vertical relationship") is a public law, and any law which provides for the relationship of equal rights and interests relationship between citizens (also known as "horizontal parallel relationship") is a private law. The scholars advocating the relationship-based theory believe that any law which

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1 Jin Zhe, Yao Yongkang and Chen Xiejun ed., *Sequel to Overview of New Disciplines of the World*, Chongqing: Chongqing Publishing House, 1990, p. 53. (in Chinese)

provides for the political relationship between State agencies or between the State and a citizen (also known as the "legal relationship between public power") is a public law, and any law which provides for the civil relationship between citizens or between the State and a citizen (also known as the "legal relationship between private power") is a private law. Legal systems in capitalist countries are generally classified into public and private laws, but such classification also meet oppositions.

2. Theory of Hierarchical Normative System

In capitalist countries, some scholars disagree with the classification of law into public and private laws. For example, American jurist Austin believes that all laws are the aggregation of orders given by those in power and they play a restrictive role through State power, which exhibits no difference in public or private law. American-Austrian jurist Kelsen also disapproves the classification of law into public and private laws by emphasizing that the system of law is the aggregation of all kinds of legal norms and the effectiveness of these legal norms comes from norms. He advocates a hierarchical description of the law, which means that international law, constitution, laws, orders and other norms derived from "supreme norms" and "fundamental norms" constitute the legal system. He objects to the use of public and private laws as the basis of legal system.

3. Other Methods of Classification of Legal System

In a capitalist country, many other methods may also be employed to classify its legal system of, such as classification by legal form into written and unwritten laws, classification by legal contents into substantive and procedural laws, classification by legal effectiveness into mandatory and discretionary laws, classification by subject of legal relationship into international and national laws, classification by source of law into indigenous and adopted law. In the common law legal system, law is classified into common and equity laws, statute and case laws. These classification methods build the legal system of a State from different perspective. After the World War II, western countries saw rapid economic development on one hand, and serious social illnesses on the other hand, giving rise to the economic law and social law (including monopoly law, securities exchange law, social insurance law, environmental protection law, etc.) which bridge the space between the public and private law. Some jurists call these legal norms as "intermediate legal norms," which are also important components of a country's legal system.

B. Theory of Legal System in Socialist Countries

The composition of the legal system of a socialist country has not taken into account the view on public and private laws completely. Lenin denied this expressly at the wake of Russian October Revolution. Referring to the civil law relationship in the preliminary stage of new economic policies, he said, "We don't recognize any 'private law,' and from our point of view, everything in the economic field is covered by the public law rather than the private law."[2] A socialist legal system is established on the public ownership of the means of production, in this connection, it is groundless to classify laws into public and private laws.

The main contents of the research of the legal system of a socialist country are:

1. The Issue Regarding Interrelation and Mutual Coordination and Unification of Laws

Under the circumstance where the development of socialist economy and society steps up its pace, legislative scope is increasingly widened and legislative contents are increasingly specialized. Although it is beneficial to people's research and application of laws, it often prompts people to look at legal phenomenon in narrow-minded and inflexible way. In order to prevent and get rid of such narrow-mindedness, research and analysis on legal system should be conducted in comprehensive or integrated manner. In addition, constant attention must be paid to improve the general principles and basic system of the law to ensure that all departmental laws and legal norms are interrelated and harmonized. As indicated by Engels, in modern countries, a law must get adapted to general economic conditions; this is not only its representation, but also the representation which does not overthrow its internal harmony by itself because of inherent contradiction.[3] Engels' conclusion is of great guiding significance for the research on and improvement of socialist legal system.

2. The Issue in Respect of Objective Basis of Legal System

Some scholars from former Soviet Union considered that the legal system was a social legal phenomenon existing objectively, which was decided by the nature of social relationship under socialist conditions and cannot be created or changed by people at will. Legal researchers have the mission to understand and use legal

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2 *The Collected Works of Lenin*, Vol. 36, Beijing: People's Press, 1985, p. 587. (in Chinese)

3 *The Selected Works of Marx and Engels*, Vol. 4, Beijing: People's Press, 1995, p. 483. (in Chinese)

system in a conscious and proactive way. However, it can be noted that laws are subjective to some extent as they are formulated by legislators intentionally. In this sense, the legal system is both objective and subjective. This opinion was controversial in the jurisprudential circle of former Soviet Union. It was held that there is no scientific basis to consider the legal system as objective and primary while legislative events, as subjective and secondary.

3. The Issue in Relation to Elementary Composition of Legal System

It is advocated that the legal system shall be established on the basis of departmental laws. This point of view was opposed by the famous former Soviet Union female jurist Yampolskaya, *et al*. She held that a departmental law was not a basic unit of the legal system, which consisted of legal norms closely-interrelated as a unified integral.

4. The Issue in Connection with Division of Departmental Laws and Criteria

This issue has been always in controversy in the theory of socialist legal system. The focus was on the proposal that "the objects regulated by the law are considered as criterion of the division of departmental laws" made by Yury N. Arzhanov, an authoritative soviet jurist studying the theory of the State and law, in the 1930s. This viewpoint became the fundamental principle of the system of law of former Soviet Union. Afterwards, legal professionals of former Soviet Union generally contended that the division of departmental laws should also consider the method the law regulates objects, in addition to the objects regulated by the law. Division of departmental laws in socialist countries is usually made by following the perspective in which the object regulated by the law and the method the law regulates objects are consistent with each other.

5. The Issue in Respect of Interrelation between and Development Tendency of Departmental Laws

One of the present tendencies of legal development of socialist countries is the combination of integration and specialization of regulation. Integration mainly means strengthening inner interrelation and mutual coordination among laws aiming to establish a closer relation among departments and norms in terms of both legal content and legal form, e.g. industrial law, agricultural law, commercial law, etc. In another tendency, some emerging departmental laws are consolidated for objective needs gradually and become a departmental law at higher level independently. For example, environmental protection law, natural resource law, law of national land and ecological law are consolidated as law of environment and

resources progressively, which is considered a first-level departmental law of the State in parallel with civil law, criminal law and executive law.

6. The Issue with Regard to the Relation and Difference between Legal System and Legislative System

In general, units of legal system refer to departmental laws and legal regimes, among others. And units of legislative system refer to compendiums, codes, bylaws, etc. Overall, these two systems supplement each other, and they are two aspects of a unity. In strict sense, legal system cannot be equivalent to legislative system in terms of concept, and they are different in the following aspects: (1) scope: legal system refers to all legal norms in effect while legislative system include ineffective or outdated legal norms; (2) subjectivity and objectivity: legal system is objective in respect of the origin of law, regulations of historical development of law and social and economic requirements, which cannot be changed by legislators at will; (3) formative factors: legislative system is influenced by State institution, legislative agencies and other aspects while the formation of legal system is the result of historical development; (4) function: legal system is the basis of legislative system, and the legal theory contained in the legal system is of guiding significance; while legislative system concentrates on the reflection of reality, etc.

The 16th National Congress of the Communist Party of China (CPC) pointed out that the integral unification of the leadership of the CPC, people's mastership and rule by law was fundamental to the development of socialist democracy. It also required that the socialist legal system with Chinese characteristics should be established by 2010. And "governing by law" was explicitly included among the five capabilities which leaders and cadres of the CPC must keep improving.[4] The aforesaid statement is where the great theoretical and practical significance of this paper come from.

II. China's Legal System of Environment and Resources

A. Brief History of Legislation in Respect of Environment and Resources

The brief history of China's legislation in respect of environment and resources can be divided into the following four stages:

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4 Bo Yue, Creation and Development of Legal Theories with Chinese Characteristics in an Active Way, *Chinese Academy of Social Sciences Review*, 12 May 2005. (in Chinese)

1. 1972-1978 (the Initial Stage)

In 1972, Chinese delegation participated in the United Nations Conference on the Human Environment (UNHEC) held in Swedish capital Stockholm with the care and guidance of Premier Zhou. The 1st National Conference on Environmental Protection was held in August 1973, in which the guideline of environmental protection was developed, i.e., protecting the environment to benefit people by relying on the masses and actions taken by everyone through all-round planning, reasonable distribution, comprehensive use and conversion of disadvantages to advantages. In 1974, several separate regulations on environmental protection were promulgated, such as Tentative Criteria on Discharge of Three Industrial Wastes, Tentative Provisions on Prevention of Coastal Waters from Pollution, etc. After the overthrow of the "Gang of Four," efforts in legal construction in relation to environment and natural resources were put in an important status. Constitution was adopted in 1978, whose the General Provisions stipulated that "the State protects the environment and natural resources, and prevents and control pollution and other public hazards."

2. 1979-1988 (the Stage of Rapid Development)

The new constitution was promulgated in 1982, and the First Amendment to Constitution was promulgated in 1988. During this decade, the following laws were promulgated: Environmental Protection Law (Tentative), Forest Law (Tentative) (1979), Marine Environmental Protection Law, Cultural Relics Protection Law (1982), Law on Prevention and Control of Water Pollution, Forest Law, Drug Administration Law (1984), Grassland Law (1985), Land Administration Law, Mineral Resources Law, Fishery Law (1986), Law on Prevention and Control of Atmosphere Pollution (1987), Wild Animal Protection Law (1988), etc.

3. 1989-1998 (the Stage of Progressive Maturity)

In 1993, the Second Amendment to the Constitution was promulgated. During this decade, the following laws were promulgated: Environmental Protection Law (1989) and Flood Control Law (1997). The following laws were amended: First Revision of Land Administration Law (1989), Law on Prevention and Control of Water Pollution, Mineral Resources Law (1996), Forest Law (1998), etc.

Over the past 20 years since the reform and opening up in 1979, the State Council and provinces, autonomous regions and municipalities directly under the Central Government have strengthened legislative efforts. Statistically, the State Council has issued 29 administrative regulations on environmental protection; competent authorities of environmental protection have issued over 70 rules;

there have been more than 900 local regulations on environmental protection issued by provinces, autonomous regions and municipalities directly under the Central Government, and 395 environmental standards developed by the State. Furthermore, criminal law, civil law, executive law and other departmental laws also include some norms on environmental protection and natural resources rules. In summary, the legal system of environmental protection and the system of natural resources law have taken shape preliminarily.

4. 1999 to Date (the New Stage of In-depth Development of Legislation in Respect of Environment and Resources)

The Third and the Fourth Amendments to Constitution were promulgated in 1999 and 2004 respectively. In order to get adapted to the objective needs of development, the First Member Representative Assembly of Research Institute of the Science of Law of Environment and Resource of China Law Society - International Seminar on the Science of Law of Environment and Resources for Sustainable Development was held from November 20 to 22, 1999, in Wuhan University with the approval of China Law Society. This assembly marked the integration of environmental protection law, natural resources law, law of national land and ecological law into the legal system of environment and resources. During this stage, the following laws were promulgated: Meteorological Law, Highway Law (1999), Seed Law (2000), Law of Administration of Sea Waters Use, Law on Prevention and Control of Sand (2001), Law of Promotion of Clean Production, Law of Assessment on Environmental Influences, Surveying and Mapping Law, Rural Land Contracting Law (2002), Highway Law, Road Traffic Safety Law, Law on Prevention and Control of Infectious Diseases (2004), Renewable Energy Law (2005), etc.; the following laws were amended: Law on Prevention and Control of Atmosphere Pollution (2000), The First Revision of Fishery Law, Drug Administration Law (2001), Water Law, Cultural Relics Protection Law (2002), Law on Prevention and Control of Radioactive Contamination (2003), Law on Prevention and Control of Solid Waste Pollution, Seed Law, Wild Animal Protection Law (2004), the Second Revision of Land Administration Law, the Second Revision of Fishery Law (2005), etc.; the State Council and provinces, autonomous regions and municipalities directly under the Central Government have strengthened the development of and amendment to supporting regulations.

In short, over the past three decades since 1972, the law of environment and resources has formed a big system with more than 30 laws developed in respect of environment and resources. This is an unprecedented and huge achievement in

China's legal history, and it has played a very important and irreplaceable role in establishing the socialist legal system with Chinese characteristics, safeguarding and promoting the development of productivity and advanced culture, stabilizing social order and improving people's quality of life.

B. Definition of Legal System

The legal system or system of law "normally refers to the unified whole of a country's departmental laws consisting of all of its legal norms in effect which are inter-connected and unified in an associated way through categorization and combination."[5] Legal system demonstrates the unification, difference, interrelation and coordination among the legal norms of a State. China is a socialist country, and its legal system is the one of a socialist country with Chinese characteristics.

"Environmental protection law" is the aggregation of legal norms which regulate the social relationships arising from the protection and improvement of environment, i.e., environmental law in a narrow sense.[6]

"Natural resources law" refers to the generic term of legal norms which regulate all kinds of social relationships occurring in the course of development and use, protection and management of natural resources by people.[7]

"Law of national land" refers to the aggregation of legal norms which regulate the social relationships in connection with investigation, planning, development, use, governance and protection of national land.[8]

"Law of ecological environment": according to the author of the monograph *On the Law of Ecological Environment* which has been published recently, "in the legal field, the positive application of ecology is largely embodied in the legislation of natural resources protection, to be exact, the legislation of preservation of ecological environment, which includes the legal system in the two aspects - ecological environmental protection and construction." "The so-called law of ecological environment is the environmental law in a modern sense; therefore, the

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5 *Encyclopaedia of China: Law*, Beijing: Encyclopedia of China Publishing House, 1984, p. 84. (in Chinese)

6 Wen Boping, *Introduction to Environmental Protection*, Beijing: Qunzhong Publishing House, 1982, p. 1. (in Chinese)

7 Xiao Guoxing and Xiao Qiangang eds., *Law of Natural Resources,* Law Press China, 1999, p. 33. (in Chinese)

8 *Encyclopaedia of China: Law*, Beijing: Encyclopedia of China Publishing House, 1984, p. 254. (in Chinese)

law of ecological environment can also be referred to environmental law in short. In fact, the concept of environmental law is easier to be understood and accepted."[9]

"Law of environment and resources" means the generic term of legal norms regulating the social relationships in respect of investigation, planning, development, use, governance and protection of ecological environment and national land and resources.

This concept implies three meanings: (1) the scope of regulation includes the entire process in connection with investigation, planning, development, use, governance and protection of ecological environment and national land and resources rather than only the process of "protection"; protection work should be conducted throughout the whole process of development and development is undertaken with protection; protection work must be earnestly carried out during investigation, planning, development, use and governance of ecological environment and national land and resources, so as to realize the objective of protection; (2) object under regulation includes all social relationships arising from investigation, planning, development, use governance and protection of ecological environment and national land and resources; (3) the legal system of environment and resources is the generic term of the legal norms which regulate the above-mentioned object within the said scope rather than a generic name of law.

"Environmental law" may be defined in a narrow or broad sense; briefly, the environmental law in a narrow sense refers to "environmental protection law" while the environmental law in a broad sense refers to "law of environment and resources."

One important thing to note is that the most important difference between the environmental law in a narrow sense and the environmental law in a broad sense is that they have different legal systems, of which the former is smaller while the latter is much bigger. (See Fig. 1: Diagram of the System of Environmental Protection Law and Fig. 2: Diagram of the System of Law of Environment and Resources)

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9 Zhou Ke, *On the Law of Ecological Environment*, Law Press China, 2001, p. 34. (in Chinese)

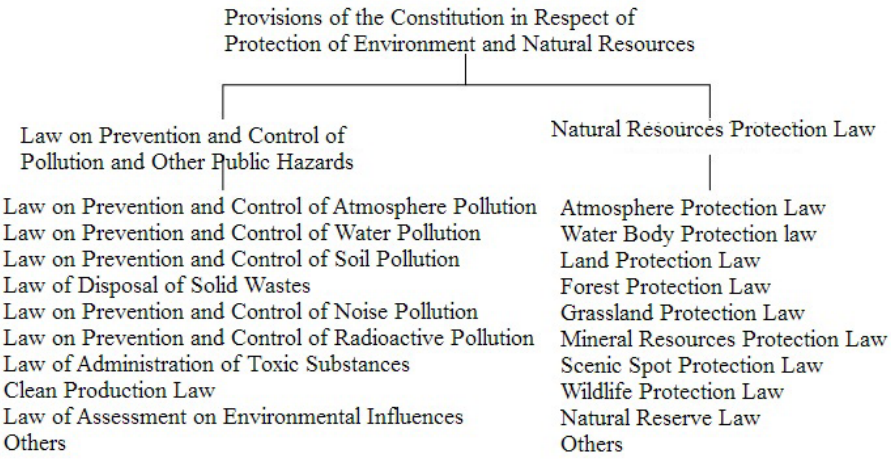

Fig. 1 Diagram of China's System of Environmental Protection Law (the Environmental Law in a Narrow Sense)

Fig. 2 Diagram of China's System of Law of Environment and Resources (the Environmental Law in a Broad Sense)[10]

C. Connotation and Denotation of Law of Environment and Resources

The system of law of environment and resources in modern China is an

10 The laws in the parenthesis are not those in effect but those expected to be developed.

integrated whole consisting of China's legal norms in respect of environment and resources in effect which are categorized, hierarchical, interrelated and coordinated. The overall picture is depicted as follows. Article 9 of the Constitution of the People's Republic of China ("Constitution") prescribes that "mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the State, that is, by the whole people, with the exception of the forests, mountains, grassland, unreclaimed land and beaches that are owned by collectives in accordance with the law. The State ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited." Article 10 provides for that "land in the cities is owned by the State. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the State in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives. The State may in the public interest take over land for its use in accordance with the law. No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways. All organizations and individuals who use land must make rational use of the land." Article 22 sets forth that "the State protects scenic spots and historical sites, precious cultural relics and other important historical and cultural heritage." Article 26 prescribes that "the State protects and improves the living environment and the ecological environment, and prevents and controls pollution and other public hazards. The State organizes and encourages afforestation and the protection of forests." Article 33 provides for that "the State respect and safeguards human rights." These provisions are norms of the law of environment and resources with supreme legal effectiveness.

Legal norms in respect of environment and resources in effect are roughly classified into the following seven categories: category I – comprehensive legal norms, such as the Environmental Protection Law; category II – law on prevention and control of pollution or other public hazards, for example, Law on Prevention and Control of Atmosphere Pollution, Law on Prevention and Control of Water Pollution, Law on Prevention and Control of Environmental Noise Pollution, Law on Prevention and Control of Solid Waste Pollution, Law of Promotion of Clean Production, Law of Assessment on Environmental Influences, etc.; category III – natural resources laws, e.g., Land Management Law, Forest Law, Wild Animal Protection Law, Mineral Resources Law, Energy Conservation Law, Coal Law, etc.; category IV – laws of protection of cultural environment, such as scenic spots and

historical sites, for instance, Tentative Bylaws of Administration of Scenic Spots, Natural Reserve Administration Bylaws, Landscaping Protection Bylaws, etc.; category V – national land law, including national land investigation law, national land planning law (e.g., Urban Planning Law), national land development law (e.g., Law of Development of Beijing, Tianjin and Tangshan, Law of Development of Yangtze River Delta), national land improvement law, etc.; category VI – standards on environment and resources with legal effect, including environmental quality standard, pollutant discharge standard and other standards; category VII – the legal norms on environment and resources in other departmental laws (executive law, civil law, criminal law and economic law), for instance, the provisions of the Criminal Law with regard to the crime of sabotaging the protection of environmental resources, the crime of illegal embezzlement of farmland, etc.; relevant provisions of the Food Health Law, Cultural Relics Protection Law and Fire Control Law.[11]

The aforesaid seven categories of legal norms in respect of environment and resources are divided into several levels based on legal effectiveness, i.e., those developed by the National People's Congress of China (NPC); those developed by the Standing Committee of the NPC; those developed or recognized by the State Council; those issued by departments of the State Council; those developed by local legislative authorities of provinces, autonomous regions and municipalities directly under the Central Government. In brief, the law of environment and resources is an integration of environmental protection law, natural resources law, national land law and ecological law. The denotation of the above-mentioned seven categories of legal norms with regard to environment and resources involves urban planning law, energy law, comprehensive use law, flood control law, etc.

D. The Place of the System of Law of Environment and Resources in the Entire Legal System

The law of environment and resources is a first-level departmental law in China's legal system. Another important basis in addition to those above is the research results produced by Chinese jurisprudential experts. They hold that

11 Category IV of the system of Australia's Environmental Law is "Relevant Provisions", i.e., provisions including those concerning occupational safety, labor protection, consumers' interest protection, and the provision in respect of environmental protection under criminal law.

China's legal system shall be divided into 10 first-level departmental laws under the leadership of China's Constitution, i.e., the Constitution (which is in parallel with other laws herein for the purpose of discipline rather than for the purpose of legal effectiveness, including election law, organization law, fundamental law of Hong Kong Special Administrative Region deriving from the Constitution), executive law, criminal law, civil law, commercial law, economic law, labor law, environmental protection law and natural resources law, procedural law and military law.[12]

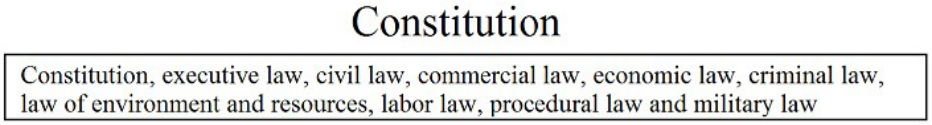

Fig. 3 Diagram of the Legal System of the People's Republic of China

Some legal scholars consider that first-level departmental laws under the Constitution shall only include executive law, economic law, civil and commercial law, criminal law and social law, and environmental law is only a component of economic law or executive law, while other legal scholars hold that first-level departmental law shall include more laws, and marriage law, social security law, etc. shall also be first-level departmental laws. The author contends that the above division of ten department laws is the most reasonable for the following reasons: the primary purpose of division of departmental laws is to help people to learn, understand, research and implement China's effective laws, improve the observance and enforcement of laws by all people, and promote the research and development of the science of law; departmental laws are divided mainly based on different social relationships regulated by the law, i.e., object under regulation, and secondly on the method of legal regulation; departmental laws is divided after taking into account the range of the field where different social relationships exist and the number of corresponding laws and regulations rather than dividing first-level departmental laws in an exceedingly broad or narrow way. Former Soviet Union and countries adopting civil law system normally have about ten first-level departmental laws. Considering the actual conditions of the current legal system of China, it is the most suitable to have ten first-level departmental laws. The opinion

12 Shen Zongling ed., *Jurisprudence*, Beijing: Peking University Press, 1996, pp. 304~324. (in Chinese)

requiring too many or too few departmental laws is one-sided. Based on China's national conditions, the integration and consolidation of environmental protection law, natural resources law, national land law and law of ecological environment into a first-level departmental law is an inevitable result of the development of the socialist legal system with Chinese characteristics. This departmental law remains named as "law of environment and resources" or "environmental law" in short. The main reasons are as follows: (1) "National land," "environment," "natural resources" and "ecological system" are closely related and share something in common. For example, land, rivers, seas, atmosphere, forests, grasslands, mineral resources, etc. are not only components of national land and resources, but also the most basic environmental factors and the most primary natural resources and ecological systems. The "law of environment and resources", highlighting both "environment" and the concepts of "national land and resources" and "natural resources," has such connotation and denotation as appropriate to the contents of this departmental law. It complies with spirit emphasized by the Environment Protection and Resources Conservation Committee of the NPC – China's supreme legislative body and is consistent with the name of the Research Institute of the Science of Law of Environment and Resource of China Law Society. (2) This help Chinese legal system to be compatible with internationally accepted practices. A majority of scholars in other countries call this departmental law "environmental law;" one branch of the international law is called "international environmental law." There are three prestigious academic organizations in the international community: the first is the International Council of Environmental Law; the second is the International Union for Conservation of Nature & Natural Resources (or called "The World Conservation Union"), which has six commissions under its administration, including the Commission on Environmental Law; the third is the United Nations Environmental Program. They are authoritative academic organizations in the realm of law of environment and resources in the international community, which have great influence on academic exchanges and cooperation. (3) China's jurisprudential circle also calls this departmental law as "environmental law." The viewpoint of Professor Shen Zongling, jurist of Peking University, who advocates the above division of ten first-level departmental laws, is representative. (4) For the sake of concise wording, "environmental law" is the most concise, so it's acceptable to call it environmental law in short, but it is necessary to expressly distinguish between the environmental law in a broad sense (i.e., law of environment and resources) and the environmental law in a narrow sense (i.e.,

environmental protection law).

E. Characteristics of Law of Environment and Resources

1. Scientific and Technological Orientation of Legal Norms

For example, the law on prevention and control of atmosphere pollution, the law on prevention and control of water pollution and environmental standards (including environmental quality standards, pollutant discharge standards, etc.) have considerable scientific and technological orientation and require extensive knowledge of social science and certain knowledge of natural science. For instance, terms such as SO_2, CO, BOD, COD, ppm and benzopyrene are from natural science.

2. Diversity of Legal Means (Norms)

The law of environment and resources can use a variety of regulation methods, by applying the means of civil law and economic law as well as the means of executive law and criminal law.

3. Peculiarity of Legal Norms

For instance, the settlement of compensation for damages in connection with dispute over environmental pollution should employ the no-fault principle rather than the fault principle applicable to compensation for damages under traditional civil law. In addition, we should apply the regime of reversion of burden of proof for compensation for damages as a result of pollution rather than the regime of burden of proof for compensation for damages in traditional civil law. The law of environment and resources undertakes not only the task of regulating the social relationships arising from investigation, planning, development, use, governance and protection of ecological environment and national land and resources, but also the task of regulating the relationship between human beings and nature.

III. The Law of Environment and Resources Is Not a Component of Economic Law

1. Different Objects under Regulation

In respect of the objects subject to economic law, there are not only controversies in the jurisprudential circles of economic law, civil law and executive law, but also disagreement inside the jurisprudential circle of economic law. Some economists even argue that economic law is not a departmental law. The

author holds that the understanding that is most consistent with jurisprudence is as follows: the object regulated by economic law is the important and public economic relationship which needs intervention by the State. Specifically, it covers three aspects: (1) macro-control economic relationship; (2) economic relationship regarding market order; (3) economic relationship regarding social security.

The object regulated by the law of environment and resources is the social relationship in connection with investigation, planning, development, use, governance and protection of ecological environment and national land and resources. Concretely, it covers three aspects: (1) social relationship in terms of environmental protection; (2) social relationship in respect of natural resources; (3) social relationship with regard to national land management.

2. Different Legal Systems

The system of economic law has the following structure: (1) macro-control law, which can be divided into industrial law, planning law, investment law, budgeting law, tax law, the law of the People's Bank of China, price law, etc.; (2) market order law, which can be divided into anti-trust law, anti-unfair competition law, product quality law, consumers' interest protection law, advertisement law, calculation and standardization law, etc.; (3) social security law, which can be divided into social insurance law, public assistance law, social welfare law, social special care law, etc.[13]

The structure of the system of law of environment and resources is as follows: (1) environmental protection law, which can be divided into the law on prevention and control of atmosphere pollution, law on prevention and control of water pollution, law of disposal of solid wastes, marine environmental protection law, law of assessment on environmental influence, clean production law, etc.; (2) natural resources law, which can be divided into land administration law, water law, forest law, grassland law, mineral resource law, coal law, energy law, energy conservation law, biodiversity law, scenic spot law, etc.; (3) national land law, which can be divided into urban planning law, rural planning law, law of water and soil conservation, flood control law, regional development law, etc.

3. Different Legal Characteristics

The outstanding characteristic of economic law is that it is closely related to the economic realm and economics. Economic legislation is the specification,

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13 Huang Xisheng and Zeng Wenge ed., *Science of Economic Law*, Chongqing: Chongqing University Press, 2003, pp. 4~5. (in Chinese)

finalization and stipulation of national macroeconomic policies. It shall basically comply with objective economic regulations. The law of environment and resources is mainly featured by the fact that it is closely related to ecological environment and natural resources, and involves extensive fields of social and natural science. The legislation in respect of environment and resources is the specification, finalization and stipulation of national policies in connection with environmental protection, natural resources, energy and national land improvement. It abides by not only objective economic regulations, but also objective natural and ecological rules.

4. The Economic Law Cannot Cover the Tasks of the Law of Environment and Resources

China's economic law undertakes the primary tasks to maintain the order of socialist market economy, ensure the accomplishment of national economic and social development plans, consolidate people's democratic dictatorship and safeguard the smooth progression of socialist modernization construction through legal regulations. The primary tasks of the law of environment and resources are, through legal regulations, to implement the scientific outlook on development and sustainable development strategies, develop and use natural resources in a reasonable way, protect living and ecological environment, prevent and control pollution and other public hazards so as to safeguard the smooth progression of socialist modernization construction and protect citizen's health, safety and happiness of future generations. It should be particularly noted that from the perspective of implementing scientific outlook on development, the economic law and the law of environment and resources share a common task to implement the overall planning of urban and rural development, regional development, economic and social development, national development and opening-up. However, the task of legally safeguarding the implementation of overall planning of harmonious development of human beings and nature to establish a society where human beings and nature exist in harmony shall be irreplaceably undertaken through legal construction in respect of environment and resources.

In summary, both the law of environment and resources and economic law are important parts of China's entire legal system, and they are first-level departmental laws which supplement each other. It is groundless and untenable to consider the law of environment and resources as a component of economic law.

Translator: WANG Shunv

Brief Comment on the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]

ZHANG Qingji *

Abstract: It has been seven years since the legislative work on the unification of transport law on the carriage of goods by sea started in May 1998, and over time this discourse has become more nuanced. A review of the discussion of the recent meeting indicates that the draft has made significant changes to current conventions on the carriage of goods by sea, including changes in the scope of application, rules on liability, bill of lading system and other rules that closely relate to the interests of carriers and shippers. The draft has also developed some new rules in response to recent developments in the international maritime industry. Although the said legislative work has not been completed yet, the impact of the changes brought about so far in the draft will be varied internationally. Therefore, it is of great significance to study the changes made so far in the draft to the current convention.

Key Words: Performing party; Scope of application; Basis of liability; Document system; Allocation of risk

The legislative work on unification of transport law on the carriage of goods by sea commenced from the time the United Nations Commission on International Trade Law (UNCITRAL) entrusted the Comité Maritime International (CMI) with the task of drafting a convention on the carriage of goods by sea in May 1998. It has been going on in a tense and yet orderly manner for 7 years. Till now, the transport law working group has held seven working group meetings to review the CMI Draft Convention on Transport Law submitted by CMI to UNCITRAL in De-

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cember 2001.[1] At the ninth, tenth and eleventh meetings, the working group performed major tasks such as analyzing and amending the draft clause by clause, completing the first reading of the draft, and coming up with its work product, i.e. the Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] (hereinafter "the Draft Convention").[2] Since the work on the second reading has not been finished, and opinions formed on certain issues during the second reading have not been organized as systematic documents, this article will centre around the Draft Convention, and supplement opinions formed during the second reading on certain issues with the aim of comparing and studying the current convention and the Draft Convention and giving a brief introduction of the legislative progress on unification of transport law on carriage of goods by sea.

Given that the "current domestic rules and international conventions have resulted in severe loopholes on many issues"[3], and the three conventions in the area of maritime law, namely, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague-Visby Rules) and the United Nations Convention on the Carriage of Goods By Sea, 1978 (Hamburg Rules)[4] are in coexistence, the UNCITRAL has developed this Draft Convention aiming to "make unified rules in an area with no unified rules"[5].

Generally speaking, the Draft Convention has made significant reforms in international conventions on the carriage of goods by sea. They are unlike the mild amendments that the Hague-Visby Rules has made to the then existing Hague Rules, or the dramatic changes the Hamburg Rules has made to the Hague Rules. Instead, by responding to various problems arising in practice and listening to

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1 The review work on the draft was started by the working group at its ninth meeting. The 15th meeting has been held so far, and the 16th meeting will be held in Vienna from 28 November to 9 December 2005.

2 Where the article does not clarify the cited provisions of the draft, the Draft Convention taking shape after the first reading is referred. Where there is a square bracket, it means the contents therein still remain to be discussed. See A/CN. 9/WG. III/WP. 32 for the Draft Convention's specific provisions, at http: //www.uncitral.org, 25 November 2005.

3 Official Records of the General Assembly, 51st Session, Supplement No. 17 (A/51/17), paragraph 211, at http://www.uncitral.org, 25 November 2005.

4 Since the Hague-Visby Rules is an amendment of the Hague Rules, there are very few differences between these two conventions. Therefore, for the purpose of this article, the author will focus on the comparison of the Hague- Visby Rules and the Hamburg Rules.

5 Official Records of the General Assembly, 51st Session, Supplement No. 17 (A/51/17), paragraph 210.

voices from different industries, and adopting the advantages of both the Hague-Visby Rules and the Hamburg Rules, the Draft Convention has reviewed the principle of liability fixation of the carrier's liabilities, and reallocated the risks and interests between the ship and the cargo parties. Since the Draft Convention has changed a great deal in comparison to the previous conventions, many countries and relevant non-government international organizations and interest groups have shown unprecedented concern for the unification of transport law on carriage of goods by sea. Not only did the maritime law associations of the sixteen countries affiliated to the CMI participate in this legislation and give their respective suggestions, Sweden, Italy, the Netherlands, the United States, China and some other countries also submitted their respective proposals successively. In addition, eleven non-government organizations including the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE), the International Union of Railways (UIC), the International Federation of Freight Forwarders Associations (FIATA) and the Committee on International Multimodal Transport of Goods, also attended each of the working group meeting sessions and made many useful suggestions on behalf of the respective interests of different industries. Such large-scale participation has indicated the importance of the Draft Convention which is bound to have varied impact on domestic legislations. Therefore, the importance of studying the changes in the Draft Convention cannot be neglected. This article will only touch upon the major aspects of such changes due to limitation of space.

I. The Modification under the Draft Convention to Current Conventions on Carriage of Goods by Sea

A. Expansion of the Scope of Carrier

In the course of the discussion, the Draft Convention abandoned the definitions for "carrier" and "actual carrier" in the Hamburg Rules, and instead adopted the definitions of "carrier" and "performing party". The Draft Convention followed the definition given in the Hamburg Rules and the Hague-Visby Rules and defined "carrier" as a person who enters into a shipping contract with a shipper. As for the "performing party", the working group, during the discussion at its twelfth meeting, came up with the concept of maritime performing party and non-maritime performing party. At that meeting, the "performing party" was defined as "a person

who is not the carrier, and directly or indirectly actually performs [or promises to perform][6] a carrier's duty to transport, load, upload, keep [or store] the goods under the shipping contract upon a carrier's request or under a carrier's supervision or control, without regard to if such person is a contracting party of the shipping contract, if he is specified in the contract, or if he is legally liable under the contract. The concept of "performing party" includes both the maritime performing party and the non-maritime performing party defined in sub-paragraphs (f) and (g) of this paragraph, but does not include any person hired by a shipper or consignee or the employee, agent, contractor or sub-contractor of a person hired by a shipper or consignee (except for a carrier)." Maritime performing party refers to "any performing party performing the duty of a carrier during the period from the arrival of goods at the loading port [or in the case of a transfer, from the arrival at the first loading port] until the goods leave the unloading port [or the last unloading port]." A performing party that carries out the duties of a carrier during the period from the departure of goods from the port to another loading port should not be considered as a maritime performing party. A non-maritime performing party refers to "any performing party that carries out the duties of a carrier before the goods arrive at the loading port or after the goods have left the unloading port."[7] At the meeting, it was also contended that a maritime performing party should be liable for damages, while a non-maritime performing party will be excluded from the scope of damage liability under the Draft Convention, but will still be included in the scope of a performing party.

Although the specific definition of a performing party is not yet quite definite, and the line between a maritime performing party and a non-maritime performing party remains open to discussion, one thing that we can be quite sure of is that the definition of a performing party has replaced the definition of an "actual carrier" under the Hamburg Rules, and has not only included a person directly or indirectly engaged in transportation within the scope of a performing party, but has also expanded it to include a person engaged in the handling, keeping or storage. This

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6 During the discussion, the working group made a temporary decision not to add a square bracket to the phrase "promise to actually perform". The purpose is to expand the scope of the definition, and to clarify its limitations on the actual performance of the shipping contract. See A/CN.9/544, paragraph 42.

7 A/CN.9/544, paragraph 29.

has expanded the scope of a carrier[8] from the sea to the land as well, and has included almost any person related to the shipping contract.

B. Expansion of the Scope of Application

As the global economy has been developing, traditional international transportation of goods has also gone through many changes, which are mainly reflected in the containerization of shipping and in the spread of "door-to-door" transportation. More and more container liner shipping contracts include the carriage before and after the carriage by sea part in them. In response to the current situation, the meeting of the working group included a key discussion on whether to expand the scope of application to "door-to-door" transportation. Although the participants of the meeting initially agreed to the expansion and it remains a debatable issue even today, the scope of the application of the Draft Convention will further expand compared to the current convention. At the twelfth meeting, the working group first established general policies, i.e. that the Draft Convention should cover "door-to-door" transportation of single or multi-modal transportations, on the precondition that such transportation involves carriage by sea, which involves transportation across the borders.[9] Under this policy, the working group, at its fifteenth meeting, after prior discussion at several meetings, defined a shipping contract as follows, "A shipping contract refers to any contract whereby a carrier undertakes payment of freight to carry goods from one place to another. The contract must provide for carriage by sea and may also provide for carriage by other means before and after carriage by sea."[10] The definition signifies that a shipping contract is no longer limited to carriage by sea. It also includes transportation contracts which involve carriage by sea as well as carriage by some other means. In contrast, both the Hague-Visby Rules and the Hamburg Rules apply only to carriage by sea in this respect. Paragraph 6 under Article 1 of the Hamburg Rules prescribes that if a contract involves carriage by sea and also carriage by some other means, it is deemed to be a contract of carriage by sea for the purposes of this convention only in so far as it relates to carriage by sea.

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8 Here, "carrier" refers to the party that has the same liability as a carrier. Since there is no corresponding word for this, the concept of "carrier" has been used instead. It has a different meaning from the word "carrier" as defined in the Draft Convention.

9 A/CN. 9/544, paragraph 57.

10 A/CN. 9/576, paragraph 52.

C. Changes to the Liability of a Carrier

Since rules on a carrier's liability are the key components of the entire legal system of carriage of goods by sea, any provision of a maritime convention in this regard is also a key provision. Looking back at the development history of the three maritime conventions, each of them has been driven by the dissatisfaction of some countries at rules regarding the then existing carrier's liability.[11] This has reflected the great importance of the carrier's liability system in the sphere of carriage by sea. The current legislation of the Draft Convention is no exception. The significant differences among the three conventions regarding the allocation of interest between the carrier and the shipper are a main drive of this legislation. Rules on the carrier's liability are undoubtedly a key focus of this legislative endeavor, and are the most disputable and the most difficult part. The liability system is at the core of the liability basis, which is the so-called liability fixation principle. The current Hague-Visby Rules and the Hamburg rules have adopted incomplete fault liability fixation principle and the principle of liability for fault respectively. Sub-paragraphs (a) to (q) of paragraph 2 of Article 4 of the Hague-Visby Rules list seventeen exemptions. Specifically, sub-paragraphs (a) and (b) provide for nautical fault exemption and fire exemption that a carrier can resort to when the person hired by him is at fault. Other exemptions reflect situations where the carrier is not at fault (for example, impediments beyond the control of the carrier, act or omission by a shipper, flaws or inherent defects of goods, etc.) and has performed his obligations. The existence of a large number of exemption rules makes the risk allocation between the ship and the cargo parties seem unfair. It is for this very reason that some major trading countries led by the United States and some developing countries strongly requested for certain reforms in 1950s, and the direct result was the Hamburg Rules. However, the Hamburg Rules put too much emphasis on the interest of the shipper, and did not turn out to be a success. Since its entry into force in 1992, it has been rarely applied and has almost become a dead letter.

On the issue of liability fixation principle, the Draft Convention intends to reach a balance between the Hague-Visby Rules and the Hamburg Rules, and

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11 The making of the Hague Rules, and of the subsequent Hague-Visby Rules and Hamburg Rules that modified the Hague Rules, is driven by the dissatisfaction of the interested parties and countries with the existing carrier's liability system.

balance the interests of both the carrier and the shipper as much as possible. In order to seek the majority's opinion, the Draft Convention provides for three variants in Article 14. Variant A adopts presumed fault liability principle, providing in Paragraph 1 that "The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in Chapter 3, unless the carrier proves that neither its fault nor that of any person referred to in Article 15(3) caused or contributed to the loss, damage or delay". Paragraph 2 of the first variant lists nine exclusions as presumption of no fault on the part of the carrier. According to this rule, once the loss, damage or delay of the goods is determined, it shall be deemed that the carrier is at fault for the loss, damage or delay, and the carrier bears the burden to prove that he and other relevant persons are not at fault or that the loss, damage or delay is covered under exemptions. Paragraph 1 of variant B and paragraph 1 of Article 5 of the Hamburg Rules adopt the principle of liability for fault, and allocate to the carrier the burden to prove that he has performed the duty of reasonable care and has not contributed to the loss, damage or delay. Paragraph 2 of Variant B lists the nine exclusions as exemptions. Variant C adopts the principle of strict liability. Thus, a carrier can be relieved from liability only by establishing that he is not at fault. After intense discussion at several meetings, the meeting combined the provisions in Variant A and Variant B, and reached an agreement on the following aspects:

Firstly, the Draft Convention has abandoned the nautical fault exemption that has been criticized, in recent years, by many countries, especially the cargo owner countries and the developing countries. Upon negotiation among multiple parties, it has been basically agreed to abolish the existing unfair clauses, i.e. nautical fault exemption clauses, in the Draft Convention.

Secondly, the fire exemption clause needs to be rewritten. The current fire exemption adopts the incomplete fault liability principle making the claimer bear the burden of proof. This has made it very difficult for claimers to truly get compensation for damage in case of a fire. Therefore, most participants at the meeting have proposed to rewrite fire exemption rules.

Thirdly, the Draft Convention has clear rules on assignation of the burden of proof. Under the current conventions, the Hague-Visby Rules and the Hamburg Rules have very different rules on the assignation of the burden of proof. The Hague-Visby Rules is not very clear on the allocation of the burden of proof, but

under its incomplete fault liability fixation principle and the general rule of "he who asserts must prove", the claimer must prove that the loss, damage or delay occurred during the carrier's responsibility period and that the carrier is at fault for such loss, damage or delay, which is a very heavy burden for the cargo owner. Of course, if the carrier attempts to argue that the loss, damage or delay has resulted from unseaworthiness (on the way) or some other exemptions, then the carrier should bear the burden of proof, unless it's a fire exemption. However, the Hamburg Rules provides that a carrier bears the burden to prove the causes of the loss, damage or delay and that the carrier and other related persons are not at fault or have not contributed to the loss, damage or delay. In case there is inadequate evidence regarding the causes of the loss, the carrier will be fully liable for the loss. Therefore, a carrier is usually held liable when he fails to explain the loss. In addition, under the two conventions, when there are multiple causes, the carrier will be liable for the complete loss unless he can prove that a quantitative part of the loss is entirely due to causes that fall under exemptions. After several rounds of discussion, the Draft Convention basically asserts that a claimer only needs to prove (a) loss, damage or delay; or (b) the reasons for or causes of the loss, damage or delay occur during the carrier's responsibility period defined in Chapter 3, while the carrier bears the burden to prove the causes of the loss, damage or delay, or that such loss, damage or delay is not his fault.

D. Changes to the Document System

The rules on bill of lading are important for carriage of goods by sea. They have been developed from business practices in the long term, and have a long history. However, with the development of modern technology, the invention of containers and the application of electronic technologies have brought about great changes to the foundation of the original business practices. The current rules on bill of lading seem problematic in solving some newly emerging legal issues. The Draft Convention has made relevant rules in response to these current issues.

1. Clarification on the Definition of Document Holder

Paragraph (f) of Article 1 of the Draft Convention provides that a "Holder" means a person who is for the time being in possession of a negotiable transport document or has the exclusive [access to] or [control of] a negotiable electronic record, and: (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed,

or (ii) if the document is a blank endorsed order document or a secret document, is the holder of such document; or (iii) if a negotiable electronic record is used, is able to demonstrate that it has [access to] or [control of] such record in pursuance of Article 62(4) of the Draft Convention. The current conventions do not define a holder of a bill of lading.

2. Specification on the Rights of a Document Holder

According to the Draft Convention, a document holder has the right to take delivery of goods, right of control, and right of claim. These rules have provided a clear legal basis for a document holder's rights.

E. New Rules under the Draft Convention

1. Rules on E-commerce

The current three conventions do not contain any rules on e-commerce. However, with the development of e-commerce technologies, e-commerce has become an inevitable issue in almost all legal systems, and the Draft Convention should make relevant rules in this regard based on the practice in the current scenario. The Draft Convention has defined the electronic bill of lading and issues related to its practice rules.

2. Rules on Right of Control

The Draft Convention has provided for issues related to right of control in Chapter 11, which is drafted based on the fact that "the current world of carriage by sea is very different from the past. In many industries, the use of negotiable transport document is decreasing dramatically, or has almost vanished"[12]. According to Article 53, the right of control of the goods means the right to agree with the carrier to a variation of the contract of carriage and the right under the contract of carriage to give the carrier instructions in respect of these goods during the period of its responsibility as stated in Article 7(1). The right to give the carrier instructions comprises right to: (a) give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage; (b) demand delivery of the goods before their arrival at the place of destination; (c) replace the consignee by any other person including the controlling party; [(d) agree with the carrier to a variation of the contract of carriage.] According to this Article, the person who has the right of control has the right to give instructions, demand

12 A/CN. 9/WG. III/WP. 21, paragraph 185.

delivery of goods before their arrival at the place of destination, replace the consignee and agree with the carrier to a variation of the contract of carriage.

The current maritime conventions do not touch on this issue, but transport conventions in other areas already have similar rules, e.g. the right of disposal in the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the right of disposition in the Warsaw Convention, etc.

3. Detailed Rules on Transfer of Rights

The current conventions have only prescribed rules on the transfer of bill of lading, but remained silent on the consequences of such a transfer. This has led to many litigation disputes in determining the obligee. The Draft Convention has provided for the mode of transfer of rights and the legal consequences in Chapter 12.

4. Detailed Rules on Right of Action

Chapter 13 of the Draft Convention provides clearly for the right of action. Since the current conventions are not quite clear on this issue, it is often a key dispute in litigation. The Draft Convention endeavors to develop clear rules regarding the right of action.

II. Impact of the Draft Convention

Since the carriage of goods by sea involves the interests of many parties, any modification of the maritime conventions may greatly influence the industries involved in the carriage of goods, especially those that are closely related to such carriage.

A. Impact on the Carrier and the Shipper

Since the carrier and the shipper have conflicting interests, the benefit to one party is often detrimental to the other. Therefore, this paper will elaborate, in a combined manner, on the influence of the Draft Convention on both parties. The Draft Convention is a reallocation of risks at sea between the carrier and the shipper based on the current rules, and is therefore, bound to have significant impact on both the parties.

Firstly, the abolition of nautical fault exemption will increase the carrier's liability. Nautical fault exemption is no longer an exemption for the carrier, and as a result, the carrier bears greater burden and liabilities. Conversely, this will be

good news for the cargo owner. On the other hand, according to the current Hague-Visby Rules, fire exemption is also an important exemption for the carrier. Fire can be very common in the carriage of goods by sea, and the loss it brings to both the ship and the cargo parties may be immense. However, since the specific cause of a fire is often hard to look into, and since it is even harder and almost impossible for a shipper to obtain evidence for the cause of the fire, the assignment of liability for losses brought about by a fire also involves vital interests of the parties to a transport contract. In the Draft Convention, some people have proposed to abolish fire exemption, and the Draft Convention has also taken that suggestion into consideration. If the proposal is accepted, it will be another benefit that the Draft Convention brings to a shipper. Certainly, the benefit brought to the shipper by the abolition of nautical fault exemption and the possible abolition of fire exemption is hidden and on a long-term basis. In the short run, it may reflect an adverse influence thereon instead. This is due to the fact that as the liability of a carrier increases, the shipping cost of a carrier also increases. As a result, the carrier will increase the freight charges in order to balance the economic loss. In the short run, although the risks for a shipper may decrease, an insurance company may not decrease the insurance premium, and as a result, the shipper will not be able to make up for the increased freight cost from a decreased insurance premium.

Secondly, the reallocation of the burden of proof will also bring varied impact to the ship and the cargo parties. It is often very difficult to find evidence for causes of losses in carriage of goods by sea, especially for consignees or shippers, who may not be able to know any facts. In addition, the loss, damage or delay of goods during their transshipment is often caused by multiple factors, making it even harder to identify the evidence proving to what extent each of the factors has contributed to the loss, damage or delay. In this context, the allocation of the burden of proof between the carrier and the cargo owner is apparently important for the overall allocation of risks between both parties. From the discussion at the meeting on Article 14, we can see that most of the participants advocate that the burden of proof for the causes of cargo loss, damage, or delay should be allocated to a carrier, and hence the carrier shall be liable for damages if the causes are unclear. This is a good trend for the cargo party, but a burden for the carrier.

Thirdly, rules on the right of control are also good news for the cargo party. The right of control unilaterally empowers the controlling party with certain rights. Whenever applicable to the carrier, the carrier should follow the orders of a controlling party. This gives the seller, who is often the shipper, a direct basis in

law to control the goods. To the cargo party, this rule explicitly provides for the person who has the right of domination over the goods, and helps the shipper gain better control of the goods. For the carrier, this rule is not completely unfavorable. Although the rules on the right of control will to some extent increase the burden of the carrier, it should be noted that the right of control can only be exercised when the carrier's circumstances allow, and that the carrier can ask for reimbursement for his out-of-pocket expenses from the person who enjoys the right of control. From this perspective, the right of control is exercised at the convenience of the carrier. It should also be noted that because of the rules on the right of control, the counterparty of a carrier has been made clear. A carrier is no longer responsible to both the party to the transport contract (the shipper) and the party under the bill of lading (the holder of the bill of lading). Under the Draft Convention, he is only responsible to the person with the right of control. For a carrier, the large number of adverse cases due to delivery without bill of lading will be substantially reduced owing to the rules on the right of control. In this sense, the rules on the right of control are also beneficial to the carrier.

B. Impact on the Insurance Sector

The insurance sector referred to here includes the Shipowner's Mutual Assurance Association and commercial insurance companies. The impact of the Draft Convention on each of them is different.

Since insurance companies mainly take on the task of dispersing risks of the cargo owners, the fluctuation of their interests will be influenced by the fluctuation in the interests of the cargo owners. The abolition of nautical fault exemption will decrease the risks confronting the cargo owners, and any loss, damage or delay caused by nautical fault can be reimbursed directly from the carrier, resulting in the decrease in the liabilities of insurance companies. On the contrary, for the Shipowner's Mutual Assurance Association, the abolition of nautical fault exemption will increase the risks of the carrier, who will insure such risks with the Shipowner's Mutual Assurance Association so as to shift the risks, resulting in the increase in the liabilities of the Association.

C. Impact on China

China is not only a big shipping country, but also a big trading country. By late 2000, China had 2525 international shipping fleets, and more than 37 million tons of shipping capacity. In 2000, China's number of international shipping fleets amounted to 5.3% of the world's total number of commercial shipping fleets, and China's containers took up 5% of the world's total containers, with the fleet total shipping capacity ranking fifth in the world.[13] Although China ranks high in terms of total shipping capacity, the competitiveness of each individual company is very weak. In 2000, of all the 290 shipping companies registered in China to engage in international carriage of goods by sea (except for the few companies like Cosco Group and China Shipping), most of the companies were relatively small in scale (many companies being single ship companies with an average shipping capacity of less than 10,000 tons) and lacked the capacity to avoid market risks, and hence the role of economies of scale cannot be given rein to.[14] Moreover, the commercial fleets in China have often been used for many years, and have poor technical performance and a poorly-trained crew. Therefore, China often suffers more frequently from cargo losses arising from nautical fault when compared with more developed countries.[15] Following the abolition of nautical fault exemption under the Draft Convention, a ship owner will be held liable for the losses resulting from such fault, which beyond any doubt, will be a big challenge for the commercial fleets in China. In addition, for those companies relatively small in scale, their ability to produce evidence is relatively weak; therefore, some adverse impact will also be imposed on those companies with the Draft Convention increasing the ship owner's burden of proof.

Although the Draft Convention is still in the discussion stage, and it remains unknown if it will finally be adopted and take effect, the Draft Convention has at least reflected a trend, and the United States Carriage of Goods by Sea Act (COGSA) of 1999 has been taking the lead in abolishing nautical fault exemption. Therefore, China should endeavor to strengthen the management capacity of the

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13 The Report on China's Shipping Development (2000), at http://www.moc.gov.cn, 25 November 2005. (in Chinese)

14 The Report on China's Shipping Development (2000), at http://www.moc.gov.cn, 25 November 2005. (in Chinese)

15 Si Yuzhuo ed., *Studies on Maritime Law*, Dalian: Dalian Maritime University Publishing House, 2002, p. 21. (in Chinese)

shipping companies, improve the marine technology and the navigation skills of crews, and enhance the shipping capacity of fleets, so that China's shipping companies will gain a competitive advantage in the legal arena in the future.

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The Reform to Delivery of Goods with Production of the Original Bill of Lading under the UNCITRAL Draft Instrument on the Carriage of Goods

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Abstract: To resolve the problem of the delay of bill of lading, the UNCITRAL Draft Instrument on the Carriage of Goods[1] has made bold reforms in the function of a negotiable bill of lading as a "delivery document". Under certain conditions, a carrier is given a statutory right to deliver goods without a bill of lading. This paper suggests that such a system design lacks reasonableness and practicality, and will even encourage fraud. The only solution to the problem of the delay of bill of lading is sea waybill and electronic bill of lading. Before electronic bill of lading is widely used, delivery upon production of letter of guarantee is the only practical way to resolve the problem of the delay of bill of lading.

Key Words: Bill of lading; Delivery of goods without a bill of lading; Delay of bill of lading; Electronic bill of lading; Letter of guarantee

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1 The full title of second reading of the Draft Instrument is 'Draft Instrument on the Carriage of Goods [wholly or partly] [by sea]', document No. A/CN. 9/ W GIII/ WP32, see http://www.uncitral.org. From November 28 to December 9 in 2005, the third working group of UNCITRAL on transportation law held the 16th conference to continue reviewing the second reading of Draft Instrument, in which delivery of goods was one of the topics of discussion. It should also be noted that where there are square brackets in the titles and specific clauses of the Draft Instrument, it remains debatable whether the contents in the brackets should be reserved.

I. Introduction

In the author's opinion, the UNCITRAL Draft Instrument on the Carriage of Goods (hereafter as "Draft Instrument"), which is in the second reading stage, has made the most radical reform to the current system by reforming the function of a bill of lading[2] as a "delivery document".

As we know, bill of lading has always been compared to the "key to a floating warehouse". This is not only a vivid description of its legal function as a "delivery document", but also a rule that was developed in the area of maritime law over the last century and which has been widely accepted by the international community. Under normal circumstances, a carrier is only allowed to deliver goods to a legitimate holder of bill of lading, or to put it plainly, deliver to the "holder of Document of Title".

However, under the Draft Instrument, the function of bill of lading as a "delivery document" has been greatly weakened. It's no longer a basic principle for a carrier to deliver goods upon production of a bill of lading. On the contrary, under certain conditions, a carrier is granted the statutory right to deliver goods without a bill of lading.

This deviant design of regime has been generally accepted by the UNCITRAL working group after its first reading of the Draft Instrument.[3] However, the following questions will be worth reflecting upon: Whether the reform in the Draft Instrument will truly be able to resolve the problem of delay of bill of lading? Will the Draft Instrument fulfill the practical needs of the current shipping and trade? What kind of influence will it bring to international trade? This article will touch on these questions based on the relevant provisions in the Draft Instrument, associated with the theory and practice of the laws on bill of lading, and hopefully give rise to some useful suggestions for the perfection of the Draft Instrument and China's participation in the UNCITRAL Conference on Transportation Law.

II. Background of the Reform of the Draft Instrument

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2 The "bill of lading" discussed in this article is limited to "negotiable bill of lading" and does not include straight bill of lading.

3 Gertjan van der Ziel, Background Paper on Delivery to The Consignee (Chapter 10), *CMI Yearbook*, 2005, p. 172.

In the contemporary practice of international trade and carriage of goods by sea, bill of lading seems to be trapped in an insurmountable dilemma: under many circumstances, the goods have arrived at the destination, while the bill of lading still remains in circulation in the area of trade. Since bill of lading serves as the "delivery document" the carrier is obliged to take back the bill of lading before delivering the goods to customers. However, in order to avoid burdening carriers with stranded costs of vessels and goods at the port, and to help the consignee to receive the goods timely and accelerate circulation of goods, the carrier tends to accept a letter of guarantee and release the goods without production of bill of lading. According to rough statistics, goods are released without production of bill of lading in 15% cases of liner shipping and as high as 50% cases of charter shipping. For the transport of some major commodities such as minerals and oils, the proportion reaches almost 100%.[4]

The primary reason for the delay of bill of lading is the innovative changes in shipping itself. The rapid development of shipping technology, along with the wide use of the fast and convenient container transportation has greatly enhanced the speed of transportation of goods. However, in contrast, the circulation of bill of lading in the area of trade is as slow as it was in the past, presenting a sharp contradiction.

According to the drafters:

(i) Delivery of goods without production of bill of lading is a common phenomenon, and leads to the deviation of the function of bill of lading as the delivery document from the practice. This indicates that continuing to preserve its function as a "delivery document" is no longer appropriate;[5]

(ii) In practice, it is not possible to require a consignee to present the bill of lading at all times, therefore, it is unrealistic to require the carrier to release goods only upon presentation of bill of lading. "It does not reflect the reality to always blame the carrier for releasing goods without production of bill of lading";[6]

(iii)Although a carrier may require a letter of guarantee when he releases goods without production of bill of lading, the letter of guarantee itself does not exempt the carrier from his liability for releasing goods without production of bill

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4 See Article 9. 4. 2.4 of "Draft Outline Instrument" by CMI ISC, 20 November 2000.

5 First reading of the Draft Instrument (Document No. A/CN. 9/WG. III/WP. 21), Paragraph 162.

6 First reading of the Draft Instrument (Document No. A/CN. 9/WG. III/WP. 21), Paragraph 181.

of lading. It remains unclear whether the carrier could recover his loss through the letter of guarantee. Since the delay of bill of lading arises from a fault in trade and is not associated with the carrier, it is unfair to allocate the risk of releasing goods without production of bill of lading to the carrier.[7]

The reform of the function of bill of lading as a "delivery document" in the Draft Instrument is completed solely based on the above understanding.

III. Analysis of Paragraphs (b) and (c) of Article 49 of the Draft Instrument

Article 49 of Chapter 10 of the Draft Instrument specified the issues on how to deliver goods after the issuance of negotiable bill of lading. Specifically, Paragraphs (b) and (c) are the key provisions for reforming the function of bill of lading as a "delivery document", so it is necessary to subject them to a comprehensive study.

A. Overview of Paragraphs (b) and (c) of Article 49[8]

Paragraph (b) provides that if the holder does not claim delivery of the goods from the carrier after the arrival of goods at the place of destination, the carrier shall accordingly advise the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such an event, the controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to identify and find the controlling party or the shipper, then the person mentioned in Article 31 shall be deemed to be the shipper for the purpose of this paragraph.

Paragraph (c) provides that the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) of this Article shall be discharged from its obligation to deliver the goods under the

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7 First reading of the Draft Instrument.

8 It should be noted that Paragraphs (b), (c) and (d) of Article 49 are also applicable to "electronic bill of lading" (referred to as "negotiable electronic record" in the Draft Instrument). In our opinion, electronic bill of lading is relatively new and the Draft Instrument does not have specific rules on how to transfer electronic bill of lading. With this background, it seems too early to discuss how a carrier shall perform its delivery obligations under an electronic bill of lading. Therefore, the comments in this article with regard to the three paragraphs are limited to hard copies of bill of lading and do not include electronic bill of lading.

contract of carriage [to the holder], irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic record has demonstrated, in accordance with the rules of procedure referred to in Article 6, that it is the holder.

It can be seen from the above provisions that the Draft Instrument no longer insists on absolute function of a bill of lading as a "delivery document". Once a bill of lading arrives at the destination later than goods, or for some other reason the holder of a bill of lading fails to request for delivery of goods when the goods arrive at the destination, the carrier would be entitled to follow the instructions of the controlling party or the shipper (including document shipper) to release the goods. In such an event, the carrier shall be deemed to have performed its obligation of delivering the goods to the holder of bill of lading and be free from any liability for releasing goods without production of bill of lading. Apparently, the essence of the reform of the Draft Instrument is to shift the risk of releasing goods without production of bill of lading to the shipper, i.e., the controlling party or shipper giving instructions of delivery shall be liable for the wrongful releasing of goods.

Strictly speaking, the Draft Instrument only "weakens" the function of bill of lading as a "delivery document" and does not abandon such function completely. This is because after the goods arrive at the destination, the carrier can release the goods without production of bill of lading after only he receives an instruction from the controlling party or the shipper. If the controlling party or shipper does not give any instruction, the function of bill of lading as a "delivery document" will remain and the carrier cannot release the goods to a consignee at his own free will, but can only dispose of the goods in accordance with Article 50 of the Draft Instrument (for example, store the goods at an appropriate place, sell the goods under certain circumstances, etc.).

B. Theoretical Analysis

We argue that, if on one hand, the Draft Instrument sustains the negotiability of bill of lading, and on the other hand, it does not insist on absolute "delivery upon production of bill of lading", the system design is in itself contradictory! The objective of a negotiable bill of lading is that all the rights incorporated in a bill of lading shall be transferred to another person together with the transfer of such document, which is also confirmed by the Draft Instrument with its express

provision in Chapter 12:Transfer of rights-"If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by passing such document to another person…"[9] The "rights incorporated in such document" referred to here shall also include the right to take delivery of the goods.[10] Given that the right to take delivery of the goods has been transferred to the holder of bill of lading, and that the shipper has lost such a right, how can a carrier follow the instructions of a shipper to release the goods without production of bill of lading in case of a delay of bill of lading and then be free from the liability arising therefrom? Legally, this does not make sense.

Apparently, if we do not emphasize the absolute principle of releasing goods upon production of bill of lading, we will need to give up on the "negotiability" of the document, which will turn a bill of lading into a sea waybill. Therefore, from a rational perspective, there are only two options in designing the function of a bill of lading: either as a traditional bill of lading, or as a sea waybill without a third option in between.

C. Whether the Provisions of the Draft Instrument are Practical

Practicability is a necessary element of a well-established law norm. No matter how sufficient and reasonable the reasons are, if a law norm which is designed based on such reasons lacks practicability, it will be a dead letter in practice.

First of all, when there is a delay of bill of lading, paragraph (b) requires the carrier to identify and notify the controlling party with reasonable effort to get his instruction on delivery.

The "right of control" provided under Chapter 11 of the Draft Instrument means that during the shipping and the control of the goods by the carrier, and without interference to the carrier's regular business operations, the controlling party has the right to require the carrier to terminate the shipping, change the destination, change the consignee, etc. According to the Draft Instrument, when a negotiable bill of lading is issued, the controlling party is the holder of the bill of lading.[11] Since a bill of lading is negotiable, it is almost impossible for the carrier

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9 Article 59, Paragraph 1 of the Draft Instrument.

10 Jiang Yuechuan, Transfer of Rights – Comments on the Provisions on Transfer of Rights under UNCITRAL Draft Instrument on Carriage of Goods, in Si Yuzhuo ed., *Annual of China Maritime Law*, Vol. 2003, p. 23. (in Chinese)

11 Article 52, Paragraph 2 of the Draft Instrument.

to determine the controlling party while the bill of lading is still in circulation in trade and has not reached the destination. Even if the carrier really knows who the controlling party is when the goods arrives at the destination and has notified him of the arrival of such goods, such party may have lost his status as the controlling party when he gives delivery instructions (due the fact that the bill of lading may have been transferred during this period). How shall we deal with this situation? Is the carrier obliged to ensure with reasonable care that the party still maintains its status as the controlling party when he gives delivery instructions? How can a carrier fulfill such an obligation? In addition, what does the term "with reasonable effort" mean? What is the standard for determining whether the effort on part of the carrier is "reasonable effort"? It is foreseeable that these questions will lead to a large number of disputes in practice.

Secondly, paragraph (b) also provides that if a carrier cannot find the controlling party, it should turn to the shipper or the person provided in Article 31 of the Draft Instrument, who is obliged to give delivery instructions to the carrier. The person referred to in Article 31 of the Draft Instrument is the "document shipper": recorded in a bill of lading as a shipper, but it is not the party who enters into the shipping contract with the carrier. Atypical example is an FOB (Free on Board) seller.

Such a provision is also unrealistic. After a bill of lading is transferred, although the shipper knows who the next holder of the bill of lading is, he cannot determine whom the document has been transferred to before the goods reach the destination due to the negotiability of a bill of lading and the fact that it can be in circulation all the time. Therefore, the shipper cannot give a correct instruction. It lacks reasonability and practicability for the law to burden the shipper with an obligation that cannot be fulfilled. It is apparent that a prudent shipper will not give any delivery instruction, and therefore such a provision would be unenforceable.

Thirdly, since the paragraph provides that the controlling party or the shipper is obliged to give a delivery instruction to the carrier when the goods arrive at the destination, it's natural that if the controlling party or shipper shall assume the corresponding responsibilities if it refuses to give such an instruction. However, the Draft Instrument has not specified the nature of such responsibilities. In fact, it's also very difficult to define such responsibilities reasonably. In particular, in the event that the shipper cannot give a correct instruction due to any objective reason, isn't it absurd for the Draft Instrument to burden the shipper with the liability for not giving an instruction?

D. A Review of the Draft Instrument from the Perspective of International Trade

1. With the function of bill of lading as a "delivery document" being weakened so significantly, the reliability of a bill of lading has been greatly reduced, which even makes it easier to commit fraud in sea transportation. We have reasons to believe that such a document will not be accepted by the parties in international trade.

According to the Draft Instrument, once there is a delay of bill of lading, the carrier can follow the instruction of the controlling party or the shipper to release the goods. In this case, the goods cannot be effectively controlled even with a bill of lading. Under "document trade", who will still be willing to purchase a bill of lading?

What is more worrisome is the fact that such a system design will greatly facilitate the controlling party or shipper to engage in fraud. As a matter of fact, there is always a concern during the discussion that such provisions will facilitate fraud.[12] However, this is not viewed seriously by the drafters, whose explanation for this is that if the holder of billing of lading takes a positive action, the shipper can be completely prevented from issuing a fraudulent delivery instruction because either the consignee holding a bill of lading or the bank has the obligation to keep a close watch on the goods. Hence, they can protect their interests by timely collection of the goods after they arrive at the destination.[13]

Even after putting aside the question whether the holder of a bill of lading can actually tell the exact time of arrival of the goods, or if it is too much a burden for the bank to watch over the goods under a bill of lading which it accepts as pledge, even if a holder could do the aforementioned, will the drafter's arguments stand? The answer is no. We understand that the negotiability determines that the speed of circulation of a bill of lading in trade is not based on the will of a single holder, but based on the length of the chain of sales contracts, whether the chain of sales contracts is smooth, the speed of the bank's business operations, the efficiency of delivery services, whether there is any incidental and other complex reasons. Therefore, the delay of bill of lading becomes inevitably common in the current international trade business. In fact, this is also acknowledged by the drafters of

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12 *Supra* note 10 at paragraph 180.
13 *Supra* note 10 at paragraphs 177 and 188.

the Draft Instrument,[14] and is therefore the logical starting point of its reform. Regretfully, when they discussed the question whether a holder of a bill of lading can protect his own interests by taking positive actions, the drafters seem to have forgotten this objective precondition: when the bill of lading is in the middle of a trade chain, the bank or party holding the bill of lading is often far away from the destination port; even if he knows that the goods have arrived, how is he able to safeguard his own interests by collecting the goods with the bill of lading in the destination port?

2. The Draft Instrument will put FOB sellers in a position with almost no guarantee.

According to the Draft Instrument, if a carrier cannot find and confirm the controlling party (it has been pointed out in this article that this is very difficult to achieve), then he should follow a shipper's instruction first; and when he fails to find the shipper, he should follow the instruction of the person (document shipper) referred to under Article 31 of the Draft Instrument.

Obviously, such provisions have given little consideration to the interests of an FOB seller. It is to our knowledge that under FOB terms, the buyer of the goods is the shipper that entered into the shipping contract with the carrier, while the shipper recorded in the bill of lading is usually the seller (document shipper). The reason why the laws of different countries permit the seller's name to be put as the "shipper" on the front side of a bill of lading is that they intend to protect the interests of FOB sellers (in terms of contract, the seller is in fact not the real shipper) and to grant them the right to request the issuance of bill of lading from the carrier in order to control the goods. The Maritime Code of the People's Republic of China[15] and the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) even expand the definition of shipper. However, according to the design of the Draft Instrument, as long as the FOB buyer, who is the shipper, delays accepting the bill of lading transferred by the seller, he will have the chance to instruct the carrier to deliver the goods to him even if he has not paid for the goods. Meanwhile, the carrier is not liable for delivery without production of bill of lading.

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14 See Part I-Background of the Reform of the Draft Instrument of this article.

15 Article 42 of the Maritime Code of the People's Republic of China defines "shipper" as: "1. The person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier; and 2. The person by whom or in whose name or on whose behalf the goods have been delivered to the carrier involved in the contract of carriage of goods by sea."

In this situation, how will an FOB seller be able to protect his own rights?

The reason behind endorsing the provisions in the Draft Instrument is that such design complies with the practice of shipping because most voyage charters contain provisions on release of goods without production of bill of lading.[16] Therefore, such a design will facilitate modern trade and business.[17] However, such reasoning is not sound. Although under FOB, a voyage charter tends to provide that a lessee can collect goods with a letter of guarantee, it must be pointed out that such practice only satisfies the interests of the buyer, but not the seller; in addition, most countries do not exempt a carrier from liability for delivery without bill of lading as the Draft Instrument does. The essence of law is a balance of interests, which is referred to by some people as the "art of balance". How can a system design that completely disregards one party's (FOB seller) interest to satisfy the interest of the other party (FOB seller and carrier) be deemed as conducive to modern trade?

E. Review of the Draft Instrument from the Perspective of a Carrier

If the Draft Instrument is finally accepted as the official document for the convention, it may not necessarily be good news for the carrier.

Firstly, since the Draft Instrument lacks practicability, even with such a provision in place, a carrier will not be able to get any instruction from the controlling party or shipper. Therefore, the problem of goods not being collected timely due to the delay of bill of lading remains unresolved. In addition to this, the vagueness of the provisions will increase the risks for carriers. The term "with reasonable efforts" is just one example. If the court finally determines that a carrier can find the controlling party "with reasonable efforts", but the carrier has followed the shipper's instruction to release the goods, then the carrier will still be held liable for releasing goods without production of bill of lading.

Secondly, even if the Draft Instrument becomes a convention, not all countries will be a part of it. If a carrier releases goods without production of bill of lading in accordance with the Draft Instrument, he will be exempt under the laws of the contracting parties to the convention. However, what will be the result if the consignee files a lawsuit against the carrier in a country which is not a party to the convention? Complicated questions as to choice of law will be involved in such a

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16 *Supra* note 10 at paragraph 174.
17 *Supra* note 10 at paragraph 181.

case. The court of the country which is not a party to the convention will determine the applicability of the convention according to the conflict rules thereof. If the convention does not apply, the carrier will not be exempt from liability for release of goods without production of bill of lading. To make it even worse, the carrier would have lost the "shelter" (immunity) provided by a letter of guarantee by then.

In a word, the design of Paragraphs (b) and (c) in Article 49 of the Draft Instrument lacks not only theoretical support, but also rationality and operability. The design will even encourage frauds. Frankly speaking, such a program for reforming the function of bill of lading as a "delivery document" is not successful.

IV. Does Bill of Lading Remain a Document of Title after the Reform

A. Introduction to the Problem

It is commonly known that the reason why a bill of lading is generally considered to be the foundation of international trade is that it performs the unique function of being a document of title. Based on this function, a negotiable bill of lading serves to transfer ownership and to create pledge rights, which are of vital importance to parties involved in the sale of goods and to banks under letters of credit.

In fact, the drafters of the Draft Instrument have also clearly realized that a bill of lading is a document that integrates the function of a shipping contract and a document of title. In addition to this, the purpose of the reform is not to wipe out its function as a document of title, but to reach a new balance between these two functions.[18] However, it is worthy of our reflection whether a bill of lading will continue to function as a document of title after its function as a "delivery document" is reformed in Paragraphs (b) and (c) under Article 49 of the Draft Instrument?

B. Conclusions under Two Different Legal Systems

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18 Si Yuzhuo, Jiang Yuechuan, Trial Legislation on Delivery of Goods without Bill of Lading – Comment on the Provisions of the UNCITRAL Draft Instrument on the Carriage of Goods on Delivery of Goods without Bill of Lading, in Si Yuzhuo ed., *Annual of China Maritime Law*, Vol. 2003, p. 17.

1. Common Law System

Although there is no accurate and unified definition on the function of bill of lading as a "document of title" under common law, basically speaking, the core of most analyses leads to the concept of "constructive possession".[19] For example, a relatively authoritative explanation of the function of bill of lading as a "document of title" is that "it is a document related to goods, the transfer of which serves to transfer constructive possession of the goods and to transfer the property rights of the goods."[20] In fact, both the functions of transferring title of goods and of creating a pledge of a bill of lading derive from constructive possession.

As pointed out by Carver in his book *Carriage of Goods by Sea*,[21] "transfer of a bill of lading leads to constructive possession, i.e. the transfer of the right to claim to the carrier for delivery of goods".

"The essence of a bill of lading as a document of title is transferring constructive possession, i.e. transfer of the right to claim for delivery from the carrier", as said in the book *Chorley & Giles' Shipping Law*.[22]

Paul Todd argued that "since the original copy of bill of lading has to be presented for delivery of goods, it means that the transfer of a bill of lading also transfers the right to possess the unloaded goods. For this reason, a bill of lading is called a document of title, representing the goods at sea, and transferring the constructive possession of the goods …"[23]

It is evident that under common law, the function of constructive possession of a bill of lading will necessarily require its holder to obtain a definite right to claim for the goods, that is to say, a carrier should release goods upon production of bill of lading. This is the fundamental reason why a bill of lading can become a document of title and this will no longer be true if the function of a bill of lading as a "delivery document" is weakened as in the Draft Instrument.

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19 This is also why scholars in China think that "document of title" should be translated as "possessive securities". See Yao Xiuhong, Wang Qianhua, Discussion on the Attributes of Rights Demonstrated by Sea Waybill Bill of Lading, *Annual of China Maritime Law*, 1997.

20 *Benjamin's Sale of Goods*, 6th edition, London: Sweet & Maxwell, 2002.

21 13th edition, 1982.

22 Quoted from Yao Hongxiu and Wang Qianhua, Discussion on the Attributes of Rights Demonstrated by Sea Waybill Bill of Lading, *Annual of China Maritime Law*, Vol. 1997.

23 Paul Todd, *Bill of Lading and Bankers' Documentary Credits*, London/Newyork: Routledge, 1990, p. 7.

2. Civil Law System

From the perspective of civil law, the key to the question whether a bill of lading can function as a document of title depends on whether it can satisfy the requirement for public notice in case of a change in property rights. Public notice means that when there is a change in property rights, such facts must be made available to the public by certain means of public notice, so that a third party is informed of the change and therefore his interests will not be injured.[24] For the title to movable property, most countries use delivery or possession as the means of public notice.[25] However, when the goods are still during sea transportation, the seller cannot deliver the goods. As a result a bill of lading is considered as a symbol for the goods and possession of a bill of the lading has the same legal effect as possession of the goods, which is a conclusion of legal fiction. However, we must be clearly aware that such a legal fiction does not come out of thin air (for example, we cannot simply assume a sea waybill to be goods), but requires support of certain other conditions.

According to the theories of possession propounded in civil law, possession can be classified into direct possession and indirect possession. When goods are still during sea transportation, the carrier has direct possession of the goods while the holder of bill of lading has indirect possession thereof. A party having indirect possession of the goods does not possess the goods directly, but may enjoy a right to claim for the return of the possession of the goods against the person having direct possession thereof based on certain legal relationships, thus giving rise to indirect control and management over the goods.[26] It is obvious that if the indirect possession of the holder of a bill of lading is to be accepted, the law must recognize the holder's right to claim for the return of the possession of the goods, i.e. the right to claim for delivery of the goods against the carrier, so that indirect possession can be turned into direct possession. Otherwise, indirect possession will be like

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24 The reason behind the requirement of public notice in case of a change of property rights is the nature of the property right itself. Since property rights are exclusive and enjoy absolute priority, if the public are not informed of the change, the interest of a third party who is not aware of the fact will be impaired when the person that has the property rights makes a claim against him.

25 As a means of public notice, delivery is focused on the dynamic change of property rights, while possession is used for static movable property rights. These two means supplement each other and function together as means of publicizing the relationship of movable property rights.

26 Wang Liming, *Property Law*, Beijing: China University of Politics and Law express, 1998, p. 819. (in Chinese)

water without source or trees without roots. In fact, the essence of publicizing the possession of bill of lading is that the law recognizes a holder's right to publicize to any third party his exclusive right of taking delivery of goods from the carrier by possession of the bill of lading. Otherwise, the function of public notice might exist only on paper and not in reality.

However, the right of a holder of a bill of lading to claim delivery of goods has been made very "fragile" due to the reform of the Draft Instrument. Once the bill of lading arrives at the destination later than the goods, or its holder fails to request for pickup of goods timely due to some other reasons, the holder's right to claim delivery will be replaced by someone else (for example, the shipper). It is obvious that such a "fragile" right of claim cannot satisfy the requirement of public notice of indirect possession. Hence, the function of public notice of holding a bill of lading is almost non-existent. Therefore, under the theories of civil law system, the function of a bill of lading as a "document of title" has almost vanished in the design of the Draft Instrument.

C. Consequence of the Reform of the Draft Instrument

The consequence of the reform (which might also be beyond the expectation of the drafters,[27]) is that under the Draft Instrument, a transfer of bill of lading can lead neither to the transfer of constructive possession or indirect possession of goods, nor to the transfer of ownership of goods. Similarly, even if a bank possesses the bill of lading, it cannot enjoy the right of pledge over the goods. This will severely disrupt the order of international trade and business: a person who has paid for the goods and holds the bill of lading may not have obtained the ownership

27 Paragraph 162 of the Draft Instrument pointed out that both the function of a bill of lading as a "document of title" and that as a shipping contract should be respected, and which function should take priority shall depend on the specific facts and circumstances. Based on this, we conclude that the original intention of the drafters' design for Paragraphs (b) and (c) of Article 49 might be: if a carrier does not release the goods without production of bill of lading, or the transfer of bill of lading takes place before the goods are released without production of bill of lading, a bill of lading will still function as a document of title. This obviously cannot be accepted based on the analysis in this article.

of the goods under law.[28] If the seller goes bankrupt, the goods will be considered bankruptcy property of the seller. When the carrier releases the goods without production of bill of lading based on the instruction of the shipper, the bank holding the bill of lading can neither require the carrier to be liable for release of goods without production of bill of lading, nor enjoy priority to claim compensation out of the auction proceeds the court acquires from the seized goods because the bank does not have pledge over the goods.

Will such a bill of lading continue to be used by those parties engaging in international trade? The answer is self-evident.

V. How can the Problem of Delay of Bill of Lading be resolved?

We believe that the solution to the problem of delay of bill of lading lies in sea waybill and electronic bill of lading. Therefore, the drafters of the Draft Instrument should carefully design legal rules on sea waybill and electronic bill of lading and the work in this area should be strengthened. For example, instead of providing a uniform rule on how to transfer rights under a sea waybill, the Draft Instrument leaves the issue to domestic laws.[29] The Draft Instrument is also silent on the substantive rules on the transfer of electronic bill of lading.[30]

A. The Use of Sea Waybill Should Be Encouraged

English Judge Antony Lloyd pointed out in his speech Bill of Lading, Do We Really Need It that: "*Except for the very few cases where a document of title is*

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28 Of course, change of legal ownership is a very complicated issue, and different counties have different rules on it. However, from the perspective of civil law system, the requirement of public notice in case of a change in property right is determined by the very nature of property right itself. Since property right is exclusive and enjoys priority over other rights, if a change in property right is not made public through a certain means ofpublic notice, a third person may not be aware that somebody holds certain property rights. When such a person holding the right claims priority against the third person, the interests of the latter will definitely be impaired.

29 See Article 61 of the Draft Instrument.

30 Chapter 2 ("Electronic Communications") of the Draft Instrument sets no substantive rule on how to transfer electronic bill of lading (of course, it's very difficult to set such rules), but simply provides that it should be processed according to the agreement between the parties concerned.

needed, I am sure that sea waybill will replace bill of lading as a uniform shipping contract for carriage of goods by sea."[31] This is a correct opinion.

Currently, the use of sea waybill has reached a certain scale, but the number of negotiable bills of lading which are used is still greater than that of sea waybills. According to a research conducted by United Nations Conference on Trade and Development ("UNCTAD"), people tend to use negotiable bill of lading out of their own habits, rather than out of their need for a document of title.[32] It is beyond doubt that business people need to make improvement in their future business practices.[33]

The Draft Instrument has included non-negotiable bill of lading into its scope of adjustment, which will greatly facilitate the generalization and use of sea waybills. Obviously, the fact that the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Visby Rules) applies only to bill of lading or similar document of title is an important reason for the sea waybills not being used widely now.[34]

B. Electronic Bill of Lading

To resolve the problem of delay in bill of lading completely, the only solution is, as Mr. Yang Liangyi has pointed out "*electronic bill of lading – savior of release of goods without production of bill of lading*".[35] The UNCTAD, while voicing its strong objection against the reform under the Draft Instrument, also considers

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31 Anthony Lloyd, The Bill of Lading: Do We Really Need It? This paper was given as the Sixth Annual Lecture of the Institute of Maritime Law of the University of Southampton, 24 November 1988.

32 Ding Ding and Yang Yuntao, The Functions of Transportation Documents in International Trade, *China Maritime Law Association Correspondence*, No. 6, 2004 (in Chinese), translated from UNCTAD Secretariat document "The Use of Transportation Documents in International Trade".

33 Some people suggest that a carrier could do as follows to encourage the use of sea waybills: if a shipper is willing to take a sea waybill, then a carrier may offer a relatively lower shipping price; if the shipper insists on taking a negotiable bill of lading, then a carrier may offer a higher price. See Yang Daming, Discussions on Potential Risks of Release of Goods without Production of Original Bill of Lading, *Annual of China Maritime Law*, Vol. 2000, p. 57.

34 Ding Ding and Yang Yuntao, The Functions of Transportation Documents in International Trade, *China Maritime Law Association Correspondence*, No. 6, 2004 (in Chinese), translated from UNCTAD Secretariat document "The Use of Transportation Documents in International Trade".

35 Yang Liangyi, *Bill of Lading and Shipping Documents*, Beijing: China University of Politics and Law Press, 2001, pp. 150~156.

electronic bill of lading as the fundamental solution to the problem.[36] This is because an electronic bill of lading can preserve the function of a paper bill of lading as a "document of title" by a "functionally equivalence method". In addition to this, it can (i) greatly reduce the operation time in the area of trade; and (ii) help a carrier to determine who the consignee is more easily when the goods arrive at the destination.[37]

Of course, the comprehensive implementation of the electronic bill of lading must be based on the platform of e-commerce. That means that it must rely on the development of the entire international trade pattern. It is a giant leap from physical transaction to document transaction, and an even greater leap from document transaction to information transaction, which is the final result of electronic , networked and digital trade and business. Therefore, it is an inevitable trend that an electronic bill of lading will finally replace its paper counterpart. However, there is still a long way to go.

C. Conclusion

On the surface, the reform of the Draft Instrument only involves the delivery obligations of a carrier. However, since a bill of lading is also an important trade document, the consequence of the reform is that it challenges the foundation of the entire international trade. If such a reform is accepted, the legal rules on both document trade and letter of credit will have to be rebuilt, which is very unrealistic.

In the end, the authors also want to point out that before an electronic bill of lading is widely used, if a carrier issues a paper bill of lading, a practical solution would be to release goods upon production of a letter of guarantee. This may be explained as follows: the reason for delay of bill of lading, in the end, will come down to the fact that international trade pattern has not been fully developed. In the interim, we cannot entirely eliminate the problems brought about by bill of lading. A consignee can only take delivery by providing a reliable letter of guarantee,

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36 See UNCTAD Commentary on CMI/UNCITRAL Draft Instrument on Transport Law, at http://www.mcgill.ca/mari timelaw/maritime-admiralty/.

37 For example, according to CMI Rules on Electronic Bill of Lading in 1990, each transfer will demand a "private key" to be issued by the carrier. Therefore, the carrier will certainly be able to determine the consignee when the goods arrive at the destination. Under the Bolero System (Bill of Lading Electronic Registry Organization) in 1999, each transfer of goods must be processed at the Title Registry, and the carrier will be able to determine the consignee if he checks through the Title Registry.

and adding a significant guarantee cost to the transaction, which is the price the consignee must pay. Meanwhile, the carrier also bears a risk in releasing goods upon production of a letter of guarantee, which is the price the carrier must pay. From a macro perspective, we would rather say that the consignee and the carrier would have to face the drawbacks brought about by delay of bill of lading jointly than say that release of goods upon letter of guarantee is unfair to the carrier.[38] International trade and carriage of goods are analogous to twins that are dependent on each other because they have formed a community of interests. It is reasonable that they share the burden of the negative effects of bill of lading in this special historic period. "The life of law lies in experience rather than logic." This motto is very appropriate for a situation where a letter of guarantee is applied to resolve a problem of delay of bill of lading. Although it might not be a perfect solution from a theoretical point of view, it is nonetheless a practical solution.

Translator: HAO Luona
Editor (English): Radhika Agarwal

38 The drafters of the Draft Instrument insisted on this opinion during the reform thereof.

我国涉外海事管辖权冲突之研究

张丽英 *

内容摘要: 本文探讨了涉及中外法院管辖权冲突和在多国同案重复诉讼的相关法律问题。海事领域的管辖权冲突问题较其他领域突出。这与海事法与海事纠纷的独特性有关。本文重点分析了海事领域管辖权冲突及其形成原因的独特性，例如船舶的“拟人化”，对物诉讼，法院挑选和船舶扣押，并分析了相关的国外案例和理论，以期通过学习他国经验，就如何解决管辖权冲突提出笔者自己的观点。

关键词: 管辖权冲突　船舶“拟人化”　对等原则　礼让　对物诉讼　法院挑选

一、引　言

虽然中国只是一个发展中国家，其海运船队规模（载重吨位）已跃居世界前五（截至 2003 年底）[1]。随着中国对外贸易和海事活动的飞速发展，国际贸易和海事纠纷呈上升趋势。近年来，涉及中外法院管辖权冲突、多国同案重复诉讼的 [2] 的相关案件也越来越多。由于相关经验不足，中国在这方面缺乏完善的立法，[3] 同时，为了更为有效地保护中方当事人的利益，大部分中国法院倾向于坚持自我管辖 [4]，因此经常导致管辖权冲突和平行诉讼，对国内投资环境也有负面效应。鉴于主要西方国家都已有完善的关于管辖权冲突的法律制度，为了学习这些国家的经验，本文对美国、英国和其他国家的相关案例和理论进行了分析，并在此基础上就如何解决管辖权冲突提出了自己的见解。

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1 世界载重吨位前十名的船队分别是如下：希腊：19.8%；日本 13.9%；挪威：7.9%；中国：5.6%；美国：5.4%；德国：5.4%；香港：4.7%；韩国：3.4%；台湾：3.1%；新加坡：2.4%。参见 http://www.moc.gov.cn/2004 - 12, 2004 年 12 月 15 日

2 曹建明：《海事法院成立十周年讲话》，下载于 http://www.chinacourt.org/public/detail.php? Id=120768, 2005 年 11 月 27 日

3 只有一个条款处理该问题，即《最高人民法院关于适用〈中华人民共和国民事诉讼法〉若干问题的意见》（1992）第 305 条。

4 张晓梅：《我国涉外海事诉讼管辖权之研究》，下载于 http://www.cnki.net/oldcnki/index4.htm，2005 年 11 月 27 日。

本文的正文分为三个部分。第二部分对管辖权冲突进行概述，介绍了中国海事领域管辖权冲突的几种形式，重点介绍了中外法院管辖权冲突和多国同案重复诉讼。第三部分以海事诉讼的特性为重点，分析了海事领域的管辖权冲突较其他领域更加频繁的原因。第四部分阐述了一些解决管辖权冲突的原则，并就此提出了笔者的观点，以期能够对该问题在中国的解决提供助益。

二、中国海事司法管辖权冲突概述

中国海事纠纷的解决主要采取四种途径：磋商、港口安全局[5]处理、仲裁和诉讼。后三种路径必然带来冲突，包括两个国内法院之间、海事法院和非海事法院之间、以及中外海事法院之间的管辖权冲突，以及仲裁和诉讼之间的矛盾、诉讼和港口管理局处理的矛盾。

（一）海事法院和一般法院的管辖权冲突[6]

海事法院和一般法院之间一直存在着持续的管辖权冲突。中华人民共和国最高法院已经发布规定，地方一般法院不能审理海事法院有专属管辖权的海事案件[7]。但在实践中，基层一般法院经常审理和判决海事案例。该问题的解决，除由任一当事方提出管辖权异议外，还可通过上级法院的协调和发文[8]。虽然如此，某些案件，如在港口的案件，其管辖权非常模糊性，一般法院和海事法院均有理由审理。[9]但是，鉴于此类案件可在国内解决，其不在本文讨论范围内。

（二）司法管辖和行政机关的冲突

在中国，部分纠纷是通过行政程序解决的，反之，美国则趋向于依赖诉讼解决。中国海事法院和海事局之间的关系相当复杂，同时兼具合作性和对抗性。例如，

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5 HAS 是指港口安全局，下载于 http://www.gzjt.gov.cn/zcfg/zcfg_result.asp?cata_id=6&action=search， 2005 年 11 月 27 日。

6 中国法院可以分成 2 种类型：专门法院和一般法院。专门法院包括海事法院，铁路运输法院和军事法院。海事法院对海事案件具有专属管辖权；铁路运输法院对破坏铁路运输的刑事案件和铁路运输争议案件有专属管辖权；军事法院对军人犯罪案件有专属管辖权。

7 《最高人民法院关于海事法院受理案件范围的若干规定》（2001）。该规定试图指明一个具体纠纷是否为一个海事或海商纠纷。

8 参见最高人民法院，最高人民法院 2003 年在全国人民大会的工作报告。

9 参见海事立法，下载于 http://www.cnnb.com.cn/gb/node2/node743/node747/userobject7ai7258.html. 访问于 2005 年 11 月 27 日

当法院要扣押一艘船舶时，执行扣押程序是海事局。在某种程度上，通过海事局调解而非诉诸诉讼对当事方解决纠纷更为有利，特别是关于船舶碰撞和共同海损的案件，这类案件的解决可能需要很长时间和巨额花费。在此方面，海事局在解决海事纠纷中起到了积极的作用。然而，另一方面，如今海事局经常过度干预海事纠纷，反而对当事方造成不便和困难。例如，在涉及海事局自身利益的多方当事人案件中[10]，海事局往往代表一方当事人与另一方当事人协商。由于海事局有其自身的利益，纠纷解决可能会对另一方当事人产生不公平的结果，或让其他当事人不满。如果在案件解决中出现对成本和费用分摊不公，海事局甚至可能会被起诉。希望海事局的法律执行程序和结果能够遵循法律法规。然而，鉴于该问题可以在国内解决，其亦不在本文讨论范围。

（三）国内法院和外国法院的管辖权冲突

管辖权冲突是很可能导致相同的诉讼待决于数个法院。这可能发生在以下的情形中：

1. 同一原告基于同一事实陈诉书、同时向数个法院起诉同一被告[11]。由于原告在此情形下的目的是施加压力给被告人，动机不良。在其他情况下，原告可能仅仅希望尽快结案或选择在其意图获得的被告财产的所在地提出诉讼。

2. 双方当事人分别在不同国家的法院提起针对对方的诉讼[12]。即 A 国诉讼中的原告等同于 B 国诉讼中的被告，反之亦然。

3. 多个原告分别在不同国家起诉相同被告[13]。例如，当 A 和 B 船的船东同意在某国提起诉讼，货主在另一国起诉船东，B 船的遇难者家属在第三国起诉 A 船。

三、海事领域管辖权冲突的特性

海事领域的管辖权冲突频发。这与海事法和海事纠纷的特性相关。因此，适当了解这些特性有助于管辖权冲突的解决。

（一）船舶拟人化

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10 海事局可能在如海难救助、沉船强制打捞等案件中作为相关当事人。

11 Lawrence Collins, *Dicey and Morris on the Conflict of Law*, London: Stevens & Sons Limited, 1987, p. 395

12 Lawrence Collins, *Dicey and Morris on the Conflict of Law*, London: Stevens & Sons Limited, 1987, P. 395

13 Lawrence Collins, *Dicey and Morris on the Conflict of Law*, London: Stevens & Sons Limited, 1987, P. 395

船舶“拟人化”使得船舶拥有一般物所没有的某些特性，并使得船舶在诉讼中可以作为被告。[14] 由于船舶的可移动性，原告可以在船舶可以到达的任何地方提起诉讼，使管辖权冲突更容易出现。一般物是不能接受文书的，而船舶可以，即便船东可以被免除责任，船舶也应该在特定情况下被逮捕并承担法律责任。

船舶是财产权的客体，但在法律文件中通常被视作自然人或法人，即船舶的“拟人化”。这强调了船舶的法律性质并使船舶的地位从物上升为“人”。[15] 一艘船舶拥有与自然人相似的某些性质，例如，船舶拥有国籍、船名、船籍港、船龄、排水量，且其船龄从其下水之时起便开始计算直至失去航行能力。船舶拟人化改变了船舶的法律地位，使其不同于一般物。

（二）对物诉讼

船舶的法人资格主要反映在对物诉讼中。在盎格鲁 - 撒克逊法律体系中，船舶可以承担侵权责任和违约责任，因而可以成为对物诉讼中的一方当事人。例如，在美国的一些案例中，如：The Little Charles 案 [16]，The Palmyra 案 [17]，The Brig Malek Adhel 案 [18]，船舶在诉讼中被视为了一方当事人。

通常情况下，对物诉讼是从扣押财产（一般为船舶）开始，且扣押程序只被授权于执行船舶优先权 [19] 或其他法律另行许可的情况，因而对物诉讼并非对所有海事争议都适用。

（三）法院挑选和船舶扣押

对于国际诉讼中对审判地的争夺，被告处于一种非常不利的地位。挑选法院毫无疑问是仅由原告掌控的，因为除非由一方（一般为被告）提出否定性宣告救济，

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14 The Bold Buccleugh, 7 Moore, P. C. 267(1852). 其认为可以对碰撞损害的肇事船舶行使优先权，如果法院愿意推定船东是在碰撞发生后善意取得船舶且并不知情。

15 Hebert, The Origin and Nature of Maritime Liens, *Tul. L. Rev.*, Vol. 4, 1930, p. 381

16 The little Charles 案，26 Fed. Case. 979, Case No. 15,612 (C. C. D. Va. 1819). 在本案中，船舶未经船东同意并在其不知情的情况下被使用。法官写道：“但是这并非针对船东的诉讼，这仅仅为针对船舶的诉讼，这是船舶的违法，但仍然是违法，因而依然被没收。虽然事故是在没有获得授权并且违背船东意志的情况下造成的，而且的确非生命物不会违法，组成船只的木材、铁和帆也不会违法，但船是由受船长指挥的船员操控的，船舶通过船长来行动、说话和汇报。因此，船舶受该汇报的影响也不是毫无道理的。”

17 “The Palmyra” 25 U. S. (12 Wheat.) 1 (1827).

18 “The Brig Malek Adhel ” 43 U. S. (2 How.) 210 (1844).

19 “The Rock Island Bridge” 73 U. S. (6 Wall.) 213 (1867).

原告享有初始选择权[20]。与管辖权选择相关的地点主要包含法院所在地，营业地，船舶所在地，侵权行为发生地和船舶扣押地（包括姐妹船的扣押）。在所有相关地点中，实践中最常选取的是船舶扣押地，因为这一选择对原告有利，体现为以下三方面：首先，船舶扣押地是海事争议中普遍选取的管辖地，较其他管辖地，如：国籍或住所地，往往对原告更具灵活性。此外，将管辖地选在船舶扣押地，原告可就地获得相应赔偿。最后，被告对这一选择影响较小。在大多数案件中，管辖地必须与被告有重要关系，例如被告的住所地和营业地。但在涉及船舶扣押地的案件中，虽然船舶由被告拥有，但船舶始终在航行，因而扣押地在大程度上是由原告决定的。如上所述，如果被告为了逃避扣押故意隐藏船舶，其必定会遭受商业损失。因此，这一选择受原告的影响更大。而且，如今主要国家均准许扣押姐妹船或相关船舶[21]，使得被告更为被动。

（四）海事法院的管辖权更为广泛

在中国，海事法院管辖权比一般法院更广泛。例如，对于协议管辖，《中华人民共和国民事诉讼法》第 244 条规定，“因合同纠纷或涉及外国人的财产权纠纷提起诉讼的，可以书面协议选择在与争议有实际联系的地点的人民法院管辖”，根据《中华人民共和国海事诉讼特别程序法》第 8 条，“海事领域的协议管辖不要求纠纷与所选择海事法院有实际联系”。这项“特殊协议管辖”被视作对民事诉讼法的突破，并反映了海事法院管辖权扩张的趋势。另一个例子是与海上油类污染有关的纠纷。通常这种侵权纠纷适用侵权行为地法。然而，海事诉讼特别程序法在民事诉讼法已规定的因素之外增加了几个其他的关联因素。根据第 7 条，海上油类污染案件应当由采取海上油类污染预防措施的地方的海事法院管辖，即使污染并非实际上在中国海域发生。

四、海事争议中司法管辖权冲突的解决

在中国加入 WTO 之后，随着中国对外贸易的发展，涉及管辖权冲突的海事

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20 Andrew Bell, *Forum Shopping and Venue in Transnational Litigation*, London: Oxford University Press, 2003, p. 338

21 E F Sharp & Sons Ltd v. MV Nefeli 1984 (3) SA 325(C) 是经报道的第一例处理关联船扣押案。该案涉及了一起扣押 Nefeli 船载货物的对物诉讼。该船于巴拿马注册并由一家希腊公司所有。申请人的海事索赔是关于船载货物和一些其他被指控为关联船舶或姐妹船舶的船只。就针对 Nefeli 船舶的索赔而获得扣押命令是没有难度的。所有的船舶分属于不同国家，并且如 King A J 观察到的那样，这正是该部门所意图迎合的情况，即一系列的“一船”公司，均由相同的利益控制，但是之前由于其独立的法律人格，免除了对姐妹船的连带责任。

争议开始增加。然而，中国并没有用以解决国际平行诉讼的完整法律制度。解决国际平行诉讼问题将有利于维护法律的稳定性和国际民事诉讼的和谐。

（一）礼让原则

中国法律并没有涉及国际平行诉讼。然而，最高人民法院的相关司法解释和人民法院的实践已不断对这一理论给予认可。根据 1992 年发布的《最高人民法院关于适用〈中华人民共和国民事诉讼法〉若干问题的意见》第 306条规定，“中华人民共和国人民法院和外国法院都有管辖权的案件，一方当事人向外国法院起诉，而另一方当事人向中华人民共和国人民法院起诉的，人民法院可予受理。”最高人民法院的意见太过简单，无法用于解决平行诉讼问题。而且，该意见使用了“可以”而不是“应当”或“必须”等措辞，意味着人民法院可以受理亦可不受理涉及平行诉讼的案件。实践中，中国法院总是将涉外案件的管辖权视为国家主权的体现，并认为中国法院没有义务承认外国法院的司法判决。因此，中国法院很少坚持禁止在不同国家法院的一案多诉[22]。一个典型的例子是在天津土产进出口公司诉某比利时公司的诉讼案[23]，人民法院忽视了其判决在中国和比利时的执行难度[24]，因而在此案中，中国当事方只得到了一纸胜诉状。

当今中国的法律规定和司法实践经常过度强调国家主权原则，因此中国法院对拥有管辖权的案件均予受理，无视该案件是否已在其他国家提出诉讼，而且如果中国法院已对该案做出判决，往往就拒绝承认和执行外国法院的判决。这种做法有一个重要的缺点，就是过度重视国家主权而忽略了国际协作。这种做法受现今司法沙文主义的影响，无益于中国发展外交关系和国际商务贸易。总结中国法院对涉及平行诉讼的案件的审理实践，就会发现坚持国内法院管辖权的思想仍然普遍存在。

笔者认为，在处理待决案件时中国应当采用国际礼让原则。当今世界是国际经济合作和贸易发展的世界，所以各种各样的纠纷的出现自然是难以避免的。因而，如果一国法院在国际民事诉讼中总是争夺管辖权的话，特别是在不同国家的所有法院都有管辖权的情况下，将必然会导致不乐见的局面，甚至影响到该国的国际关系。总而言之，国际礼让应当成为一项不同国家法院处理国际民事诉讼中涉及管辖权争议的案件的基本原则。

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22 Xi Yaoming, Lis pendens in civil procedure, *Judicial Review*, Vol.6 2002, pp. 15~17.

23 林准编：《国际私法案例选编》，北京：法律出版社 1996 年版，第 64~68 页。

24 林准编：《国际私法案例选编》，北京：法律出版社 1996 年版，第 64~68 页。在本案中，被告向一个比利时法院申请原告给付货款。尽管如此，合同履行地的人民法院受理了起诉并随后做出审判。但表面上接受了管辖， 执行却是一个难题，由于被告在中国没有住所地和可扣押的财产，且被告已经在比利时的法院提起了相同的诉讼，该比利时法院也行使了管辖权。

（二）对等原则

国际礼让的实践需要联系到对等原则，同时与判决的承认和执行紧密相关。如果一个外国法院在某个平行诉讼案件中对中国持有不友好或甚至敌视的态度，例如当外国法院坚持受理同时在中国法院待决的案件，中国法院应当不只宣告其管辖权，而且也应在未来处理类似案件时对该国采取对等原则。

（三）有效管辖原则

所谓有效管辖原则，即中国法院仅坚持以下案件的管辖权：其对当事人及其财产拥有有效控制、判决可能在中国执行的案件，或一个有效判决可以被当事人申请的外国法院承认和执行的案件。这是因为如果一项中国法院做出的有效判决不能被执行，判决只等同于胜诉方的一张白纸。在这种情况中，放弃管辖权更为有利，否则将对法院的权威性有消极影响。这个原则与英美国家的有效原则（实际控制原则）不同。英国的有效原则是指只要传票可以在英国境内送达到当事人，一个英国法院即可受理该案件。然而，本文所指有效管辖原则强调判决的可执行性，其目的是限制中国法院对涉外案件的管辖权。

（四）有条件限制原则

所有禁止重复诉讼的国家都采用有条件禁止或限制禁止的原则。迄今为止，尚未有任何此类国家采用无条件（或无限制、完全的）禁止原则。因此，中国也应坚持有条件限制原则，以完善相关法规。换言之，中国应该遵守国际礼让原则，如：遵守国际条约、尊重国际习惯和国际公约，但必须建立在坚持国家主权的基础上。因此，中国应无条件地承认、但不应完全禁止平行诉讼。

（五）促进海事法律的国际统一

各国海洋立法的不统一是管辖地之所以至关重要的主要原因，也是对选择法院现象的合理解释。不同管辖法院的程序差异使得原告更趋向于选择某些法院，而不是其他法院；此外，由于国内法及其适用法规的相对不统一，选择不同的法院，运用到某特定案例中的实质性原则也会有所不同。由于大部分海事法律涉及技术和专业知识，因而海事法比其他领域更容易实现统一。即使国际公约有其局限性，它们仍然可以在一定程度上减少管辖权冲突。在海事领域，主要的任务是推进关于船舶扣押的国际立法，该方面立法的统一可能在一定程度上减少海事争议中的

管辖权冲突。

1952 年 5 月 10 日，《统一海船扣押某些规定的国际公约》在布鲁塞尔签订，签订或加入该公约的国家超过 63 个，其总目标是在国际层面统一规定通过司法程序扣押海船的权利，从而确保对船舶所有人的索赔。

现行公约是在 1999 年制定的。

五、结　论

除国内立法和国际协作外，再没有其他的方式可用来解决海事诉讼中的管辖权冲突问题，而国内层面的立法和司法实践是其主要解决方式。但如今，中国关于海事诉讼管辖权冲突的法律规定接近于零，亟待解决。笔者认为，普遍原则和只在海事领域存在的特殊原则可以解决这个问题。就普遍原则来说，中国应改正其过去过度强调国家主权而缺乏国际礼让的司法管辖权实践。同时，因为海事诉讼中的管辖权冲突具有其特殊性，应当用特殊方式解决。传统的“船舶拟人化”理论已经失去了其存在的依据，反而给新船东带来困扰，此外，该理论也成为了法院挑选的原因之一。因此，对该理论的摒弃将在一定程度上减少海事诉讼的管辖权争议。在国际层面统一海事立法是解决管辖权冲突的最好方式，但是鉴于其需要多国家协作，并不一定是最有效的方式。

（中译：郑蔚茗）

On the EU's Review of the Antitrust Exemption for Liner Conferences

XU Jun*

Abstract: This paper seeks to make legislative suggestions on the antitrust exemption for China's liner shipping industry through the introduction of the provisions in the Treaty on European Union on agreement-based monopoly and exemption and of the European Union's legislation on antitrust exemption for Liner Conferences. It also and through the analysis of European Commission's review of the Regulation No. 4056/86.

Key Words: EU; Liner Conferences; Review of the antitrust exemption

In 2003, the European Commission carried out a review of the antitrust exemption for Liner Conferences and released a White Paper in 2004. Although the final results of the review have not yet come out, the review constitutes a severe challenge to traditional understanding of Liner Conferences.

I. The Provisions of the Treaty on European Union on Agreement-based Monopoly and Exemption

Article 81 of the Treaty on European Union[1] is aimed at all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may restrict competition (hereinafter referred to collectively as the "Agreements"). Paragraph (1) of the foregoing Article 81 provides that the foregoing Agreements shall be prohibited, while Paragraph (3) thereof provides that exemption from the foregoing Agreements shall meet the following conditions (hereinafter referred to as the "four elements"):

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1 Namely, Article 85 of the original Treaty Establishing the European Community.

1. Contributing to improving the production or distribution of goods or to promoting technical or economic progress;

2. Allowing consumers a fair share of the resulting benefit;

3. Not imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

4. Not affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

II. The European Union's Legislation on the Antitrust Exemption for Liner Conferences

Taking account of the special nature of maritime transport services, in order to avoid excessive regulation of maritime transport, in 1986, the EC Council adopted Regulation No. 4056/86, granting Liner Conferences limited antitrust exemption, whose main contents include:

1. Scope of Application of Regulation 4056/86

Regulation No. 4056/86 shall apply only to international maritime liner shipping services from or to Community ports, other than tramp vessel services.

2. Scope of Antitrust Exemption

In accordance with the provisions in Regulation No. 4056/86, agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are hereby exempted from the prohibition in Article 81(1) of the Treaty, when they have as their objective the fixing of rates and conditions of carriage, and, as the case may be, one or more of the following objectives: (a) the coordination of shipping timetables, sailing dates or dates of calls; (b) the determination of the frequency of sailings or calls; (c) the coordination or allocation of sailings or calls among members of the conference; (d) the regulation of the carrying capacity offered by each member; (e) the allocation of cargo or revenue among members.

3. Conditions and Obligations of Antitrust Exemption for Liner Conferences

The exemption provided for shall be granted subject to the condition that the agreement, decision or concerted practice shall not, within the common market, cause detriment to certain ports, transport users or carriers by applying for the carriage of the same goods and in the area covered by the agreement, decision or concerted practice, rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge.

The obligations attached to the exemption shall include: (1) the shipper and Liner Conference shall negotiate on the rates, conditions and quality of liner services; (2) the shipper is entitled to arrange inland transport operations and quayside services at its own discretion; (3) the freight charge of the liner company shall be conveniently available for inquiry.

III. The European Commission's Review of Regulation No. 4056/86

A. Process

The European Commission began to review Regulation No. 4056/86[2] in March 2003. It was the first time the Regulation had been reviewed since it was released. The review focused on the legitimacy of the antitrust exemption granted by Regulation No. 4056/86 to Liner Conferences. The European Commission issued a questionnaire among the shipping industry and the relevant government departments and received 36 responses from liner companies, shippers, freight forwarders, the relevant government departments, etc. The questionnaire had 21 questions. On December 4, 2003, the European Commission held a hearing on the review of Regulation No. 4056/86. In October 2004, the European Commission issued the White Paper on the Review of Regulation No. 4056/86 (hereinafter "the White Paper").[3]

The "White Paper" claimed that in the past ten-plus years, independent carriers (i.e., the carriers out of the Liner Conferences) were playing an increasingly important role on most shipping routes in Europe. In addition, more and more carriers cooperated with each other through consortia and alliance (not involving fixed freight charge), and secret service contracts between carriers and shippers were also increasing substantially. The problem arising from these developments was whether or not the antitrust exemption granted by Regulation No. 4056/86 to Liner Conferences was still legitimate under Article 81(3) of the Treaty on the European Union. The White Paper concluded that there was no conclusive evidence

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2 Council Regulation (EEC) No 4056/86 of 22 December 1986, laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport.

3 White paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport.

proving that the antitrust exemption granted by Regulation No. 4056/86 to Liner Conferences was still legitimate in the current market environment and on the basis of the "four elements" stipulated under Article 81(3) of the Treaty. Therefore, the European Commission suggested considering abolition of the antitrust exemption granted by Regulation No. 4056/86 to Liner Conferences and further considering whether there are other alternatives.

B. Prospect

As a regulation on block exemption, Regulation No. 4056/86 was adopted by the previous European Community Council . Therefore, any modification to it shall be made by the Council of the European Union through legislation. The European Commission may provide related suggestions, but such suggestions shall be subject to the determination by the Council of the European Union. Therefore, it's very difficult to predict at present whether the antitrust exemption granted to Liner Conferences can survive in the EU in the end.

C. Significance

The European Commission's review against Liner Conferences illustrates that there is no "natural" industry which may enjoy the antitrust exemption, and that even the traditional liner shipping industry shall comply with the general competition rules ("four elements" in terms of the EU) in order to maintain the exemption.

For example, the European Commission Regulation No. 823/2000[4] specifying the antitrust exemption for liner shipping companies (consortia) may be valid for only five years and shall be terminated on April 25, 2005. The European Commission set a term for the antitrust exemption mainly for the purpose of reviewing the exemption regularly (once every five years) and ensuring that the block exemption granted by it may always comply with the "four elements". In 2004, the European Commission began a review of Regulation No. 823/2000, found that it complied with the "four elements" and agreed to continue to extend

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4 Commission Regulation (EC) No. 823/2000 of 19 April 2000, on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).

it. On April 20, 2005, the European Commission issued Regulation No. 611/2005, made slight modification to Regulation No. 823/2000 and extended the antitrust exemption for consortia to April 25, 2010. It is worth noting that no term has been set for Regulation No. 4056/86.

Agreements restricting competition are detrimental to competition "in nature". However, not all such agreements are bad because they can also bring about higher efficiency, reduced costs, improved quality of goods or services, occurrence of new products and new technologies, etc. In other words, when the positive economic benefits brought about by such agreements are greater than the negative impact of the restrictions on competition, we shall consider granting an exemption on such agreements. To review such exemption within a certain period will help protect the interests of consumers and avoid the abuse of the exemption. From this perspective, no matter what the final results of the review are, the EU's review of Regulation No. 4056/86 is of positive significance.

IV. China's Legislation on the Antitrust Exemption for the Liner Shipping Industry

Currently, China has no clear legislative provisions on the antitrust exemption for the liner shipping industry. However, after the Antitrust Law of the People's Republic of China is promulgated in the future, the relevant laws and regulations shall be formulated to grant the liner shipping industry the antitrust exemption expressly. Otherwise, China's legislation will conflict against the relevant legislation of China's trading partner countries (regions), such as the US, EU, Australia, etc. All of these countries (regions) have clear legislation granting the liner shipping industry the antitrust exemption. The foregoing legislative conflict (if any) will place the liner companies operating the shipping lines in China under a significantly asymmetrical legal environment. This will not be conducive to the stability of China's liner shipping industry and will have a significant impact on China's foreign trade.

Therefore, China's transportation authorities should, from now on, conduct extensive investigations on the current competitors of China's liner industry, including Liner Conferences, Consortia, Alliance, Discussion Agreements, etc., research into China's legislation on the competition and antitrust exemption in the liner industry from the scope of application, conditions and obligations and other aspects, expedite the relevant legislative process and have it keep pace with the

Antitrust Law of the People's Republic of China, and provide a fair and reasonable legal environment. This will help in regulating the competitive acts in China's shipping market effectively and to protect the healthy development of China's shipping market practically.

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Reflections on Relevant Legal Issues concerning Seabed Sunken Objects

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Abstract: From the perspective of legal determination, seabed sunken objects are neither ownerless objects nor the "common heritage of mankind". In principle, they shall belong to their owner or inheritor at the time of sinking. Nevertheless, those seabed sunken objects whose owner cannot be identified pursuant to certain procedures, with the exception of cultural relics and public property, shall be deemed ownerless since their sinking, and the preemption regime should be applicable. The Convention on the Protection of Underwater Cultural Heritage contains fair and reasonable provisions on the protection and management of underwater heritage, and for this reason, it is necessary for China to join this Convention. However, there are no provisions concerning the ownership of underwater cultural heritage under this Convention, and besides, certain problems also arise in the feasibility of the regime of protection and management for underwater cultural heritage.

Key Words: Seabed sunken objects; Ownerless objects; Underwater cultural heritage; Ownership

Seabed sunken objects are located at the bottom of the ocean, and the ocean is divided into a variety of parts with vastly different legal statuses, including the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, the high seas and the international seabed area etc. Hence, the legal disputes over seabed sunken objects are relatively complicated in terms of the legal attribute, the legal ownership and the protection and management thereof. As a matter of fact, people still have a vague understanding of many issues with regard to seabed sunken objects. It is because of its unclear legal status that many countries have had

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divergent understandings, which is very unfavorable for the protection of seabed sunken objects and particularly underwater cultural heritage. It is reasonable to say that several years ago when the mankind's technological level was limited, the destruction caused to seabed sunken objects (particularly underwater cultural heritage) was not that severe. Yet, along with the progress of modern science and technology, such destruction has been increasingly serious, and the protection of underwater cultural heritage has become an urgent issue that demands an immediate solution. China's legislations on international seabed sunken objects are relatively complete, but its academic research in this regard is practically inexistent with only few scholars engaging in in-depth discussions thereof. During the international law practices, the Chinese government has seldom used relevant international laws and domestic laws to safeguard its legitimate rights and interests as well. This paper attempts to preliminarily discuss the legal issues concerning seabed sunken objects, with a view to clarifying some issues, such as the legal attribute, the ownership and the management of seabed sunken objects to some extent; in this way, it intends to attract the attention of more people and encourage research in this aspect.

I. Legal Attribute of Seabed Sunken Objects

In order to appropriately settle the issues regarding the ownership and protection of seabed sunken objects, the legal attribute of such objects should be defined first. Currently, there is certain unscientific understanding with respect to the legal attribute of seabed sunken objects both in China and abroad, and hence a discussion is necessary.

A. Could Seabed Sunken Objects Be Considered Ownerless?

Many people believe that seabed sunken objects are ownerless; such a viewpoint needs to be thought over theoretically. First we need to define what an "ownerless object" is. Since the adoption of the Roman Law, an ownerless object has been defined as "a tradable object which does not belong to anybody in reality".[1] According to the Roman Law, there are five types of ownerless objects, i.e. an object that has never been owned, belongings of the enemy, heritage without

1 Pietro Bonfante, translated by Huang Feng, *Textbook of Roman Law,* Beijing: China University of Political Science and Law Publishing House, 1992, p. 185. (in Chinese)

an inheritor, derelict, and a buried object which is usually deemed an ownerless object.[2]

Apparently, seabed sunken objects do not belong to any of the five types of ownerless objects defined above. Then, will the lack of actual control on a long-term basis or the fact that ownership cannot be actually exercised for many years, constitute the reason for the owner's loss of ownership and the seabed sunken objects belonging to ownerless objects? First of all, ownership is a type of legal right of dominion, and the loss of actual control does not necessarily result in deprivation of ownership. Secondly, the owner's ownership of an object will not be denied just because he "cannot actually exercise such ownership for many years". For one thing, sunken objects are not occupied by anybody when they are sunken at the bottom of the sea, and hence there is no such issue as acquisitive prescription at all. Namely, no other person could have been able to acquire the ownership of seabed sunken objects in light of prescription. Furthermore, as regards the extinctive prescription, "when people do not exercise the right of claim continually through a legal period, its effect will be impaired"; it is an extinction of obligation.[3] "Prescription rules out the right of claim only."[4] It applies exclusively to the right of claim, and the maternal right itself which has generated the right of claim will not die out due to the expiration of the prescription. "The extinctive prescription does not apply to ownership".[5] Laws in Germany, Switzerland, Japan, etc. have also stipulated that ownership shall not be the object of extinctive prescription. It is visible that from the ancient Rome until the modern society, the object of extinctive prescription has been the creditor's rights, and extinctive prescription is not applicable to ownership. As a result, the fact that the owner has not exercised the ownership for a long time does not necessarily deprive him of the ownership. Additionally, what is noteworthy is that the reason why the owner has failed to exercise his rights to the sunken objects is not subjective but objective since he has

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2 Zhou Nan, *Original Theory of Roman Law (Volume One)*, Beijing: The Commercial Press, 1994, pp. 318~319 (in Chinese); see also Pietro Bonfante, translated by Huang Feng, *Textbook of Roman Law*, Beijing: China University of Political Science and Law Publishing House, 1992, pp. 199~200. (in Chinese)

3 Zhou Nan, *Original Theory of Roman Law (Volume One)*, Beijing: The Commercial Press, 1994, p. 918. (in Chinese)

4 Pietro Bonfante, translated by Huang Feng, *Textbook of Roman Law,* Beijing: China University of Political Science and Law Publishing House, 1992, p. 302. (in Chinese)

5 Dieter Medicus, translated by Shao Jiandong, *General Introduction to German Civil Law*, Beijing: Law Press China, 2001, p. 90. (in Chinese)

been rendered unable to exercise such rights, and he will exercise his rights as soon as the circumstances permit him to do so. As remarked by Bi Xiaopu, a consultant of the International Salvage Union: "There are abundant examples in which the owner exercises his ownership to the sunken objects after 100 years".[6] Thirdly, ownership is a sort of complete real right and real right of an indefinite period of time. It will not perish owing to the lapse of time. Besides, as a type of absolute right and *jus in rem*, it will not be deprived just because of spatial change. Once the owner acquires the ownership of a certain object, the existence of such ownership will not be affected just because the said object has been relocated.

B. Are Seabed Sunken Objects the "Common Heritage of Mankind"?

Some people argue that seabed sunken objects (particularly those located in the international seabed area (hereinafter "the Area")) are the "common heritage of mankind". The preamble of the United Nations Convention on the Law of the Sea states "*inter alia* that the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind," and Article 136 thereof further explicitly prescribes that, the "Area" and its resources are the common heritage of mankind. Accordingly, are seabed sunken objects located in the "Area" equivalent to resources in the Area and then constitute the common heritage of mankind? In this respect, Article 1 of the United Nations Convention on the Law of the Sea provides that the "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction; and Article 133 stipulates that "resources" refer to all solid, liquid or gaseous mineral resources *in situ* in the "Area" at or beneath the seabed. In other words, under the Law of the Sea, "resources" only include mineral resources. Seabed sunken objects are not mineral resources and thus they do not constitute the "common heritage of mankind" under the Law of the Sea. Therefore, from the perspective of positive law, seabed sunken objects are not the "common heritage of mankind".

Then based on legal principle, can seabed sunken objects constitute the "common heritage of mankind"? The answer is still negative. Resources

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6 Jon Henley, UN Shuts Lid on Sunken Treasure Chests New Convention Aims to Outlaw the Pillage of Ancient Shipwrecks and Drowned Civilizations, at http://www.common-dreams.org/headlines01/1103-03.html, 15 April 2004.

constituting the "common heritage of mankind" have to be, first, natural resources and gifts given to the human society by the natural world, second, resources indispensable to the survival and development of the human society, and third, resources beyond the scope of any private law ownership, State sovereignty or jurisdiction. If the above three conditions are not satisfied, no resource can become the "common heritage of mankind". The writer is of the view that "seabed sunken objects" are not natural resources and the existence of private law ownership cannot be excluded. Hence, the above-mentioned conditions are not met, and "seabed sunken objects" cannot be considered the "common heritage of mankind".

C. The Owner of Seabed Sunken Objects Does Not Necessarily Lose Ownership of These Objects

The Roman Law features relatively insufficient research on sunken objects and just roughly proposes that the nature of sunken objects is "similar to that of lost property",[7] and hence, regulations concerning lost property is usually applicable to sunken objects there under. With respect to lost property, it is generally stipulated in laws of various countries and regions that the finder is obliged to notify, keep custody of and return the lost property, while the man who has lost the property is obliged to pay back the expenses and pay compensation. If the man who has lost the property fails to assert his right within a certain limit of time, the finder shall acquire the ownership of the lost property.[8] Seabed sunken objects are objects sunken in the water independent of the owner's will. The owner usually has no subjective fault for its submergence. The ownership does not necessarily vanish along with the submergence of the objects, provided that the owner shall bear the burden of proof for his ownership. Of course, whether or not the owner exits and whether or not the owner is identifiable are theoretically two completely different matters.

II. Legal Ownership of Seabed Sunken Objects

The complexity of seabed sunken objects has resulted in the complexity of the

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7 Zhou Nan, *Original Theory of Roman Law (Volume One)*, Beijing: The Commercial Press, 1994, p. 319. (in Chinese)

8 E.g. the provisions of Articles 803~807 of Taiwan Civil Law.

legal ownership issue thereof. It is a principle that seabed sunken objects belong to their owner at the time of sinking. However, the principle cannot solve all problems arising in reality. The legal ownership issue of seabed sunken objects has to be classified and analyzed in a careful and detailed manner.

A. Ownerships of Seabed Sunken Objects with Identifiable Owner and with Unidentifiable Owner

As has been introduced above, the person asserting the ownership shall prove his ownership. Based on the possibility to identify the ownership as a standard, seabed sunken objects can be divided into two categories, i.e. those with identifiable owner and those with unidentifiable owner. Seabed sunken objects with "unidentifiable owner" include circumstances where the ownership of these objects are not claimed by anybody within the due time and circumstances in which said ownership is claimed and yet the claimant cannot provide effective proof within the due time.[9] If such division standard also applies to onshore objects, the significance of identifying the owner of seabed sunken objects is much more complicated considering the special condition thereof, i.e. being sunken for multiple years. Owner identification is the first and the most difficult challenge of right assertion.

Identification is an essential procedure. The principle of procedural justice ought to be strictly abided by, so as to guarantee that relevant owners are fairly treated. The writer holds that a citizen shall assert his rights within one year after the relevant country releases domestically the information regarding discovery or salvage of seabed sunken objects, but within 6 months after the seabed sunken objects have been recovered at the latest. As to whether or not the assertion is justified, the decision shall be made at the coastal States' meeting or the consultative meeting within half a year after the case is accepted.

As soon as the owner of seabed sunken objects is identified pursuant to the prescribed procedure, he can recover occupation and control of the objects and

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9 Making classification as per whether the owner of sunken objects can be identified is a very common practice. Such classification is embodied in Article 303 of the United Nations Convention on the Law of the Sea, Article 79 of the General Principles of the Civil Law of the People's Republic of China, Article 93 of the Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China and Article 2 of the Measures Governing the Participation of Foreign Firms in the Salvage of Sunken Ships and Objects in the Chinese Coastal Waters.

practically realize his ownership. However, the owner shall repay all expenses incurred by the salvor in the process of retrieving and keeping custody of such heritage and pay certain compensation thereto. The compensation shall be decided by both parties through consultation, but generally shall not be less than 30% of the value of the concerned sunken objects.[10] If the owner fails to repay the expenses or compensation, the salvor can retain an appropriate part of such heritage until the due sum is fully acquired. Nevertheless, the owner can also choose to give up his ownership of such heritage, in which case he does not need to repay the expenses and pay the compensation.

When the owner of seabed sunken objects cannot be identified in light of the stipulated procedure, it can be presumed that they are derelict, and the abandonment behavior shall take legal effect at the time the objects sank. Thereupon, seabed sunken objects will become ownerless objects and the preemption system shall apply and grant the ownership thereto to the preempting person. However, the salvor is not necessarily the preempting person. With respect to sunken objects located in the territorial sea, according to the doctrine of sovereignty preemption,[11] the preempting person thereof shall be a State.[12]

B. Ownerships of Seabed Sunken Objects Which Are Public Property and Property in Private Law at the Time of Sinking

10 This percentage is with reference to the provision of Articles 805 of Taiwan Civil Law.

11 "Sovereignty preemption" is a system under which a State itself automatically acquires the ownership of ownerless objects within its territorial limits. It is a special form of the preemption principle. Unless otherwise specially emphasized, the preemption mentioned herein shall refer to preemption in a common sense, i.e. private preemption.

12 Just as what is pointed out by international law scholar Liu Nanlai: "As long as the owner is identified, his benefit will generally be recognized. As to ownerless objects discovered within the territorial sea of a coastal State, the ownership shall be vested with the coastal State." See Luo Changping, Chinese Sunken Treasures Triggering International Disputes, at http://www.cars.net.cn/webnew/file/200308188095.html, 11 September 2004. (in Chinese)

Public property[13] and property in private law are two types of property of absolutely different natures. Public property refers to property for social public benefit which shall not be used for commercial activities. It constitutes *res extra commercium* in nature which cannot be owned privately or whose private ownership is inappropriate. In other words, neither preemptive acquisition nor prescription acquisition is applicable, as has been acknowledged by multiple States since the adoption of the Roman Law.[14] On the other hand, property in private law stands for property used for civil and commercial activities for the individual benefit of the owner. It is limited by the acquisitive prescription. If the occupant has held certain property in private law in an open, peaceful and independent manner for a certain period of time, the original owner will be deprived of his right to such property.

Seabed sunken objects comprising public property at the time of sinking shall belong to a State, on the precondition that the State owning such public property can be preliminarily determined. Since public property is not constrained by the preemption system and the acquisitive prescription in the civil law, the occupant shall not acquire ownership of seabed sunken objects deemed as public property regardless of the duration of the occupancy by the salvor. With respect to seabed sunken objects ascertained as public property whose possessing State cannot be identified, if they are located in the territorial sea of a certain State, it is presumed that the coastal State is the owner; if they are located in the contiguous zone, in the exclusive economic zone or on the continental shelf of a certain State, it is also assumed that the coastal State is the owner; however, if they are located in the high

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13 Here public property and publicly owned property are not exactly identical. Public property is defined in terms of the nature and direct purpose of the property while publicly owned property is defined in terms of the identity of the subject of right to the property. Publicly owned property mainly includes State-owned and collectively-owned property. Taking State-owned property as an example, it consists of State-owned property with operational profitability and State-owned property without operational profitability. By and large, only the latter constitutes public property, and the former constitutes property in private law instead. See Gao Fuping, *Original Theory of Real Right Law*, Beijing: China Legal Publishing House, 2001, p. 776. (in Chinese)

14 In the Roman Law, the provision of acquisitive prescription does not apply to objects belonging to the State, the State Treasury or the Emperor. See Pietro Bonfante, translated by Huang Feng, *Textbook of Roman Law*, Beijing: China University of Political Science and Law Publishing House, 1992, p. 222. (in Chinese); Zhou Nan, *Original Theory of Roman Law*, Beijing: The Commercial Press, 1994, p. 355 (in Chinese); Gao Fuping, *Original Theory of Real Right Law*, Beijing: China Legal Publishing House, 2001, p. 672. (in Chinese)

seas, then it is assumable that they are owned by the State of cultural origin thereof. A State having claimed that seabed sunken objects belong to its public property, it shall also bear the burden of proof in accordance with certain procedure; namely, besides proving that it is the owner of such seabed sunken objects, it also has to prove that such seabed sunken objects belong to its public property. As a highly rational organization, a State will find it easier than an individual to perform such liability but still, it is also obliged to repay the expenses of salvage and custody caused to the salvor and pay the corresponding compensation.

See the discussion in the following part for the ownership issue of property in private law with unidentifiable owner.

C. Ownerships of Seabed Sunken Objects Which Are Cultural Relics and Ordinary Objects When Recovered

Seabed sunken objects that became cultural relics are also known as underwater cultural heritage whose ownership is somewhat different from that of ordinary seabed sunken objects. The foremost challenging issue is to define what legal provisions shall apply as the standard to judge whether or not the sunken objects are cultural relics, followed by the issue of ownership of sunken objects once they have been affirmed to be cultural relics.

The writer maintains that whether seabed sunken objects located in the internal waters, archipelagic waters or territorial sea of a certain State constitute cultural relics shall be subject to the law of such coastal State. Moreover, regardless of whether those seabed sunken objects comprise cultural relics, and regardless of the objects' State of origin, so long as their owner cannot be identified within a certain limit of time, they shall belong to the coastal State.

On the other hand, with respect to whether or not seabed sunken objects located in the contiguous zone, in the exclusive economic zone or on the continental shelf of a certain State whose owner cannot be identified constitute cultural relics, the matter cannot be generalized about. In the event that the State of origin of the seabed sunken objects is a coastal State or it remains unidentified, whether or not they comprise cultural relics shall be subject to the law of such coastal State. If they constitute cultural relics, they are subject to its jurisdiction and ownership. If the State of origin of the seabed sunken objects is another State or other States, whether or not they comprise cultural relics shall be subject to the international treaty jointly participated by relevant States. In the absence of such

jointly participated international treaty, the concerned parties shall make a decision through consultation. If the parties unanimously agree through consultation that those objects are cultural relics, the management and ownership thereof must also be decided by the parties through consultation. However, if a consensus cannot be reached through consultation, the law of the coastal State shall prevail. With regard to sunken objects which do not constitute cultural relics, the preemption system will apply.

In respect of whether or not seabed sunken objects located in the high seas or the "Area", constitute cultural relics, they shall be protected, managed and approved for salvage by the State with actual relation therewith. Under such circumstance, provided that their owner cannot be identified as per the specified procedure, the preemption system must become applicable and the seabed sunken objects shall be owned by the preempting person.

The Regulations of the People's Republic of China concerning the Management of the Work for Protection of Underwater Cultural Relics enacted in 1989 prescribes that all the cultural relics of Chinese origin, or of unidentified origin, or of foreign origin that remain in the Chinese territorial waters as well the cultural relics that are of Chinese origin or of unidentified origin that remain in the contiguous zone, in the exclusive economic zone or on the continental shelf of China shall belong to China; with respect to the cultural relics that are of Chinese origin that remain in the contiguous zone, in the exclusive economic zone, or on the continental shelf of a foreign State and in the high seas, China shall have the right to identify the owners of the objects. Furthermore, the Measures Governing the Participation of Foreign Firms in the Salvage of Sunken Ships and Objects in the Chinese Coastal Waters promulgated by the State Council in 1992 also provide that any cultural relics found in the recovered sunken ships and objects or during the salvage operation shall be reported without delay to the local administrative department for cultural relics. The administrative department for cultural relics must then dispose of them in accordance with the laws and regulations of the People's Republic of China concerning cultural relics protection.

Accordingly, China has relatively complete and definite regulations on the

ownership of ownerless underwater cultural relics.[15] However, the ownership and jurisdiction of cultural relics of foreign origin that remain in the contiguous zone, in the exclusive economic zone or on the continental shelf of China are not provided in the regulations. With respect to the cultural relics of Chinese origin that remain in the high seas or in the contiguous zone, in the exclusive economic zone or on the continental shelf of a foreign State, it is merely stipulated that China shall have the right to identify the owners of the objects, which is far from being enough. As a coordinating State and according to the regulations of the Convention on the Protection of Underwater Cultural Heritage, China has the main responsibility, but not the ownership, to protect and manage all cultural relics of foreign origin that remain in the contiguous zone, in the exclusive economic zone or on the continental shelf of China. Nevertheless, the State of origin is also entitled to participate in the protection and management. Finally, with respect to the underwater cultural heritages to which China has verifiable link that are located in the contiguous zone, in the exclusive economic zone or on the continental shelf of a foreign State, China shall also have the right to participate in the consultation concerning the protection, management and ownership thereof. What is more, when underwater cultural relics of Chinese origin are located in the high seas, China can also take the lead in terms of the protection and management thereof. Said "right to identify the owners of the objects" can be interpreted as China's right to get involved in the management during the consulting process as a consulting State. The writer advises that at the time of revision, relevant regulations and measures must explicitly provide for rights enjoyed by China pursuant to the Convention, with reference to the regime regarding the consulting States and consultation conferences under the Convention.

D. Ownership of Seabed Sunken Objects That Are Located in the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone or on the Continental Shelf and in the High Seas

In accordance with the United Nations Convention on the Law of the Sea, the

15 This point has also been admitted by western scholars. They believe: "China's mechanism has been developed after carefully analyzing the actions taken by other countries, for which reason China is in a leading position in this aspect." Quoted from Kuen-chen FU, A Commentary on the 2001 Convention on the Protection of Underwater Cultural Heritage of the UNESCO, in Xiamen University Center for Oceans Law Studies ed., *Academic Conference Proceedings Commemorating the 20th Anniversary of Execution of the United Nations Convention on the Law of the Sea*, p. 158. (in Chinese)

territorial sea, the contiguous zone, the exclusive economic zone or the continental shelf of a State, the high seas and the "Area" have different legal statuses. Accordingly, the ownerships of seabed sunken objects located in different parts of the ocean are not the same.

The issue of ownership of special seabed sunken objects has been elaborated above. Then what about the ownership of ordinary seabed sunken objects? The writer proposes that pursuant to the prescribed procedure, with regard to ordinary seabed sunken objects with unidentified owner located in the internal waters, archipelagic waters or territorial sea of a certain State, regardless of the State of origin thereof, the sovereignty preemption system shall be applicable and the ownership thereof shall be vested with the coastal State as soon as they become sunken; when, on the other hand, they are located in the contiguous zone, the exclusive economic zone or on the continental shelf of a certain State, and their State of origin is the coastal State or an unidentified State, they shall be managed by the coastal State and, according with the preemption system applying, the salvor must own them as soon as the salvage is completed; however, if the State of origin thereof is another State or States, they shall be jointly managed by the coastal State and other States which have expressed an interest in being consulted and posses a verifiable link to the seabed sunken objects, in which case the preemption system shall also apply and the sunken objects shall be owned by the salvor as soon as the salvage is completed; when they are located in the high seas, they shall be solely managed by the State of origin; finally, in the event of other States having verifiable link to the sunken objects, a "coordinating State" shall be jointly selected by them for the management thereof as per the common decision. Under such circumstance, the "coordinating State" will usually be the State of origin. If the State of origin is unclear, a "coordinating State" shall be jointly selected by all the States which have verifiable link thereto for consultation over the management thereof. Whether or not the State of origin is definite, ordinary sunken objects located in the high seas constitute ownerless objects and the preemption system shall apply to them.

Article 15 of the Measures Governing the Participation of Foreign Firms in the Salvage of Sunken Ships and Objects in the Chinese Coastal Waters promulgated by the People's Republic of China in 1992 states: The ownership of the sunken ships and objects recovered within the territorial seas of the People's Republic of China resides in the People's Republic of China. The Chinese and foreign firms shall obtain their respective gains from the recovered objects or the sum evaluated in terms of money. With respect to the sunken ships and objects recovered within

the contiguous zone, the exclusive economic zone or the continental shelf of the People's Republic of China, the Chinese and foreign firms shall share the gains from the recovered objects or the sum evaluated in terms of money as per the proportion stipulated under the contract. For ordinary seabed sunken objects, such regulations are relatively scientific and reasonable and totally conform to the international law. It is true that the Measures have not provided for ownership of ordinary sunken objects with unidentified owner located in the high seas, which is understandable since it is not advisable for a domestic law to contain regulations in this respect. However, it is clear that the preemption system shall also be applicable and the ownership shall be attributed to the salvor.

E. Basis for a State to Assert Rights to Seabed Sunken Objects

When a State asserts rights in the name of seabed sunken objects' owner, it exists as the owner within the meaning of the private law. On the other hand, when a State claims ownership of ownerless sunken objects that remain in its sovereign areas such as internal waters, archipelagic waters and territorial sea, the basis of its claim is the sovereignty preemption principle.

If seabed sunken objects are located in the internal waters, archipelagic waters or territorial sea, or the contiguous zone, the exclusive economic zone or the continental shelf of a State, the basis of the State's right to the heritage's protection and management is the jurisdiction *ratione loci*.

When the to-be-identified owner of seabed sunken objects is a citizen of a State, the State has the right and obligation of assisting its citizen to recognize and exercise the ownership, which is decided and required by the State's jurisdiction *ratione personae*.

In the event that seabed sunken objects are located in the internal waters, archipelagic waters or territorial sea, in the contiguous zone, the exclusive economic zone or on the continental shelf of a foreign State, or the high seas and their owner cannot be identified, the State having been determined the State of origin of such seabed sunken objects shall be entitled to exercise the right of protection and management of such objects or participate in exercising such right until the new owner thereof appears. Such custody right originates from the State's jurisdiction *ratione materiae*. Jurisdiction *ratione materiae* is undoubtedly less superior to jurisdiction *ratione personae*, which in turn is less superior to jurisdiction *ratione loci*.

III. Protection and Management of Underwater Cultural Heritage Perceived under the Convention on the Protection of Underwater Cultural Heritage

Thanks to the technological progress, there is basically no underwater cultural heritage which is beyond the discovery or salvage range of human beings nowadays. As underwater cultural heritage itself represents or carries plenty of richness, international ocean treasure hunters have tremendous interest therein and their commercial development thereof has become increasingly frequent. In spite that approved commercial development itself is not against the international law, numerous treasure hunting companies have been engaged in predatory or destructive salvage of seabed heritage for their own benefit, thereby greatly damaging integrity of the underwater cultural heritage. Hence, the protection of underwater cultural heritage is not only of vital significance but also an increasingly pressing task. The Convention on the Protection of Underwater Cultural Heritage adopted by the 31st session of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2001 has made relatively detailed provisions on the protection and management of underwater cultural heritage. But unfortunately, the Convention has not taken effect so far.

The Convention defines "underwater cultural heritage" as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years." The Convention states that the preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage. Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation. The Convention states that States Parties shall take measures to prohibit the use of their territory under their exclusive jurisdiction or control in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention and that States Parties shall take all practical measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention. The Convention requires that States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage

illicitly exported and/or recovered, where recovery was contrary to this Convention. In the event of any violations under the Convention, each State Party shall impose severe sanctions and deprive offenders of the benefit deriving from their illegal activities. Each State Party shall seize underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention. The Convention also prescribes that States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention and that each State Party shall undertake to share information with other States Parties concerning underwater cultural heritage. Any dispute between two or more States Parties concerning the interpretation or application of this Convention shall be subject to negotiations in good faith or other peaceful means of settlement of their own choice, including mediation by UNESCO, arbitration, the International Tribunal for the Law of the Sea (ITLOS) and its Seabed Disputes Chamber and the International Court of Justice. This Convention shall enter into force three months after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession.

The most substantial provisions of the Convention are Articles 7 until 12, whose main contents are as follows:

1. Regulation and Authorization Right

Article 7 of the Convention stipulates that the States Parties have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea. No activity directed at underwater cultural heritage shall be engaged in without their express consent. Article 8 of the Convention states that States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone and may manage activities of transferring underwater cultural heritage out of their contiguous zone without their approval.

According to the regulations of Article 8, a coastal State shall also be subject to the provisions of Articles 9 and 10 when it comes to underwater cultural heritage within their contiguous zone. Judging from the two provisions, a coastal State is not entitled to independently regulate underwater cultural heritage located in its exclusive economic zone or on its continental shelf in principle but rather obliged to provide protection thereto.

2. Reporting and Notification Regime

Article 9 of the Convention makes provisions on the reporting and notification regime in respect of underwater cultural heritage located within the exclusive

economic zone or on the continental shelf. The Convention states that a coastal State is obliged to protect underwater cultural heritage located in its exclusive economic zone or on its continental shelf and hence a coastal State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it. If its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf of another State Party, the said State Party shall require its national or the master of the vessel to report such discovery or activity to it and that other State Party; alternatively, the said State Party shall require its national or the master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties. States Parties may choose either of the two reporting means. In any case, a State Party shall notify the Director-General of such discoveries or activities reported to it. The Director-General shall promptly make available to all States Parties any such information supplied by that State Party. Any State Party with verifiable link to the concerned underwater cultural heritage, particularly with cultural, historical or archaeological connection, may declare to another State Party in whose exclusive economic zone or on whose continental shelf such underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage.

According to the stipulations of Article 10, the coastal State Party shall consult all other States Parties which have declared an interest in consultation on how best to protect the underwater cultural heritage and coordinate such consultations as the "Coordinating State". Unless there is immediate danger to the underwater cultural heritage, the Coordinating State shall not be entitled to solely take measures or issue authorizations concerning the underwater cultural heritage; such a right shall be jointly enjoyed by the consulting States. The Coordinating State shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, and issue all necessary authorizations for such agreed measures, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures or issue those authorizations. However, a State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to independently prohibit or authorize any activity directed at such heritage to prevent

interference with its sovereign rights or jurisdiction. Even at ordinary times, the Coordinating State may independently conduct any necessary preliminary research on the underwater cultural heritage located in its exclusive economic zone or on its continental shelf and may issue all necessary authorizations therefore, provided that it shall promptly inform the Director-General of the results, who in turn will make such information promptly available to other States Parties. In coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not, in itself, constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.

Article 11 prescribes the reporting and notification regime of underwater cultural heritage located in the international seabed Area. States Parties have the responsibility to protect underwater cultural heritage located in the Area only. When a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, said State Party shall require its national, or the master of the vessel to report such discovery or activity to it. In the meantime, such State Party shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to it. The Director-General shall promptly make available to all States Parties any information supplied by that State Party. Any State Party may declare to the Director-General its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Said declaration shall be based on a verifiable link to the underwater cultural heritage concerned, paying particular regard to the preferential rights of States of cultural, historical or archaeological origin. According to the regulations of Article 12, the Director-General shall invite all States Parties which have declared an interest to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the "Coordinating State". Under this circumstance, the consulting States will normally select the State of origin of the underwater cultural heritage to serve as the "Coordinating State". The Director-General shall also invite the International Seabed Authority to participate in the consultations. No State shall be entitled to solely take measures or issue authorizations concerning the underwater cultural heritage located in the international seabed Area, unless there is immediate danger to the underwater cultural heritage; all consulting states shall

also jointly enjoy such right.. The Coordinating State must implement protection measures previously agreed by the consulting States, including the Coordinating State, and issue all necessary authorizations for such agreed measures unless the consulting States, including the Coordinating State, agree that another State Party shall implement those measures or issue those authorizations. The Coordinating State may independently conduct any necessary preliminary research on the underwater cultural heritage located in the international seabed Area and may issue all necessary authorizations therefore, provided that it shall promptly inform the Director-General of the results, who in turn shall make such information available to other States Parties. In coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.

It is also provided under the Convention that without the consent of the flag State, no State Party shall undertake or authorize activities directed at State vessels and aircraft sunken in the contiguous zone, the exclusive economic zone, on the continental shelf or in the international seabed Area. However, there is no provision under the Convention concerning whether or not the consent of the flag State is required when a coastal State Party undertakes or authorizes activities directed at State vessels and aircraft sunken in the archipelagic waters or the territorial sea. It is only prescribed that a State Party shall inform all flag States bound by the Convention of the discoveries of State vessels and aircraft with identifiable nationality and if possible, it should also inform other States with verifiable links, particularly with cultural, historical or archaeological links, to such State vessels and aircraft. The writer believes that with respect to activities directed at underwater heritage located in the archipelagic waters or territorial sea, the joint approval of the coastal State and the identifiable flag State shall be obtained in order to facilitate the establishment of a harmonious international community.

From the above provisions, it can be perceived that in respect of activities directed at underwater cultural heritage located in the internal waters, archipelagic waters or territorial sea of a State Party, the coastal State Party shall have the exclusive right of regulation and authorization; with regard to activities directed at underwater cultural heritage located in its contiguous zone, the coastal State shall be entitled to regulation and authorization on the basis of the Article 303 of

United Nations Convention on the Law of the Sea;[16] as regards activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the coastal State Party does not have the sole regulation right in principle but is entitled to independently take measures or issue authorizations only where the purpose is to prevent interference with its sovereignty or jurisdiction, there is immediate danger to the underwater cultural heritage, or preliminary research is conducted on the underwater cultural heritage, provided that such right of independent action is exclusive to the said coastal State Party or the Coordinating State; in connection with activities directed at underwater cultural heritage located in the international seabed Area, no State Party is entitled to independent regulation, and States Parties are only obliged to take measures to prevent immediate danger to the underwater cultural heritage if any. It is the Coordinating State's exclusive right to conduct preliminary research on the underwater heritage located in the international seabed Area. It is evident that the reporting and notification regime serves as the basis of the entire Convention.

It is thus clear that the stipulations under the Convention on the protection and management of underwater cultural heritage are relatively complete, strict, fair and reasonable; furthermore, they correctly handle the relationships among the State's jurisdiction *ratione loci, jurisdiction ratione personae and jurisdiction ratione materiae*, which embodies the tendency of coordination, cooperation and development of the international community. Yet, the Convention has avoided the fundamental issue of ownership of underwater cultural heritage, leaving out of consideration the issue of owner identification of underwater cultural heritage and the owner's rights. Under the circumstance that ownership is not defined, it is highly doubtful whether or not effective protection and management of property can be guaranteed. Determining the legal nature and ownership of underwater cultural heritage is currently a permanent cure of the disputes arising in the

16 Article 303 of the United Nations Convention on the Law of the Sea stipulates that: 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose. 2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.3.Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges. 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

international community and an effective measure of protection of underwater cultural heritage. The writer regards that such fundamental issue shall be explicitly stipulated in the Convention. Additionally, with reference to some other provisions of the Convention, such as the one that states that "particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin" in respect of the underwater cultural heritage located in the international seabed Area, the specific connotation and actual orientation of "the preferential rights" are not explicit enough. In consequence, the Convention is somewhat defective in terms of rationality and operability, and whether its purpose of protecting underwater cultural heritage can be optimally realized or not is still subject to the examination of time and practice. Naturally, since the Convention has not entered into effect so far, various States are currently just following the principle of jurisdiction *ratione loci* in practice, i.e. the coastal State exercises the protection obligation and the right of regulation and authorization regarding underwater cultural heritage located in its internal waters, archipelagic waters or territorial sea or in its contiguous zone, in its exclusive economic zone or on its continental shelf, and the salvage gains shall be finally proportionally shared by the coastal State and the salvor. On the other hand, the underwater cultural heritage located in the high seas is under no protection and management on the whole.[17]

Another important matter is the way the relationship between the protection and management and the development and exploitation is handled, and since the purpose of the Convention is to ensure and strengthen the protection of underwater cultural heritage, the Convention's prescriptions on the development and exploitation of underwater cultural heritage tend to be passive. In principle, underwater cultural heritage shall not be commercially exploited under the Convention. Any activities directed at underwater cultural heritage are protected by law only when they have been approved by the competent authority, are in total conformity with the Convention and ensure the maximum protection of underwater

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17 In May 1999, the British expert salvor Michael Hatcher discovered the Chinese "Tek Sing" shipwreck in the Indonesian waters and recovered it after having spent three months and nearly USD 3 million. There were approximately 1 million pieces of Chinese porcelains on the shipwreck, of which 650,000 pieces were broken by them and only 356,000 pieces remained. Those porcelains were sold for DEM 22.4 million (approximately over USD 11 million) at an auction in Germany in 2000. All the gains had been evenly shared between Michael Hatcher and the Indonesian Government. See Luo Changping, Chinese Sunken Treasures Triggering International Disputes, at http://www.cars.net.cn/webnew/file/200308188095.html, 11 September 2004. (in Chinese)

cultural heritage. The Convention states that responsible non-intrusive access to observe or document *in situ* underwater cultural heritage shall be encouraged to create public awareness, appreciation and protection of the heritage excepting when such access is incompatible with its protection and management. Consequently, some people, in particular the salvaging companies, will consider that the protection and management of underwater cultural heritage under the Convention is too rigid while the development and exploitation thereof is poorly regarded. In their view, rather than witnessing some sunken objects with great economic values slowly decay underwater, it is better to recover them as soon as possible to benefit the people.[18] Such a view is not without any sense.

IV. Conclusion

People have never attached importance to the legal research on seabed sunken objects. Even now, its theoretical significance and practical value have been recognized by only a tiny minority. The main interest of the writer is to promote research related to this matter so as to enable the practical circle to better handle issues concerning seabed sunken objects. In summary, the writer is of the opinion that since ownership is a sort of complete real right, real right of an indefinite period of time, absolute right and *jus in rem*, in essence, it will definitely not perish merely with the lapse of time or spatial change. Therefore, seabed sunken objects cannot directly become ownerless objects. In terms of international law and theory, seabed sunken objects do not constitute the "common heritage of mankind" either. In principle, seabed sunken objects shall belong to their owner at the time of sinking, provided that the owner shall prove his ownership and repay expenses and pay compensation to the salvor. Seabed sunken objects whose owner cannot be identified pursuant to the prescribed procedure shall be deemed derelict and ownerless from the moment they sank. The right of protection and management over seabed sunken objects shall be exercised by the State with verifiable link thereto as per the principle of jurisdiction *ratione loci* taking precedence of jurisdiction *ratione personae* and jurisdiction *ratione personae* taking precedence of jurisdiction *ratione materiae*. With the exception of the ownership of cultural relics, the preemption system shall generally apply to underwater sunken objects

18 Luo Changping, Chinese Sunken Treasures Triggering International Disputes, at http://www.cars.net.cn/webnew/file/200308188095.html, 11 September 2004. (in Chinese)

with unidentifiable owner and the ownership shall be vested with the preempting person.

When it comes to the relationship between the two aspects of seabed sunken objects, i.e. the protection and management and the development and exploitation, the writer holds that the salvage of seabed sunken objects with material and irreplaceable scientific, artistic and historical value shall be handled by the States very prudently for the benefit of mankind as a whole and with a sense of responsibility for human civilization. In this case, the concept of "protection foremost" shall be firmly established. If permanent preservation of the recovered cultural heritage cannot be guaranteed, salvage shall be strictly forbidden so as to ensure *in situ* protection of the underwater cultural heritage. As to other seabed sunken objects with considerable scientific, artistic and historical value, where preservation on a long-term basis of the recovered cultural heritage can be guaranteed, the salvage can be ratified; otherwise, the salvage shall be prohibited. Regarding seabed sunken objects featuring economic value, if their economic value will shrink along with the lapse of time, under the precondition that their value is not destroyed, the salvage, development and exploitation of seabed sunken objects shall occur as soon as possible, so that their functions to mankind can be maximized.

With respect to the settlement of disputes concerning underwater cultural heritage, the writer believes that in order to prevent disputes, the States can enter into prior bilateral or multilateral conventions regarding the protection, jurisdiction, ownership, etc. of underwater cultural heritage as the basis of dispute settlement for the future. As regards existing disputes, friendly settlement shall be sought. In the event of disputes arising in connection with the jurisdiction and management, the disputing parties shall consult first with each other in a friendly manner; in the event consultation fails, an application can be made with the UNESCO for mediation; if such mediation fails again, the dispute may be submitted to an international permanent court of arbitration, to the International Court of Justice, or the International Tribunal of the Law of the Sea. If there is any dispute relating to the ownership of underwater cultural heritage, the parties may make assertions with the competent authorities or courts of relevant States and, when applicable, with the conference of the consulting States.

In spite that China's regulations on seabed sunken objects have been very scientific and can be deemed advanced even globally, improvement is still required. For instance, there should be stipulations on the jurisdiction and ownership of

seabed sunken objects located in the high seas, the contiguous zone, the exclusive economic zone, or on the continental shelf of a foreign State, so as to expand the scope of protection and management of seabed sunken objects. In addition, China shall also make sufficient reference to reasonable provisions under the Convention on the Protection of Underwater Cultural Heritage, e.g. the reporting and notification regime, the regime of Coordinating State and the consultation conference, in order to strengthen the States' cooperation in the protection of the underwater cultural heritage and better achieve optimal protection of the underwater cultural heritage. Altogether, States with developed maritime trade history such as China have greater responsibility in protecting and managing underwater cultural heritage under the Convention. China shall join the Convention and facilitate its entry into effect as soon as possible. Before the Convention takes effect, China can also, in accordance with the international private law and general legal principles, skillfully utilize relevant States' laws and international laws to protect or participate in the protection of underwater cultural heritage in a more effective and appropriate manner, which will help to safeguard China's legitimate rights and interests as well as prevent illegal or inappropriate salvage of underwater cultural heritage, thereby strengthening protection of cultural heritage of mankind.

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Nature of the Principle of Common Heritage of Mankind

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Abstract: The common heritage of mankind principle has become a major principle under the United Nations Convention on the Law of the Sea (UNCLOS). However, when it comes to the nature of the concept of common heritage of mankind, there are many different views among scholars in the international academic community. After analyzing the emergence, evolution and connotation of the concept of common heritage of mankind, this paper explores the nature of the concept noting that, as a legal concept containing substantial contents and specific principles, it has acquired the status of international custom which all countries should comply with. Additionally, the paper also expounds the theoretical and practical significance of research and discourses on the nature of the concept of common heritage of mankind.

Key Words: United Nations Convention on the Law of the Sea; Common heritage of mankind; Legal nature

The common heritage of mankind principle has become a major principle under the UNCLOS, but the international academic community has not yet reached an agreement as to the nature of the concept of common heritage of mankind. The author believes that research and discourses on the nature of the concept of the same will help define its characteristics and legal consequences more coherently and contribute to all countries' understanding and better execution of the principle. Such researches will definitely help all countries, including China, properly exploit, utilize and manage the resources in the "Area" delimited based on the common heritage of mankind principle, and facilitate the sustainable and coordinated development of society and economy.

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I. The Process of Formation of the Concept of Common Heritage of Mankind

As the basis of the Area Regime of the 1982 UNCLOS, the formation process of the concept of common heritage of mankind comprises roughly four stages.

A. Initiation Stage-Proposing the Concept of Common Heritage of Mankind

In 1967, in the 22nd UN General Assembly, Arvid Pardo, Malta's ambassador to the United Nations, proposed the idea of the common heritage of mankind for the first time, marking the inception of the concept of common heritage of mankind upon the world stage. He argued that seabed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction, should be the common heritage of mankind. He also proposed that UN General Assembly should carry out researches on this issue. The 22nd UN General Assembly thus adopted his proposal and passed the Resolution No. 2340. According to this Resolution, General Assembly established an Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction (hereinafter "the Ad Hoc Committee on Peaceful Uses of the Seabed and the Ocean Floor") which comprised 35 member States.[1] Since then, the UN has made great efforts to complete this task.

B. Inception Stage -Institution of the Concept of Common Heritage of Mankind

After repeated deliberations and discussions by Committee on Peaceful Uses of the Seabed and the Ocean Floor, the 25th UN General Assembly (1970) passed the Resolution No. 2749: Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil. Thereof, beyond the Limits of National Jurisdiction

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1 In 1968, after deliberation of the report of the *Ad Hoc* Committee on Peaceful Uses of the Seabed and the Ocean Floor, the UN General Assembly passed the Resolution No. 2467 (on December 21, 1968), among which the Resolution No. 2467A decided to establish a Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, composed of 42 member States (the "Standing Committee on Peaceful Uses of the Seabed and the Ocean Floor", the Ad Hoc Committee on Peaceful Uses of the Seabed and the Ocean Floor was thus replaced).

(hereinafter "the Declaration of Principles"), which marked the institution of concept of common heritage of mankind as a legal principle. The Resolution was passed by 118 votes to 0, with 14 abstentions. The Declaration of Principles declares that the seabed and the ocean floor, the subsoil thereof as well as the resources thereof, beyond the limits of national jurisdiction, are the common heritage of mankind. It is thus clear that not only did the Declaration of Principles adopt the concept put forward by Dr. Pardo, but the international community also agreed to apply the concept to international seabed area (the Area).

C. Evolution Stage - Development of the Concept of Common Heritage of Mankind

The principles stated in the Declaration of Principles, and other principles implicit in the concept of common heritage of mankind, were subsequently quoted by UN bodies, different groups of countries and international organizations in their resolutions and declarations, which demonstrated the concept's development process. Such documents include Resolution of United Nations Conference on Trade and Development (UNCTAD) on the Development of Seabed Resources (1979), Declaration of Santo Domingo (1972), Resolution of Inter-American Juridical Committee of the Organization of American States on the Law of the Sea (1973), Fourth Summit Conference of the Non-Aligned Countries' Resolution concerning the Law of the Sea and Political Declaration relating to the Question of the Seabed (1973), etc.[2] The concept of common heritage of mankind was also

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2 On June 1, 1976, the UNCTAD passed the Resolution No. 108V - Resolution on the Development of Seabed Resources. In this resolution, it reaffirmed that "the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the Area, are the Common Heritage of Mankind". It is set out in the Declaration of Santo Domingo (1972) that in accordance with the Declaration passed by Resolution No.2749 of UN General Assembly, the seabed beyond the patrimonial sea or beyond the continental shelf uncovered by the patrimonial sea, and the resources thereof, are the Common Heritage of Mankind. It is set out in Art. 13 of the Resolution of Inter-American Juridical Committee of the Organization of American States on the Law of the Sea (1973) that the seabed and the ocean floor beyond the 200-miles zones and the continental shelf and the exploitable resources thereof are the Common Heritage of Mankind. In the Fourth Summit Conference of the Non-Aligned Countries' Resolution concerning the Law of the Sea and Political Declaration relating to the Question of the Seabed (1973), the heads of States or governments present reaffirmed that they agreed to the basic principles of the Declaration of Principles passed by UN General Assembly in 1970, in accordance with which the Area and ocean floor resources beyond the limits of national jurisdiction are the Common Heritage of Mankind.

confirmed in Article 11 of the Moon Treaty (1979) (Agreement Governing the Activities of States on the Moon and Other Celestial Bodies). Article 11(1) of the Moon Treaty states that the moon and other celestial bodies, and the resources thereof, are the common heritage of mankind. The concept of common heritage of mankind in the Declaration of Principles has thus been developed and applied by the international community in a wide range of situations and contexts.

D. Establishment Stage - Establishment of the Concept of Common Heritage of Mankind

The common heritage of mankind principle was finally established in the UNCLOS after 15-years (from 1967 to 1982) of fierce debates in the United Nations General Assembly. On the basis of this principle, the International Seabed Area Regime (or simply the "Area Regime") was established in the UNCLOS, which marked the establishment of the concept of common heritage of mankind as a binding legal principle with legal consequences.[3] For instance, Article 136 of UNCLOS sets out that "the Area and its resources are the common heritage of mankind". Without a doubt, UNCLOS has also enriched and expanded the connotation of the concept of common heritage of mankind.

II. Research on the Connotation of the Concept of Common Heritage of Mankind

The connotations of the concept of common heritage of mankind mainly involve the following aspects:

A. Legal Attributes

From the perspective of UNCLOS, we should acknowledge that common heritage of mankind is a legal concept rather than a political one. Its legal attributes include the following aspects: the subject of the concept is "all mankind", including modern humans and future humans; the object of the concept is property, which

3 The provisions related to the International Seabed Area Regime are mainly set out in Part XI, the Annex III (Basic Conditions of Prospecting, Exploration and Exploitation) and the Annex IV (Statute of the Enterprise) of the UNCLOS.

refers to the seabed and ocean floor and the subsoil thereof as well as the resources of the Area, which are beyond the limits of national jurisdiction;[4] and such property is jointly owned by all mankind with a special ownership. In other words, the property of the Area, including resources thereof and interests therefrom, should be jointly managed by the international community.[5]

B. General Elements

The concept of common heritage of mankind generally implies notions such as "no exclusive control", "common management", "common benefit", "peaceful use", and "reservation for future generations".[6]

C. Basic Principles

1. First, the principle of non-appropriation, which means that no state, natural person or legal person may own any part of the Area or its resources;

2. Second, the principle of observing the Charter of the United Nations, which means that any exploitation in the Area shall comply with the Charter's principles and purposes;

3. Third, the principle of common use and development, which means that the Area shall be used for the benefits of all mankind, especially for the development of the under privileged countries;

4. Fourth, the principle of peaceful use and reservation, which means that the Area shall be reserved exclusively for peaceful purposes;

5. Lastly, the principle of governing by an international body, which means that all exploiting activities in the Area shall be conducted under the common

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4 UNCLOS, Art. 1(1)(a).

5 For instance, Art. 137(2) of UNCLOS provides that all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act; Art. 157(1) provides that the Authority is the organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area, particularly with a view to administering the resources of the Area; Art. 140(2) provides that the Authority shall provide for the equitable sharing of financial and other economic benefits derived from activities in the Area through any appropriate mechanism, on a non-discriminatory basis, in accordance with relevant provisions.

6 Barbara Ellen Heim, Exploring the Last Frontiers for Mineral Resources, A Comparison of International Law Regarding the Deep Seabed, Outer Space, and Antarctica, *Vanderbilt Journal of Transnational Law*, Vol. 23, 1990, pp. 819, 827.

governing of an international body.[7]

Obviously, the basic principles above should be implemented consistently as a whole, and neither one may be over emphasized to the neglect of the other.

D. Main Contents

UNCLOS had enriched and expanded the concept of common heritage of mankind by encapsulating the above basic principles in the following nine aspects.

1. Scope and Nature of the Area and the Resources Thereof

There are explicit provisions in UNCLOS dealing with this aspect. Article 1(1), Subparagraph (a) sets out that Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. Article 136 sets out that the Area and its resources are the common heritage of mankind.

2. Prohibiting Appropriation of the Area and Its Resources

Article 137(1) of UNCLOS sets out that "no State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized."

3. Common Management

Article 137(2) of UNCLOS states that "all rights in the resources of the Area are vested in mankind as a whole, on whose behalf the International Seabed

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7 For instance, in his proposal to the UN General Assembly, Professor Pardo proposed that UN should draft a convention to declare that the seabed and ocean floor are Common Heritage of Mankind, which shall include the following principles, (1) no State may own in any way the seabed and ocean floor underlying high seas beyond the limits of present national jurisdiction; (2) any exploiting activities in the seabed and ocean floor underlying high seas beyond the limits of present national jurisdiction shall be carried out according to the principles and purposes of the Charter of the United Nations; (3) use and economic development of the seabed and ocean floor underlying high seas beyond the limits of present national jurisdiction shall be carried out for the purpose of protecting the interests of all mankind, and the net financial income therefrom shall be first used to promote the development of underprivileged countries; (4) the seabed and ocean floor underlying high seas beyond the limits of present national jurisdiction shall be reserved exclusively for peaceful purposes for ever. In the Memorandum, he also argued that the proposed convention shall establish an international body (a) governing the seabed and ocean floor beyond the limits of present national jurisdiction on behalf of all countries; (b) regulating, supervising and controlling all activities in the Area; and (c) ensuring that all activities in the Area comply with the principles and provisions of the proposed convention: See UN Doc. A/6695, 18 August 1967.

Authority shall act." Article 157(3) of UNCLOS states that "the Authority is based on the principle of the sovereign equality of all its members." And Article 159(1) of UNCLOS sets out that "the Assembly shall consist of all the members of the Authority."

4. Complying with the Rules of the Charter of the United Nations and Effectively Participating in the Activities in the Area

In Articles 140, 148, 138, 141 and 145 of UNCLOS, this aspect is clearly embodied. For instance, Article 138 sets out that the general conduct of States in relation to the Area shall be in accordance with the provisions of Part XI, the principles embodied in the Charter of the United Nations and other rules of international law; Article 148 sets out that the effective participation of developing States in activities in the Area shall be promoted as specifically provided for in Part XI, having due regard to their special interests and needs, and in particular to the special need of the land-locked and geographically disadvantaged States among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.

5. Serving Mankind as a Whole

Articles 151, 145, 155(2), 147, 143, 144 and 149 of UNCLOS highlight this aspect. For instance, Article 143(1) sets out that marine scientific research in the Area shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole, in accordance with Part XIII (Marine Science Research); Article 149 sets out that all objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

6. Freedom of the Seas Applies beyond the Area

According to Article 135 of UNCLOS, laws and principles applying to the waters superjacent to the Area or the air space above those waters, differ from those applying to the Area. In other words, in the Area, the common heritage of mankind principle shall be applicable and not "freedom of the seas".

7. Prohibiting any Amendment to the Common Heritage of Mankind Principle

For instance, Article 155(2) of UNCLOS provides that the Review Conference shall ensure the maintenance of the principle of the common heritage of mankind; under Article 311(6), States Parties agree that there shall be no amendments to

the basic principle relating to the common heritage of mankind and that they shall not be parties to any agreement in derogation thereof. The above provisions in UNCLOS are to prevent the deterioration of the legal foundation of regimes established in accordance with the concept of common heritage of mankind.

8. Distributing Non-living Resources of the Outer Continental Shelf

Article 82 of UNCLOS sets out that the coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles, and the payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of "equitable sharing criteria". The purpose of such provisions is to materially realize the concept of common heritage of mankind, i.e., to realize equitable sharing of benefits.

9. Settling Disputes in the Area

Not only does UNCLOS provide for the functions and powers of the Seabed Disputes Chamber, the body established specially for settling disputes in the Area, but also provides for the body's advisory jurisdiction and the validity of its advisory opinion. For instance, Article 159(10) of UNCLOS sets out that if the Assembly requests the Seabed Disputes Chamber to give an advisory opinion on a proposal before it on any matter, it shall defer voting on that proposal pending receipt of the advisory opinion by the Chamber; if the advisory opinion is not received before the final week of the session in which it is requested, the Assembly shall decide when it will meet to vote upon the deferred proposal.

E. Main Features

According to relevant provisions of UNCLOS, the main features of the concept of common heritage of mankind include common ownership, joint management, joint participation and common benefit. Obviously, this is a summarization of its contents, principles and attributes.

1. Common Ownership

The Area and its resources belong to all mankind and shall be used for the benefit of mankind as a whole; no State, natural person or legal person may unilaterally own, carve or exploit any part of the Area. See Articles 137(1), 137(2), 140, 143, 149 and 141 of UNCLOS. Such ownership, in the author's opinion, is of specificity. The specificity are reflected in the following aspects - each common proprietor enjoys equal rights, but no one may exercise such rights unilaterally; no

such rights may be exercised except with the approval of all mankind, namely the Authority's approval on behalf of mankind; if any country or group of countries carry out any action in respect of the common property without approval of the international community, it is a violation of international law.

2. Joint Management

All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall exercise such rights and manage such resources for the benefit and development of all mankind. See Articles 137(2), 157(1), 144, 145, 150(2), 151 and 155 of UNCLOS. The regime of common management is to establish the Authority through which all members participate in the joint management of the activities in the Area. The Authority shall control the activities in the Area and manage the resources therein.

3. Joint Participation

The Area is open to all States, the purpose of which is for the developing States and the Enterprise of the Authority to improve their technologies for exploiting the resources in the Area, and obtain more opportunities of training their technicians by equal participation in the activities in the Area, and so as to make progress. See Articles 141, 148 and 150 of UNCLOS. According to Article 170(1) of UNCLOS, the Enterprise is the organ of the Authority which shall carry out activities in the Area directly, as well as the transporting, processing and marketing of minerals recovered from the Area.

4. Common Benefit

As provided for in the Article 140 of UNCLOS, activities in the Area shall be carried out for the benefit of mankind as a whole, and all economic benefits therefrom shall be distributed among all States, taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations. This is the only way to achieve equitable sharing, common benefit and common development.

Of course, the above attributes of the concept of common heritage of mankind are interrelated. Common benefit is the purpose of common ownership; joint participation is the channel of common benefit; joint management is the method of common benefit; common ownership is the basis of joint management, joint participation and common benefit.

III. Analysis of the Nature of the Concept of Common Heritage of Mankind

As mentioned above, UNCLOS not only established the concept of common heritage of mankind but also enriched and expanded its connotations. However, the nature of the concept of common heritage of mankind remains a controversial topic in the international community. There are five main views on the nature of the concept of common heritage of mankind as follows:

1. General Principles of Law. Scholars holding this view classify the concept of common heritage of mankind as a general principle of law. Their representative is Schachter from America.

2. *Jus Cogens*. Some scholars from developing countries argue that the concept of common heritage of mankind is *jus cogens*. Their representatives are Anand from India, Paolilo from Uruguay, and Movchan from former Soviet Union. The purpose of holding this view is to prevent any State from exploiting the resources in the Area by concluding any agreement outside the governing of UNCLOS.

3. Political Character. Some scholars argue that common heritage of mankind is a political concept instead of a general legal concept. Their representatives include Larschan and Brennan from America, Brown and Schwarzenberger from Britain.

4. Philosophical Character. Some scholars argue that common heritage of mankind is just a philosophical concept. This is because the concept of common heritage of mankind lacks the definiteness required for a legal principle as well as the two elements of customary international law - State practice and legal conviction. The representatives are Joyner and Barkenbus from America.

5. International Custom. Some scholars from developing countries argue that common heritage of mankind is a concept of International Custom. They believe that the concept of common heritage of mankind was established in the Resolution No. 2749 (i.e. Resolution on "Declaration of Principles"), which was passed in UN General Assembly by 118 votes to 0, with 14 abstentions, and was repeatedly reaffirmed in the following UN General Assembly Resolutions and other declarations and resolutions of many groups of nations and international organizations. All of these obviously meet the criterion of an international custom.

In the author's opinion, all of the above perspectives have some truth in them, but they all have their inadequacies. Following are some comments on each of the

views.

1. General Principles of Law. Article 38(1) of the Statute of the International Court of Justice (1945) provides that the International Court of Justice may apply "general principles of law" in deciding disputes submitted to it, but there is no definition of "general principles of law", which results in differences of opinions among scholars. In fact, "general principles of law" are rarely a source of international law. The International Court of Justice (including its predecessor the Permanent Court of International Justice) has seldom made use of general principles in deciding disputes.[8] Meanwhile, considering the number of parties to the UNCLOS, the concept of common heritage of mankind has not become a general principle of law yet. There are currently 191 United Nations Member States out of which only 147 States ratified the UNCLOS, accounting for only 77% of the total membership. In other words, common heritage of mankind has not yet been accepted as a general principle of law by all the Member States of UN.

2. *Jus Cogens*. In accordance with Article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole. Considering the above mentioned difference between the number of Member States of UNCLOS and the number of UN Member States, common heritage of mankind has not yet been accepted by all the UN Member States and, thus, cannot form a peremptory norm of general international law at present.

3. Political Character. It should be noticed that in the 22nd UN General Assembly, Professor Pardo not only put forth the concept of common heritage of

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8 There are several major cases that were decided by applying general principles of law: (1) 1928 PCIJ's (Permanent Court of International Justice) judgment on the case of *Chorzow Factory* (on the substantial stage). PCIJ stated that "it is a general principle of law that any illegal act gives rise to obligations of reinstatement or compensation for the loss." (2) 1962 ICJ's judgment on the *Temple Case*. ICJ found that Thailand attempted to overturn the boundary documented on map on the ground of error, and overruled its claim by applying the principle of estoppel. (3) 1970 ICJ's judgment on the *Case concerning the Barcelona Traction, Light and Power Company, Limited* (on the second stage). ICJ stated that there were no relevant provisions dealing with the national rights in respect of a limited liability company or its directors in international laws; so, in dealing with such issues, reference to relevant provisions of national law is required (ICJ referred to the general concept of national law in respect of limited liability companies). See also Mayama Zen, General Principles of Law,in Nishii Masahiro ed., *Illustrated International Law*, Tokyo: Yuhikaku Publishers, 1998, pp.10~11 (in Chinese); Ian Brownley ed., translated by Zeng Lingliang and Yu Minyou, *Principles of International Law*, Beijing: Law Press China, 2003, pp. 13~14 (in Chinese); PCU. Ser. A, No. 9, p. 21; *ICJ Reports*, 1962, p. 32; *ICJ Reports*, 1970, pp. 33~34.

mankind, but also proposed the legal principles involved therein, such as 'peaceful use and reservation', 'serving mankind as a whole', 'common use and sharing', and 'governing by an international body'. Obviously, these principles are of a legal nature. In addition, UN always regards the issues with respect to international seabed area as legal issues. So, this view is not convincing. Obviously, the purpose of those holding the view of common heritage of mankind as a political concept is to bring the Area within a legal vacuum so as to develop and exploit the Area and its resources based on "freedom of the seas".

4. Philosophical Character. As mentioned above, the concept of common heritage of mankind is one of the legal concepts with rich contents and specific principles. It involves moral aspects according to which the benefit and needs of mankind in the future must be considered in making policies and setting out conditions with respect to activities in the Area. For instance, activities in the Area shall be carried out effectively, avoid unnecessary waste and should be within the Area's production capacity. These moral elements are obviously implicit in the concept of common heritage of mankind itself or derived therefrom. So, the common heritage of mankind concept involves some moral elements, but is not a philosophical concept in itself.

5. International Custom. As mentioned above, the common heritage of mankind principle derives from a Resolution of the UN General Assembly - the Declaration of Principles. To comment upon this view, we must analyze the legal nature of this Resolution. The legal nature of the common heritage of mankind principle depends on the legal nature of the Resolution from which it derives. In fact, those scholars from developing countries, who regard common heritage of mankind as international custom, put undue emphasis on the nature of the UN General Assembly Resolution and fail to comprehensively study the Resolution's specific form, contents and effects. The nature of UN General Assembly

Resolutions is still a controversy among theorists.[9]

In the author's opinion, the Declaration of Principles as a UN General Assembly Resolution is of a legal nature, for which reasons are listed as follows:

First, the Declaration of Principles was passed by a majority of the members voting in its favor. As mentioned above, the Declaration of Principles was passed by 118 votes to 0, with 14 abstentions. It shows that most nations agreed with it. In other words, most States are willing to be bound by it.

Second, the Declaration of Principles was widely respected. The principles therein were repeatedly quoted by UN bodies, other groups of nations and international organizations in their resolutions including Resolution of United Nations Conference on Trade and Development (UNCTAD) on the Development

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9 Generally speaking, UN General Assembly Resolutions are just proposals, without legal binding effect on member States. But the Resolutions are legally binding in the following cases. For instance, issues in respect of UN's organization and structure, budget, and internal rules. (See Art. 5, 6, 23(2), 61(2), 97, 17, 21 and 101(1) of the Charter.) In fact, since UN General Assembly Resolutions are unlimited in form and subject matter, some Resolutions directly promoted the establishment of some conventions. For instance, the Universal Declaration of Human Rights (1948) resulted in the formation of International Covenants on Human Rights (1966); the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (1963) led to the formation of the Outer Space Treaty (1967); the Declaration of Principles Governing the Seabed and the Ocean Floor (1970) led to the establishment of UNCLOS (1982). In addition, in order to settle this dispute on the legal nature of UN General Assembly Resolutions, the international community had made several theoretical attempts, putting forward theories like 'Instant Custom' and 'Soft Law'. (I) Instant Custom: This theory suggests that a UN General Assembly Resolution shall instantly turn into international custom upon approval as long as it has one element (subject element), namely that it indicates all states' legal conviction (belief). But in the case of the *North Sea Continental Shelf* cases (1969), the ICJ did not support this theory which suggests that Resolutions without objective element (national practice) may become international custom. The significance of this theory lies in the fact that it differed from the old 'formation model' of international custom and suggested that legal conviction exist prior to national practice; it changed the conventional model that national practice should be prior to or simultaneous with legal conviction. The theory of "Instant Custom" has significant implications for the emerging fields of international law, especially those fields in which the progress of science and technology is a premise for its resources exploitation and development, such as international seabed resources development, outer space resource exploitation, natural resources exploitation and use of the Antarctic area, and may promote the establishment of such area' legal status and resource development there. (II) Soft Law: This theory suggests that UN General Assembly Resolutions do not strictly provide for the member States' rights and obligations, but its regulations and contents may guide and regulate the activities of the member States. From this perspective, UN General Assembly Resolutions may be regarded as a kind of soft law between law and non-law. Since UN General Assembly Resolutions involves different contents and forms, and the Soft Law itself is not clearly defined, this theory cannot be sure of the nature of UN General Assembly Resolutions.

of Seabed Resources (1979), Declaration of Santo Domingo (1972), Resolution of Inter-American Juridical Committee of the Organization of American States on the Law of the Sea (1973), and Fourth Summit Conference of Non-Aligned Countries Resolution concerning the Law of the Sea and Political Declaration relating to the Question of the Seabed (1973), etc. Subsequently, these principles were not only quoted but also further developed in the Moon Treaty. Article 11(1) of the Moon Treaty states that the moon, and the resources thereof, are the common heritage of mankind as a whole. It is thus clear that the Declaration of Principles is widely respected in the international community.

Third, the Declaration of Principles has been observed and followed by most nations. This is reflected in the States Parties' abidance by the principle of common heritage of mankind. In 1994, many nations signed the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December10, 1982 (hereinafter "the Agreement of Implementation") which specially consolidated and developed the principle of common heritage of mankind.[10] Recently, both the US Commission on Ocean Policy and the Senate Foreign Relations Committee has suggested that the American Government should join UNCLOS, which indicates that, in time, the US will also abide by the regimes established by UNCLOS, including the Area regime.[11] It is thus clear that its regulating effects are expanding and widely accepted.

Meanwhile, in the author's opinion, Declaration of Principles also greatly contributed to the conversion of the concept of common heritage of mankind into a legal UNCLOS principle. Such effects of the Declaration mainly include:

First, Declaration of Principles affirmed the concept of common heritage of mankind. After the UN General Assembly passed the Declaration of Principles,

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10 It is set out in the preface of the Agreement of Implementation that the State Parties thereto reaffirmed that the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (hereinafter "the Area"), as well as the resources of the Area, are the common heritage of mankind.

11 In 2000, US Commission on Ocean Policy was established by Congress, the members of which were appointed by the President. The Commission's mandate was to present findings and give recommendations for a new and comprehensive national ocean policy. The Commission had suggested that the American Government accept UNCLOS. US Senate Foreign Relations Committee had held two hearings in 2003. After having studied and weighed America's concerns and interests, United States Senate Foreign Relations Committee also suggested that the American Government should approve UNCLOS to ensure US dominance in ocean affairs and its influence over international governing bodies and to protect its interests. US's entry into UNCLOS will definitely push forward the development of the UNCLOS regime and principles, including the Area regime.

the idea of common heritage of mankind was no longer an issue in the Committee on Peaceful Uses of the Seabed and the Ocean Floor and the Third United Nations Conference on the Law of the Sea. It is clear that the concept of common heritage of mankind as set forth in Declaration of Principles had been affirmed by the international community.

Second, Declaration of Principles established the status of the concept of common heritage of mankind. The Area regime established by UNCLOS adopted the principles outlined in the Declaration of Principles and also expanded its scope. The concept of common heritage of mankind thus obtained its status as a statute law and developed into a major principle of UNCLOS.

Third, the Declaration of Principles expanded the scope of the concept of common heritage of mankind. The Area regime was provided for in Part XI of UNCLOS. The provisions set out in Section 1 (General Provisions) and Section 2 (Principles Governing the Area) are the fundamentals of the Area regime, while Section 3 (Development of Resources of the Area) and Annexes III and IV set out the detailed provisions with respect to the principles established in the above two sections. However, UNCLOS is not just a repetition of the Declaration. It also complements, clarifies and widens the principles and contents of Declaration of Principles. This has been proved above.

To sum up, the Declaration of Principles is a Resolution of legal nature and surely has legal validity. Therefore, the concept of common heritage of mankind established by the Declaration is a legal concept that has now developed into a concept of international custom, which must be observed by all States. It should be noted that different ideas and irrational interpretations in respect of the common heritage of mankind principle were just advocated by a few scholars, mainly from US or Britain or those nations that have sufficient funds and superior technologies necessary for exploiting resources of the Area. They were seeking theoretical support for their plans of exploration and exploitation while avoiding fulfilling their legal obligations under UNCLOS.

IV. Significance of Research on the Nature of the Concept of Common Heritage of Mankind

A. Theoretical Significance

1. In Favor of our Comprehensive Understanding of the UNCLOS Regime and Principles

UNCLOS, as a convention regulating all issues of ocean in an all-round way, was formulated in 1982, which had amended, complemented and improved the old irrational marine legal regime. The purpose of UNCLOS is to establish a new international marine legal order with justice and fairness and establishing the Area regime on the basis of the common heritage of mankind principle is a major step towards realizing this goal. Surely, the research on this topic will help us to comprehend and understand UNCLOS principles and regime as a whole, and will provide us with theoretical guidance for our practices and for responding to the actions of some Western countries in dealing with ocean affairs not conforming to the contents of UNCLOS.

2. In Favor of Each Country's Understanding and Implementation of the Regulations Formulated by UNCLOS Organs

Many regulations related to the Area regime have been formulated by the Authority - an organ established by UNCLOS, such as Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (ISBA/6/A/18,"Regulations on Prospecting and Exploration") and Regulations on Prospecting and Exploration for Sulphides and Cobalt-rich Crusts in the Area (ISBA/10/C/WP. 1). These regulations appropriately embody the principles and regime under the UNCLOS (including UNCLOS and its Annexes) in details, and shall have binding force on all State Parties. The research on this topic may reveal the essence of common heritage of mankind and contribute to each country's understanding and better implementation of the regulations formulated by UNCLOS organs.

3. In Favor of the International Community's Understanding of the Illegal Nature of Activities outside the UNCLOS Mechanism

Joint participation, common benefit and common development of what is designated as common heritage of mankind, which constitute the basis of the Area regime, require that all nations' activities in the Area should be governed and controlled exclusively by the Authority. Any other agreement and arrangement with respect to activities in the Area outside the UNCLOS mechanism may not be able to realize the above purposes, settle the disputes related to activities in the Area or protect investors' exclusive rights to and interests in the resources of the Area. So, all other arrangements or agreements established on the basis of "freedom of the seas" shall be improper and illegal and shall be eliminated.

4. In Favor of International Community's Reference to and

Development of the Area Regime

As is known to all, the Area regime based on common heritage of mankind principle has already had positive effects on the activities in the outer space and in the Antarctic region., and relevant regulations have been considered or formulated based on the principle In the author's opinion, with increasingly deeper research on the legal nature of common heritage of mankind, international community will reference and develop the common heritage of mankind principle in still more diverse fields.[12] The application of the regime to these fields based on

12 Of course, to some extent it is difficult to completely apply the Area regime in outer space and the Antarctic region. There are significant differences between them. (1) The differences between the Area and outer space include, first, that the two kinds of regimes were formed in different ways. By negotiation and entering into treaties, the outer space law was formed and developed; common heritage of mankind as a concept in the Law of the Seas was established in UNCLOS after all concerning issues were submitted to the third United Nations Conference on the Law of the Sea for deliberation and a package deal was reached. Second, the two kinds of regimes involve different contents. Regulations in the Outer Space Treaty related to the concept of common heritage of mankind mainly include Art.1 (Free for Exploration and Use), Art.2 (No National Appropriation), Art. 3 (Observe International Law and the Charter of the United Nations) and Art.4 (Exclusively for Peaceful Purposes, No Military Use). These provisions reflect the elements and characteristics of the concept of common heritage of mankind, as well as its specific principles. But the Outer Space Treaty does not set out any provisions with respect to development of outer space resources (including regimes of international control and benefit distribution), which is a major defect compared to the UNCLOS regimes. It is set out, for the first time, in the Moon Treaty, that the concept of common heritage of mankind applies to outer space. The Moon Treaty also provides the purposes of the governing regimes of the outer space resources, such as Arts. 11(1), 5 and 7 of the Moon Treaty. These provisions, though, made progress compared to the Outer Space Treaty, the international regimes with respect to development of moon resources, the governing organs and guidelines of which will not be established until the development begins, which still lag behind compared to the UNCLOS. (2) The differences between the Area and the Antarctic region include, first, that they are different in prerequisites. In respect of the Antarctic region, some nations have made territorial claims in light of the "Theory of Sector". Although these claims are not recognized, the situations in the Antarctic area are after all different from those in the Area and Outer Space. Second, they have different legal regimes. The Antarctic Treaty applies to and governs the Antarctic area. The main provisions of Antarctic Treaty (1959) include Art. 1 (Exclusively for Peaceful Purposes, No Military Use), Art. 4 (Freezing territorial sovereignty and claims to the Antarctic area), Art. 5 (Prohibiting nuclear explosions or disposal of radioactive wastes in the Antarctic area), Art. 7 (Admitting any Treaty-state may alone inspect any area in the Antarctic area including equipments), and Art.9 (Consultative meetings among member nations and deciding solutions by common negotiation). However, there are no relevant regimes established for the Area. For instance, the Declaration of Principles affirms that there is an area of the seabed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined, recognizing that the existing legal regime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources. Therefore, it is not easy to apply the Area regime in the Antarctic region.

common heritage of mankind principle may promote world peace and all round development.

B. Practical Significance

1. In Favor of all States regarding the Area Regime as their Action Guidelines

As mentioned above, common heritage of mankind is a concept of international custom with binding force on each State. So, no doubt, it shall govern each State's activities in the Area. All States' practices since then indicate that the regime and principles of UNCLOS (including the Area regime) have been recognized and observed by them. Obviously, UNCLOS (including the Area regime) has been generally followed, consolidated and developed, and has become an authoritative document with respect to marine activities.

2. In Favor of Development of the Area Regime within the UNCLOS Mechanism

It is set out in Articles 82 and 76(8) that the coastal States shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines; and the coastal States shall accept the recommendations made by the Commission on the Limits of the Continental Shelf related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles from the baselines. Such provisions embody the principles of the Area regime that require international organizations to equally share resources in the Area. For this purpose, Russia and Brazil submitted to the Commission on the Limits of the Continental Shelf their applications for continental shelf delimitation beyond 200 nautical miles from the baselines respectively in January 2002 and May 2004. Activities within the UNCLOS mechanism have been following the Area regime.

3. In Favor of the Area Regime Having Positive Effects on Other Fields of International Laws

So far, in accordance with the relevant provisions of Regulations on

Prospecting and Exploration (such as Article 23),[13] the Authority has signed the Contracts on Prospecting and Exploration for Polymetallic Nodules in the Area with seven registered pioneer investors.[14] But commercial exploitation of the resources in the Area has not yet been substantially carried out due to the influences of international market prices of minerals and most countries' declining demands for minerals in their domestic markets, as well as the limits of the exploration area's topography, current speed, environmental impact assessment and the state of the technology and equipment. In the author's opinion, with the implementation and development of the Area regime within the UNCLOS mechanism, the Area regime will be referenced and applied more frequently in other fields of international law (such as outer space and the Antarctic region), which will promote the peace, stability, and development of the international community.

4. In Favor of Making a Great Progress in the Exploitation of International Seabed Area Resources and other Relevant Fields

Since the exploitation of the resources in the Area needs strong technical support, the implementation of the Area regime will significantly promote the development of international seabed resources exploitation and other relevant fields, especially of deepwater exploiting technology, equipment technology, environmental processing technology, marine technology, processing technology and transportation technology, and thus advance the institutional improvement with respect to marine resources development. When it comes to China, the research on the nature of the concept of common heritage of mankind has a still greater practical significance in respect of the implementation of the strategic policy of the Party Central Committee and State Council on developing marine resources, ensuring resources supply for the sustainable development of economy and society,

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13 Such as the Regulation 23(1) of Regulations on Prospecting and Exploration which sets out that after a plan of work for exploration has been approved by the Council, it shall be prepared in the form of a contract between the Authority and the applicant as prescribed in Annex 3 to these Regulations; Regulation 23(2) sets out that the contract shall be signed by the Secretary-General on behalf of the Authority and by the applicant.

14 The seven registered pioneer investors in the international ocean floor resources exploitation include, India's National Institute of Oceanography (NIO), Association Francaised' Etude et de Recherche des Nodules Oceaniques (AFERNOD), Japan Deep Ocean Resources Development Company (DORD), Russia's Southern Scientific & Production Association for Marine Geological Operations (YUZHMORGEOLOGIYA), China Ocean Mineral Resources Research and Development Association (COMRA), Korea Ocean Research and Development Institute (KORDI), and the International Ocean Metal Joint Organization (IOM).

and the great rejuvenation of the Chinese nation.

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The Relationship between Concept of Sustainable Development and Law concerning the Sea

MEI Hong *

Abstract: The law concerning the sea (hereinafter "sea law") is a general term of the legal norm that governs all kinds of activities that people conduct in all areas of the sea, as well as the social relations derived from these activities. Though the concept of the sea law has not been well accepted among Chinese domestic scholars, it is necessary, from the view of the concept of sustainable development, to integrate and systemize the law and regulations relating to the ocean and admiralty in order to update the legislative guiding ideology and basic principles, as well as to set overall legislative purposes, and to offer a legislative guarantee for the sustainable use of marine environment and resources. Furthermore, the sea law is expected to give priority to the methodology and the mechanisms of regulation through ecologicalization employed in the marine environment and resource law, as well as to take as auxiliary means other laws and regulations in this departmental law that govern all social relations concerning the use of marine environment and resources. It would be beneficial to change the current scattered situation of the laws and regulations concerning the sea and the status quo of singular, severable, disordered and contradictory means, in order to construct a mechanism of a legal regulation of the sea law that governs the relationship between human beings and the ocean in a comprehensive manner.

Key Words: Concept of sustainable development; Era of environment; Law concerning the sea

I. The Concept and the Scope of the "Sea Law"

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The law of our ancestors was mainly focused on the "land-based law" that governed land-based activities. As a result, the accumulation and conclusion of land-based activities was inevitably reflected in a considerable number of rules with regard to activities at sea.[1] The diversity, comprehension and complexity of the activities at sea determined that the "land-based law" was incapable to govern all types of activities at sea. With the development of science and technology, and the improvement of the standards of social and economic life, more and more people have actively started to join in the exploitation, use, study, and protection of the ocean and other ocean-based activities. At the same time, there has been a dramatic rise of acknowledgement and attention of the ocean among people. It is beneficial to engage in sea-based activities through the improvement and the enrichment of the laws and regulations concerning the sea, the integration of the sea law in accordance with scientific concepts and ideas, and through the establishment of a departmental law concerning the sea. Academic discussions on this view are also quite valuable.

The so-called "sea law", is a general term of the legal norm that governs all kinds of activities that people conduct within the sea as well as the social relations derived from these activities. It covers a wide range of areas. As international law at sea, it contains the legal norms that regulate the legal status of all sea areas; as administrative law at sea, it contains the norms that regulate the management of the port-by-port administrative authorities; as private law at sea, it contains the legal norms that govern personal and property relations in the sea between subject on an equal footing. On one hand, the sea law governs the static legal relations between States derived from the establishment of sovereignty of States over certain areas of the sea, such as territorial seas and internal waters. On the other hand, it governs the dynamic legal relations among States, legal persons, other organizations and natural persons derived from certain activities, such as exploitation of resources, scientific research, environmental protection, navigation, and trade. There is a considerable amount of issues that have risen up in these relations that cannot be resolved by one departmental law alone or by several departmental laws jointly. As a result, the remaining issues are required to be resolved by new breakthroughs in the traditional legal areas in order to fit into the variable objective situation.

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1 Zhang Yongjian, The Outline Study on the Features of Law of Admiralty - with a Brief Discussion on the System of Law of Admiralty, *Study on Law of Admiralty*, No. 1, 2003. (in Chinese).

The comprehensive development of laws and the regulations relating to the ocean, as well as the reciprocity influence among them inevitably bring the sea law into being. Laws and regulations relating to the ocean are scattered among other departmental laws. Specifically, the international law at sea is categorized as international law; the administrative law at sea is categorized as administrative law; the maritime law is categorized as one of the special laws in civil and commercial law. These laws and regulations stand out distinctly in other departmental laws with their particularities and independence. In this regard, they are deemed to be special instances or special laws in the corresponding departmental laws. As for problems occurred in maritime activities, the situation is either that the conflict arises among several departmental laws, all having regulations over the same issue, or a "vacuum" occurs when no departmental law has regulations over it. The existing laws and regulations hardly result in the legal effectiveness that fits into the reality since legislators are not well versed in, or familiar with the particularity and the technicality of maritime activities. The actual demands of the development of maritime activities cannot be met with the situation as it is currently. It is necessary to establish the departmental law concerning the sea highlighting its professional capacity and the particularities of the maritime activities, considering the increasing diversity and complexity of the social relations that the sea law governs, given the constant enhancement of internal integrity of the laws and regulations relating to the ocean.

The international relations, administrative relations, civil and commercial relations, and the criminal relations derived from the sea interlace, interact and influence one another, with a trend of increasing diversity and complexity, which constitute an integrated system of objects that the sea law governs. Those social relations governed by the sea law derive from the human interaction with the ocean. By co-existing in the same space, the ocean has given some certain features to these social relations. Accordingly, the objects that the sea law governs as a system have common ground with such features.

The sea law can be categorized into public sea law and private sea law according to the objects it governs. The public sea law is a general term of the legal norms that govern the maritime social relations among States, natural persons, legal persons, and other social organizations. It mainly consists of the maritime

transportation administrative law[2], the sea use management law, the marine environmental protection law, the marine resource protection law, and other public laws relating to the ocean. The private sea law is a general term of the legal norms that govern the maritime social relations between private individuals, including the maritime law and the maritime international private law as the main sources.

Generally speaking, the legal effects of the legal norm of the sea law are divided into five levels. The first level contains fundamental provisions concerning the declaration of marine territory, the marine rights and interests, the reasonable exploitation of marine resources, the effective protection of marine environment, and other fundamental provisions in constitution. The second level concerns marine basic laws intended to maintain the sovereignty of the State and its maritime rights and interests, such as the Law of the People's Republic of China on the Territorial Seas and the Contiguous Zones, and the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf. The third level relates to special regulations on the exploitation and use of the ocean, the protection of marine resources, and the comprehensive management law of maritime resources, the sea use management law and of the marine environmental protection law. The fourth level consists of administrative regulations and ordinances of the Department of State Council with regard to the management of the ocean and maritime management. The fifth level refers to local regulations and ordinances formulated in accordance with the local needs. Though China has issued approximately thirty

2 The maritime transportation administrative law is a general term of the legal norm that governs administrative management relations of maritime transportation derived from exercising administrative power by administrative authorities of maritime transportation.

laws and regulations relating to the ocean,[3] the achievements of the legislations are far from enough to meet the demands of the actual needs of maritime economic development. As a result, China needs to make more laws and regulations concerning the sea and improve the legislative work in this regard.

The author believes that the integration of all laws and regulations relating to the ocean and the establishment of a departmental law concerning the sea are some of the top priorities within the legal construction relating to the sea law. Over the years, China has successively issued the Marine Environmental Protection Law of the People's Republic of China, the Maritime Traffic Safety Law of the People's Republic of China, the Fisheries Law of the People's Republic of China, the

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3 So far, China has issued the following laws and regulations relating to the ocean: 1. The Statement on the Territorial Sea of the People's Republic of China; 2. The Decision of the Standing Committee of the National People's Congress on Approving the United Nations Convention on the Law of the Sea; 3. The Law of the People's Republic of China on the Territorial Seas and the Contiguous Zones; 4. The Statement on the Baselines of Territorial Sea of the People's Republic of China; 5. The Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf; 6. The Marine Environmental Protection Law of the People's Republic of China; 7. The Maritime Traffic Safety Law of the People's Republic of China; 8. The Fisheries Law of the People's Republic of China; 9. The Mineral Resources Law of the People's Republic of China; 10. The Law of Surveying and Mapping of the People's Republic of China; 11. The Regulations on Foreign Vessels Management of the People's Republic of China; 12. The Ordinance on the Management of Foreign-related Marine Scientific Survey and Research of the People's Republic of China; 13. The Ordinance on Management of Foreign Businessmen Participation in Salvaging Sunken Ships and Objects in China's Coastal Waters of the People's Republic of China; 14. The Rules of Management of Foreign Non-Military Ships Passing through Qiongzhou Strait; 15. The Ordinance on Inspection of International Navigation Ship Entry into the Ports of the People's Republic of China; 16. The Regulation on Sino-Foreign Cooperative Exploitation of Maritime Oil Resource of the People's Republic of China; 17. The Ordinance on Management of Laying Submarine Cables and Pipelines of the People's Republic of China; 18. The Ordinance of the People's Republic of China on Environmental Protection in Exploration and Exploitation of Marine Oil; 19. The Ordinance of the People's Republic of China on Prevention of Pollution by Vessels in Sea Waters; 20. The Ordinance of the People's Republic of China on Management of Ocean Dumping; 21. The Ordinance of the People's Republic of China on Prevention and Control of Pollution Damages to the Marine Environment by Coastal Engineering Construction Projects; 22. The Ordinance of the People's Republic of China on Prevention of Pollution Damage to the Marine Environment by Land-based Pollutants; 23. The Ordinance of the People's Republic of China on Prevention of Marine Environment Pollution from Ship Recycling; 24. The Ordinance of the People's Republic of China on Investigation of Traffic Accidents at Sea; 25. The Ordinance of the People's Republic of China on Inspection of Ships and Facilities at Sea; 26. The Regulations of the People's Republic of China of Management on the Navigation Warning and Notice; 27. The Rules for the Implementation of the Fisheries Law of the People's Republic of China; 28. The Ordinance of the People's Republic of China on the Protection of Underwater Cultural Heritage; 29. The Implementation Rules for Law of the People's Republic of China on the Protection of Aquatic and Wild Animals.

Mineral Resources Law of the People's Republic of China, the Law of the People's Republic of China on the Territorial Seas and the Contiguous Zones, and other laws of the sea and laws concerning the management of the ocean. The Department of State Council also promulgated a couple of administrative regulations, such as the Regulation on Sino-Foreign Cooperative Exploitation of Maritime Oil Resource, the Ordinance on the Management of Foreign-related Marine Scientific Survey and Research, the Ordinance on Management of Laying Submarine Cables and Pipelines and the Ordinance on Management of Regional Registration of Exploration of Mineral Resources. However, a fundamental law relating to the management of the ocean is still absent in the current system of the sea law. At the same time, laws and regulations as listed above have problems of non-conformance with the legislative ideas and the urgent need of improvement of the norm design.

It is noted that the in the academia, different terms are employed to describe the general concept that contains the laws and regulations as stated above. Some scholars use the term "legal system of the ocean";[4] some others label it as "admiralty law";[5] some scholars also claim to use the "sea law" to define these laws and regulations.[6] Scholars dedicated to the research on the environment and resource law reinforce the construction of the "legal system of marine environment and resources",[7] also known as the "legal system of marine resources",[8] or the "legal system of marine resource protection"[9] of China. The author believes that the concepts listed above clearly have different connotations. The "sea law" is the only appropriate term that can be adopted to describe the general term of the legal norms that govern all kinds of social relations relating to the ocean. The

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4 Yao Hui'e, Analysis on the Improvement of the Legal Construction of the Ocean in China towards the New Century, *Symposium on Annual Meeting of Research Committee of Environment and Resource Law of China Law Society*, 2003, pp. 507~511. (in Chinese)

5 Si Yuzhuo, *Research on the Legislative Trend of International Admiralty and the Solutions*, Beijing: Law Press China, 2002. (in Chinese)

6 Si Yuzhou, Hu Zhengliang and Cao Chong, Analysis on the Independent Subject System of the law Concerning the Sea, *Maritime Education Research*, No. 1, 1997. (in Chinese).

7 Cai Shouqiu and He Weidong, *Contemporary Law of Marine Environment and Resources*, Beijing: China Coal Industry Publishing House, 2001, pp. 14~17. (in Chinese)

8 Li Zheng, Legislative Considerations on a Couple of Issues Concerning the Sustainable Development of Marine Resources, at http://www.riel.whu.edu.cn/show.asp?ID=737, 20 September 2005. (in Chinese)

9 Zhao Yingjie and Liu Naizhong, Research on Measures of the Use of Marine Resources in a Sustainable Manner and Its Legislative Guarantee, *Symposium on Annual Meeting of Research Committee of Environment and Resource Law of China Law Society*, 2003, pp. 527~530. (in Chinese)

term "the legal system of the ocean" or "the system of the law of the ocean" has an explicit meaning. However, in a narrow sense, it merely refers to the "international law of the sea", while in a broad sense, it covers the scope of the "public sea law" at most but not including the legal norms of private law nature. Those who engage in legislation or enforcement of the law concerning the ocean often use the term "legal construction of the ocean". It stands out the features of the industry, which is beyond reproach. However, since we are living in the "era of environment",[10] it is not enough to merely focus on the legal construction of the ocean when embarking on a program of legal reform at an appropriate time in order to realize the sustainable use of marine resources and the well development of marine ecology. Using the term "admiralty law" leaves the impression of an unclear concept and non-strict definition since the word "admiralty" is vague.[11] The "admiralty law", in a broad sense, not only contains the provisions regarding maritime transport, maritime insurance, salvage, ship collision, and other matters within the scope of maritime law, but also covers all laws and regulations relating to the ocean, such as the port law, the waterway law, the crew law, the vessel law, the shipping management law, and the admiralty justice. However, the Admiralty Law, generally speaking, does not include the international law of the sea, the marine environmental protection law, sea use management law as well as the administrative regulations concerning the ocean. Consequently, it has a narrower scope than that of the "sea law".

Against the background of concentrating on the protection of environment and resources, further innovation of a series of basic regimes in accordance with the strategy of sustainable development have been highlighted in the constructions of the "sea law" to constitute the framework of marine environment and resource

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10 For "era of environment" as well as other similar terms, see treatises on environment and resource laws. Some scholars interpret it as the "era of environmental civilization", see Chen Quansheng & Zhang Zitai, *Ecologicalization of the Constitution and Administrative Law*, Beijing: Law Press China, 2001; some scholars also name it as the "era of environmental crisis", see Xu Xiangmin, Some Questions on "Citizen Right of Environment", *Jurisprudence of China*, No. 2, 2004. (in Chinese). This Article mainly analyzes the theoretical implications of the concept of sustainable development for the sea law in the 21th century, that is to say, focusing on the current situation and future development. As a result, the term "era of environment" and "the 21th century" can be replaced in turn or mentioned at the same time in this article.

11 The term "admiralty" is used in various occasions in China. It has a broad and a narrow meaning. In a narrow view, the "admiralty" merely refers to "accident on the sea" or "peril of the sea". In a broad view, it refers to maritime or marine affairs, including all affairs relating to navigation at seas.

law, in order to achieve the sustainable use of marine environment and resources. But the marine environment and resource law is only a part of the "sea law".[12] The author believes, it is necessary to have an overall and systematic adjustment and reformation of the current sea law in order to update the guiding ideology of the sea law of China, and to create the system of the sea law, in order to go with the trend of the concept of sustainable development, as well as to satisfy the requirements of the legal construction in the era of environment. In this sense, concentrations should not be merely made on the legislation, the amendment and the abolition of marine environment and resource law in accordance with the concept of sustainable development, but also given on the environmental value in the integrated department of the sea law, infiltrating the concept of legal ecology in all areas of the laws and regulations relating to the ocean, including the law of admiralty and the admiralty administrative law.[13] The integrity and synthesis as features of the environmental issues have determined this approach as stated above, and the inner relationship between laws and regulations concerning the ocean also

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12 Prof. Cai Shouqiu gave the definition of "law of marine environment and resources" in the narrow, medium and broad view respectively in the Chapter I of Introduction to Contemporary Law of Marine Environment and Resources in the book *Contemporary Law of Marine Environment and Resources*. In the meanwhile, he points out that the definition of the term in his book is mainly based on the medium view, that is to say, a general term of the legal norm that governs the social relations in respect of the exploitation, the use, the protection and the improvement of marine environment and resource. It is not hard to conclude that "the legal system of marine environment and resources" is subordinate to the system of the sea law. The legal system of marine environment and resources, either looking into the concept or the design of the norm, mainly consists of the legal norm with public law nature. It is hard to include the law of admiralty, crew law, maritime international private law and other private law sections. Cai Shouqiu & He Weidong, *Contemporary Law of Marine Environment and Resources*, Beijing: China Coal Industry Publishing House, 2001, pp. 14~20. (in Chinese)

13 The term "legal ecologicalization" means to incorporate the ecological theory into the departmental law progressively, in accordance with the requirements of the era of environment, to take the principle of ecology and the requirements of environment protection as a standard for amendment to laws, to have an overall adjustment, reform and innovation of the current law, and to review the legal behaviors of all kinds through the theory and ideas of ecology in order to meet the requirements imposed by ecological rules. The legal ecologicalization notion that is based on the value of sustainable development is a reflection of the traditional jurisprudence putting people's interests first. In this sense, it is required to explore the relation between ecology and law from multi-dimensional perspective, and to incorporate the requirement of ecological protection and the idea of sustainable development into all departmental laws. By doing so, the legal guiding ideology, the legislative purpose, and the specific rules will be in conformity with the theory of ecological environment, meet the needs of environment protection, and promote the reform of the contemporary legal system towards the environment-friendly direction, which will be beneficial to sustainable development.

offer a possibility for development.

Legal concept is a category of theory that infers the abstracts and extracts of laws and regulations as well as their phenomena with common features from the legal practical activities among people. "Concept is the basic element of legal ideologies, and also constitutes the basis of re-classification and re-allocation of disorganized specific issues."[14] "The course of a legal concept coming into being also goes along with the course of some certain value identification coming into being."[15] The forming of the concept of the sea law derives from the clear awareness that people give identical value to the functions carried by laws and regulations governing the integrated social relations as well as marine environment and resource when they are developing and applying the laws and regulations relating to the ocean. The design of the concept of the sea law is the reflection of professional wisdom in making a rational distinction and categorization. By relying on the professional wisdom, an overall and systematic regulation will be placed on abundant legal activities relating to the ocean; in the meanwhile, the departmental law concerning the sea will be constructed in a more scientific and rational approach. The significance of conceptualizing the sea law also lies in the fact that a concept is the premise of the application of legal rules and principles. "The unique function of a concept provides possibilities for the use of legal rules and principles through the distinction and classification of factual factors of all kinds."[16]

Nowadays, the concept of the "sea law" has not been widely accepted among domestic scholars. However, it is of necessity, from the point of view of the concept of sustainable development, to review the laws and regulations relating to the ocean, integrate and systemize the laws and regulations relating to the ocean and admiralty, update the legislative guiding ideology and the basic principle, set the overall legislative purpose, construct an improved legal system, and offer a legislative guarantee for the sustainable use of marine environment and resources, which have become the common awareness among scholars.

The establishment and the improvement of the departmental law concerning the sea, is neither a simple codification, nor merely an issue of discussion among staffs working in legislative, executive, and judicial departments with regard to the

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14 *Oxford Dictionary of Law*, Beijing: Guangming Daily Press, 1988, p. 533. (in Chinese)

15 Chen Jinzhao, *Study on Jurisprudence*, Beijing: Peking University Press, 2002, p. 92. (in Chinese)

16 Zhang Wenxian, *Study on Jurisprudence*, Beijing: Law Press China, 1997, p. 76. (in Chinese)

ocean and admiralty and scholars who contribute to the research in related areas. On the contrary, it deserves to be listed as the key to the legal construction of a State and to be paid a positive attention. The establishment of the sea law, as well as the reformation and innovation of its specific regimes, plays a significant part in the course of enforcing the strategies of sustainable development. Achieving the goals of protection of the marine environment, the diversity of marine biology and the reasonable exploitation and use of marine resources represents a complicated and systematic project. It requires all kinds of laws and regulations within the departmental law concerning the sea to absorb the value of sustainable development in order to create an "a society where everyone accept and respect the law".

II. The Current Legislative Situation of the Sea Law of China and Its Existing Issues

Generally, China did not pay enough attention to the legislations concerning the ocean before its policy of reform and opening to the outside world. This is a concentrated reflection embodied in lacking for a national slip law that governs activities concerning the ocean. Instead, there are a couple of policy documents and administrative regulations, ordinances and rules that were issued relating to territorial seas, straits, ports, vessel management, and the protection of water resources. After the 1980s, the legal construction concerning the ocean and admiralty of China came into the stage of its overall development which is mainly reflected as below:

1. The Environmental Protection Law of the People's Republic of China gave a general requirement for the protection of marine environment as the basic law on environmental protection. Later, the Standing Committee of the National People's Commission of China (the NPC Standing Committee) issued the Marine Environmental Protection Law of the People's Republic of China in 1982 and then made an amendment to it in 1999. It is the first slip law of China relating to the ocean. It focuses on the issues of marine ecology protection, indicating that China had integrally combined the development of ocean affairs with the protection of marine environment, and had incorporated it to the governance of the State in accordance with law. In order to enforce the law, the Department of State Council of China has issued administrative regulations in a stream, namely the Ordinances of the People's Republic of China on Prevention and Control of Marine Pollution from Ships, Environmental Protection in Exploration and Exploitation of Marine

Oils, Management of Ocean Dumping, Prevention of Marine Environment Pollution from Ship Recycling, Prevention of Pollution Damage to the Marine Environment by Land-based Pollutants, and Prevention and Control of Pollution Damages to the Marine Environment by Coastal Engineering Construction Projects. In addition, the State Environmental Protection Administration, the State Oceanic Administration, the Ministry of Communications, and the related departments in the coastal provinces and cities also issued a series of ordinances, rules and local regulations. The publication of such laws, regulations and rules indicates that the Chinese legal system on marine environmental protection is making some progress.

Concerning the management of the exploitation and use of the ocean, the Chinese government has issued successively a series of laws and regulations, such as the Law of the People's Republic of China on the Territorial Seas and the Contiguous Zones, passed on the 24th session of the seventh NPC Standing Committee on 25 February 1992 and coming into effect the same day, the Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf passed on the 3rd session of the ninth NPC Standing Committee on 26 June 1998 and coming into effect the same day, the Law of the People's Republic of China on Management of the Use of Sea Areas; and the Administrative Regulations on Marine Nature Reserve. These legislations demonstrate that the basic laws relating to the four areas of the sea, (i.e., the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf) regulated by the Chinese government since the late 1970s, have basically outlined a systematic and coordinative law of the ocean of China through constant efforts over three decades.

The current laws and regulations relating to the ocean have legal effects against the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, and other sea areas that are subject to the sovereignty of China. The laws of contiguous zone, the exclusive economic zone and the continental shelf constitute the "charter" relating to Chinese protection of marine rights and interests. The approval of the use of sea areas, the compensated use and the function zoning, as the three rules that were established under the Law on Management of the Use of Sea Areas, offer the necessary legal means to achieve a comprehensive management of the ocean by the Chinese government. The Marine Environmental Protection Law, the Maritime Traffic Safety Law, the Mineral Resources Law, the Ordinance on the Management of Foreign-related Marine Scientific Survey and Research, and other laws and regulations have provided the guidelines to comply

with for the activities that mainly concentrate on the exploitation and use of the ocean, such as the exploitation of marine resources, the environment protection, the transportation at sea, and the marine scientific research.

2. China has made specific rules in a large number of laws and regulations that govern activities relating to the ocean. Take the Fisheries Law of 1986 as well as its implementation rules as examples. They make a clear point that the application of the law and the rules cover the territorial seas and all other sea areas subject to the sovereignty of China, and they also present clear stipulations in the area of marine fishing license, operating range of fishing at sea, and conservation of marine fishery resources. The Mineral Resource Law of 1986 specifies the rules for the exploitation of marine oil and gas. The Chinese government and its departments in charge have issued a quite considerable number and a broad range of administrative regulations concerning the ocean, such as the Regulation on Sino-Foreign Cooperative Exploitation of Maritime Oil Resource of 1982, the Ordinance on Prevention and Control of Marine Pollution from Ships of 1983, the Ordinance on Environmental Protection in Exploration and Exploitation of Marine Oil of 1983, the Ordinance on Management of Ocean Dumping of 1985, the Ordinance on Prevention of Marine Environment Pollution from Ship Recycling of 1988, the Management Ordinance on Laying Submarine Cables and Pipelines of 1989, the Management Ordinance on the Protection of Underwater Cultural Heritage of 1989, the Provisional Regulation on the Management of the Use of Sea Areas under the Jurisdiction of China of 1993, and the Ordinance on the Management of Foreign-related Marine Scientific Survey and Research of 1996.

3. China participates in the conclusion of treaties concerning the laws of the ocean with a positive move. Merely in 1980, China had joined five international conventions on maritime affairs, namely the International Regulation for Preventing Collisions at Sea of 1972, the International Convention on Civil Liability for Oil Pollution Damage of 1969, the International Convention on Tonnage Measurement of Ships of 1969, the International Convention for Safe Container of 1972, and the International Convention for the Safety of Life at Sea of 1974. After that, China approved or acceded to more international legal instruments concerning the ocean. It also took part in the United Nations Third Conference on the Law of the Sea between 1973 and 1982, signed the United Nations Convention on the Law of the Sea (UNCLOS) on 10 December 1982, and was among the first of the 119 signatory States. Finally, after considerable deliberation, the 19th session of the eighth NPC Standing Committee approved the UNCLOS on 15 May 1996,

which came into effect for China on 17 June 1996. Becoming a member State to UNCLOS marks the beginning of the marine career of China on the way of governing the ocean in accordance with the law and the path for the developing of its economy towards the world. China has gone with the international stream of the "century of the ocean" by adding more special laws and regulations concerning the management of the ocean in the recent years in order to regulate the management of the exploitation and use of the ocean. These laws and regulations are the basic principles of the "governance of the State in accordance with the law" and also constitute the basis of the legal construction concerning the law of the sea.

It should not be ignored that currently the system of the oceans law and the admiralty law still has many deficiencies that need to be urgently addressed.

1. So far, activities concerning the ocean in China have been conducted without any constitutional basis. As a large maritime State, China does not have any explicit statement or even a sentence on the ocean or other issues concerning the ocean in its Constitution. The only article within the 1982 Constitution with an implicit reference to the ocean is Article 9, stipulating that "mineral resources, waters, forests, mountains, grasslands, wastelands, beaches and other natural resources all belong to China…" The term "mineral resources" here can be interpreted as including seabed mineral resources; the term "beaches" should include riverside strand and tidal flat. China has adopted the amendment to the Constitution as its constitutional approach in recent years. However, there is still none stipulation relating to the ocean in the Amendments to the Constitution that have already come into force.

2. Legislative lacunas remain in some key areas. The Law on the Exclusive Economic Zone and the Continental Shelf issued in 1998 filled in a blank of legislation concerning the law of the sea. However, it took six years for it to come into being, after the issuing of the Law on the Territorial Seas and the Contiguous Zones brought to a climax of the legislation concerning the law of the sea, which made the legislative work concerning the law of the sea slowed down. The six-year labor of the law also widened the time gap between China and neighboring States. There are many lacunas that remain in legislation concerning the law of the sea. Specifically, the legislation on management of man-made structures at sea is a blank part in the management of marine rights and interests; neither the basic law on the protection of the exploitation of marine resource, nor the law on management of the use of coasts, the law on management of coastal zones, or other comprehensive laws or regulations exist in the areas of the exploitation of marine

resource.

Currently, many rules of law governing activities concerning the ocean are attached in slip laws that do not take the ocean as the main object of regulation. The Agriculture Law, the Fisheries Law, the Mineral Resource Law and other slip laws governing activities concerning the ocean are not concentrating on the ocean, though they contain some provisions relating to activities concerning the ocean. On the other hand, there are very few special laws and regulations that govern activities concerning the ocean. In particular, the slip law that governs the relations in emerging maritime industry remains absent.

It is of necessity for China to build and improve the system of laws and regulations relating to the ocean. To meet that end, it requires the government to formulate and enforce the Law on Management of the Exploitation of the Ocean, the Law on Management of Coastal Zones, the Law on Management of the Exploitation of the Islands, the Regulation on Management of Marine Nature Reserve and Particular Reserve, the Regulation on Management of Coastal Projects, and other regulations on comprehensive management. It also requires it to formulate and enforce regional and local regulations and rules in accordance with national regulations, such as the Law on Management of the Exploitation of the Bo Sea, the Law on Management of the Exploitation of the Nansha Islands and the Surrounding Sea Areas, and ordinances on management of coastal zones at provincial level. Last but not the least, it also requires the it to make constant supplements, amendments and improvements to the basic regulations, the regulations on comprehensive management, the regulations on industry management, and local regulations on management of the ocean that have come into force.

3. The ocean-related laws that were issued in the early and the mid-1980s will have trouble to meet the current demands of the protection of marine rights and interests and the exploitation of marine resources due to the deep influence of the planed economic system and the "concentration on the land rather than on the sea" in a traditional view. The typical examples are the Mineral Resource Law of 1986, the Regulation on Sino-Foreign Cooperative Exploitation of Maritime Oil Resource of 1982, and the Ordinance on Environmental Protection in Exploration and Exploitation of Marine Oil of 1983, which regulate mainly the exploitation of marine oil and gas. There are also laws and regulations on the fishing resources, such as the Fisheries Law of 1982, the Rules for the Implementation of the Fisheries Law of 1987, and the Regulation

on Protection of Aquatic Resources Reproduction of 1979. A mark on the planed economic system has been deeply rooted in all laws and regulations listed above, which shows that these laws and regulations are unable to meet the demands of the market economy. In addition, some legislations of the law of the sea are merely a copy of the legislations of the land-based law, without giving sufficient consideration to the features of the ocean.

4. The admiralty law is not consistent or cooperative with the law of the ocean. The admiralty law has been long separated from the law of the ocean, in theory and practice, within the legislation, the judiciary and academic research. As a result, the admiralty law and the law of the ocean belong to different areas and the inner relations between them have been neglected. "The admiralty law as well as the research on it in China Mainland has been developed in a quite unique manner, that is to say, concentrating on affairs in practice and practical use, valuing the individualism and particularity of the industry, focusing on phenomena, procedures and specific business. However, it has also been developed somehow neglecting the learning and the discussion of the legal essence, the basic theory of law, and the development rules reflected in these typical features. Likewise, the research on inner-relations between the admiralty law and other laws in the legal system has also been neglected."[17]

5. Some legal norms have a very low legal status, making it hard to achieve their legislative purpose. Take the Rules on Management of Foreign Vessels and the Regulation on Management of Marine Nature Reserve as examples. The former possesses a foreign affairs-oriented feature, and the latter plays a key role in the environment protection, however, it will make it very difficult for the relevant departments to enforce them, as long as their legal status remains being the departmental rules. In consequence, it is necessary to escalate their legal status as much as possible, such as being laws or administrative regulations, in order to make them more practical.

6. Some legal norms are too simple, making them unable to play the role of regulations in uniformity. The administrative regulations and ordinances issued by the central government or local government play a dominant role among the current laws and regulations relating to the ocean. Regulations and ordinances of this type are seldom changed either by supplement or amendment promptly after

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17 Zhang Yongjian, The Wanderer in the Law Family - the Return and the Development of the Admiralty Law of China, *Chinese Journal of Maritime Law*, No. 1, 2001. (in Chinese)

being issued, which largely weakens the actual legal effectiveness in practice. The typical instance in the regard of management of the exploitation of marine resources is that there are many regulations on management in certain industries while there are few or none of regulations on comprehensive coordination and management of the exploitation of marine resources.

With the constant development of society, people have begun to pay more and more attention to the use and exploitation of the ocean. The 48th General Assembly of the United Nations in 1993 made resolutions to push the member States to make a rapid progress of legislation concerning the sea in order to protect marine resources within their jurisdiction. China formulated and issued Agenda 21 of China in 1994 in accordance with the UN Agenda 21, taking into account the actual circumstances of China. The Agenda 21 of China proposed the strategies, solutions, and roadmaps for the sustainable development of China, of which the strategy of sustainable development relating to the ocean constitutes the key part. However, the laws and regulations of China as mentioned above do not have explicit and specific provisions concerning sustainable development and the legislation concerning the resources, since the concept of sustainable development and the legislation concerning the resources has never been deemed to be the important legislative purpose in its guiding ideology. As a result, the laws and regulations of this type are unable to meet the demands for the protection of marine resources and the realization of sustainable development of marine economy.

III. The Implications of the Concept of Sustainable Development for the Sea Law

The 21th century represents a boom for the development of marine affairs. For the sake of national economic development, States have started to pay much attention to the reasonable use and exploitation of marine resources, and the protection and the improvement of marine ecological environment. They make use of scientific, economic, legal and educational means as well as other means in order to develop their marine business, and to carry out all kinds of activities at sea aiming at developing civilizations.

The 21th century is also the era of environmental civilization. Since the middle of the last century, human had suffered a series of natural disasters. As a consequence, human beings began to make it a matter of conscience the relationship between humans and nature, in order to understand the essence of respecting the

nature and learn to harmoniously co-exist with it. On the path towards the new era of environmental protection, people of insight have developed a deeper reflection of the issue on the environment of human survival by looking into history. The concept of sustainable development has brought about a revolutionary guideline that has challenged the current production mode and lifestyle of human beings. It has become a key part of the study of law and the legal construction to "make a profound reflection on the conventional legal ideas, legal concepts, legal value orientations, main focuses of the law, legal relieves, and the legislative tendency that emphasize the interests of this generation".[18]

The behaviors governed by the sea law will, in a direct or indirect manner, exert an influence on the quality, quantity and the effectiveness of marine environment and resources. The development of marine affairs in the era of environment represents a demand in order to accomplish the sustainable use of marine resources and strengthen the protection of marine environment. The protection of the marine environment, and the reasonable exploitation and use of marine resources are some of the missions of the "era of environment".[19] In this regard, the sea law should use the concept of sustainable development as guidance when ruling activities relating to the sea. Furthermore, the sea law should obtain profound awareness on the legislative guiding ideology, the legislative purposes and basic principles as well as the mechanisms of legal regulations, in order to make a theoretical preparation for the rise of the sea law in line with the actual trends.

A. Progress in the Legislative Guiding Ideology and Its Basic Principles

Currently, pursuing economic interests at the cost of the use of marine environment and resources in a non-sustainable manner constitutes an outstanding issue in the marine operations and economic activities relating to the ocean. Consequently, marine living resources are declining, there is a severe ecological damage in some areas of the sea, environmental pollution is increasing and marine disasters are taking place more frequently.

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18 Chen Quansheng, *The Sustainable Development and the Legal Reform*, Beijing: Law Press China, 2000. (in Chinese)

19 The theme of the world environmental day in 2004 was "Wanted! Seas and Oceans - Dead or Alive". This theme emphasizes that the human society could not treat the oceans as a place to dispose garbage at the will, nor regard it as an inexhaustible source of treasure. It requires the governments and people of all States to choose ways to deal with the oceans. At the same time, it calls for every one of us to take actions in order to protect the oceans.

It has been proved that promoting sustainable development is the only way to achieve a good protection of the marine environment and the eternal use of marine resources. Accordingly, all the laws and regulations under the departmental law concerning the sea should comply with the legislative guiding ideology with the sustainable development as their main objective and follow the "sustainable development-oriented principle" as the basic principle of the legislation.

The guiding ideology of the State's legislation is generally consistent with the political, economic and social development goals of the State. The current and long-term development goal of China is to develop rapidly while maintaining the economy, population, resources and environment in harmony. To achieve this goal, China has to cultivate a circular economy by making the best use of resources and protecting the environment simultaneously, as well as to implement the people-oriented, integrated, coordinated and sustainable development concepts, in order to make a fundamental transformation for the economic growth of China. It also has to focus on the legal construction to bring regulation and social roles of environmental laws and rules into full play, in order to improve the relationship between human beings and nature in a positive manner. The concept of sustainable development is consistent with the actual needs. It combines economic development and ecological sustainability. It claims that the exploitation and use of the environment, resources and energy, the basis for human development, should be carried out with maximum efficiency and minimum pollution. This ideology has drawn wide attention and has been well accepted among the society. Legislators have already adopted it in the formulation and amendment of law. The sustainable development-oriented value must be considered the legislative principle of this law in order to put this ideology into practice. .

The sustainable development-oriented principle refers to the fact that the legislations on environment and natural resources shall consider the conditions of the environment and natural resources necessary to meet the demands of the human society as well as its economic development; it should also consider the capacity that the environment and natural resources can offer for the development of the society and future generations; as well as the theoretical basis for the establishment of the legal norm.[20] The principle of sustainable development requires humans to respect, realize and maintain natural values, re-regulate their attitudes and

20 Jin Ruilin and Wang Jin, *Study on a Couple of Issues over Legislation of Environment and Natural Resources of China*, Beijing: Peking University Press, 1999, p. 62. (in Chinese)

behaviors towards the nature, and build a new type of relationship between humans and nature on the basis of mutual benefit, co-existence, and development in harmony. Furthermore, the integrity of economic, social and ecological interests will be achieved through the improvement of social and economic activities, such as seeking scientific evaluation of resources and location methods, placing the resources accounting into the category of national economy accounting, as well as reforming natural resource price as an economic mean.

The legal principle is a main reflection of the legal spirit of the times. The legal principle, as the basis and starting point of legal concepts and rules in legislation, plays a dominant and directing role in the entire legal norm and the regulation system of the State. The legal construction of the sea law in the era of environment has obtained much enlightenment from the concept of sustainable development. It has established the guiding ideology of sustainable development[21] that combines the fairness principle, the sustainable principle, and the common ground principle. It will incorporate the element of value of law with the feature of the time into the principle of sustainable development. Meanwhile, it will also take this principle as a bridge between the purpose of the sea law and its specific regimes and rules. It will integrate the regimes and rules of the sea law at all levels, making the best effort to eliminate and prevent the inner contradictions between the system and the rules of the sea law, in order to achieve its internal harmony.

Specifically, when using and exploiting marine resources and conducting admiralty and maritime activities, people should be warned that resources are limited, nature is closely related to humans, environment pollution and ecological damage are irreversible, together with other "iron" rules of ecology. A feedback mechanism of sustainable development should be built as soon as possible with

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21 "The sustainable development can be embodied in three principles that take the development of people as their basic task. The first one is the fairness principle, which emphasizes the fairness among the same generation and also among different generations. The second one is the sustainable principle, which means that the development of the human economy and society should not be beyond the bearing capacities of resources and environment. The third one is the common ground principle, which relates that all mankind only owns one earth though each State may have its own mode of sustainable development, thus, when being confronted with the common challenge, the common future of the human beings will be achieved only through a common awareness and common actions." See Chen Yingxia, A New Type of Human Centralism of Ecology - Looking into the Sustainable Development from the Dialectic View Combining the Two Points and the Main Points Theories, *Journal of Huaihua Normal School*, No. 3, 2002 (in Chinese), quoted from Lv Zhongmei ed., *Transcending and Keeping Conservative - the Innovation of the Environment Law Based on Sustainable Development*, Beijing: Law Press China, 2003, p. 13. (in Chinese)

early warning, in order to prevent marine environmental interests from being injured by economic activities and to achieve the sustainable use of marine environment and resources. The legal norm relating to the reasonable exploitation of marine resources and protection of marine ecological environment has occupied a large proportion of the laws and regulations concerning the ocean already formulated in China. This promising trend should be kept and extended. Laws and regulations of marine environment and resources shall look up to the principle of sustainable development as the standing point. Other laws and regulations in the departmental law concerning the sea shall have a prompt reform in the era of environment, such as the maritime law with an outstanding "profitable" feature that belongs to the commercial law. At present, the amendment to Maritime Law of China has been listed on the agenda. Experts of the maritime law have completed the proposed draft of amendment to the Maritime Law in the scientific research project funded by the Ministry of Communications. The proposed draft of amendment to the Maritime Law has added the ship-induced pollution damage compensation regime in accordance with the appropriateness principle, after predicting correctly the developing trend of international admiralty legislation.

Starting from the concept of protecting marine environment and resources, the deficiencies of the theory of the sea law should be reviewed based on the concept of sustainable development. The principle of sustainable development shall be taken as reference to innovate the system and rules of the sea law, to build an integrated departmental law concerning the sea, and to promote the transformation of a law as a technical mean into a law containing values.

B. The Overall Extension of the Legislative Purpose

The law is the norm that is enforced through compulsory binding force by the State and is generally applied to the entire society to govern behaviors. The primary condition to make a law is to ensure that the law is in conformity with the intention and motives of the legislators; in other words, in line with the legislative purposes. The legislative purposes of the sea law determine the guiding ideology, the objects governed, as well as the effectiveness of enforcement of the sea law. In fact, the purposes are the most straightforward expression of the values that the sea law pursues.

The current sea law in China is not a concept or a name of a law. It is a general term of the legal norm that governs all kinds of activities that people conduct in

all areas of the sea as well as the social relations derived from these activities. The social relations governed by the sea law generally contain factors relating to the ocean. However, the laws and regulations concerning the sea with public law nature are not in conformity with those with private law nature in the formality and purpose of legislation since they share different legal characteristics and also have a large difference between the objects that are governed and the methods that are used to govern the social relations. In the departmental law concerning the sea that covers many laws with different natures and different contents, it is not hard to discover with careful observations that either the international law of the ocean, the maritime administrative law of States, or the maritime law with an outstanding technical and practical features, or the maritime conflict of laws and the maritime procedure law, has placed the "promotion of the sustainable development of the economy and the society" as the ultimate end of the legislation in their corresponding legislative progress, which constantly brings forth the new laws replacing the old ones and also is always changing. The laws and regulations with factors relating to the ocean have been integrated into the departmental law concerning the sea in uniformity, combining the jurisprudence with science through different methods but bearing a common purpose.

There have been many sea environmental crises near to this century. The positive attention that people pay to the protection of marine ecology and the scientific consideration that governments take to develop marine business have promoted many laws and regulations relating to the ocean to start considering the entire value of protecting the marine ecology. The legislative purpose to achieve by the sustainable development of marine environment and resource is built on the basis of the entire value of the sea law, in order to place restrictions on the behavior of economic development that is not consistent with the protection of marine ecology. In particular, the sea law in the era of environment concentrates on the equal intergeneration of the use of marine environment and resources since the economic values and the strategic significance of marine environment and resources relate to the significant benefits for the future generations. In the process of legislation, legislators are required to reflect the modern idea of intergeneration equality in the distribution and use of all kinds of marine resources, aiming at constructing a legal system that shows the idea of intergeneration equality, including regimes such as the functional zoning of marine resources, the paid use of marine resources, and the comprehensive management of the marine resources. Within the sea law there should be coordination between the short-term behaviors

and the long-term plans towards the prospect of the human beings and the benefits for the future generations. The rational arrangement of the regime between the protection and the use of marine environment will be the outcome of such coordination.

The legislative purpose of the sea law in the era of environment is in essence to keep the balance and stability of the marine ecological system, of the relations between the existing profits of the humans and the long-term development and reproduction, in order to achieve the ultimate goal of the sustainable development of the economy and the society. This task or essential purpose is a full reflection of the value of the sustainable development incorporated into the sea law nowadays.

C. Construction of the Regulation Mechanism of the Sea Law That Governs the Relations between People and the Ocean in a Comprehensive Manner

1. The Necessity to Construct the Regulation Mechanism of the Sea Law

It is necessary to construct a well-organized regulation mechanism of the sea law, so as to resolve the conflicts among laws and regulations relating to all kind of interests of the marine environment and to build an integrated departmental law concerning the sea. The legal regulation mechanism refers to the integrity of inner structure, inner relations, and mode of operation that combines the subjects, objects and behaviors that the law governs (including the methods and the processes that the law employs to govern such relations). It mainly refers to the mechanism and operation mode that the law employs to exert an influence on the objects that the law governs in order to achieve governance.[22]

The legal regulation mechanism is necessary to make up for the deficiencies of the sea law of China. The current situation of the sea law in China is as follows. China has issued basic laws of the ocean to maintain the sovereignty of the State and its marine rights and interests, the comprehensive management laws of marine resources, the special laws of marine environment protection, the special laws of resources, the management laws of marine industry, the maritime laws, the special procedural laws of maritime litigation, and administrative regulations that govern

22 Cai Shouqiu, *The Theory of Adjustment - the Reflection of and the Supplement to the Mainstream Study of Jurisprudence*, Beijing: Higher Education Press, 2003, p. 556. (in Chinese)

all kind of matters. Basically, the framework of the sea law has been shaped. However, many issues remain unresolved; among them is the lack of an effective legal regulation mechanism of the sea law. To make it specific, every law has an explicit legal purpose and employs different legal means. However, there is no guiding legal regulation mechanism for laws and regulations concerning the sea as a whole, which leads to the isolation and separation of the legal purpose and the legal means. The legal regulation mechanism is not unified for the laws and regulations concerning the sea law, giving rise to overlaps or absence of rules governing certain interests, that is to say, some interests lack or have very few legal means to govern them, while some others have to subject to overlapping or conflicting laws, which leads to the poor operation of law, weakening the credibility of law, and impairing the authority of law. The phenomenon of "five dragons playing in the sea" is one typical instance.[23] The current management of the ocean in China gives priority to the scattered management by industries, while taking the centralized coordination as auxiliary method. The departments in charge of ocean affairs fail to give a clear division of functions among them. For that reason, coordination is hardly to be achieved, which brings about overlapped powers and inefficiency. As a result, these departments do what they think to be right respectively, and the tragedy of the "five dragons playing in the sea" becomes more and more miserable. In this sense, only having legal purposes and legal means but not combing them together makes it unable to clarify rights and obligations, as well as to clear the blocks in the maintenance of interests. Therefore, the key of this issue is the lack of such a mechanism.

In order to change the situation where the legal means are employed in a singular, severable, disordered, and contradictory manner, it is of necessity to give an overall consideration, to combine the integrated mechanisms with the different legal means, anticipating that the interplay takes place in coordination within the regime, reflecting the advantage as a whole. Only when it works smoothly in the entire "circulatory system" of the departmental law concerning the sea, could all the branches of the system be well organized and functioning, and the different

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23 In the current regime of management of marine environment, a phenomenon called "the five dragons managing the ocean" appeared. "Five dragons" refer to the department of environment protection, the department of the ocean, the department of maritime affairs, the fishery department and the military department. The five departments manage the ocean in a scattered manner relying on their function respectively. Under the influence of the overlapped management regime, the phenomenon of "the five dragons playing the ocean" occurs.

legal means work as they are supposed to in the operation of the integrated legal mechanism. Thus, the construction of the legal regulation mechanism of the sea law is indispensable.

It is hardly to resolve the contradiction between the scarcity of marine environment resources and the increasing demand of interests that people seek from marine environment, which brings about the issue of marine environment and resources. The limited carrying capacity of the ocean, that is, the scarcity of marine environment resources, causes disordered competition among economic individuals when using marine resources particularly when there is no ownership to claim since economic individuals will always try to take and use marine resources as much as possible driven by economic interests at low cost or even free, in order to reduce the cost of production and prevention. Such unlimited attempts to pursue the maximum interests inevitably causes serious conflicts of interest, which ultimately leads to the misuse, waste or even exhaustion of marine environment and resources. Consequently, it is essential to employ a legal regulation mechanism in order to resolve conflicts of interests relating to the ocean.

The legal regulation mechanism, legislative purpose, and regulation methods of sea law constitute an integral part of the departmental law. Such regulation mechanism not only provides guidance for the resolution of interest conflicts, but also a feasible operation mode of existing environmental law. Moreover, it supplements and improves the basic theory in connection with Chinese sea law.

2. The Legal Regulation Mechanism of the Sea Law That Governs the Relations between People and the Ocean

The relationship between people and the ocean is formed through the use of marine environment and the exploitation of marine resources. Among laws and regulations of all types that govern the relationship between humans and the ocean, the marine environment and resource law contains the most concentrated and the largest number of provisions that govern such relationship, with the most obvious effectiveness. The legal purpose of the laws and regulations on marine environment protection and marine resources management is about the tasks, roles, functions, and the relationship between people could be governed by the law. The legislative purpose of the marine environment and resource protection law of China, for example, lies in protecting and improving the marine environment, protecting the marine resources, preventing pollution damage, maintaining the ecological balance, ensuring human health, and promoting the sustainable development of economy and society. The legislative purpose as such is

established in accordance with the Chinese policy and task of marine environment protection. One of its purposes is that, the tasks, roles, function of the protection of resources, the reasonable exploitation and use of resources, and governance of the relationship between people and the ocean. The legal norm contained in the Marine Environment Protection Law of China has escalated the relation between people and the ocean and made it subject to legal regulation. It will help people to respect and protect marine environment and resources as well as to exploit and use them in a sustainable way. Furthermore, it also helps people to maintain their long-term marine interests. The Marine Environment Protection Law has created the mechanisms in respect of the survey, information publication, problem prevention, behavior, control, remedy, incentive, accountability, supervision and management of behaviors in connection with marine environment and resources, and other legal regulation mechanisms that specifically govern the relationship between people and the ocean.

In addition to the marine environment protection law, other laws falling under the category of sea law fail to reflect the requirements of marine environment protection in their legislative notions, guiding ideologies, principles and other legislative matters since such laws do not govern the relationship between human beings and the ocean in a direct way, and were issued in a period of time when sustainable development was not as important as it is currently. The relation between people and the ocean becomes increasingly complicated. In an objective view, the era of environment needs to inculcate the notion of environment protection to all regulations of behaviors related to the use of marine environment and resources. In this sense, it is also necessary to improve the traditional methods and legal regulation mechanisms in the marine environment and resource law that particularly govern the relationship between human being and the ocean. In the meanwhile, verdurization or ecologicalization, which means to make a reformation and improvement through the ecological and environment friendly views, should be applied to the traditional methods and mechanisms employed in those laws that do not possess the features of the environment and resource law, such as the maritime law and the maritime administrative law. The traditional methods and mechanisms in those laws can be those of the civil and commercial law, administrative law, criminal law, and procedural law. In this way, those laws will become an integral part of the legal regulation mechanism of the sea law that governs the relationship between people and the ocean in a comprehensive manner, so as to completely innovate the sea law in the view of the sustainable development.

Based on the concept of "sea law", this article proposes the idea of formulating an integrated sea law through the combination of the regime and the norm of the sea law, with the main purpose of promoting the development of the existing laws and regulation that govern the relationship between people and the ocean in a more comprehensive and systematic manner in order to draw people's attention to the protection of marine ecological interests and to achieve a sustainable development of marine activities practiced by people. To construct an integrated sea law does not simply mean to combine the laws relating to the ocean that are scattered in different departmental laws. Because it has little significance in the theoretical research to construct a departmental law purely based on the fact that the objects that each law governs are related, that is to say, merely selecting laws that govern the human's direct use of the ocean or the human behaviors that take place at sea, or the consequences of such behaviors for the ocean to establish a departmental law is not enough. Furthermore, there are big distinctions in the legislative purposes, the legislative principles and other legislative matters among the basic laws of the ocean to maintain the sovereignty of States and marine rights and interests, the marine environment and resource laws to protect marine ecology and prevent marine environment pollution damage, the comprehensive management laws of marine resources that govern social relations of all kinds in the sea areas as well as the use and exploitation of marine resources and special laws of resources, the maritime law that governs the vessel and shipping relationship at sea, the management laws of marine industries, the administrative laws of maritime departments, and other laws and regulations relating to the sea . In this regard, it is unable to provide theoretical guidance to the legislative, executive, judicial, and the relevant business departments, if the codification is made merely on the basis that all objects each law governs contain factors relating to the ocean. The objective requirement of the legal construction in the era of environment is to build an integrated sea law, taking into account the marine environment as a whole. The significance of the marine environment as a whole lies in the fact that it is a "common interest" of all mankind. States, maritime powers or land-locked States are all required to protect marine environment, no matter if they are engaged in the exploration and the exploitation of the seabed, or in the transport and trade of navigation and commerce.

The slogan of the Rio Declaration on Environmental and Development is "sustainable development". It is a slogan that gives a full consideration to the environment and what concerns people's interests. In order to preserve the earth

environment which is rational as a whole and interdependent, we are required to protect the environment and natural resources, and perform all kinds of the environmental obligations or at least the harmless obligations. We are also required to observe the rules of natural variations taking place on earth, as well as the ecological values and their meaning to people. In terms of protection of marine environment and resource, it should be given full acknowledgement to the marine environment as a whole, the common ground feature, and the hazardous feature of behaviors that impair marine environment. In terms of the regulation mechanisms, comprehensive regulation mechanisms are supposed to be employed, including the legal, administrative, market, scientific and technical, and social regulation mechanisms, as well as other mechanisms governing the relationship between people and the ocean. As for the legal regulation mechanisms, the mechanisms as stated above can be legitimized through legislation, that is to say, placing them to the scope of legal principles, means, and regimes. In this way, before they govern the relationships between human beings and the ocean, they will have guaranteed their enforcement and implementation through the enforcement of law.

In the era of environment, by observing and considering the marine environment as an entirety, and reviewing the legislative work of marine environment and resources, we will find out first that effective control mechanism against marine environment pollution with the purpose of sustainable development requires the comprehensive use of multiple means. The marine environment protection law ought to have a transformation from the singular mode "order-control" to the mode of coordinated control with multiple mechanisms. Secondly, under the mode of coordinated control with multiple mechanisms, both compulsory norm and non-compulsory means are necessary to control the marine environment pollution. The legal regime of marine environment and resource should be reformed in respect of its compulsory norm in order to highlight its strictness, compulsoriness, applicability, and timeliness. At the same time, the discretionary norm should be emphasized by educating, demonstrating, convincing, suggesting, consulting, cooperating, and providing funds, knowledge, and techniques. Such ways are meant to guide the subjects in the legal relations to voluntarily conduct behaviors that are beneficial for the prevention and control of marine pollution and the protection of marine environment as permitted by the law. Thirdly, when employing the law as a mean to govern the relationship between people and the ocean, the marine environment and resource law needs to function correctly. In the meanwhile, it is also necessary to have a censorship of all legal behavior norms

having a direct or indirect relation with the marine environment and resources, always bearing in mind the protection of the environment and the sustainable development in order to "green" the laws and regulations relating to the ocean, update the guiding ideology, adjust and improve the specific regimes, combine and integrate all kinds of laws and regulations relating to the ocean, and achieve an integrated sea law which is able to govern the relationship between people and the ocean in a comprehensive and effective manner.

Generally speaking, the legal system of China mainly contains the departmental laws divided as: the constitution, the administrative law, the civil and commercial law, the criminal law, the economic law, the labor and social security laws, the environment and natural resource laws, the procedural law, and the military law in accordance with the objects and methods of the legal regulation and other standards, taking into account the purpose, norm, balance, development, opening, and other legal principles used to divide departmental laws.[24] The author proposes the idea of integrating all laws and regulations relating to the ocean, with the intention of giving an academic thinking, instead of seeking a seat for the sea law in the legal system of the State. In other words, the author attempts to study as a whole the different laws, regulations, conventions and customs relating to the ocean, then to consider the coordination between these laws and regulations, and pay attention to the regime arrangement in a systematic and reasonable manner, in order to achieve the integrity of the legal functions and values, with the goal of an uniformed legislative guiding ideology.

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24 Li Long, *The Study of Jurisprudence*, Beijing: the People's Court Publishing House & China Social Science Publishing House, 2003, pp. 369~378. (in Chinese)

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