中华海洋法学评论

China Oceans Law Review

2020 年第 3 期　总第 35 期（季刊）

Volume 16 Number 3 (Quarterly)

《中华海洋法学评论》编辑部

Editorial Board of *China Oceans Law Review*

EDITORIAL BOARD

（In Alphabetical Order of Surnames）

卷首语

本期的重心是曾被称为“海洋宪章”的《联合国海洋法公约》（UNCLOS）理论与实践的研究，中外学者的三篇论文分别就UNCLOS框架内外海洋法的发展与完善、UNCLOS缔约国在争端解决机构上的不同取向和偏好、UNCLOS对南极争端解决机制的影响与启示等，分别展开深入的分析与讨论，拓展了UNCLOS理论、实践研究上的深度与广度。

《〈联合国海洋法公约〉框架内、外（在某些情况下）国际海洋法的新进展》是意大利米兰比科大学法学院Tullio Scovazzi教授在第二届中欧国际海洋法研讨会（厦门）报告的一篇精彩论述。该文并不否认UNCLOS作为国际海洋法的“基石”、甚至“海洋宪章”的基础性、综合性优点，但却客观、科学地剖析了该法律文件自制定之初就存在的明显的空白、模糊空间，以及在全球海洋实践中不可避免地暴露出来的时代局限性和所遭遇的新挑战，并具体、深入地分析了国际海洋法学界应对这些”不足”所做出的一系列补充、完善与发展的策略。例如，UNCLOS立法时，缔约国间不愿意或没有能力处理的专属经济区、大陆架划界及历史性海湾确认等一系列法律空白，就是通过国际法院或仲裁庭的判决案例所形成的习惯法予以规范。涉及国家管辖范围以外海域渔业、生物多样性保护、矿产资源开发等，也展现了UNCLOS既有条文的整合、修改所产生的法律新功能。而联合国教科文组织（UNESCO）的《水下文化遗产保护公约》更克服了UNCLOS因“先到先得”“自由打捞”的“打捞法”优先原则导致对文化遗产掠夺性破坏的可能倾向。总之，作者清晰地区分、展示了UNCLOS自缔约以来，作为一项全球性的基础海洋法律文件的内、外演化与发展过程、来龙去脉，逻辑清晰，论证深刻，对国际海洋法律体系的深度认识与未来发展，都具有重要的价值。

国家间海洋事务的争端解决机制是《联合国海洋法公约》法律实践的重要内容，缔约国诉诸国际法院、法庭或仲裁庭的强制机制是解决争端的重要途径之一。西班牙科尔多瓦大学Miguel García García-Revillo教授的《关于缔约国根据〈联合国海洋法公约〉第287条所作“声明”的讨论》一文，

深入分析、研究了在国际海洋争端实践中，缔约国根据 UNCLOS 第 287 条允许从国际海洋法法庭、国际法院、《公约》附件七仲裁庭和《公约》附件八特别仲裁庭等四个争端解决法院或法庭中做出选择时，争端双方可能存在的不同意愿与偏好，及其所导致的不同的法律理解与实践偏差。这一研究对于国际社会根据 UNCLOS 开展的海洋事务争端强制机制实践，提出了若干不同的、详尽的前瞻性预案，同样具有重要的学术与实践价值。

南极及周边海域是地球上重要而特殊的涉海区域，国际社会已于 1959 年缔结了《南极条约》，并制定了一整套的法律制度即“南极条约体系”。作为“海洋宪章”的 UNCLOS 于 1982 年通过后，虽在理论上适用于所有海域，但并未明确其与南极条约体系之间的关系，与南极条约体系又存在明显的冲突。刘唯哲的《〈联合国海洋法公约〉对南极海域争端的影响与启示》一文，分析了 UNCLOS 与南极条约体系之间的冲突所引发的南极海域各类争端产生的来龙去脉，并评估了南极条约体系之下的争端解决机制。作者认为，这些争端产生的根本原因在于各国依据 UNCLOS 在南极主张领海、专属经济区和大陆架，但这并不足以撼动南极条约体系，同时 UNCLOS 中关于强制管辖程序的规定和海底区域制度也为南极争端的解决机制带来了启示。

除了以上三篇基于 UNCLOS 的不同方面对国际海洋法及相关实践的研究外，张春昌、帅月新的《船舶碰撞溢油污染损害赔偿责任认定的法律问题——以“达飞佛罗里达”轮与“舟山”轮碰撞污染事故应急处置费案的再审为例》一文则是对国内海事司法实践的新探索。作者结合国际公约、国际惯例和国内法律，对海上船碰事件中溢油污染赔偿的责任主体、污染应急的认定及处置费率的计算、政府海事机构在污染应急行动民事索赔中主体地位的合法性等问题，提出了不少与传统司法实践不同的认识。该文主要基于最高人民法院对“达飞佛罗里达”轮与“舟山”轮在长江口专属经济区海域碰撞污染事故应急处置费用纠纷案的再审判决的创新精神，对相关海事司法实践，做了有益的新探讨。

《中华海洋法学评论》编辑部 谨识

收录数据库：

中国知网	http://www.cnki.net/
万律	http://www.westlawchina.com/index_cn.html

维普	http://www.cqvip.com/
HeinOnline	http://home.heinonline.org/
华艺数位	http://www.airitilibrary.com/
读秀	http://www.duxiu.com/
超星法源	http://lawy.org/
北大法律信息网	http://www.chinalawinfo.com/

官方网站	http://colr.xmu.edu.cn/
Facebook	https://www.facebook.com/COLawRev/
微信公众号	中华海洋法学评论

Editorial Note

The focus of this issue lies in the research on the theory and practice of the United Nations Convention on the Law of the Sea (UNCLOS), which was once called the "Constitution for the Oceans". The three papers from Chinese and foreign scholars respectively conduct in-depth analysis and discussion on the development and improvement of the law of the sea within or without the UNCLOS framework, the different orientations and preferences of UNCLOS States Parties on dispute settlement institutions, and the impact and revelation of UNCLOS on the settlement mechanism of Antarctic disputes, which bring expansion to the depth and breadth of UNCLOS theoretical and practical research.

The Progressive Development of International Law of the Sea: Within or (in Certain Cases) without the UNCLOS is a brilliant discussion delivered by Tullio Scovazzi, a professor of International Law, Department of Law, University of Milano-Bicocca, Milan, Italy, at the 2nd Sino - European States International Law of the Sea Symposium. Without denying the fundamental and comprehensive advantages of UNCLOS as the "cornerstone" of International Law of the Sea, or even the "Constitution for the Oceans", the paper, however, objectively and scientifically dissects the obvious empty and fuzzy space existing in the legal literature since its formulation, as well as its limitations of the times and new challenges inevitably exposed in global ocean practice, and makes a specific and in-depth analysis of a series of complement, improvement, and development strategies generated by the international maritime law community to deal with these "deficiencies". For example, a series of legal gaps such as exclusive economic zones, delimitation of continental shelf, and confirmation of historic bays that States Parties were unwilling or unable to deal with at the time when UNCLOS was drafted are regulated by customary laws formed by cases judged by the International Court of Justice or arbitral tribunals. When it comes to fishery, biodiversity protection, and mineral development in sea areas beyond the national jurisdiction, new legal functions generated from the integration and modification of existing UNCLOS

provisions are well presented. Furthermore, UNESCO Convention on the Protection of Underwater Cultural Heritage is a new achievement without the UNCLOS framework, which helps UNCLOS overcome the erroneous tendency of possible predatory destruction to cultural heritage due to the priority principle of law of salvage: "first come, first served" and "free salvage". In a word, the author clearly distinguishes and demonstrates the internal and external evolution, development process and ins and outs of UNCLOS since its conclusion as global basic maritime legal literature. With clear logic and profound argumentation, the paper is of important value for the in-depth understanding and future development of the international maritime legal system.

The dispute settlement mechanism for international maritime affairs is an important part of UNCLOS's legal practice, and the enforcement mechanism of States Parties' appeal to the International Court of Justice, courts or arbitration tribunals is one of the important ways to resolve disputes. The paper *Declarations Pursuant to Article 287 of the UNCLOS* written by Prof. Miguel García García-Revillo from University of Cordoba, Spain performs in-depth analysis and research that in the practice of international maritime disputes, when States Parties are allowed to make choices from four dispute-settling courts or tribunals: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), the arbitration procedure as regulated in Annex VII of the Convention (Annex VII Arbitration) and the special arbitral procedures as provided by Annex VIII of the Convention (Annex VIII Special Arbitration), there may exist different wills and preferences between two sides of the disputes as well as different legal understanding and practice deviation resulted from them. This research puts forward several different and detailed forward-looking plans for the practice of dispute enforcement mechanism of maritime affairs carried out by the international community based on UNCLOS, which also has important academic and practical values.

Since Antarctica and its surrounding waters are important and special sea-related areas on earth, the international community has adopted the Antarctic Treaty in 1959 and formulated a complete set of legal systems, the "Antarctic Treaty System". Although the UNCLOS, as the "Constitute for the Oceans", is theoretically applicable to all sea areas after it was adopted in 1982, the relationship between UNCLOS and the Antarctic Treaty System is far from clear, and there are obvious conflicts between them. LIU Weizhe's

article *UNCLOS' Impact on and Implications for Antarctic Maritime Disputes* analyzes the ins and outs of various disputes in the Antarctic waters caused by the conflicts between UNCLOS and the Antarctic Treaty System, and assesses the dispute settlement mechanism under the System. The author asserts that the root cause for these disputes is that countries claim territorial waters, exclusive economic zones and continental shelves in Antarctica based on UNCLOS, which, however, is not enough to shake the Antarctic Treaty System. At the same time, UNCLOS's provisions on compulsory jurisdiction procedures and its seabed area system also offer inspiration to the mechanism of settling Antarctic disputes.

In addition to the above three researches on International Law of the Sea and related practices based on different aspects of UNCLOS, *The Legal Issues of Compensation for Oil Pollution Damage Caused by Ship Collision* by ZHANG Chunchang and SHUAI Yuexin is a new exploration to China's domestic maritime judicial practice. In combination with international conventions, international practices and domestic laws, the authors put forward a lot of understandings different from traditional judicial practice on the determination of liability subject of compensation for oil pollution damage caused by ship collision at sea, the calculation of disposal rates, and the legality of subject status of the government maritime agency in the civil claims of pollution emergency operations. The article makes new beneficial discussion mainly based on the Supreme People's Court's innovative spirit in the Retrial on the Dispute over the Cost of Preventive Measures in the Collision and Pollution Accident of *M.V CMA CGM Florida* and *M.V Chou Shan* and related maritime judicial practice.

COLR Editorial

Indexing:

CNKI	http://www.cnki.net/
Westlaw China	http://www.westlawchina.com/index_cn.html
Cqvip	http://www.cqvip.com/
HeinOnline	http://home.heinonline.org/
Airiti	http://www.airitilibrary.com/
Duxiu	http://www.duxiu.com/
Lawy.org	http://lawy.org/

Lawinfochina.com	http://www.lawinfochina.com/
Website	http://colr.xmu.edu.cn/
Facebook	https://www.facebook.com/COLawRev/
WeChat Official Account	COLReview

目 录
Table of Contents

论文 (Articles)

新发展与新文献 (Recent Developments and Documents)

附录 (Appendix)

《联合国海洋法公约》框架内、外（在某些情况下）国际海洋法的新进展

Tullio Scovazzi*

一、 一再重复的观点

联合国大会每年通过主题为“海洋和海洋法”的决议均强调，《联合国海洋法公约》（UNCLOS）是开展各种海洋活动必须遵循的法律框架。例如，最近一项决议重申 UNCLOS “为海洋中开展的所有活动制定了法律框架，作为国家、区域和全球在海洋领域采取行动与合作的基础，具有战略重要性，需要保持其完整性……”。[1]

虽然各国和学者们经常重申类似的观点，但 UNCLOS 仍有可能被质疑其能否完全地符合事实。不过 UNCLOS 无疑是国际法编纂进程的一个基石，其被描述为一部“海洋宪章”“一项国际社会的重大成就”“第一个几乎涉及海洋利用和海洋资源所有方面的综合条约”，以及一个“成功地顾及到所有国家利益冲突”的文书。[2] UNCLOS 拥有以上的（及未提及的其他）优点是公认的。然而，上述决议提出的所有海洋活动都必须限定在《联合国海洋法公约》范围内的观点，却是远不能令人信服的。

第一，UNCLOS 本身存在一些明显的空白。参与谈判的国家不愿意或没有能力处理和解决几个棘手的问题，最后成为 UNCLOS 中被故意留下的模糊空间。这种情况下，可以通过习惯国际法的规定（通过习惯国际法进行规制）来填补空白。UNCLOS 条款中使用的一些通用术语也可能不够精准。对 UNCLOS 相关条款的不同理解在原则上是可以接受的，各国的实践可能成为条约解释中更为重要的一

* Tullio Scovazzi，意大利米兰比科大学法学院国际法学教授。电子邮箱：tullio.scovazzi@unimib.it。本文是系作者参加第二届中欧国际海洋法研讨会（厦门）的报告论文，作者诚挚感谢厦门大学南海研究院的邀请以及与会专家所提反馈意见。

1 Resolution adopted by the General Assembly on 23 December 2016: Oceans and the law of the sea, A/RES/71/257.

2 Tommy T. B. Koh, *A Constitution for the Oceans*, in U.N., *The Law of the Sea - Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, New York, 1983, p. xxiii.

种方法（通过 UNCLOS 的条约解释进行规制）。

第二，更明显的是，虽然 UNCLOS 为许多事项提供了一个坚实的法律制度，但因此认为 UNCLOS 是海洋法领域法律规制的终极状态也是不切实际的，该领域可能会出现意想不到的问题，可能会开展需要特定规则的新活动，其中可能会包括一些偏离 UNCLOS 所规定的活动。对原 UNCLOS 制度的增补和修改已通过两个所谓的《执行协议》并被纳入 UNCLOS 公约本身（通过 UNCLOS 的整合进行规制）。另外一种情况是 UNCLOS 不足以满足实际需求（这种情况很少发生，但也不能完全排除）时，便需要起草一项国际通行的新文书，以避免需要通过其他文书规制的海法领域无章可循的风险。

二、通过习惯国际法进行规制

UNCLOS 最明显的空白位于关于专属经济区划界的第 74 条和与之相似的关于大陆架划界的第 83 条，UNCLOS 第 74 条：

> 1. 海岸相向或相邻的国家间专属经济区的界限，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。
>
> 2. 有关国家如在合理期间内未能达成任何协议，应诉诸第十五部分所规定的程序。
>
> 3. 在达成第 1 款规定的协议以前，有关各国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，并在此过渡期间内，不危害或阻碍最后协议的达成。这种安排应不妨害最后界限的划定。
>
> 4. 如果有关国家间存在现行有效的协定，关于划定专属经济区界限的问题，应按照该协定的规定加以决定。[3]

第 74 条和第 83 条，其给人的印象是，尽管内容详尽但没有规定任何实质性的制度。通过诉诸程序手段，它们规避了解决利害攸关的主要问题。除了指出有关国家为找到解决办法而必须诉诸的程序之外，第 74 条和第 83 条并没有对划界问题作太多说明。特别是，第 1 款没有具体说明有关国家未就划界达成协定时可适用的实质性规则是什么。援引《国际法院规约》第 38 条并未就如何解决问题的

3 《联合国海洋法公约》第 83 条几乎复制了第 74 条，唯一的变化是用“大陆架”取代了“专属经济区”。

实质（即如何在地图上画线），[4] 提供任何明确的指导。指出“公平解决”的目标似乎是多余的，因为任何由各方自由谈判和缔结的协定，自然都体现了公平解决。第 4 款规定，如果有关国家间存在现行有效的协定，则该协定适用，这让人想起帕利斯先生（Monsieur de La Palice）的故事一样，是显而易见。第 74 条和第 83 条可以理解为一种有关国家为缔结一项关于划界的协定并诚实行事的一般义务的确认，但无法从中推断出任何关于如何解决问题的进一步指导。

第 74 条和第 83 条内容的模糊是有实际原因的。在 UNCLOS 制定的谈判阶段，涉及海洋划界等敏感问题的国家强烈反对可能对其海岸相向或相邻的国家有利的明确规则。此外，面临多样化的划界问题（视海岸线的特点和不同的邻国的而定）的国家，更喜欢采用一种模糊的措词，使它们有足够的灵活性在不同领域玩不同的把戏。通过在 UNCLOS 的文本中作出明确的规定来打破这种僵局是极其困难的。这便是 UNCLOS 起草人对非常有争议的划界问题选择模糊化处理原因。若不想打开潘多拉魔盒，就必须如此，否则可能会阻碍 UNCLOS 的通过或普遍接受。[5]

现今，UNCLOS 留下的规范空白正通过自 1969 年 [6] 以来由国际法院或仲裁法庭作出的一系列国际裁决来填补。这一系列引人注目的国际裁决使用了一些解决问题的“方法”（如等距离原则、比例原则、减少岛屿的影响、移动等距线、划出通道），根据每个具体案件的相关情况，法院裁定哪些方法适用于划定沿海海域，以实现公平解决。这些方法今天已经成为习惯国际法规则。

UNCLOS 的另一个空白来自第 10 条第 6 款。该款指出，UNCLOS 关于海湾的规定不适用于所谓的“历史性”海湾。这一例外造成了一个法律空白，因为 UNCLOS 没有具体说明什么是“历史性”海湾，以及适用于这些海湾的其他规则有哪些。在国际实践和理论著作中，常给“历史性海湾”提出一些法律要素作为有无“历史”的条件，即国家权力的行使、这种权利行使的长期存在并持续、其他国

---

4 《国际法院规约》第 38 条具体规定了国际法院必须适用的规则类型：一、法院对于陈诉各项争端，应依国际法裁判之，裁判时应适用：（子）不论普通或特别国际协约，确立诉讼当事国明白承认之规条者；（丑）国际习惯，作为通例之证明而经接受为法律者；（寅）一般法律原则为文明各国所承认者；（卯）在第五十九条规定之下，司法判例及各国权威最高之公法学家学说，作为确定法律原则之补助资料者。二、前项规定不妨碍法院经当事国同意本“公允及善良”原则裁判案件之权。

5 Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea, PCA-CPA, Judgement, para. 116 (1999). UNCLOS 的僵局如此明显，以至于仲裁法庭于 1999 年 12 月 17 日裁决厄立特里亚 - 也门仲裁（第二阶段：海洋划界）案时作出如下评论：" 无论如何，对条款（UNCLOS 第七十四条和第八十三条）的解释必须留有意见分歧的余地。联合国海洋法第三次会议在最后一刻努力就一个非常有争议的问题达成协定，其目的是有意识地尽量少做裁决。不过，很明显，这两条都设想了一个公平的结果”（裁决第 116 段）。

6 1969 年 2 月 20 日，国际法院在北海大陆架案（德意志联邦共和国诉丹麦、德意志联邦共和国诉荷兰案）中首次作出了相关判决。

家的承认以及沿海国存在重大利益（不太常见）。但是，有关国家对具体案件中是否存在这种条件提出了许多不同的看法。[7]

三、 通过 UNCLOS 的条约解释进行规制

UNCLOS 第 7 条有关“直线基线”的情况表明，UNCLOS 条款如果从字面上理解，可能会有不同的含义，有时各国对 UNCLOS 条款的理解也会出现过于宽泛、甚至不同的解释。

“基线”一词是指划分领海和其他海洋区域的线。直线基线制度是一种例外，根据这种规则，领海的正常基线是沿岸的低潮线。而如果出现某些情况，可以连接陆地上适当的点将直线基线绘制到海洋中。第 7 条相关各款内容如下：

> 1. 在海岸线极为曲折的地方，或者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。
>
> 3. 直线基线的划定不应在任何明显的程度上偏离海岸的一般方向，而且基线内的海域必须充分接近陆地领土，使其受内水制度的规范。

注意，这两款规定中可能会有一些冗杂之处，因为一个曲折的海岸必然地形破碎，反之亦然。但背后的观念很清晰，即不可以通过激进的方法改变、重塑特定国家海岸的形状，唯一能做的是运用几何方法修正明显不规则的海岸线。简化而不改变：这是直线基线作为例外的补充途径的目的。

然而，对第 7 条的解读留下了一种不确定感，因为该条款的措辞没有包含足够的几何精度。在这方面可能会产生一些问题，例如一条海岸线何时可以被认为是极为曲折的？凹入程度和曲口宽度的比例是多少？一系列岛屿离海岸多远才算紧接海岸？这个距离应该在海岸到最近的岛屿还是到最外部的岛屿之间距离？岛屿本身之间的距离应该是多少，才能构成一个系列？位于垂直于海岸方向而非平行于海岸方向的一系列岛屿是否符合直线基线的条件？如何才能确定直线基线的划定是否明显偏离海岸的一般方向？海岸的一般方向本身是如何确定的？[8] 在哪些情况下，可以认为海洋区域充分接近陆地领土，在什么情况下又可以认为海域与陆地领土充分接近？第 7 条都没有给出明确的答复。

如果 UNCLOS 为直线基线的单段规定了最大长度限制，所有问题都会得到解决。但事实并非如此，尽管有人试图使其更加精确，但第 7 条的规定仍然较为

---

7 《联合国海洋法公约》第 298 条第 1 款（a）项（1）目，对不同于海湾的海洋水域也可以提出“历史性”的要求。

8 很明显，所有这方面的相关结论很大程度上都受到所用地图比例尺的影响。

模糊。推断最大长度限制可能会被认为是对条款解释的歪曲，应根据其灵活性对该条款予以理解。

不考虑第 7 条，个别沿海国的立法中有其自身的实践。在这些实践中，这些国家在确定海岸线直线基线制度时，依赖于相当有弹性的标准，这些海岸线虽然不是直线的，但似乎也并非极为曲折或紧接海岸有一系列岛屿。尽管国际法院发出了警告，[9] 但当今个别国家的实践似乎明确地指向了对《公约》第 7 条进行更加宽泛地解释和适用，远远超出了其绝对的措辞。在大多数情况下，只有少数国家或在划定海洋界限时可能会受到直线基线制度影响的邻国提出的抗议。这种宽泛解释的趋势可能导致对第 7 条的新解读。

四、 通过 UNCLOS 的条文整合进行规范

（一）两项 UNCLOS 执行协定

迄今已通过的两项 UNCLOS 执行协定是通过 UNCLOS 自身的整合进行规范的一个典型的例子。在这种情况下，对 UNCLOS 内涵的修改是通过“生理”方式来进行的，这种方式并不会导致 UNCLOS 体系的逻辑破坏。

1994 年，UNCLOS 最具创新性部分中的几项规定得到了修改，即涉及国家管辖范围以外的海底矿产资源的部分，这些资源适用人类共同继承财产制度。[10] 做出这些修改是为了能够使各国普遍加入《公约》，包括尚未成为《公约》缔约国的发达国家。具体做法就是联合国大会在 1994 年 8 月 17 日通过了第 48/263 号决议所附的《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》。

实际上，在这里，“执行协定”这个在政治上审慎使用的称谓只不过是“修正”一词的委婉说法，从法律角度来看，用“修正”会更正确。原则上，1994 年《关于执行〈联合国海洋法公约〉第十一部分的协定》的规定应作为单一文书一并解释和应用”（《执行协定》第 2 条）。但是，如果 1994 年《执行协定》与 UNCLOS 第十一部分之间有任何不一致之处，则以 UNCLOS 的规定为准。[11]

在渔业领域也出现了将一些额外规定“纳入” UNCLOS 制度的趋势。《执行 1982 年 12 月 10 日〈联合国海洋法公约〉有关养护和管理跨界鱼类种群和高度洄

---

9 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), ICJ, Judgement, para. 212 (2001). 国际法院在 2001 年 3 月 16 日对卡塔尔和巴林之间的海洋划界和领土问题作出裁决时指出，“直线基线法是确定基线的正常规则的例外，只有在满足若干条件的情况下才能适用。这种方法必须有限制地适用”（判决第 212 段)。

10 见下文，第四节第二点。

11 截至 2020 年 11 月，仍有 18 个 UNCLOS 的缔约国尚未成为《1994 年执行协定》的缔约国，这一备受关注的事实引发了几乎无法解决的条约法问题。

游鱼类种群的规定的协定》于 1995 年 12 月 4 日开放，以供签署。这项条约有一个明显的缺陷，那就是标题长得令人难以接受，当然它也有很多优点，例如详细规定了适用渔业的预防性做法（第 6 条和附件二），规定缔约方“须能够对悬挂本国国旗的船只切实执行对这些船只负有的责任”方可准其用于公海捕鱼（第 18 条，第 2 款）。最值得注意的是，它规定不愿意遵守养护和管理措施的国家不应该在公海捕鱼，从而给传统的公海自由原则带来了一个明显而受欢迎的排他。[12] 因此，可以让那些只利用其他国家商定的自我约束措施却不接受由此造成的负担的“搭便车”国家无法在公海捕鱼。所有这些发展都是对 UNCLOS 渔业制度的重要补充。

（二）有可能制定的第三项 UNCLOS 执行协定

2015 年 6 月 19 日，联合国大会以协商一致方式通过了第 69/292 号决议，该决议涉及根据 UNCLOS 制定一项关于养护和可持续利用国家管辖范围以外海洋生物多样性的具有法律约束力的国际文书。于是，成立了一个筹备委员会，其任务是就此类文书草案文本的内容向联合国大会提出实质性建议。谈判涉及四个主要专题，即“海洋遗传资源，包括惠益分享问题”、“包括海洋保护区在内的划区管理工具等措施”、“环境影响评估”和“能力建设和海洋技术转让”，旨在作为“一揽子事项”，意思是说这些专题彼此不能分开。

2017 年 7 月 21 日，筹备委员会建议联合国大会尽快决定召开政府间会议，以审议其对拟纳入 UNCLOS 的具有国际法律约束力的文书案文内容的建议。出席筹备委员会会议的大多数代表团在若干方面达成了共识，但对于其他内容还存在意见分歧。

在主要专题中，海洋遗传资源问题带来了一些政治和法律方面的挑战，这可能使其成为谈判中最困难的部分。关于未来制度的一些组成部分方面仍然存在分歧，首先是关于该制度应该基于公海自由原则，还是基于人类共同继承财产原则，这是该制度首先要做出的基本选择。

UNCLOS 第 136 条宣布，国际海底区域（以下简称”区域“），即国家管辖范围以外的海床、洋底和底土及其资源，为人类的共同继承财产。这是 UNCLOS 的主要创新方面。人类共同继承财产制度的基本内容是禁止国家侵占、指定“区域”只用于和平目的、为了全人类的利益来利用“区域”及其资源，并特别考虑发展中国家的利益和需要，以及建立一个有权代表人类行使资源权利的国际组织。这些

12 《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》第 8 条第 3 款，一方面，对有关渔业真正感兴趣的所有国家都有权成为某一次区域或区域渔业管理组织的成员或这种安排的参与方；第 8 条第 4 款，另一方面，只有属于这种组织的成员或安排的参与方的国家，或同意适用这种组织或安排所订立的养护和管理措施的国家，才可以捕捞适用这些措施的渔业资源。

内容都可以在《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》中找到。[13]“区域”及其资源是人类的共同继承财产（第 136 条）。任何国家都不得对“区域”的任何部分主张或对行使主权，任何国家或自然人或法人也不得将“区域”的任何部分据为己有（第 137 条，第 1 款）。“区域”专门用于和平目的（第 141 条）。“区域”资源的所有权利都属于全人类，一个国际组织——国际海底管理局（以下简称“管理局”）有权代表全人类采取行动。“区域”内活动为全人类的利益而进行，不论各国的地理位置如何，也不论是沿海国或内陆国，并特别考虑到发展中国家的利益和需要（第 140 条，第 1 款）。管理局应作出规定并通过适当机构，公平分配从“区域”活动中取得的财政及其他经济利益（第 140 条，第 2 款）。

然而，“区域”的矿产资源的前景仍然不明朗，因为一些因素对其未来的商业开发造成了负面影响。其中包括矿床的位置极深，采矿技术的研发成本高昂，以及在当前的经济条件下，海底采矿与陆上采矿相比仍然没有竞争力。

与此同时，开发国家管辖范围以外的遗传资源已成为一项具有商业前景的活动。尽管深海温度条件极端、完全黑暗和高压，但深海海底并不是沙漠。深海海底是与一系列不同的典型特征相关的各种生命形式的栖息地，这些典型特征包括热液喷口、冷水渗漏、海山或深水珊瑚礁。特别是，深海海底提供具有独特遗传特征的生物群落生存的能力，包括在极端温度（嗜热菌和超嗜热菌）、高压（嗜压微生物）和其他困难条件（嗜极微生物）下的生存能力。

到目前为止，只有少数国家和私营实体拥有到达深海海床并采集那里发现的生物体样本所需的财政手段和尖端技术，以此在实验室中分离出样品中的遗传物质，其结果可能是开发具有商业价值的产品并为其申请专利。

这类活动带来的法律问题是 UNCLOS 和 1992 年的《生物多样性公约》都没有为国家管辖范围以外的海洋遗传资源规定任何具体的监管框架。

在这方面，一些国家，特别是一些发展中国家的立场是，UNCLOS 关于人类共同继承财产的原则也适用于海洋遗传资源，管理局的任务也应涵盖这类资源。其他国家，特别是一些发达国家，则依赖公海自由原则，自由获取和不受限制地开采遗传资源。

似乎这两种相互矛盾的观点都源于一再重复的观点，即 UNCLOS 是在海洋空间进行的所有活动的法律框架。然而，UNCLOS 无法创造奇迹去规范那些在谈判期间尚无法预见的活动，因为当时人们对海洋生物基因的用途还知之甚少，UNCLOS 的任何条款中也均未提到“遗传资源”和“生物勘探”[14] 这两个词。

---

13 尽管《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》修改了”区域”的制度（见上文，第四节第一点），但人类共同继承财产原则仍然是《联合国海洋法公约》的重要启示。

14 这一活动目前被理解为寻找有商业价值的遗传资源。

事实上，UNCLOS 将“区域”内的“活动”一词定义为“勘探和开发区域的资源的一切活动”（第 1 条，第 1 款），而“区域”的“资源”这一术语被定义为“‘区域’内在海床或海床及其下原来位置的一切固体、液体或气体矿物资源，其中包括多金属结核”（第 133 条，a 项）。这意味着，UNCLOS 关于人类共同继承财产的现行制度不包括“区域”的非矿物资源，矿产资源勘探和开采规则不能扩展到位于区域内的其他资源。

然而，这并不妨碍各国将人类共同继承财产原则扩展到 UNCLOS 未涵盖的新发现资源，如果这些国家愿意这样做的话。现今，“区域”制度的范围已经比它乍看之下所认为的范围要广泛。根据 UNCLOS，“区域”作为人类共同继承财产的法律条件也影响到对活动的监管，尽管这些活动与采矿活动不同，但也位于这一空间。“区域”制度包括与采矿活动或多或少直接相关的主题，如海洋科学研究（见第 143 条，第 1 款），保护海洋环境（见第 145 条）和保护水下文化遗产（见第 149 条）。就前两个主题而言，很难明确区分在海床上发生的事情和在上覆水域发生的事情。

然而，将人类共同继承财产原则延伸到“区域”的非矿物资源将是合乎 UNCLOS 精神的自然演化，UNCLOS 是一项以联合国大会第 2749（XXV）号决议为基础的条约，[15] 旨在“有助于实现公正公平的国际经济秩序，这种秩序将照顾到全人类的利益和需要，特别是发展中国家的特殊利益和需要，不论其为沿海国或内陆国”（UNCLOS 序言）。虽然缺乏明确的遗传资源制度，但使所有国家之间共享惠益的目标仍然可以视为 UNCLOS 精神中包含的一个基本目标。同样，在遗传资源领域，适用以“先到先得”或“谋求资源的捕捞自由”为基础的海洋自由原则会导致不公平的后果。所以，可以构想新的合作计划，包括关于获取和分享惠益的规定，就是未来国家管辖范围以外的海洋遗传资源制度的基础。这也将完全符合《生物多样性公约》第 1 条及其《关于获取遗传资源和公正及公平分享其利用遗传资源所产生惠益的名古屋议定书》（名古屋，2010 年）第 10 条规定的公

15 Resolution adopted by the General Assembly on 24 October 1970: Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, United Nations General Assembly, A/RES/2749(XXV). 根据《关于各国管辖范围以外海洋底床与下层土壤之原则宣言》，国家管辖范围以外的所有海底资源都受人类共同继承财产制度管辖。该决议没有对矿产资源和非矿产资源进行区分。

平公正分享利用遗传资源所产生的惠益的原则。[16]

如果第三个执行协定得以通过并生效，这可能会大大改善海洋国际法，并建立一种更加公平的海洋资源开发体系。鉴于正在讨论的许多问题非常有难度且错综复杂，因而谈判需要有关国家本着克制的精神并努力发挥建设性的想象力。如果在讨论的这一初步阶段，没有出现解决几个关键问题的最佳方式，也不足为奇。对于即将举行的会议会产生的结果，时间自会说明。

五、通过其他文书进行规范

在 UNCLOS 制度中不完整或者说是明显令人不满的水下文化遗产方面，为了避免那些可能导致不良后果的风险，已通过一项在与 UNCLOS 不同并具有普遍性的文书。

UNCLOS 为水下文化遗产规定的制度似乎并不完整，只有两项载于《公约》不同部分的规定，即第 149 条[17]（第十一部分，“区域”）和第 303 条[18]（第十六部分，“一般规定”）。而且，这两项规定在概念上存在矛盾。一方面，第 149 条的基本假设是，遗产必须为了造福人类予以保存和利用，与遗产有关联的某些国家应享有优先权。而另一方面，第 303 条第 3 款至少在英文文本中可以这样解释，即含蓄地鼓励掠夺水下文化遗产，特别是在大陆架上发现的遗产。该条款优先考虑“打捞法和其他海事规则”，照一些英美法系国家的理解，这样一套规定适用“先到先得”或“自由捕捞”的方式来把水下文化遗产据为己有。这无疑有利于私人商业获

16 《关于获取遗传资源和公正和公平分享其利用所产生惠益的名古屋议定书》，于 2010 年 10 月 29 日《生物多样性公约》缔约方大会第十届会议通过。“缔约方应考虑有必要制定一种全球性多边惠益分享机制并考虑这一机制的模式，以便解决公正和公平分享从跨界的情况下发生或无法准予或获得事先知情同意的利用遗传资源和与遗传资源相关的传统知识中获得的惠益。遗传资源和与遗传资源相关的传统知识的使用者通过这一机制所分享的惠益，应该用于支持在全世界保护生物多样性和可持续地利用其组成部分。”虽然《名古屋议定书》不适用于国家管辖范围以外的区域，但它可能成为未来适用于这些区域内资源的制度的灵感来源。

17 《联合国海洋法公约》第 149 条“考古和历史文物”：在“区域”内发现的一切考古和历史文物，应为全人类的利益予以保存或处置，但应特别顾及来源国，或文化上的发源国，或历史和考古上的来源国的优先权利。

18 《联合国海洋法公约》第 303 条“在海洋发现的考古和历史文物”：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 33 条时推定，未经沿海国许可将这些文物移出该条所指海域的海床，将造成在其领土或领海内对该条所指法律和规章的违犯。3. 本条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在其他国际协定和国际法规则。

益，[19] 而有损于为公众利益进行研究和展示水下文化遗产的目标。如果是这样，与水下发现的某些文化遗产有联系的国家可能会被剥夺为防止其历史与文化遗产遭掠夺的任何权利和措施。

2001 年 11 月 2 日，教科文组织（联合国教育、科学及文化组织）于巴黎正式通过了《水下文化遗产保护公约》（Convention on the Protection of Underwater Cultural Heritage，以下简称“CPUCH”）。该公约以 UNCLOS 第 149 条为基础，其基本目标是防范因 UNCLOS 第 303 条第 3 款产生的自由掠夺制度的风险。它做出的一般性规定是，缔约国有义务“为全人类之利益保护水下文化遗产”（第 2 条第 3 款）以及“不得对水下文化遗产进行商业开发”（第 2 条第 7 款）。尽管 CPUCH 制度并没有完全禁止海事法，包括打捞法和打捞物法，但它具有防止适用这类法则所产生的所有不良影响的实际效果。[20] 例如，关于在大陆架上发现的水下文化遗产，CPUCH 规定了一种程序机制，涉及与遗产有可证实联系的国家的参与，这些国家必须就如何最好地保护遗产进行磋商。[21]

CPUCH 已于 2009 年 1 月 2 日生效。CPUCH 虽然正式申明 UNCLOS 不受妨碍，[22] 但实际上却试图对 UNCLOS 中一个非常有问题的方面进行补救。如果对遗产的掠夺是 UNCLOS 制度的结果，那么 UNCLOS 在这一具体问题上就是错误的。[23]

六、结　论

正如示例所表明的那样，国际海洋法的修改与完善既可以在 UNCLOS 内发生，在某些情况下也可以在 UNCLOS 外发生。后者并不是值得担忧的事。UNCLOS 像任何法律文书一样，都与谈判和通过该公约的时间有关（具体到本公

---

19 R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (1999), in International Legal Materials, 1999, p. 807. 例如，根据美国第四巡回上诉法院 1999 年 3 月 24 日对 R.M.S. Titanic 公司诉 Haver 案所作的裁决，打捞物法是指“如果一个人在通航水域发现了长期失踪或被遗弃的沉船，并将其财产化为实际占有或推定占有，那么他就成为财产所有人。”反过来，打捞法适用于财产所有人已知的情况，该法赋予打捞人对财产的留置权（或对物权）。

20 《水下文化遗产保护公约》第 4 条“与打捞法和打捞物法的关系”：打捞法和打捞物法不适用于开发本公约所指的水下文化遗产的活动，除非它：（a）得到主管当局的批准，同时（b）完全符合本公约的规定，同时又（c）确保任何打捞出来的水下文化遗产都能得到最大程度的保护。

21 该机制以三个步骤的程序（报告、磋商、紧急措施）为基础。

22 《水下文化遗产保护公约》第 3 条“本公约与《联合国海洋法公约》之间的关系”：本公约中的任何条款均不得妨碍国际法，包括《联合国海洋法公约》，所赋予各国的权利、管辖权和义务。本公约应结合国际法，包括《联合国海洋法公约》，加以解释和执行，不得与之相悖。

23 令人遗憾的是，有些国家似乎还没有充分认识到 CPUCH 传达出的合理信息，因为该条约到 2017 年 8 月为止只对 57 个国家生效。

约，相关时间为 1973 年至 1982 年之间）。UNCLOS 本身作为时代的产物，无法阻止时间的流逝。国际海洋法经历了一个自然演化和逐渐发展的过程，这一过程与各国的实践相联系，各国的实践发挥着其对 UNCLOS 的影响。

翻译：黄宇欣、曲娇、张海英
校对：李长山

The Progressive Development of International Law of the Sea: Within or (in Certain Cases) without the UNCLOS

Tullio Scovazzi*

I. A Commonly Repeated Statement

The resolutions that the United Nations General Assembly yearly adopts on the subject "Oceans and the Law of the Sea" emphasize that the United Nations Convention on the Law of the Sea (Montego Bay, 1982, hereinafter "UNCLOS") is the legal framework within which all activities in the sea must be carried out. For instance, a recent resolution reaffirms that the UNCLOS

> *sets out the legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance as the basis for national, regional and global action and cooperation in the marine sector, and that its integrity needs to be maintained (...).*[1]

While an analogous assumption is often repeated by States and scholars, the question may be asked whether it fully corresponds to the truth. There is no doubt that the UNCLOS is a cornerstone in the process for the codification of international law. It has been rightly described as a "constitution for oceans", "a monumental achievement in the international community", "the first comprehensive

---

* Tullio Scovazzi, Professor of International Law, Department of Law, University of Milano-Bicocca, Italy. Email: tullio.scovazzi@unimib.it. This article is the author's conference paper of the 2nd Sino - European States International Law of the Sea Symposium (Xiamen). The author would like to express his sincere gratitude to the South China Sea Institute of Xiamen University for the invitation and to all the experts for their comments on the author's presentation.

1 Resolution adopted by the General Assembly on 23 December 2016: Oceans and the law of the sea, A/RES/71/257.

treaty dealing with practically every aspect of the uses and resources of the seas and the oceans", as well as an instrument that "has successfully accommodated the competing interests of all nations".[2] The UNCLOS has these and other merits that nobody could deny. However, the assumption that everything that occurs in the seas must necessarily fall under the scope of the UNCLOS – if this is the idea put forward in the above mentioned resolutions – is far from being convincing.

A first remark is that there are some evident gaps in the UNCLOS itself. The States involved in the negotiations for this treaty were not willing or capable to address and settle a few thorny questions that were deliberately left in the vague. In this case, the gaps could be filled by resorting to provisions of customary international law (regulation through customary international law). It may also happen that some UNCLOS provisions make use of general terms that lack sufficient precision. Where different understandings of the relevant UNCLOS provisions are in principle admissible, State practice may be important in making one interpretation prevail over another (regulation through UNCLOS interpretation).

A second, and even more obvious, remark is that, while it provides a solid legal regime for many matters, it would be illusory to think that the UNCLOS is the end of legal regulation in the field of law of the sea. Unexpected problems may arise and new activities can be developed that require specific rules, including perhaps some departures from the UNCLOS provisions. In two cases additions and changes with respect to the original UNCLOS regime have been integrated into the UNCLOS itself through the adoption of so-called implementation agreements (regulation through UNCLOS integration). In another case, where the UNCLOS regime was clearly unsatisfactory – this happens very seldom, but cannot be excluded altogether –, a new instrument of universal scope has been drafted to avoid the risk of undesirable consequences (regulation in another context).

II. Regulation through Customary International Law

The most evident gap in the UNCLOS can be found in Article 74, relating to the delimitation of the exclusive economic zone, and in the analogous Article 83, relating to the delimitation of the continental shelf:

---

2 Tommy T. B. Koh, *A Constitution for the Oceans*, in U.N., *The Law of the Sea - Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, New York, 1983, p. xxiii.

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV [= Settlement of Disputes].

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, 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.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive zone shall be defined in accordance with the provisions of that agreement" (Art. 74).[3]

The reading of Articles 74 and 83 leaves the impression that, despite the elaborated content, they do not provide any substantive regime. By resorting to procedural means, they avoid tackling the main issue at stake. Apart from indicating the procedures to which the States concerned are bound to resort with the aim to find a solution, Articles 74 and 83 do not say very much on the question of delimitation. In particular, para. 1 does not specify what the substantive rules are that become applicable if the States concerned do not reach an agreement on the delimitation. The reference to Article 38 of the Statute of the International Court of Justice does not provide any clear guidance on how to address the substance of the question,[4] that is how to draw a line on a map. The indication of the objective of achieving an equitable solution seems redundant, as any agreement which has been freely negotiated and

---

3 Arts. 74 & 83 of the United Nations Convention on the Law of the Sea. Art. 83 reproduces almost completely Art. 74, the only change being "continental shelf" instead of "exclusive economic zone".

4 Art. 38 of Statute of the International Court of Justice Statute. The provision specifies the categories of rules that the International Court of Justice must apply: "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) (...) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

concluded by the parties embodies by definition an equitable solution. Para. 4, which provides that, where there is an agreement in force for the States concerned, such agreement applies, somehow recalls the story of Monsieur de La Palice. Articles 74 and 83 can be understood as a confirmation of the general obligation of the States concerned to behave in good faith in order to conclude an agreement on the delimitation. But it is impossible to infer from them any further guidance on how to reach the solution of the problem.

The vague content of Articles 74 and 83 was due to practical reasons. During the UNCLOS negotiations, States involved in sensitive issues of maritime delimitation strongly opposed precise rules which could have played in favour of their opposite or adjacent neighbouring States. Also States facing manifold issues of delimitation, depending on the characteristics of the coastlines and the different neighbouring States concerned, preferred a vague wording which would grant them enough flexibility to play different games in different fields. It was extremely difficult to force such a stalemate situation by setting forth clear-cut provisions in the UNCLOS text. Here is the explanation of the UNCLOS drafter's choice to leave the very controversial issue of delimitation unresolved. This was necessary to avoid the opening of a Pandora's box which could have precluded the very adoption of the convention or its universal acceptance.[5]

Today the normative gap left in the UNCLOS is being filled by international decisions, which since 1969[6] have been rendered by the International Court of Justice or arbitral tribunals. This notable body of international decisions shows the use of a number of "methods" (such as equidistance, proportionality, reduced effect of islands, the shifting of the equidistance line, the drawing of a corridor) that, in the light of the circumstances which were relevant in each specific case, were found by courts to be appropriate for delimiting maritime coastal zones in order to achieve an equitable solution. The methods in question have today consolidated into rules of customary

---

5 Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea, PCA-CPA, Judgement, para. 116 (1999). The stalemate of the UNCLOS is so evident that the arbitral court that on 17 December 1999 decided the *Eritrea - Yemen Arbitration (Second Stage: Maritime Delimitation)* case made following remark: "In any event there has to be room for differences of opinion about the interpretation of articles [= Arts. 74 & 83 of the UNCLOS] which, in a last minute endeavour at the Third United Nations Conference on the Law of the Sea to get agreement on a very controversial matter, were consciously designed to decide as little as possible. It is clear, however, that both articles envisage an equitable result" (para. 116 of the award).

6 The first relevant judgment was rendered by the International Court of Justice on 20 February 1969 in the *North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands).

international law.

Another gap in the UNCLOS can be found in Paragraph 6 of Article 10. It states that the UNCLOS provisions on bays do not apply to so-called historic bays. This exception creates a legal vacuum, as nowhere the UNCLOS specifies what historic bays are and what other rules apply to them. Some conditions are referred to in international practice and doctrinal works as the constitutive elements of a historical title over bays – namely the exercise of State authority, the long-lasting duration of this exercise, acquiescence by other States and, although less frequently, the presence of vital interests by the coastal State. But many different views are put forward by the States concerned as regards the existence of such conditions in specific cases.[7]

III. Regulation through UNCLOS Interpretation

The instance of straight baselines (Article 7 UNCLOS) shows that sometimes States practice corresponds to a rather broad interpretation of an UNCLOS provision that could have a different meaning if understood in a literal manner.

The word "baseline" designates the line from which the territorial sea and the other coastal zones are measured. A system of straight baselines is an exception to the rule according to which the normal baseline of the territorial sea is the low water mark along the coast. Instead, if certain circumstances occur, straight baselines can be drawn into the sea to connect appropriate points on land. The relevant paragraphs of Article 7 read as follows:

> *1. 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. (...)*
>
> *3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters. (...).*

Some redundancy may be noticed in the provision, as a deeply indented coast is

---

7 Art. 298, para. 1(a)(i), UNCLOS refers to "disputes (…) involving historic bays or titles". This implies that historic claims can be made also as regards marine waters different from bays.

necessarily cut into, and viceversa. But the idea behind it seems clear. Nature cannot be remade by changing in a radical way the shape of a State. What is allowed is to rectify by a geometrical device a manifestly irregular coastline. To simplify without altering: this is the purpose of the straight baselines exception.

However, the reading of Article 7 leaves a feeling of uncertainty, as the wording of the provision does not contain sufficient geometrical precision. A number of questions may be asked in this regard. When can a coastline be considered to be deeply indented and cut into? What should the ratio be between the length of the closing line of the indentation and the distance between this line and the most internal point of the indentation? At what distance from the coast should a fringe of islands be located to be considered in its immediate vicinity? Should this distance be measured between the coast and the closest island or the most external one? What should be the distance between the islands themselves in order to constitute a fringe? Could fringes located in a direction perpendicular to the coast, and not parallel to it, qualify for straight baselines? How is it possible to determine whether the drawing of straight baselines departs to any appreciable extent from the general direction of the coast? How is the general direction of the coast itself to be determined?[8] In what cases can marine areas be considered as sufficiently closely linked to the land domain? No clear responses are given in Article 7.

All the problems would have been solved if the UNCLOS had established a limit of maximum length for the single segments of a straight baseline. But this was not the case and Article 7 was left vague in its content despite some attempts to give it more precision. To infer maximum length limits could be considered as a distortion in the interpretation of a provision which should be understood in conformity with its flexible nature.

Irrespective of Article 7, a practice has developed in the legislation of several coastal States. It shows that they rely on rather elastic criteria in the determination of the drawing of their straight baselines systems along coastlines that, while not linear, do not seem deeply indented or fringed by islands in their immediate vicinity. Despite

8 It is evident that any conclusions in this respect are greatly influenced by the scale of the map utilized.

a warning by the International Court of Justice,[9] the practice of several States seems today definitely oriented towards a quite extensive interpretation and application of the relevant criteria that goes far beyond strict wording of Article 7 UNCLOS. Protests are in most cases limited to those made by a few countries or by neighbouring States which could be affected by the effect of a straight baselines system in making a maritime delimitation. This trend towards an extensive interpretation could lead to a new reading of Article 7.

IV. Regulation through UNCLOS Integration

A. Two UNCLOS Implementation Agreements

Evident instances of regulation through integration in the UNCLOS itself are the two UNCLOS implementation agreements which have been adopted so far. In this case, changes into the UNCLOS regime are effected in a "physiological" manner that does not entail a rupture in the logic of the UNCLOS system.

In 1994 several provisions were changed in the most innovatory part of the UNCLOS, that is the part relating to the mineral resources of the seabed beyond the limits of national jurisdiction, which are subject to the regime of common heritage of mankind.[10] The changes were made to achieve the universal participation in the convention, including by the developed States that had not yet become parties to it. This was done through the conclusion of the Agreement Relating to the Implementation of Part XI of the UNCLOS, which was annexed to Resolution 48/263, adopted by the General Assembly on 17 August 1994.

In fact, here the politically prudent label of an "implementation agreement" is nothing more than a euphemism for the word "amendment" which would have been more correct from the legal point of view. In principle, the provisions of the 1994 Implementation Agreement and those of Part XI of the UNCLOS "shall be interpreted and applied together as a single instrument" (Article 2 of the Agreement). However, in the event of any inconsistency between the 1994 Implementation Agreement and

---

9 Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), ICJ, Judgement, para. 212 (2001). In deciding on 16 March 2001 the case between Qatar and Bahrain on *Maritime Delimitation and Territorial Questions*, the International Court of Justice pointed out that "the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively" (para. 212 of the judgment).

10 See infra, para. IV. B.

Part XI of the UNCLOS, the provisions of the former prevail.[11]

The trend to "integrate" in the UNCLOS regime some additional provisions has occurred also in the field of fisheries. The Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, was opened for signature on 4 December 1995. This treaty has one evident defect – that is the unbearable length of its title – and many merits. For instance, it includes detailed provisions on the precautionary approach as applied to fisheries (Article 6 and Annex II), it establishes that a party may authorize a vessel to use its flag for fishing on the high seas "only where it is able to exercise effectively its responsibilities in respect of such vessel" (Article 18, para. 2) and, most notably, it brings an evident, but welcome, exception to the traditional principle of freedom of the high seas by providing that States which are not willing to comply with conservation and management measures can be excluded from fishing on the high seas.[12] Free rider States, that take advantage from the self-restraint measures agreed by the other States without accepting the consequent burdens, can thus be excluded from high seas fisheries. All these developments are important additions to the UNCLOS regime of fisheries.

B. A Possible Third UNCLOS Implementation Agreement

On 19 June 2015, the United Nations General Assembly adopted by consensus Resolution 69/292, relating to the development of an international legally-binding instrument under the UNCLOS on the conservation and sustainable use of marine biodiversity beyond national jurisdiction. A Preparatory Committee (PrepCom) was established with the mandate to make substantive recommendations to the General Assembly on the elements of a draft text of such instrument. The negotiations

---

11 Incidentally, the fact that eighteen States (as in November 2020), which are parties to the UNCLOS, are not yet parties to the 1994 Implementation Agreement is a persistent matter of concern and raises almost inextricable questions of law of treaties.

12 Art. 8 of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. On the one hand, all States having a real interest in the fisheries concerned have the right to become members of a sub-regional or regional fisheries management organization or participants in such an arrangement (Art. 8, para. 3). On the other, only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such an organization or arrangement, have access to the fishery resources to which those measures apply (Art. 8, para. 4).

address four main topics intended as a "package", in the sense that none of them can be separated from the others, namely "marine genetic resources, including questions on the sharing of benefits", "measures such as area-based management tools, including marine protected areas", "environmental impact assessments" and "capacity building and transfer of marine technology".

On 21 July 2017, the PrepCom recommended to the General Assembly to take a decision, as soon as possible, on the convening of an intergovernmental conference to consider its recommendations on the elements to be included in the text of an international legally binding instrument under the UNCLOS. Several elements generated consensus among most delegations attending the PrepCom meetings. On other elements there was divergence of views.

Among the main topics, the question of marine genetic resources presents a number of political and legal challenges that probably make it the most difficult aspect of the negotiation. Differences persist as regards a number of components of the future regime, starting from the fundamental choice on whether it should be based on the principle of freedom of the high seas or on the principle of common heritage of mankind.

Under Article 136 of the UNCLOS, the "Area", that is the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, and its resources, are declared to be the common heritage of mankind. This is the main innovatory aspect of the UNCLOS. The basic elements of the regime of common heritage of mankind are the prohibition of national appropriation, the destination of the Area for peaceful purposes, the use of the Area and its resources for the benefit of mankind as a whole, with particular consideration for the interests and needs of developing countries, and the establishment of an international organization entitled to act on behalf of mankind in the exercise of rights over the resources. They can all be found in Part XI of the UNCLOS.[13] The Area and its resources are the common heritage of mankind (Article 136). No State can claim or exercise sovereignty over any part of the Area, nor can any State or natural or juridical person appropriate any part thereof (Article 137, para. 1). The Area can be used exclusively for peaceful purposes (Article 141). All rights over the resources of the Area are vested in mankind as a whole, on whose behalf an international organization, that is the International Sea-Bed Authority

13 Although the regime of the Area was modified by the Agreement Relating to the Implementation of Part XI of the UNCLOS (see *supra*, para. IV. A), the principle of common heritage of mankind remains a major source of inspiration for the UNCLOS.

(hereinafter "ISA"), is entitled to act. Activities in the Area are carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States (Article 140, para. 1). The ISBA provides for the equitable sharing of financial and other economic benefits derived from activities in the Area through an appropriate mechanism (Article 140, para. 2).

However, the prospects coming from the mineral resources in the Area remain uncertain, as some factors have a negative impact on their future commercial exploitation. They include the great depths at which deposits occur, the high costs involved in research and development of mining technology and the fact that, under current economic conditions, deep seabed mining remains uncompetitive if compared to land-based mining.

In the meantime, the exploitation of genetic resources found beyond the limits of national jurisdiction has become a commercially promising activity. The deep seabed is not a desert, despite extreme conditions of temperature, complete darkness and high pressure. It is the habitat of diverse forms of life associated with typical features, such as hydrothermal vents, cold water seeps, seamounts or deep water coral reefs. In particular, it supports biological communities that present unique genetic characteristics, including the ability to survive extreme temperatures (thermophiles and hyperthermofiles), high pressure (barophiles) and other difficult conditions (extremophiles).

So far, only few States and private entities have at their disposal the financial means and sophisticated technologies required to reach the deep seabed and take samples of organisms found there, in order to isolate in laboratories the genetic materials deriving from them. The result could be the development and patenting of commercially valuable products.

The legal problems arising from this kind of activities are due to the fact that neither the UNCLOS, nor the 1992 Convention on Biological Diversity provides any specific regulatory framework for marine genetic resources beyond national jurisdiction.

In this regard, several States, especially within the group of developing countries, take the position that the UNCLOS principle of common heritage of mankind applies also to marine genetic resources and that the mandate of the ISBA should cover also such resources. Other States, in particular some developed countries, rely on the principle of freedom of the high seas, which would imply freedom of access to, and unrestricted exploitation of, genetic resources.

It seems that both the conflicting views move from the frequently repeated assumption that the UNCLOS is the legal framework for all activities taking place in marine spaces. However, the UNCLOS cannot work the miracle of regulating those activities that were not foreseeable in the period when it was being negotiated. At this time, very little was known about the uses of the genes of marine organisms. The expressions "genetic resources" and "bioprospecting"[14] do not appear in any of the UNCLOS provisions.

It is a matter of fact that the term "activities" in the Area is defined in the UNCLOS as "all activities of exploration for, and exploitation of the resources of the Area" (Article 1, para. 1) and that the term "resources" of the Area is defined as "all solid, liquid or gaseous mineral resources *in-situ* in the Area at or beneath the seabed, including polymetallic nodules" (Article 133, *a*). This means that the present UNCLOS regime of common heritage of mankind does not include the non-mineral resources of the Area and that the rules envisaged for the exploration and exploitation of mineral resources cannot be extended to other resources located therein.

However, this does not prevent States from extending the principle of common heritage of mankind to newly discovered resources not covered by the UNCLOS, if they wished to do so. The scope of the regime of the Area is already today broader than it may be believed at first sight. Under the UNCLOS, the legal condition of the Area as common heritage of mankind has an influence also on the regulation of activities that, although different from mining activities, are located in this space. The regime of the Area encompasses subjects which are more or less directly related to mining activities, such as marine scientific research (see Article 143, para. 1), the preservation of the marine environment (see Article 145) and the protection of underwater cultural heritage (see Article 149). As far as the first two subjects are concerned, it is difficult to draw a clear-cut distinction between what takes place on the seabed and what in the superjacent waters.

Yet, extension of the principle of common heritage of mankind to the non-mineral resources of the Area would be a natural evolution within the spirit of the

14 This activity is currently understood as the search for commercially valuable genetic resources.

UNCLOS, that is a treaty based on General Assembly Resolution 2749 (XXV)[15] and aiming at contributing "to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular the special interests and needs of developing countries, whether coastal or land-locked" (UNCLOS preamble). While a specific regime for genetic resources is lacking, the aim of sharing the benefits among all States can still be seen as a basic objective embodied in the spirit of the UNCLOS. Also in the field of genetic resources, the application of the principle of freedom of the sea, that is based on a "first-come-first-served" or "freedom-of-fishing-for-resources" approach, leads to inequitable consequences. New cooperative schemes, including provisions on access and sharing of benefits, could be envisaged as the basis for the future regime on marine genetic resources beyond national jurisdiction. This would also be in full conformity with the principle of fair and equitable sharing of the benefits arising out of the utilization of genetic resources, set forth in Article 1 of the Convention on Biological Diversity and in Article 10 of its Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya, 2010).[16]

If the future agreement will ever be adopted and enter into force, it could lead to a major improvement in international law of the sea and a more equitable system of exploitation of marine resources. Given the difficulties and intricacies of many among the issues under discussion, the negotiations require a spirit of moderation and efforts of constructive imagination by the States involved. It is not surprising

---

15 Resolution adopted by the General Assembly on 24 October 1970: Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, United Nations General Assembly, A/RES/2749(XXV). Under this resolution, all the resources of the seabed beyond national jurisdiction fall under the common heritage of mankind regime. The resolution does not make any distinction between mineral and non-mineral resources.

16 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, adopted by the Conference of the parties to the Convention on Biological Diversity at its tenth meeting on 29 October 2010. "Parties shall consider the need for and the modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally". While the Nagoya Protocol does not apply to areas beyond national jurisdiction, it could become a source of inspiration for a future regime applying to resources located in such areas.

if, in this preliminary stage of the discussions, the best way to address several crucial questions has not yet materialized. Time will tell about the results of the forthcoming meetings.

V. Regulation in Another Context

To avoid the risk of undesirable consequences, in the case of underwater cultural heritage where the UNCLOS regime is incomplete or clearly unsatisfactory, an instrument of universal scope has been adopted in a context different from the UNCLOS.

It appears that the regime provided by the UNCLOS for underwater cultural heritage is fragmentary, being composed of only two provisions included in different parts of the convention, namely Article 149[17] (in Part XI, "The Area") and Article 303[18] (in Part XVI, "General provisions"). Moreover, the two provisions are in a conceptual contradiction one with the other. On the one hand, Article 149 is based on the assumptions that the heritage must be preserved and used for the benefit of mankind and preferential rights should be granted to certain States that have a link with it. On the other, para. 3 of Article 303 can be interpreted, at least in its English text, as an implicit invitation to the looting of the underwater cultural heritage, especially the heritage found on the continental shelf. It gives priority to "the law of salvage and other rules of admiralty", that is a body of rules that are understood in some common law countries as providing for the application of a first-come-first-served or freedom-of-fishing approach for the appropriation of the

17 Art. 149 of the United Nations Convention on the Law of the Sea: "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".

18 Art. 303 of the United Nations Convention on the Law of the Sea: "1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose. 2. In order to control traffic in such objects, the coastal State may, in applying article 33 [= the contiguous zone], presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article [= customs, fiscal, immigration or sanitary laws and regulations]. 3. Nothing in this article affects the rights of identifiable owners, the law of salvage and 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".

underwater cultural heritage. This can only serve the interest of private commercial gain[19] at the detriment of the objective of the study and exhibition of underwater cultural heritage for public interest. If this is the case, a State which has a cultural link with certain objects found underwater could be deprived of any means for preventing the pillage of its historical and cultural heritage.

The Convention on the Protection of the Underwater Cultural Heritage (hereinafter "CPUCH"), adopted in Paris on 2 November 2001 within the framework of the UNESCO (United Nations Educational, Scientific and Cultural Organization), builds on the assumptions contained in Article 149 UNCLOS and basically aims at preventing the risk of a freedom of pillage regime arising from Article 303, para. 3, UNCLOS. It provides in general that States Parties are bound to "preserve underwater cultural heritage for the benefit of humanity" (Article 2, para. 3) and that "underwater cultural heritage shall not be commercially exploited" (Article 2, para. 7). Although it does not totally ban the law of admiralty, including law of salvage and law of finds, the CPUCH regime has the practical effect of preventing all the undesirable effects of the application of this kind of rules.[20] For instance, as regards the underwater cultural heritage found in the continental shelf, the CPUCH sets forth a procedural mechanism which involves the participation of the States having a verifiable link to the heritage, which are bound to consult on on how best to protect the heritage.[21]

The CPUCH has entered into force on 2 January 2009. While formally stating

---

19 R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (1999), in International Legal Materials, 1999, p. 807. For example, according to the United States Court of Appeals for the Fourth Circuit in the decision rendered on 24 March 1999 in the case *R.M.S. Titanic, Inc. v. Haver* (in *International Legal Materials*, 1999, p. 807), the law of finds means that "a person who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession becomes the property's owner". In its turn, the law of salvage, which applies where the owner of the property is known, gives the salvor a lien (or right *in rem*) over it.

20 Art. 4 of the Convention on the Protection of the Underwater Cultural Heritage: "Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection".

21 The mechanism is based on a three-step procedure (reporting, consultations, urgent measures).

that the UNCLOS is not prejudiced,[22] in fact the CPUCH tries to bring a remedy to a very questionable aspect of the former. If the looting of the heritage is the result of the UNCLOS regime, it is the UNCLOS that is wrong on this specific matter.[23]

VI. Conclusion

As the proposed instances show, changes in international law of the sea can take place both within and, in certain cases, without the UNCLOS. The latter case should not be seen as an alarming event. The UNCLOS, as any legal instrument, is linked to the time when it was negotiated and adopted (the period between 1973 and 1982, in the specific case). Being itself a product of time, the UNCLOS cannot stop the passing of time. International law of the sea is subject to a process of natural evolution and progressive development which is linked to States' practice and can display its influence also on the UNCLOS.

22 Art. 3 of the Convention on the Protection of the Underwater Cultural Heritage: "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea".

23 Sadly enough, it appears that the sensible message coming from the CPUCH has not yet been fully appreciated by several States, as this treaty is today (November 2020) in force for only 65 States.

关于缔约国根据《联合国海洋法公约》第 287 条所作“声明”的讨论

Miguel García García-Revillo*

一、前　言

众所周知，由于“蒙特勒准则”[1]（Montreux Formula），1982 年《联合国海洋法公约》（United Nations Convention on the Law of the Sea，以下简称“《公约》”）第 287 条允许缔约国从四个争端解决法院或法庭中选择，以处理与本国相关的涉及重要国际条约解释与适用的争端。这四个争端解决法院或法庭分别是：国际海洋法法庭（International Tribunal for the Law of the Sea，以下简称“ITLOS”）、国际法院（International Court of Justice，以下简称“ICJ”）、《公约》附件七规定的仲裁程序（附件七仲裁庭）和《公约》附件八规定的特别仲裁程序（附件八特别仲裁庭）。

---

* Miguel García García-Revillo，西班牙科尔多瓦大学法学院国际公法学教授。本文系西班牙科学与创新部“海洋管理框架下的新近和待解决问题”项目论文（项目编号：PGC 2018-098828-B-I00）。。

1 “蒙特勒准则”最初也被称为“里普哈根准则”（“Riphagen Formula”），里普哈根指威廉里普哈根教授，该准则意指各国可以从所列法院或法庭（见《公约》第 287 条）中选择自己偏好的法院或法庭。在第三次联合国海洋法会议期间提出并接受这一方法之前，一些国家一致赞成为未来《公约》的强制解决机制指定一个法院或法庭，但对指定哪个特定法院或法庭（简言之：国际法院、当时的海洋法法庭或仲裁庭）却有不同意见。1975 年 3 月在蒙特勒举行的一次非正式会议上提出的这一灵活的“方式”，被这些国家接受。参见 Jean-Pierre Quéneudec, *Coup d'oeil retrospectif sur les origines du Tribunal International du Droit de la Mer*, in Ando, Mc Whinney & Wolfrum eds., Liber amicorum Judge Shigeru Oda, Kluwer, The Hague, London, New York, 2002, p. 621-632; José Antonio Pastor Ridruejo, *La solución de controversias en la III Conferencia de las Naciones Unidas sobre el Derecho del Mar*, REDI, Vol. 30:1, 1977, p. 11–32; Louis B. Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, San Diego Law Review, Vol. 12, p. 495 (1975).(as quoted by Quéneudec, cit. p. 624 and note 15); José Manuel Sobrino Heredia, Miguel García García-Revillo, *El Tribunal Internacional del Derecho del Mar. Origen, organización y competencia,* Servicio de Publicaciones de la Universidad de Córdoba, Madrid, 2005, p. 52 and following; Myron H. Nordquist ed. in chief, *United Nations Convention on the Law of the Sea: A Commentary*, Center for Oceans Law and Policy, University of Virginia, Vol. 1.

上述法院或法庭的选择与《公约》的强制解决机制密不可分，这一解决机制中包含《公约》第十五部分所规定的“导致有拘束力裁判的强制程序”。在这方面，对《公约》第 287 条可以从许多角度加以分析，但由于时间和空间的限制，本文集中讨论三个具体问题，其中重点讨论缔约国家的意愿或同意。第一个问题是关于根据《公约》第 287 条作出的声明与《国际法院规约》（the Statute of the International Court of Justice）第 36 条第 2 款任择条款制度框架下的声明之间的关系。第二个问题是关于缔约国根据《公约》第 287 条作出声明时，是否可能在各法院或法庭之间确定一个优先顺序，以及当这一顺序与争端所涉另一国声明所确定的优先顺序不一致时所具有的效力。最后，第三个问题是关于《公约》缔约国迄今为止在根据第 287 条作出的声明中所“表达”的实际偏好，以及它们根据《公约》争端解决机制所实际优先选择的法院或法庭。

二、缔约国根据《公约》第 287 条所作声明与《国际法院规约》第 36 条第 2 款任择条款制度框架下的“声明”之间的关系

根据《联合国海洋法公约》第 287 条：

第 287 条程序的选择

1. 一国在签署、批准或加入本公约时，或在其后任何时间，应有自由用书面声明的方式选择下列一个或一个以上方法，以解决有关本公约的解释或适用的争端：

(a) 按照附件六设立的国际海洋法法庭；

(b) 国际法院；

(c) 按附件七组成的仲裁法庭；

(d) 按照附件八组成的处理其中所列的一类或一类以上争端的特别仲裁法庭。

2. 根据第 1 款作出的声明，不应影响缔约国在第十一部分第五节规定的范围内和以该节规定的方式，接受国际海洋法法庭海底争端分庭管辖的义务，该声明亦不受缔约国的这种义务的影响。

3. 缔约国如为有效声明所未包括的争端的一方，应视为已接受附件七所规定的仲裁。

4. 如果争端各方已接受同一程序以解决这项争端，除各方另有协议外，争端仅可提交该程序。

5. 如果争端各方未接受同一程序以解决这项争端，除各方另有协议外，争端仅可提交附件七所规定的仲裁。

6. 根据第 1 款作出的声明，应继续有效，至撤销声明的通知交存于联合国秘书长后满三个月为止。

7. 新的声明、撤销声明的通知或声明的满期，对于根据本条具有管辖权的法院或法庭进行中的程序并无任何影响，除非争端各方另有协议。

8. 本条所指的声明和通知应交存于联合国秘书长，秘书长应将其副本分送各缔约国。

根据《国际法院规约》第 36 条第 2 款及以下条款。

2. 本规约缔约国得随时声明关于具有下列性质之一切法律争端，对于接受同样义务之任何其他国家承认法院之管辖为当然而具有强制性，不须另订特别协定。

a. 条约之解释;

b. 国际法之任何问题

c. 任何事实之存在，如经确定即属违反国际义务者；

d. 因违反国际义务而应予赔偿之性质及其范围。

3. 上述声明，得无条件为之，或以数个或特定之国家间彼此约束为条件，或以一定之期间为条件。

4. 此项声明应交存联合国秘书长并由其将副本分送本规约各当事国及法院书记官长。

5. 曾依常设国际法院规约第三十六条所为之声明而现仍有效者，就本规约当事国间而言，在该项声明期间尚未届满前并依其条款，应认为对于国际法院强制管辖之接受。

6. 关于法院有无管辖权之争端，由法院裁决之。

不难看出，两种文本之间有一些相似之处。例如，在形式上，两种文本都明确要求或默示假定以书面形式作出的声明;在地点上，两者都交存于联合国秘书长，由秘书长应将副本分送给各自文本所确定的国家;在时间上，两者都可以在任何时间作出。事实上，两者的相似之处不仅体现在程序或形式方面，而且体现在各自的内容方面。例如，从本质上讲，这两种制度都是以平等、无歧视为基础的，这一点在任择条款制度中的明确指出并隐含在《公约》第 287 条中，而且两者都允许“保

留”，即声明者可以根据一般的加减惯例，对其声明的范围设置限制或条件。[2]

然而，这两项规定也存在显著差异，笔者认为最重要的一点是，在各自的（部分重合）的适用范围内，声明在争端解决机制中发挥的作用。在笔者看来，这严重影响到平等的实施，并因此影响到根据《公约》第 287 条和《国际法院规约》第 36 条第 2 款分别提出的“保留”的作用。

主要的区别在于：在任择条款制度中，按照《国际法院规约》第 36 条第 2 款作出的声明有双重作用。第一，选择法院或法庭，在这种情况下，唯一可能的法院就是国际法院。第二，确定该法院（国际法院）对案件的强制管辖权，在此类案件中，就声明国而言，该法院的管辖权基于此类声明[3]。相比之下，根据《公约》第 287 条作出的声明只有第一种作用，无第二种作用。这些声明仅用于确定处理适用《公约》 强制解决机制的争端的法院或法庭，并不用于确定哪些争端应提交给此类强制管辖。《公约》的其他条款对此作出了规定，如与第 288、297 和 298 条有关的第 286 条，所有这些条款都在第十五部分。[4]

在解释这些声明时，这一点具有重大意义，尤其是正如上文所述在处理对等和“保留”（如果提出）时。特别是任择条款制度的对等与根据《公约》第 287 条双方在声明中选择同一法院或法庭所能推导出的对等并不完全一致时。就这一点来说，虽然在任择条款制度中，声明之外的任何事项都必须视为不在国际法院的管辖范围之内，但根据《公约》第 287 条的规定，未提交至该声明方选择的法院或法庭的任何事项，并不被视为在强制解决机制之外的事项，而是强制提交至另一法庭：按附件七组成的仲裁庭。在笔者看来，这种差异产生了重要的后果。在《国际法院规约》第 36 条第 2 款的制度中，声明国声明自愿接受法院的管辖。因此，解释这种自愿接受时理所应当地必须加以一定的限制，以便不使这种自愿接受超出声明国的实际意图。另一方面，出于同样的理由，在任意条款制度下，提交给国际法院强制管辖权与“对接受同样义务之任何其他国家”对等，这也是合乎逻辑

---

2 正如 Oda 法官在 1984 年 11 月 26 日关于在尼加拉瓜境内及针对尼加拉瓜的军事与准军事活动案（尼加拉瓜诉美利坚合众国）的《对国际法院判决的单独意见》中所述，为了促进接受法院的强制管辖权，国际联盟大会在其 1924 年 10 月 2 日的决议中认定了任择条款制度保留的合法性。该决议“认为对 [第 36 条第 2 款] 的研究表明，这些条款的范围很广，使各国能够遵守根据第 36 条第 2 款开放供签署的《特别议定书》，并保留其认为必不可少的内容”（《国际联盟公报》，特别补编第 21 号，第 21 页，着重强调）（《国际法院案例汇编》，1984 年，第 490 页）。关于对任择条款制度的保留，参见 R. Casado Raigon, *La jurisdicción contenciosa de la Corte Internacional de Justicia. Estudio de las reglas de su competencia*, Servicio de Publicaciones de la Universidad de Córdoba, Córdoba, 1987, p. 101。

3 众所周知，任择条款制度并不是赋予国际法院管辖权的唯一途径，它也可以以一项国际条约 (《国际法院规约》第 36 条第 1 款) 为基础，甚至应诉管辖也可以赋权。

4 关于《公约》强制解决机制的实际范围，参见 Miguel García García-Revillo, The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea, Brill-Nijhoff, Leiden-Boston, 2015, p. 31-144.

的。相反，在《公约》的争端解决机制中，任何提交强制管辖的争端，并不是因为第 287 条作出的声明，而是因为实施了第 286 条、288 条等一系列规定。因此，未提交给声明国选择的法院的事项并没有被排除在具有约束力裁判的强制性程序之外，而只是强制提交给声明国选择的法院以外的法院，即附件七所规定的仲裁庭。因此，如果一国选择了“默认”法院（按附件七组成的仲裁庭）以外的其他法院，在有疑问的情况下，应优先考虑前者而不是后者，这是合理的；简言之：可以倾向于对该国的同意作出广泛的解释。

在解释“保留”时，也应考虑到缔约国同意在一种制度和另一种制度中的不同含义。在任择条款制度中，“保留”限制了国际法院的强制管辖权。因此，国际法院对保留进行广泛的解释，以确定声明者在向联合国秘书长交存声明时真正接受了国际法院的管辖。但是，在《公约》第 287 条中，声明有不同的作用：只是将属于强制解决机制范围内的争端分配给选定的法院或法庭（一个或多个）和默认法庭（按附件七组成的仲裁庭）。既然目的不同，缔约国的“同意”也就不同，因此必须根据案件的具体情况以不同的方式加以解释。

三、缔约国在所选法院或法庭之间确立优先顺序的声明

根据《海洋法公约》第 287 条，发表声明的缔约国可以自由选择一个或多个所列的法院或法庭，即国际海洋法法庭、国际法院、按附件七组成的仲裁庭和按附件八组成的特别仲裁庭。

发生争端时，如果双方选择了一个法院或法庭就不会有问题：如果双方选择了同一个法院或法庭，[5] 除非双方另有约定，否则该法院或法庭将是唯一有管辖权的法院或法庭；但是，如果双方选择了不同的法院或法庭，除非双方另有约定，否则管辖权将属于按附件七组成的仲裁庭。如果争端一方指定了多个法院或法庭而没有确定优先顺序，[6] 而其对方也指定了多个无优先顺序的法院或法庭或只指定一个法院或法庭，也不会有问题。在这种情况下，共同法院或法庭或任何一个共同

---

5 如以下案例，安哥拉、孟加拉国（就两项特定争端）、保加利亚、刚果民主共和国、斐济、希腊、马达加斯加、巴拿马（就一项特定争端）、圣文森特和格林纳丁斯、瑞士、坦桑尼亚和乌拉圭（国际海洋法法庭）为一方，丹麦、洪都拉斯、荷兰、尼加拉瓜、挪威、瑞典和联合王国（国际法院）为另一方。这些例子应加上埃及和斯洛文尼亚，它们选择了按附件七组成的仲裁庭。在这种情况下，由于该仲裁庭正是具有强制剩余管辖权的法院，所以明确指定其为唯一的法院实际上没有必要。

6 如葡萄牙和东帝汶（四个法院或法庭）、墨西哥和厄瓜多尔（国际海洋法法庭、国际法院和特别仲裁庭），加拿大（国际海洋法法庭和按附件七组成的仲裁庭）、白俄罗斯、俄罗斯联邦和乌克兰（按附件七组成的仲裁庭和特别仲裁庭），澳大利亚、比利时、爱沙尼亚、芬兰、意大利、拉脱维亚、立陶宛、阿曼、西班牙和多哥（国际海洋法法庭和国际法院）这些国家还应加上荷兰，它们选择了国际海洋法法庭和国际法院，但没有指定优先顺序。其 2017 年 2 月 27 日的声明转载如下。

法院或法庭应有权受理争端。[7]

但是，在没有明文禁止的情况下，根据第 287 条作出声明的国家也可以确定所选法院或法庭之间优先顺序，不论该顺序是否与上述规定所公布的顺序一致。[8] 事实上，在笔者看来，这是另一种方式的“保留”。那么，这种情况可能会造成问题，以下是一些例子。

假设一国选择了国际海洋法法庭和国际法院，但没有确立优先顺序，而其对手也作出了完全相同的选择，但确立了优先顺序（首选国际海洋法法庭、其次为国际法院），那么第一个国家是否能够在国际法院对第二个国家提起诉讼？第二个国家能在国际法院对第一个国家提起诉讼吗？也就是说，在对方没有确立法院或法庭的优先顺序的基础上，第二个国家是否可以将案件提交国际法院，尽管它自己声明表示优先选择国际海洋法法庭？或者，如果一国首选国际海洋法法庭，其次为国际法院，另一国首选国际法院，其次为国际海洋法法庭，那么哪个是两国的主管法院或法庭？更复杂的是：当选择了第 287 条所列举的三个或四个法院和法庭时，怎么办？笔者认为，这些问题的答案主要取决于怎样理解根据第 287 条第 4 和第 5 款选择“同一程序”。

一些学者[9]在深入研究了各种情形后，认为，当其中一国没有设定指定法院或法庭的优先顺序时（例如 A：西班牙选择了国际海洋法法庭和国际法院，但没有确定优先顺序，而佛得角首选国际海洋法法庭，其次为国际法院）：（一）未确定优先顺序的国家只能将争端提交给双方都选择的法院或法庭中其对手的首选法院或法庭（例 A 中：国际海洋法法庭）；（二）相反，确定优先顺序的国家可以在双方都选择的法院或法庭（例 A 中：国际法院或国际海洋法法庭）对另一方提起诉讼。另一种情况是，当两个国家选择了相同的法院或法庭，但优先顺序相反时（例如 B：（克罗地亚首选国际海洋法法庭，其次为国际法院，另一随机国家首选国际法庭，其次为国际海洋法法庭[10]），由于存在讨论中的国家没有接受第 287 条第 5 款中定义的“同一程序”的情况，鉴于无法确所选的哪个法院或法庭是当事各方所接受的解决争端的“同一程序”，争端必须提交按附件七组成的仲裁庭。[11] 可以理解这种基于第 287 条文本的推理，但笔者认为这些情况可能产生不同的结果。

由于上述原因，笔者认为应该避免这种推论，即由于声明国已经根据第 287

---

7 See, in this respect, A. Cannone, *Il Tribunale Internazionale del dirito del mare,* Cacucci, Bari, 1991, p. 55.

8 事实上，有几个国家就是这样做的。如奥地利（国际海洋法法庭、特别仲裁庭、国际法院）、德国（国际海洋法法庭、按附件七组成的仲裁庭、国际法院），匈牙利（国际海洋法法庭、国际法院、特别仲裁庭）佛得角、克罗地亚、黑山以及特立尼达岛和多巴哥（国际海洋法法庭、国际法院）阿根廷和智利（国际海洋法法庭、特别仲裁庭）与突尼斯（国际海洋法法庭、按附件七组成的仲裁庭）。

9 A. Cannone, *Il Tribunale Internazionale del dirito del mare,* Cacucci, Bari, 1991, p.57.

10 迄今为止，尚未向联合国秘书长交存任何此类声明。

11 A. Cannone, *Il Tribunale Internazionale del dirito del mare,* Cacucci, Bari, 1991, p.56.

条作出声明确定了优先顺序，这种顺序就是起限制作用，就如同在根据任择条款制度作出的声明中提出“保留”一样。首先，在任择条款制度中不存在确定法院或法庭的优先级顺序，因为任择条款制度仅涉及一个法庭。最重要的是，这种优先顺序并不是为了排除，正如根据《国际法院规约》第 36 条第 2 款所作声明中的保留一样。确立优先顺序的国家无意剥夺其所选择的法院或法庭的管辖权（如果它们想，它们只须在其声明中放弃选择该法院或法庭）；相反，他们希望将管辖权授予他们选择的每一个法院或法庭。因此，在两个或两个以上法院或法庭可能具有权限的情况下，各国只是设立一种相对偏好。

正如之前关于国际海洋法法庭管辖权的解释一样，[12] 在笔者看来，很难证明一个国家确定两个法院或法庭的优先顺序时同时信任这两个法院或法庭，即使在作出决定的时刻，也是在表达自己对其中一个的偏爱。就这点而言，例如两个同时选择了国际海洋法法庭和国际法院（但顺序完全相反）的国家应通过按附件七组成的仲裁庭解决争端，仅仅因为它们的优先顺序不同，而按附件七组成的仲裁庭正是他们没有选择且试图通过各自的声明所避免的法庭，这在笔者看来似乎违反了第 287 条的目的和宗旨（违背了《公约》的整个争端解决机制）。假设确立优先顺序的国家是为了包含而不是排除，笔者认为对第 287 条最正确的解释是提供尊重当事方意愿的解决办法，而这些解决办法必然会将争端引向当事各方明确选择的一个法院或法庭。

如果寻求一种既符合目的又符合宗旨的解决办法，就必须考虑到这样一个事实：一般情况下，确立优先顺序的国家是即将成为被告的一方。在这方面，一个打算对另一国家提起诉讼的国家不可能通过确定可选法院或法庭的优先顺序来限制自己的可能性；因为如果没有这样这样的顺序，所有这些法院或法庭都可以由它支配。如果一个国家已经有了优先选择，任何打算采取法律行动的国家必须尊重该优先选择（无论后者是否有自己的优先选择）。但是，笔者认为，确立优先顺序成为一国对没有建立这种顺序的对手的一种优势，是不可接受的。在笔者看来，在我看来，一个国家作为被告时设定优先顺序，当其角色颠倒，在随后的情况下若成为原告，也无法避免这一顺序。这将使该国家能够仅仅因为案件中的新被告没有为自己确立优先顺序而将其案件提交给该国家设定顺序一致的法院或法庭。

公平地说，当一个国家起诉没有确定优先顺序的国家，从被告变为原告时，必须保持前后一致并遵守其之前确定的优先顺序。当然，一个国家提交声明时可以确定两个优先顺序，一个用于是原告的情况，另一个用于是被告的情况。但是，由于声明没有区分原告与被告的情况，就必须在所有情况下考虑其中确定的优先顺序。

---

12 See *inter alia*, Miguel García García-Revillo*, The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea*, Brill-Nijhoff, Leiden-Boston, 2015, p. 159.

综上，当至少有一个诉讼当事方已通过第 287 条所作的声明中确立了优先顺序时出现了各种假设，笔者的意见是可以采用以下双重模式来确定法院或法庭：

（一）服从被告确定的优先顺序

（二）被告没有确定优先顺序时，服从原告的优先顺序

再看前文的案例，结果可能有以下几种：

例 A：一国选择了国际海洋法法庭和国际法院，但没有确定优先顺序（例如本文选用案例中的西班牙），另一国首选国际海洋法法庭，其次为国际法院（例如佛得角）。在这种情况下，西班牙可以在后者首选的法庭，即国际海洋法法庭起诉佛得角，但不能在国际法院起诉；而相应地，佛得角为了尊重自己的优先顺序，应在国际海洋法法庭起诉西班牙，而不能在国际法院起诉。

例 B：一国首选国际海洋法法庭，其次为国际法院（例如克罗地亚），而另一国（由于迄今没有例子，称该国为 X）作出了同样的选择，但顺序相反：首选国际法院，其次为国际海洋法法庭。在这些例子中，克罗地亚可以将案件提交给 X 国的首选法院，即国际法院，但不提交给国际海洋法法庭，而 X 国则可以在克罗地亚的首选法院，即国际海洋法法庭对其提起诉讼，但不能在国际法院提起诉讼。无论哪种方式，都可以避免当两国同时选择国际法院和国际海洋法法庭时，争端最终提交按附件七组成的仲裁庭的情况。

如果选择了两个以上的法院或法庭，且至少有一个国家确定了优先顺序，则适用同样的标准。

然而，各国避免其声明被解释的最佳方式无疑是自行表达其倾向性。荷兰于 2017 年 2 月 27 日发表的声明就属于这种情况，根据该声明：

> 荷兰王国认为其已选择了与选择国际法院或国际海洋法法庭或两者的任何其他缔约国“同一程序”。
>
> 如果另一缔约国选择了国际法院和国际海洋法法庭，但未指明优先顺序，则荷兰王国应被视为只选择了国际法院。

四、《公约》缔约国在选择解决属于强制解决机制的争端的法院或法庭时的真实偏好

正如前言中所指出的，缔约国同意有关的第三个问题涉及各国对《公约》第 287 条所列法院或法庭的偏好取向。笔者再次把重点放在提交给《公约》强制解决机制的争端上，由于《公约》第十五部分、第十一部分、附件五至八，通过国际海洋法法庭本身或通过其海底争端分庭，使得国际海洋法法庭在处理第 187 条所规定的国际海底区域争端和第 292 条关于船只和船员迅速释放的争端方面具有优

势。因此，在处理这类争端时，一般规则是将争端提交给国际海洋法法庭，例外情况是将争端提交给其他法庭。但事实恰恰相反，在必须作出有约束力裁判的强制性程序处理出现剩余争端时，一般规则是提交按照附件七组成的仲裁法庭，因为其被赋予强制性的剩余管辖权，而例外情况是提交给国际海洋法法庭（或“蒙特勒准则”下的其他法院或法庭之一）。尤其是只有在任何争端发生之前，当事双方根据第 287 条提出声明，选择同一个法院或仲裁法庭时，这一例外才会成立。因此，事实是，尽管第 287 条所列的所有法院或法庭在形式上都是绝对平等的，尽管它们的位置不同，但这种平等是表面的，而不是实际的。

首先，虽然有些法院或法庭，如国际海洋法法庭和按附件七组成的仲裁庭，原则上可以处理任何类型的争端，但其他法院或法庭，如国际法院和按附件八组成的特别仲裁庭，则受到某些限制。[13] 其次，尽管它们之间没有优先顺序，但其中一个法庭（按附件七组成的仲裁庭）对没有作出声明的案件有剩余强制管辖权，这一事实使该法庭在事实上和法律上都明显优于其他法院或法庭。在这方面，第 287 条的规定似乎不是为了鼓励各缔约国作出声明，而是为了劝阻它们采取这种行动。另一方面，之所以这样做，是因为通过规定一个具有剩余强制管辖权的法院，任何没有声明的情况都具有特定的含义：选择按附件七组成的仲裁庭。在第三次联合国海洋法会议期间，这是大多数国家首选的法院。因此，大多数国家通过选择放弃发表声明来“表达”其偏好是合理的。从这个意义上说，如果被赋予剩余强制管辖权的法院是国际海洋法法庭（如第十五部分初稿所提议的），那么各国对仲裁的偏爱就会促使它们根据第 287 条作出声明（或至少通过选择按附件七组成的仲裁庭而退出国际海洋法法庭）。在这方面，秘书长和联合国大会一再呼吁各缔约国作出此类声明，但没有得到热烈的回应，因为各国的回避行为表明了一种完全值得尊重的倾向：它们倾向于仲裁。[14]

鉴于所讨论的内容和对缔约国根据第 287 条所作声明的分析，似乎很明显的是绝大多数国家“选择”附件七的仲裁法庭；也就是说，绝大多数国家没有作出任何声明。截至 2020 年 8 月 6 日，在《海洋法公约》167 个缔约国和欧盟中，多达

---

13 特别是，由于其形式，特别仲裁法庭似乎不是为了处理附件八第 1 条规定以外的争端而设计的。另一方面，鉴于《国际法院规约》（第 34 条）规定的属人原则，很明显，对于 UNCLOS 附件九中的国际组织（迄今为止是欧洲联盟）来说，在根据第 287 条（附件九第 7 条第 1 款）作出声明时，可用的法院或法庭实际上是三个，而不是四个，因为这些组织不能诉诸国际法院。

14 Treves 持相反的立场，他认为，没有选择不一定表明倾向于仲裁，尽管这是它所带来的后果；在他看来，不发表声明有时相当于一种符合正常“官僚谨慎”的“观望”态度。参见 Tullio Treves, *Choice of Procedure for the Compulsory Settlement of Disputes under the Law of the Sea Convention*, in Lucius Caflisch *et al* Coords., El Derecho internacional. Normas, hechos y valores: Liber amicorum José Antonio Pastor Ridruejo, Servicio de Publicaciones de la Facultad de Derecho, Universidad Complutense de Madrid, Madrid, 2005, p. 447–453。

116 个国家（加欧盟）没有声明选择第 287 条所列的任何法院或法庭。[15] 出于上述原因，笔者倾向于各国将国际海洋法法庭作为默认法庭，但事实是，它们更倾向于按附件七组成的仲裁庭，而且绝大多数国家仍在通过不作声明“选择”这类程序来处理提交给《公约》强制管辖权制度的争端。

五、结论性意见

《公约》第 287 条在该条约规定的强制管辖权制度中发挥着关键作用，因为它确保从属于该条约的争端（无论其范围是广义的还是狭义的）始终属于有约束力的裁判强制程序的管辖范围。当事方可以通过根据上述第 287 条发表声明明确选择该管辖法院，也可以通过不发表任何声明的默示选择，这相当于选择了默认法庭：按附件七组成的仲裁庭。

关于声明（或无声明），有几个方面与缔约国的同意特别相关。关于这些方面，笔者可以得出以下结论：

（一）尽管《公约》第 287 条中的法院或法庭选择和《国际法院规约》第 36 条第 2 款的任择条款制度有些相似之处，但它们有不同的功能。任择条款制度的作用是选择法院（国际法院）并确定该法院的强制管辖范围，而根据《公约》第 287 条作出的声明只有第一种作用，而没有第二种作用。因此，在两种不同的制度中，缔约国的“同意”也必然有不同的解释。

（二）一国在其根据第 287 条作出的声明中确定了所选择的两个或两个以上法院或法庭之间的优先顺序，而与其有争端的另一国家也作出了同样的选择，但顺序不同或相反时，对第 287 条第 4 至 6 款进行严格的字面解释可能会导致与《海洋法公约》的目标和宗旨以及两国的真实“同意”相悖的结果，因为当双方选择的法院不同时，由此产生的法院或法庭将是按附件七组成的仲裁庭。

（三）关于提交给《公约》中强制争端解决程序并作出有约束力决定的的争端的主管法庭，真正的优先选择从始至今仍然是《公约》附件七中规定的仲裁庭。第 287 条指定它为无声明和争端所涉国家选择的法院或法庭不同时的默认法庭。因为《公约》的绝大多数缔约国没有根据该条款作出任何声明，它同样是首选法庭。

翻译：黄宇欣、张晓意

校对：黄　锐

---

15 在未作声明的国家中，笔者统计了加纳（最初于 2009 年作出声明但于 2014 年撤回声明）和沙特阿拉伯。相比之下，笔者没有统计埃及和斯洛文尼亚的声明，因为它们明确选择按附件七组成的仲裁庭为唯一的法庭，也没有统计阿尔及利亚、古巴和几内亚比绍的声明，因为它们拒绝接受国际法院的管辖。最后这些声明可以归纳为未声明国名单，因为它们没有实际效力，因为国际法院不是具有强制剩余管辖权的法院。

Declarations Pursuant to Article 287 of the UNCLOS

Miguel García García-Revillo*

I. Introduction

As it is well known, Article 287 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), as a result of the so-called "Montreux Formula",[1] allows States Parties to the Convention to choose among four different fora for dealing with disputes, in which those States might be involved, concerning the interpretation or the application of that important international treaty. Those fora

---

* Miguel García García-Revillo, Professor of Public International Law, Faculty of Law, University of Cordoba, Spain. This paper has been prepared in relation to the activities by the Research Project "Cuestiones recientes y pendientes en el marco de la ordenación de mares y océanos" (PGC 2018-098828-B-I00), Spanish Ministry of Science, Innovation and Universities.

1 The Montreux Formula, also originally known as the "Riphagen Formula", in reference to Professor Wilhem Riphagen, means the possibility for States to elect the forum of their choice among those included in the list (currently in Art. 287 UNCLOS). Until it was proposed and accepted, during the Third United Nations Conference on the Law of the Sea, a number of States were coincident in favoring the designation of a single forum for the compulsory settlement system of the future Convention but divergent as regards the particular court or tribunal to be invested with such prominent position (in short: the International Court of Justice, the then so-called Law of the Sea Tribunal, or the Arbitral procedures). This flexible "formula", as proposed in an informal meeting held in Montreux in March 1975, was found acceptable by those States. See Jean-Pierre Quéneudec, *Coup d'oeil retrospectif sur les origines du Tribunal International du Droit de la Mer*, in Ando, Mc Whinney & Wolfrum eds., Liber amicorum Judge Shigeru Oda, Kluwer, The Hague, London, New York, 2002, p. 621-632; José Antonio Pastor Ridruejo, *La solución de controversias en la III Conferencia de las Naciones Unidas sobre el Derecho del Mar*, REDI, Vol. 30:1, 1977, p. 11–32; Louis B. Sohn, S*ettlement of Disputes Arising Out of the Law of the Sea Convention*, San Diego Law Review, Vol. 12, p. 495 (1975).(as quoted by Quéneudec, cit. p. 624 and note 15); José Manuel Sobrino Heredia, Miguel García García-Revillo, *El Tribunal Internacional del Derecho del Mar. Origen, organización y competencia*, Servicio de Publicaciones de la Universidad de Córdoba, Madrid, 2005, p. 52 and following; Myron H. Nordquist ed. in chief, *United Nations Convention on the Law of the Sea: A Commentary*, Center for Oceans Law and Policy, University of Virginia, Vol. 1.

are, respectively: the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), the arbitration procedure as regulated in Annex VII of the Convention (Annex VII Arbitration) and the special arbitral procedures as provided by Annex VIII of the Convention (Annex VIII Special Arbitration).

Such election of forum is inseparably connected with the compulsory settlement system of the UNCLOS, that is, with its compulsory procedures entailing binding decisions, as established in Part XV of this treaty. In this respect, there are many facets of Article 287 that might be analyzed but, due to the logical limit in time and space, I would like to focus myself on three specific issues in which the will or consent of the States is particularly noteworthy. The first one refers to the relationship between declarations made according to Article 287 UNCLOS and those made under the framework of the optional clause system regulated in Article 36(2) of the Statute of the ICJ. The second deals with the possibility (or not) of establishing a preference order between fora, when making a declaration according to Article 287 UNCLOS, and its effects when this order does not coincide with the preference order established in a declaration made by the other State involved in the dispute. Finally, the third issue refers to the real preference of States Parties to the Law of the Sea Convention as "expressed" by them in their declarations made pursuant to Article 287 so far, as well as the resulting preferred forum of their choice according to the settlement system of UNCLOS.

II. The Relationship Between Declarations Made According to Article 287 UNCLOS and Those Made Under the Framework of the Optional Clause System Regulated in Article 36(2) of the Statute of the ICJ

According to Article 287 of the United Nations Convention on the Law of the Sea:

> *Article 287 Choice of procedure*
>
> *1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:*
>
> *(a) the International Tribunal for the Law of the Sea established in*

accordance with Annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

And according to Article 36(2) and following of the Statute of the International Court of Justice:

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

As it can be easily seen, there are several similarities between one text and the other. For example, as regards the form, both texts refer to declarations expressly requiring or implicitly assuming that they are in writing; as regards the place, both are deposited with the Secretary General of the United Nations, who shall transmit copies to those States determined in their respective texts; as regards the time, both can be made at any time. In fact, similarities come out not only in their procedural or formal aspects but also in those concerning their respective contents. For example, in essence, both systems are based on reciprocity, without prejudice that it appears explicit in the optional clause system and implicit in Article 287 UNCLOS, and both of them allow "reservations", that is, the possibility for the declarant to introduce limits or conditions to the scope and range of their declarations, by virtue

of the classic principle *in plus stat minus*.[2]

Nevertheless, there are also remarkable differences between both provisions, the most important of which is, in my view, the role that declarations are respectively called to play within the settlement system in their respective (and partially coincident) ambits of application. This affects, critically in my opinion, both the operation of reciprocity and, as a consequence of it, the function to be fulfilled by the said "reservations" respectively made pursuant to Article 287 UNCLOS and to Article 36(2) of the Statute of the International Court of Justice.

The main difference is the following: in the optional clause system, declarations made according to Article 36(2) of the Statute of the ICJ play a double function. Firstly, they serve to choose a forum, in this case, the only possible one, that is the International Court of Justice. Secondly, they also serve to determine the compulsory jurisdiction of that forum (the ICJ) for the cases in which its jurisdiction, as regards the declaring State, is based upon this specific way[3]. In contrast, declarations made pursuant to Article 287 UNCLOS only play the first but not the second of the two afore-mentioned functions. They only serve to determine the competent forum for dealing with disputes falling under the compulsory settlement system of UNCLOS, but they do not serve to determine which disputes are submitted to such compulsory jurisdiction. This determination is provided for in other provisions of the Convention, such as Article 286 in relation to Articles 288,

---

2 As Judge Oda recalls in his Separate Opinion to the Judgment of the International Court of Justice, of 26 November 1984, in the case concerning the *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), in order to facilitate the acceptance of the compulsory jurisdiction of the Court, the legality of reservations to the optional clause system was assumed by the General Assembly of the League of Nations in its Resolution of 2 October 1924, in which it "[c]onsider[ed] that the study of the ... terms [of Art. 36, paragraph 2] shows them to be sufficiently wide to permit States to adhere to the Special Protocol opened for signature in virtue of Art. 36, paragraph 2, *with the reservations which they regard as indispensable" (League of Nations Officia1 Journal, Special Supplement No. 21*, p. 21, emphasis added) (*ICJ Reports*, 1984, p. 490). On reservations to the optional clause system, see R. Casado Raigon, *La jurisdicción contenciosa de la Corte Internacional de Justicia. Estudio de las reglas de su competencia*, Servicio de Publicaciones de la Universidad de Córdoba, Córdoba, 1987, p. 101.

3 As it is well known, the optional clause system is not the only way for conferring jurisdic-tion upon the ICJ. It can also be based upon an international treaty (Art. 36(1) of the Statute of the International Court of Justice) and even on the so-called *forum prorogatum*.

297 and 298, all of them in Part XV, among others.[4]

This is significantly relevant at the time of interpreting such declarations, especially, as anticipated above, when dealing with reciprocity and, as the case may be, "reservations". In particular, the reciprocity of the optional clause system is not totally coincident with the reciprocity that may be deduced from the condition that both parties have chosen the same forum in declarations pursuant to article 287 UNCLOS. In this respect, while in the optional clause system anything that is outside of a declaration must be deemed as outside of the Court's jurisdiction, according to article 287 UNCLOS, anything that is not submitted to the court or tribunal chosen by the declarant is *not* considered to be outside the compulsory settlement system but *is* compulsorily submitted to another forum: Arbitration VII. This difference has, in my view, important consequences. In the system of article 36(2) of the Statute of the International Court of Justice, the declaring State imposes submission to the Court's jurisdiction upon itself. It is thus logical that this willing imposition must be interpreted somewhat restrictively in order not to take this self-imposed submission beyond the point actually intended by the declarant. On the other hand, for that same reason, it is also logical that in the optional clause system, in applying strict reciprocity, what is submitted to the compulsory jurisdiction of the ICJ is submitted only "in relation to any other State accepting the same obligation". On the contrary, in the UNCLOS settlement system, whatever is submitted to compulsory jurisdiction is not submitted because of declarations made pursuant to the said Article 287 but because of the imposition of a set of provisions such as Article 286, 288 and others. Hence, what is not submitted to the forum elected by the declaring State is not excluded from the compulsory procedures entailing binding decisions but just obligatorily submitted to a forum other than that chosen by the declarant, namely, the arbitral tribunal regulated in Annex VII. It is logical, then, that if a State has chosen a forum other than that available "by default" (Arbitration VII), preference should be given, in case of doubt, to the former rather than to the latter; in short: an extensive interpretation of such State's consent could be favored.

The said different meaning of the States' consent in one system and the other should be also taken into account at the time of interpreting "reservations". In the

---

4 As regards the real scope of the compulsory settlement system of the Law of the Sea Convention, see Miguel García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea*, Brill-Nijhoff, Leiden-Boston, 2015, p. 31-144.

optional clause system, "reservations" limit the compulsory jurisdiction of the ICJ. It is thus logical that they are interpreted widely by the ICJ to be sure that its jurisdiction was truly accepted by the declarant when it deposited its declaration before the United Nations Secretary General. However, in that of Article 287 UNCLOS, they play a different function: they just serve to distribute disputes falling under the compulsory settlement system either among the chosen fora or among the chosen forum (or fora) and the default forum (Arbitration VII). Insofar as the purpose is different, the States' consent is different too and, accordingly, must be interpreted in a different way, depending on the particular circumstances of the case.

III. Declarations Establishing a Preference Order Between the Chosen Fora

According to Article 287 of the Law of the Sea Convention, States making a declaration are free to choose one or more of the enlisted courts or tribunals, namely, ITLOS, ICJ, Arbitration VII or/and Special Arbitration (Annex VIII).

In case of dispute, the situation is not problematic when the parties choose *one single* court or tribunal[5]: if both have chosen the same forum, this will be the only one with competence unless agreed otherwise; however, should they choose different fora, competence falls to Arbitration VII, again unless they agree otherwise. Nor would it be problematic in the case where one litigant in the dispute has designated several fora without establishing priorities[6] and its opponent has also designated several fora without preferences or just one single forum. In this case, the coincident court or tribunal, or any of the coincident courts or tribunals,

5 This is the case of Angola, Bangladesh (for two specific disputes), Bulgaria, Democratic Republic of the Congo, Fiji, Greece, Madagascar, Panama (for a specific dispute), St. Vincent and the Grenadines, Switzerland, Tanzania and Uruguay (ITLOS), on the one hand, and Denmark, Honduras, Netherlands, Nicaragua, Norway, Sweden and United Kingdom (the ICJ), on the other. To those cases should be added Egypt and Slovenia, which have chosen Arbitration VII as the unique forum. What happens here is that, since this is precisely the forum with compulsory residual jurisdiction, its explicit designation as the only forum is not actually necessary.

6 This is the case of Portugal and Timor-Leste (the four fora), México and Ecuador (ITLOS, ICJ and Special arbitration), Canada (ITLOS and Arbitration VII), Belarus, Russian Federation and Ukraine (Arbitration VII and Special Arbitration), and Australia, Belgium, Estonia, Finland, Italy, Latvia, Lithuania, Oman, Spain and Togo (ITLOS and ICJ). To these States, electing ITLOS and ICJ with no order of preference, Netherlands should be also added. Its Declaration of 27 February 2017 is reproduced in pages below.

shall have jurisdiction to entertain the dispute.[7]

However, in the absence of an express prohibition, States making a declaration pursuant to Article 287 can also set an order of preference between the elected fora, whether or not it coincides with the order posted by the said provision.[8] In fact, this is another way, in my view, to make "reservations". Then, the situation may be more problematic. Let's see some examples.

In the assumption that one State has chosen ITLOS and the ICJ, without establishing preference, and its opponent has made precisely the same choice but with a preference order (1st ITLOS, 2nd ICJ), would the first State be able to bring a case against the second State before the ICJ? Could the second State do the same against the first? That is to say, on the basis that the opponent has not set up a preference for one forum over the other, might this second State bring the case before the ICJ despite its own declaration expressing preference for ITLOS? Or what would be the competent forum between two States should one choose 1st ITLOS and 2nd ICJ and the other 1st ICJ and 2nd ITLOS? More complicated yet: what is the solution when the chosen fora comprise the three or four courts and tribunals enumerated in article 287? In my opinion, the answer to these questions mainly depends on what is to be understood by choosing "the same procedure" according to Article 287.4 and 5.

Some scholars,[9] after examining various scenarios in depth, consider, in cases where one of the States has not set a preference among the designated fora (Example A: Spain choosing ITLOS and the ICJ with no preference, *versus* Cape Verde choosing 1st ITLOS and 2nd the ICJ) that: 1/the State that has not established a priority can only bring the dispute to whatever coincident forum has been chosen as the top priority by its opponent (in Example A: ITLOS); 2/contrarily, the State that establishes priorities can bring the case against the other before any of the coincident fora (in our Example A: the ICJ or ITLOS indistinctly). On the other hand, regarding situations where the two States have chosen the same fora but

---

7 See, in this respect, Andrea Cannone, *Il Tribunale Internazionale del dirito del mare*, Cacucci, Bari, 1991, p. 55.

8 In fact, several States have done so. This is the case of Austria (1st ITLOS, 2nd Special Arbitration, 3rd ICJ), Germany (1st ITLOS, 2nd Arbitration VII, 3rd ICJ), Hungary (1st ITLOS, 2nd ICJ, 3rd Special Arbitration) Cape Verde, Croatia, Montenegro and Trinidad & Tobago (1st ITLOS, 2nd ICJ) Argentina and Chile (1st ITLOS, 2nd Special Arbitration) and Tunisia (1st ITLOS, 2nd Arbitration VII).

9 Andrea Cannone, *Il Tribunale Internazionale del dirito del mare*, Cacucci, Bari, 1991, p. 57.

in reverse order of preference (Example B: Croatia choosing 1st ITLOS and 2nd the ICJ, *versus* a random State B choosing 1st the ICJ and 2nd ITLOS),[10] it has been assumed that, since a situation exists in which the States in question have not accepted *the same procedure* as defined in article 287.5, the dispute must be submitted to Arbitration VII, in view of the impossibility of determining which of the chosen fora constitute the "same procedure" as accepted by the parties for the settlement of the dispute.[11] I understand that reasoning, which is based upon the text of Article 287, but I believe a different outcome is possible for these situations.

For the reasons explained above, in the previous section, I think that it should be avoided the inference that, because the declarant State has set up an order of preference by way of a declaration made *ex* Article 287, such order is exhibiting an intent toward restriction, as would be the case if "reservations" were introduced in a declaration made pursuant to the optional clause system. First, because the establishment of a priority among fora has no parallel in the optional clause system, since the latter refers only to a single forum. And above all, because such preference order is not designed to exclude, as are reservations made in declarations pursuant to article 36(2) of the Statute of the International Court of Justice. States that establish priorities have no intention of depriving one of their chosen fora from exercising jurisdiction (if they did, they would merely have to abstain from choosing it in their declaration); on the contrary, they wish to confer jurisdiction upon each and every one of their choices. Thus, in situations in which two or more fora may have competence, States are simply setting up a preference relative to each.

As explained in previous works on the jurisdiction of ITLOS,[12] in my view it is difficult to argue that a State which, for example, establishes a preference order between two fora trusts in both of them, even when, at the moment of decision, it is expressing a preference for one over the other. In this respect, it seems to me contrary to the object and purpose of Article 287 (and to the whole settlement system of UNCLOS) that two States who, for example, coincide in the election of ITLOS and ICJ, though in reverse order, should be obliged to settle their dispute

---

10 To date, no declaration of this kind has been deposited with the United Nations Secretary-General.

11 Andrea Cannone, *Il Tribunale Internazionale del dirito del mare*, Cacucci, Bari, 1991, p. 56.

12 See, *inter alia*, Miguel García García-Revillo, *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea*, Brill-Nijhoff, Leiden-Boston, 2015, p. 159 and following.

by Arbitration VII, merely because of their prioritization, when Arbitration VII is precisely the forum that they have not selected, and that they are trying to avoid by making their respective declarations. Assuming that the will of those who establish a preference order is cumulative rather than exclusive, I think that the most correct interpretation of Article 287 favors solutions that are respectful with the will of the litigants, and those solutions should invariably lead the dispute to one of the courts or tribunals expressly chosen by the parties.

If a solution is sought that is consistent both with object and purpose, one must take into account the fact that the order of preference has been established generally for situations in which the State that imposes it is going to be the defendant. In this respect, it seems nonsensical that a State intending to bring suit against another State would limit its own possibilities by self-imposing a preference order on the available fora; without such an order, all of them are at its disposal. The preferences of a State that has prioritized its choices must be respected by any State seeking to take legal action against it (whether the latter State has established a preference of its own or not). Nonetheless, it would be unacceptable in my view that the establishment of such an order becomes an advantage for the State imposing it over an opponent who has not. In my opinion, a State that stipulates an order of preference chiefly for situations when it is the defendant, cannot then avoid that order when the roles are reversed and it becomes the plaintiff in subsequent situations. This would allow it to take its case to the coincident forum of its convenience merely because the defendant in the case had not established a precedence for itself.

In fairness, that same State must be coherent and abide by its chosen priority when it becomes plaintiff against those same States who may not have decided on their own preference. Of course, a State might submit a declaration with a double preference order, one for the cases in which it assumes the role of applicant and a different one for the cases in which it assumes the role of respondent. But, in lack of such distinction, as far as its declaration is unique, the preference order established therein must be taken into account in all situations.

In view of all this, and despite the variety of hypotheses that arise when at least one of the litigants establishes an order of preference in its declaration *ex* article 287, my opinion is that the following double pattern might be applied to determine the competent forum:

1/ The submission to the preference order set out by the defendant;

2/ In the absence of such a precedence set out by the defendant, the submission

of the plaintiff to its own order of preference.

Turning to the original examples that were used earlier, the outcomes might be the following:

1) Example A – One State chooses ITLOS and the ICJ without setting a priority (in our example, Spain) and another selects ITLOS as 1st and the ICJ as 2nd (again in our example, Cape Verde). Spain, in this case, could sue Cape Verde in the forum preferred by the latter, that is, ITLOS, but not before the ICJ; while Cape Verde reciprocally, by respecting its own preference order, should bring its suit with Spain before ITLOS but not before the ICJ.

2) Example B – One State chooses ITLOS as 1st and the ICJ as 2nd (for example, Croatia) and the other State (as there are no examples to date, this State shall be referred to as X), opts for the same but in reverse order: ICJ as 1st and ITLOS as 2nd. In these examples, Croatia could bring the case to the forum preferred by State X, namely, the ICJ, but not before ITLOS, while the Second State, X, reciprocally, could bring suit against Croatia before the forum preferred by the latter, ITLOS, but not before the ICJ. Either way, what would be avoided is that the dispute eventually ends in Arbitration VII when both States have coincided in expressing trust both in the International Court of Justice and in the International Tribunal for the Law of the Sea.

3) The same criteria would be applied in situations where more than two fora were chosen and with at least one of the States having established an order of preference.

Nonetheless, the best way for States to avoid situations in which their declarations might need to be interpreted is, doubtlessly, to express their preferences on their own. This is the case of the recent Declaration by the Netherlands, of 27 February 2017, according to which:

> *The Kingdom of the Netherlands considers that it has chosen "the same procedure" as any other State Party that has chosen the International Court of Justice or the International Tribunal for the Law of the Sea or both. In the event another State Party has chosen the International Court of Justice and the International Tribunal for the Law of the Sea without indicating precedence, the Kingdom of the Netherlands should be considered as having chosen the International Court of Justice only.*

IV. The Real Preference of States Parties to UNCLOS as Regards the Competent Forum for Dealing with Disputes Falling Under the Compulsory Settlement System

As pointed out in the Introduction, a third issue in which the consent of the States is particularly relevant concerns their preference for one forum of those offered by the list of Article 287 UNCLOS. Focusing ourselves once more in disputes submitted to the compulsory settlement system of the Law of the Sea Convention, and as a result of Part XV, Part XI and Annexes V to VIII of the Convention, ITLOS, by itself or through its Seabed Disputes Chamber, has been invested by the Convention with a preponderant role with respect to some types of disputes, namely, those regulated in article 187 regarding the International Seabed Area and those defined by article 292 regarding prompt release of vessels and their crews. Accordingly, in dealing with these types of disputes, the general rule is submission to ITLOS and the exception is submission of the dispute to a different forum. But quite to the contrary, in dealing with the remaining disputes under the compulsory procedures entailing binding decisions, the general rule is submission to an arbitral tribunal as envisaged in Annex VII, insofar as that body has been invested with the compulsory residual jurisdiction, while the exception is submission to ITLOS (or one of the remaining fora of the "Montreux Formula"). Particularly, this exception only holds if, before any dispute has arisen, both litigants have filed a declaration pursuant to Article 287 in which they choose the same permanent or arbitral tribunal. Therefore, the truth is that, whereas all the fora listed in Article 287 are formally placed in absolute equality, despite the position they occupy on the list, that equality is more apparent than real.

Firstly, while some fora, like ITLOS and Arbitration VII, are ready, in principle, to deal with any kind of dispute, others, like the ICJ and special arbitration of Annex VIII, are submitted to certain limitations.[13] Secondly,

13 In particular, due to their shape, it seems that special arbitral tribunals are not designed to deal with disputes other than those established in Art. 1 Annex VIII. On the other hand, given the limitations *ratione personae* imposed by the Statute of the ICJ (Art. 34) it is obvious that, for the international organizations of Annex IX UNCLOS (to date, the European Union), the available fora, at the time of making a declaration pursuant to Art. 287 (Art. 7(1) Annex IX) are actually three and not the four contained in the list, because these organizations cannot access the ICJ.

despite the absence of a precedence among them, the fact that one of these fora (Arbitration VII) was invested with residual compulsory jurisdiction for cases where no declarations are made, places this forum, *de facto* and *de iure*, in a position of clear superiority over the rest. In this respect, Article 287, as configured, does not seem to be designed to stimulate States to make declarations but, on the contrary, to dissuade them from such action. It does so, on the other hand, because by setting out one forum with residual compulsory jurisdiction, any absence of a declaration has a specific meaning: it implies a choice for Arbitration VII. During the Third United Nations Conference on the Law of the Sea, this was the forum preferred by most States. Accordingly, it is logical for that majority to "express" its preference by choosing to forego the process of making a declaration. In this sense, if the forum invested with residual compulsory jurisdiction had been, for example, the International Tribunal for the Law of the Sea (as proposed in the first drafts of Part XV), the preference of States for arbitration would have had the stimulus for making declarations *ex* Article 287 (or at least to opt out of ITLOS by choosing Arbitration VII). In this respect, the reiterated calls by the Secretary-General and the General Assembly of the United Nations inviting States to make such declarations have not been met with enthusiastic response since the omissive behavior by States is expressive of a totally respectable preference: their preference for arbitration.[14]

In view of what has been discussed and having analyzed the declarations made by the States Parties pursuant to article 287, it seems clear that there is an overwhelming majority "choosing" the arbitral tribunal of Annex VII; which is to say, a large majority of States have not made a single declaration. As of 6 August 2020, among the 167 States Parties plus the European Union to the Law of the Sea Convention, up to 116 States (plus the EU) have not made a declaration

14 Taking a contrary stance, Treves does not think that the lack of choice necessarily indicates a preference for arbitration, even though it is the consequence it entails; in his view, not making a declaration corresponds sometimes to a "wait and see" attitude consistent with normal "bureaucratic prudence". See Tullio Treves, *Choice of Procedure for the Compulsory Settlement of Disputes under the Law of the Sea Convention*, in Lucius Caflisch *et al* Coords., El Derecho internacional. Normas, hechos y valores: Liber amicorum José Antonio Pastor Ridruejo, Servicio de Publicaciones de la Facultad de Derecho, Universidad Complutense de Madrid, Madrid, 2005, p. 447–453.

choosing any of the fora listed in Article 287.[15] For the reasons explained above, I personally would have preferred that States had posted ITLOS as the default forum, but the facts are that they preferred to give this prominent position the Annex VII Arbitration and that a large majority of them are still "choosing" this type of procedure for dealing with their disputes submitted to the compulsory jurisdiction system of UNCLOS by refraining themselves from making a declaration in conformity with that provision.

V. Concluding Remarks

Article 287 of the United Nations Convention on the Law of the Sea plays a critical role within the system for compulsory jurisdiction under this treaty, as it assures that disputes submitted to that system (whatever broad or narrow it might be) always fall under the jurisdiction of a compulsory procedure entailing a binding decision. This competent forum can be chosen by the parties either expressly, by means of a declaration made pursuant to the said Article 287, or implicitly, by refraining themselves from making any declaration at all, which equates to elect the default forum: Annex VII Arbitration.

There are several aspects regarding declarations (or the absence of them) in which the consent of States appears particularly relevant. In relation to them, we can underline some conclusions:

1. Despite the choice of forum in Article 287 UNCLOS and the optional clause system of Article 36(2) of the Statute of the International Court of Justice have several similarities, they fulfill different functions. While the optional clause system serves to choose a forum (the ICJ) and to determine the scope of the compulsory jurisdiction of that forum, declarations made according to Article 287 UNCLOS just accomplish the first function but not the second. As a consequence of this, the interpretation of the States' consent in one system and the other must be different too.

2. When a State includes a preference order between two or more of the

15 Among the non-declaring States, I have counted Ghana, that originally made a declaration in 2009 but it withdrew it on 2014, and Saudi Arabia. In contrast, I have not counted neither the Declarations of Egypt and Slovenia, which precisely choose Arbitration VII as the unique forum, nor those of Algeria, Cuba and Guinea-Bissau, which limit themselves to refuse the jurisdiction of the ICJ. These last Declarations could be summed up to the list of non-declaring States as they have no real effect because the ICJ is not the forum with compulsory residual jurisdiction.

chosen fora in its declaration *ex* Article 287 and it is involved in a dispute with other State doing so but in a different or a reverse order, a strict literal interpretation of paragraphs 4 to 6 of Article 287 might bring to a result contrary to the object and purpose of the Law of the Sea Convention and against the actual consent of both States, inasmuch as the resulting forum would be Arbitration VII when the fora elected by both litigants might be a different one.

3. The real preference, as regards the competent forum for dealing with disputes submitted to compulsory procedures entailing binding decisions in UNCLOS, was, and still is, the Arbitration provided in Annex VII of that international treaty. It was nominated in Article 287 as the default forum both for cases in which a declaration has not been made and for those in which the fora elected by the States involved in the dispute are not the same. And it is still the preferred forum insofar as a large majority of States Parties to the Convention have not made any declaration according to that provision.

《联合国海洋法公约》对南极海域争端的影响与启示

刘唯哲 *

内容摘要：《联合国海洋法公约》（以下简称为“《公约》”）创设的海域制度引发了南极海域各类争端，这些争端产生的根本原因在于《公约》与南极条约体系之间的冲突。即使各国依据《公约》纷纷在南极主张领海、专属经济区和大陆架，但这并不足以撼动南极条约体系，不可能对现有南极海域秩序产生根本性影响。同时，《公约》中关于强制管辖程序的规定和海底区域制度，也为完善现有南极争端解决机制提供了值得借鉴的启示。

关键词：联合国海洋法公约　南极海域争端　解决机制

一、引　言

南极[1]蕴含着丰富的生物资源和油气资源，在《南极条约》（The Antarctic Treaty）签订之前就已是各国争相宣告领土主权的地域。1959 年签订的《南极条约》使其成为了具有特殊法律地位的大陆，该条约冻结了所有针对南极地区提出的领土主张，使南极局势维持着相对的稳定。以《南极条约》为基础，南极条约协商国签订了一系列的条约，从而产生了一整套区域性制度，即“南极条约体系”。1982 年通过的《联合国海洋法公约》（以下简称“《公约》”）是现行海洋法的“宪章”，可在所有海域适用。然而《公约》并未明确其与南极条约体系之间的关系，其内容又与南极条约体系存在明显冲突，《公约》在南极海域与南极条约体系的重叠适用必定会影响到后者所建立的秩序。虽然南极领土主权冻结之现状无法被撼动，但各利益攸关国还是会利用《公约》来争取南极海洋权益。

---

* 刘唯哲，武汉大学中国边界与海洋研究院国际法专业 2019 级博士研究生。电子邮箱：kellyliu2017@163.com。本文获《中华海洋法学评论》“《联合国海洋法公约》生效 25 周年回顾与前瞻”征文比赛优秀奖。

1 本文所指南极是指南纬 60 度以南的区域，既包含南极陆地（含冰架），同时也包括南纬 60 度以南海域。

总的来说，南极争端主要分为海域争端和领土争端两类，《公约》在南极海域的适用必然会对海域争端产生一定影响，同时，该公约争端解决机制的完备也对现存南极争端解决机制也带来了启示。

二、南极海域争端类型

各国在南极领土归属及相关海域权利归属的问题上存在法律和事实上的分歧，且存有法律利益上的冲突，引发了南极地区存在的海域争端和领土争端。

《南极条约》第 4 条实际上冻结了南极的领土主权主张。[2] 第 1 款规定任何行为不得作为放弃或承认原来所主张的南极领土主权或主权权利的依据，从而确立了“无偏见条款”；第 2 款将“无偏见条款”适用范围扩大到条约缔结之后的各国行为。《南极条约》第四条对领土主张冻结的模糊性规定使得南极领土现有主张国、潜在主张国和非主张国之间的利益冲突得以缓解和搁置。《南极条约》始终是缔约各方为了维持南极地区长期和平的权宜之计，是相互妥协后的产物，这样一来，领土主权之争便被暂时掩盖和搁置。[3] 然而，《南极条约》缔结过程完全忽略了潜在海域争端的存在，这为之后的海域争端埋下了伏笔。

主权原则是一项重要的国际法原则，领土主权之争在《公约》签订之前是南极地区的主要争端类型。而随着《公约》谈判的进行，海域权利之争在南极海域展开。有的学者认为，国际法中并没有要求沿海国在主张海洋权利之前必须正式确立其领土主张，所以南极领土主张国可以自由地主张他们的海洋权利。[4] 据此，即使南极领土主张因《南极条约》的生效而被冻结，也不影响主张国在南极海域主张其《公约》项下的海洋权利。但由于陆地决定海洋，海洋权利主张可被视作是对领土主张的重申，各国纷纷主张相关的南极海洋区域，实际上是希望借此巩固自己在南极的领土主张。

《公约》对沿岸国海域权利的扩张使得南极领土主张国再一次嗅到了资源和权利的味道，南极海域的争夺战也随即展开。

---

2 《南极条约》第 4 条第 1 款：“本条约的任何规定不得解释为：（a）缔约任何一方放弃在南极原来所主张的领土主权权利或领土主权；（b）缔约任何一方全部或部分放弃由于它在南极的活动或由于它的国民在南极的活动或其他原因；（c）损害缔约任何一方关于它承认或否认任何其他国家在南极的领土主权、主权权利的主张或这些主张的基础。”《南极条约》第 4 条第 2 款：“在本条约有效期间所发生的一切行为或活动，不得构成主张、支持或否定对南极的领土主权的要求的基础，也不得创立在南极的任何主权权利。在本条约有效期间，对在南极的领土主权不得提出新的要求或扩大现有的要求。”

3 吴宁铂：《南极外大陆架划界法律问题研究》，复旦大学 2012 年硕士学位论文，第 17 页。

4 Federica Mucci & Fiammetta Borgia, *The Legal Regime of the Antarctic*, The IMLI Manual on International Maritime Law, Volume I: The Law of the Sea, Oxford University Press, 2014, p. 499.

（一）领海和专属经济区

南极海域主张的对立首先体现在各主张国能否根据《公约》扩大其在南极海域的主权权利。《南极条约》第 6 条也允许各国根据国际法在南极公海海域行使权利，[5] 但由于“公海”和“权利”措辞的模糊性，其具体含义并不明确。这是否意味着南极海域不由《南极条约》规范而由公海制度管理呢？南极条约体系的发展给出了否定的答案：其不仅涵盖了南极海域的生物资源养护，还涉及到海域矿物资源的开发利用和南极海洋环境保护等事项。[6] 毫无疑问，各国在依据《公约》主张权利时，必须顾及到南极条约体系下特殊的南极海域制度。在这方面，主张国基于其“南极领土”主张《公约》项下的领海和专属经济区，必然会遭遇非主张国的反对，引起海域争端。

《公约》和《南极条约》通过以前，1958 年《日内瓦四公约》实际上已初步明确了相关的海域制度。但是，尽管国际上普遍以 3 海里为领海宽度，四公约之一的《领海及毗连区公约》并未就领海的宽度进行规定。《公约》的通过使得领海宽度得以扩张，沿海国据此可主张 12 海里的领海。以澳大利亚为例，其在 1990 年便发表声明将其南极领土的领海宽度扩大至 12 海里。但这又是一份缺乏国际法效力的声明，因为澳大利亚仅将 12 海里领海的法律效果限制在本国国民。[7] 这表明在涉及主权的领海问题上，主张国倾向于谨慎行事，不敢在主权问题上与《南极条约》中的冻结条款抵触。

与领海相异，《南极条约》签订之时并无专属经济区制度。倘若各国能依据其南极领土合法主张 200 海里专属经济区，便能在南极海域享有勘探和开发该海域内自然资源的专属权利。迄今，已有四个主张国声明了南极专属经济区。由于《南极条约》第四条规定各国不得在南极创立任何主权权利，南极专属经济区主张也因有违反该条款之嫌，而被非主张国反对。除了以南极大陆为基础主张专属经济区，阿根廷还以其南纬 60 度以北的桑德维奇群岛主张跨越到南极海域的 200 海里专属经济区。[8]

以上，南极领海和专属经济区的主张都存有主张国和非主张国之间的争端，除此以外，即便承认这些主张合法存在，各个海域之间还存在着重叠主张而待划界的争端。

---

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

6 陈力：《论南极海域的法律地位》，载《复旦学报（社会科学版）》2014 年第 5 期，第 159 页。

7 阮振宇：《南极条约体系与国际海洋法：冲突与协调》，载《复旦学报（社会科学版）》2001 年第 1 期，第 133 页。

8 英国和阿根廷均对该群岛主张主权，英国称其为南桑德维奇群岛。

（二）外大陆架

与《大陆架公约》相比，《公约》除了重申自然延伸的标准，还引入了距离标准以确定大陆架的外部界限，其实质上扩大了一国可主张的大陆架范围。[9] 值得注意的是，沿海国对其大陆架享有基于主权的固有权利，不需要任何宣示，但当其主张超过 200 海里的大陆架外部界限时，则需要向大陆架界限委员会（以下简称“委员会”）提交划界申请案以其审核并提出建议。[10] 这为各主张国借助《公约》项下的机构重申对南极的领土主权提供了机会。

目前，澳大利亚、英国、挪威和阿根廷均已向委员会提交了正式的涉及南极海域的大陆架划界案。这些划界案可分为如下两类：

第一类，主张国以南极大陆为基础主张 200 海里外大陆架。除英国外，其它三国均以其“南极领土”为基础，向委员会提交了划界案。但是，澳大利亚和挪威在划界案中均主动要求委员会不审议附属于南极领土的大陆架部分。[11] 阿根廷尽管未如此要求，但由于多国向联合国秘书长寄出照会，提请委员会不予审议涉南极大陆的大陆架部分，[12] 委员会也决定不予审议附属于南极的大陆架外部界限申请。

第二类，主张国以南纬 60 度以北岛屿（以下简称“亚南极岛屿”）为基础向委员会提交的跨越南极海域的外大陆架划界案。澳大利亚、阿根廷、英国都有如此主张，其中，阿根廷和英国均主张乔治亚群岛和桑德维奇群岛延伸至南极海域的大陆架。据英国[13] 和阿根廷[14] 于 2009 年分别提交的划界案显示，两国划定的乔治亚

---

9 《国际公法学》编写组：《国际公法学》（第 2 版），高等教育出版社 2018 年版，第 257 页。

10 《联合国海洋法公约》第 76 条第 9 款，第 77 条第 3 款。

11 参见澳大利亚联邦，《澳大利亚大陆架划界案执行摘要》，载联合国网站，https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_2004_c.pdf，（待作者确认访问日期）；以及挪威于 2009 年 5 月 4 日向联合国大陆架界限委员会提交的大陆架划界案执行摘要，参见 Norway, Continental Shelf Submission of Norway in respect of Bouvetøya and Dronning Maud Land Executive Summary, UN website (待作者确认访问日期), https://www.un.org/Depts/los/clcs_new/submissions_files/nor30_09/nor2009_executivesummary.pdf。

12 参见英国、美国、俄罗斯、印度、荷兰以及日本针对阿根廷的 200 海里外大陆架划界案向联合国秘书长提交的照会，Communications received with regard to the submission made by Argentina to the Commission on the Limits of the Continental Shelf, UN website (待作者确认访问日期), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm。

13 United Kingdom of Great Britain and Northern Ireland, Submission in respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands, Executive Summary, UN website (May. 5, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/gbr45_09/gbr2009fgs_executive%20summary.pdf.

14 Argentina, Outer Limit of the Continental Shelf, Argentina Submission, Executive Summary, UN website (May. 5, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf.

群岛和桑德维奇群岛的外大陆架外部边缘几乎完全重合（如图 1，图中上半部分是英国的主张，下半部分是阿根廷的主张，框中是涉及乔治亚群岛和桑德维奇群岛的部分）。由于两国的划界案涉及未解决的领土争端，委员会根据其议事规则决定暂不审议该处大陆架划界申请。与英阿的划界案情形不同，澳大利亚以领土主权无争议的三座亚南极岛屿为基础主张越南极海域大陆架。[15] 2004 年，澳大利亚向委员会提交了外大陆架划界案申请。[16] 该申请中，既存在一处以“南极领土”为起点的大陆架外部界限，也包含两处以亚南极岛屿为起点而作的外大陆架界限。[17] 根据委员会给出的建议，即使大陆架外部界限跨越到了南极海域，以亚南极岛屿主张的涉南极外部界限基本得到了委员会的认可。然而，尽管在程序上已被委员会认可，但其法律效力如何，是否与《南极条约》中不得在南极创设任何主权权利相违背，都是值得探讨的问题。

可见，尽管南极的领土争端虽因南极条约体系的建立而被搁置，但由于该体系并未明确其与《公约》之间的适用关系，各主张国为了谋取未来在南极的权益，都在尽力扩大自身的南极海洋主权权利。南极领土主张国基于本国的“南极领土”主张而提出的海域主张均受到了非领土主张国的反对，这是因为南极领土的主权主张已被冻结，基于主权而新创立的衍生权利自然也不能得到承认。[18] 但是，沿海国根据《公约》，基于亚南极岛屿主张的涉南极海域外大陆架和专属经济区如何与南极条约体系相协调，也亟待探讨和解决。

南极海域争端解决的主要路径或在于从根本上厘清《公约》和南极体系之间的关系。但现有的南极争端解决机制如何？其是否能在一定程度上缓解现存各国在南极的争端？因此，了解南极条约体系现有的争端解决机制就显得十分必要。

三、现有南极争端解决机制

以和平手段解决争端不仅是《联合国宪章》的规定，也是国际法基本原则的要求。和平解决南极争端的要求同时也包含在南极条约体系之中。南极条约体系之下涉及南极争端解决的文件主要包括《南极条约》、《南极海洋生物资源养护公约》（Convention for the Conservation of Antarctic Marine Living Resources，以下简称“《养护公约》”）、《关于环境保护的南极条约议定书》（Protocol to the Antarctic

15 三座岛屿分别为赫德岛、麦克唐纳群岛和麦夸里岛。

16 参见澳大利亚联邦，《澳大利亚大陆架划界案执行摘要》，载联合国网站 https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_2004_c.pdf，（待作者确认访问日期）。

17 两处涉南极海域的大陆架主张区分别为凯尔朗深海高原地区和麦夸里海岭地区。

18 朱瑛、薛桂芳、李金蓉：《南极地区大陆架划界引发的法律制度碰撞》，载《极地研究》2011 年第 4 期，第 320 页。

Treaty on Environmental Protection，以下简称“《议定书》”）及其附件六。[19]

《南极条约》第 11 条对条约的解释和适用引起的争端设置了两种解决机制。第一种是争端方之间相互协商，以期通过谈判、调查等和平方式化解争端。如果争端未能通过第一种机制得到解决，经争端各方的同意，应提交国际法院解决，但当争端各方未能就提交国际法院达成一致，他们应该继续寻求第一种机制解决争端。[20]

《养护公约》第 25 条中有与《南极条约》第 11 条相似的争端解决机制，但针对的争端是与前者相关的“解释和适用”的争端。[21] 不能通过谈判等和平方法解决的争端，经过各方的同意，应当提交给国际法院或仲裁，同样的，不能就提交国际法院或仲裁达成一致的，争端各方应回归和平的解决方法。[22]

《议定书》中包含两种争端解决机制：一般机制与特殊机制。前者与《南极条约》第 11 条的规定类似。但与《南极条约》不同的是，《议定书》要求争端方应首先履行一个程序性义务，即就争端的解决进行磋商。特殊机制专门针对《议定书》第 7、8、15 条和《议定书》附件项下的争端，以及涉及《议定书》第 13 条（在该条与上述几条相关的情况下）的争端，各国在成为《议定书》缔约国时，或之后的任何时候，可选择通过国际法院或仲裁法庭来解决上述争端。如果各争端方选择了同一种解决方式，则该方式优先，除非各方另外达成协议。[23] 如果各方未选择同一种解决机制或双方都接受了两种机制，则该争端只能提交给仲裁法庭，除非各方另有协议。如未作出选择或作出的选择已经失效，则该国被视为已经接受仲裁法庭的管辖。[24] 由此可见，对于特定争端，仲裁可成为一种强制解决机制。但在这些特定争端被提交强制解决机制之前，有 12 个月的时间让争端各方根据第 18 条的规定解决争端，且《议定书》专门规定其未授予国际法院与仲裁庭解决《南极条约》第 4 条范围内的争端，即南极主权争端。[25]

南极条约体系中关于争端解决的条款，有时候被评价为“较为简单，甚至是过于简单”。[26]《南极条约》和《养护公约》均未说明在争端方未能和平解决争端，且未就将争端提交国际法院或仲裁法庭达成合意的情况下应如何解决争端，可见南极争端解决机制仍有改进的空间。正因为南极条约体系之下争端解决机制的不完善，部分南极条约体系协商国在遇有争端时更愿意寻求非南极条约体系的争端解

19 郭红岩：《论南极条约体系关于南极争端的解决机制》，载《中国海洋大学学报（社会科学版）》2018 年第 3 期，第 8 页。
20 《南极条约》第 11 条。
21 《南极海洋生物资源保护公约》第 25 条第 1 款。
22 《南极海洋生物资源保护公约》第 25 条第 2 款。
23 《关于环境保护的南极条约议定书》第 19 条第 1、4 款。
24 《关于环境保护的南极条约议定书》第 19 条第 3、5 款。
25 《关于环境保护的南极条约议定书》第 20 条第 2 款。
26 Arthur Watts, *International Law and the Antarctic Treaty System,* Cambridge University Press, Vol. 11, 1992, p. 90.

决机制。例如，在澳大利亚诉日本捕鲸一案中，澳大利亚便寻求国际法院解决其与日本在南极海域的捕鲸争端，此外，诉求建立在日本违反《国际捕鲸管制公约》之上。[27] 现有南极争端解决机制的不完善会导致各缔约国不愿意在南极条约体系之下解决争端，这样不仅不利于争端解决机制的发展，也可能因为个案援引的法律文件不同而导致适用标准的差异，从而造成同质案件裁判结果碎片化的不利后果。同时，援引南极条约体系之外的国际法律文件来解决南极地区的争端，可能会因南极地区的特殊法律地位而引发适用冲突。随着科技的发展和人类南极活动的日益频繁，在南极条约体系之内建立更完整的争端解决机制不仅能为将来可能发生的争端提供适用南极地区、标准统一的解决方法，还能避免引发更多的适用冲突。

综上所述，目前南极条约体系之下的争端解决机制是以和平解决为原则，一般解决机制均与《联合国宪章》的要求相符。在谈判、调查等方式无法解决争端的时候，经过争端各方的同意可以将争端提交给国际法院或仲裁法庭，只有针对特定争端，如矿物资源活动禁止、环境影响评价和应急预案相关的争端，才有强制仲裁程序。

四、《公约》对南极海域争端的影响及启示

《南极条约》第 6 条明确了该条约的适用范围，并明确该条约不应妨碍任何一国根据国际法规定享有的公海权利。[28] 根据《维也纳条约法公约》规定的条约解释方法，此处的“公海”应是指 1958 年《日内瓦公海公约》中所规定的“不属领海或一国内水域之海洋所有各部分”。第 6 条所指“国际法”应包含国际海洋法，但对于“国际海洋法”是指签订《南极条约》时期的国际海洋法还是指随着时间推移一直演进的国际海洋法，本文认为采取后面一种解释更为恰当，因为国际法中各国在公海的权利是不断变化的，采用更为灵活的解释能让《南极条约》更贴近当今现实，延长其生命力。而《公约》是现行国际海洋法中不可或缺的部分，因此《南极条约》和《公约》在南极地区的重叠使用是必然趋势，而《公约》对南极争端造成影响的同时也会为其解决机制带来一定启示。

（一）对南极领海与专属经济区争端的影响

《南极条约》只提及了公海及其国际法规制，并没有规范领土毗邻海域的法

27 Whaling in the Antarctic (Australia *v.* Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226

28 《南极条约》第 6 条。

律地位，因此当《南极条约》和《公约》在南极地区同时适用，就会产生争议，即南极领土主张国依据《公约》主张相应的海洋权利是否违反《南极条约》第 4 条第 2 款的规定。

在国际法中，领海被视为是一国领土的构成。[29] 由于南极条约第 4 条冻结了各国对南极领土的主权主张，领海主张自然也应被冻结。由于在《南极条约》生效时，当时国际法规定的领海宽度为 3 海里，但随着《公约》的签订，领海宽度由 3 海里变成了最远可至 12 海里，如果将南极领海由 3 海里扩大至 12 海里，这是不是与《南极条约》第 4 条第 2 款相违背？笔者认为，尽管《公约》是国际海洋法发展的结果，但发展后的领海制度并不能适用于被冻结的南极领土主张（包括领海主张）。因此，倘若南极领土主张国依据《公约》主张 12 海里领海，则违反了《南极条约》不得扩大现有领土主权之禁止。澳大利亚所作的限制性的领海声明便是其不敢公然违反冻结条款的体现。

专属经济区方面，澳大利亚认为专属经济区是附属于领土主权的权利，所以不构成对原有主权主张的扩大，因此正式提出了南极专属经济区主张，但其他主权主张国并不认同这种主张的法律基础。专属经济区制度是《公约》首创的制度，沿岸国在专属经济区享有专属性的主权权利。即使认为专属经济区主张不属于扩大或提出新的主权主张，但沿岸国的确依靠这一主张在南极创立了新的主权权利，因此违背了《南极条约》。同时，倘若承认主张国在南极专属经济区的权利，可能会引起与《南极条约》体系中规定相矛盾的资源利用开发行为，[30] 这些矛盾将有待进一步调和。

（二）对南极大陆架争端的影响

《公约》对领海和专属经济区方面的规定并未引起实质性的争端，只是引发了各海域主张国和非主张国之间的对立。而在大陆架争端方面，由于南极油气资源的吸引和大陆架界限委员会的介入，《公约》对大陆架（尤其是外大陆架）的规定对南极条约体系造成了较大的冲击，或在南极海域形成《公约》与南极体系之间不可调和的矛盾。《公约》不仅规定各沿岸国可主张 200 海里大陆架海域，还赋予沿岸国在特定情况下主张 200 海里外大陆架的权利。对于后者，沿岸国需要向大陆架界限委员会提交外大陆架划界案，且凡是被委员会审议通过的划界案则会被赋予一定的法律约束力，成为“最终的和具有法律拘束力的”。《公约》规定的这一程序为各国主张涉南极海域大陆架提供了法律基础。目前，七个南极领土主张

29 《国际公法学》编写组：《国际公法学》（第 2 版），高等教育出版社 2018 年版，第 249 页。

30 例如，《关于环境保护的南极条约议定书》第 7 条规定：“任何有关矿产资源的活动都应予以禁止，但与科学研究有关的活动不在此限。”

国均提交了涉南极 200 海里外大陆架划界案（其中，智利提交了初步信息）。由此看来，《公约》极大地加剧了南极大陆架主张争端。

一方面，国际社会对于能否基于南极大陆主张大陆架基本保持一致的态度，《公约》对此并不会改变南极条约体系项下的海域现状。尽管七个主张国均提交了涉南极大陆架划界案，但他们并不会因为向委员会提交了以南极大陆为基础的外大陆架申请，便要求委员会对该部分予以审议。相反，相关各国在划界案申请中均请委员会注意南极洲所具有的特别法律和政治地位，要求其不审议相关部分的申请，以保持《公约》和《南极条约》的协调一致。同时，这些大陆架主张引起了其他非领土主张国的反对，它们认为南极不存在任何领土主权，因此也就不存在所谓的沿岸国，领土主张国主张的大陆架海洋权利也就不能成立。

另一方面，以亚南极岛屿为基础主张跨越到南极海域的外大陆架的申请却极大地挑战了《南极条约》体系。委员会于 2008 年基本同意澳大利亚基于其亚南极岛屿延伸至南极海域的大陆架外部界限主张。值得一提的是，尽管德国、俄罗斯、荷兰、美国、日本和印度针对澳大利亚以南极大陆为基础提出的大陆架外部界限申请部分纷纷发表声明表达反对态度，但六国均未对亚南极岛屿所涉南极大陆架部分提出任何反对意见。[31] 这些国家似乎承认亚南极各国可以以《公约》为基础主张外大陆架，即使相关区域已进入南极海域。有的学者还认为澳大利亚此举为《公约》和《南极条约》所兼容，即利用亚南极岛屿主张涉及到南极海域大陆架并未被冻结条款禁止。[32] 笔者认为这一观点过于信赖委员会建议的法律效力，忽略了《南极条约》禁止在南极创设任何主权权利的规定，也无视了南极条约体系的现有发展。

首先，委员会给出审核意见只具有建议性质，有学者就认为这样一个建议性质的意见不足以约束各国按照建议划定外部界限，[33] 还有学者认为由于委员会是全部由地质、地球物理、水文方面的专家组成的机构，其建议对各国没有法律拘束力。[34] 因此，即使大陆架界限委员会认可了澳大利亚在南极海域所主张的大陆架外部界限，其他各国仍然可以对此提出反对。

其次，即使依据《公约》，澳大利亚有权以亚南极岛屿主张越南极海域的大陆架，但由于《南极条约》禁止在南极创设任何主权权利，澳大利亚所主张的南纬 60

---

31 参见德国、俄罗斯、荷兰、美国、日本和印度针对澳大利亚划界案向联合国秘书长提交的照会，Reaction of States to the submission made by Australia to the Commission on the Limits of the Continental Shelf, UN website (待作者确认访问日期), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm。

32 吴宁铂：《澳大利亚南极外大陆架划界案评析》，载《太平洋学报》2015 年第 7 期，第 9 - 16 页。

33 Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Springer-Verlag Berlin Heidelberg, 2008, p. 84.

34 范云鹏：《论大陆架界限委员会的法律地位》，载《中国海洋法学评论》2007 年第 1 期，第 156 页。

度以南大陆架因违反《南极条约》而无效。毫无疑问，一旦承认澳大利亚对南极海域大陆架的主权权利，即认可澳大利亚享有该地区专属的矿产资源等的专属勘探开发和科学研究等主权权利，而这与《南极条约》所规定的南极地区应为了全人类利益而永远专为和平目的而使用的宗旨相违背。即使澳大利亚承诺其不会开采南极海域大陆架上的矿产资源，其对大陆架享有的其他主权性权利和管辖权的行使也会在一定程度上威胁南极的和平与安全。从这个角度来说，阿根廷以其亚南极岛屿主张的跨域至南极海域的专属经济区也会因违背《南极条约》而无效。

最后，现有南极条约体系中的南极海域矿物禁止开采之规定与大陆架制度不可兼容。90 年代初，《议定书》的签订使南极所有海域矿物资源的开发利用完全被禁止，有学者认为这从根本上禁止了各主张国在南极海域享有的大陆架权利。[35] 大陆架制度创设的根本目的在于使沿海国在其领土的自然延伸上享有矿物资源勘探和开发等专属性主权权利，在现有南极条约体系下，此种专属性权利并无存在之可能。

可以说，《公约》的生效引发了一系列的南极海域争端。由于南极大陆领土主权的冻结，《公约》中的领海、专属经济区制度并不会对《南极条约》体系项下的南极海域制度造成冲击。但各国依据《公约》以其亚南极岛屿主张延伸至南极海域的大陆架的行为，极有可能冲击到南极条约体系项下的南极海域制度。大陆架界限委员会审议通过澳大利亚亚南极岛屿的大陆架外部界限划界案这一事实或使得相关国家有了合法依据将国家主权权利扩展到南极海域，这从根本上与南极条约体系相冲突。而这一问题的解决追根溯源还是要从《南极条约》和《公约》本身的关系入手。

由于《南极条约》并未对大陆邻近海域的权利归属作出明确规定，各国可以借诸如大陆架的“突破口”来强化自己的“领土主权”，这可能会引发新的领土主权争端，但由于《南极条约》“冻结”的主权是整个南极条约体系的基础，对它的撼动可能造成整个体系的崩溃，加之《公约》并不能适用于南极大陆地区，所以《公约》并未对南极平静的领土主权现状造成实质性冲击。

（三）《公约》对完善南极争端解决机制的启示

首先，南极争端的解决需要建立更广泛的强制争端解决程序。南极条约体系中现存的争端解决机制是以和平解决为原则，以国家之间自行采用和平手段解决为主。若要将争端提交国际法庭或仲裁庭，则需以国家同意为前提，而只有《议定书》中的特殊情况才能适用强制仲裁程序。随着人类南极活动日益频繁，各种类

35 阮振宇：《南极条约体系与国际海洋法：冲突与协调》，载《复旦学报（社会科学版）》2001 年第 1 期，第 136 页。

型的争端会逐渐凸显，仅仅依靠《议定书》中与环境相关的强制仲裁程序远远不够。以旅游船只的管辖为例，相当一部分南极旅游船只并不注册在南极条约协商国的国籍下，这样便不能要求这些船只遵守南极条约体系的规定。由于各主张国的领土主张已被冻结，其海域主张也不能作为对这些船只行使管辖权的基础。而一旦这些船只引起的环境污染或是责任事故便可引起国际争端，当争端方无法自行采用和平手段解决争端，且未就将争端提交国际法庭或仲裁庭达成一致时，这些争端大概率会出现悬而不决的状态，不利于人类南极活动的开展和南极地区的国际合作。

《公约》第 15 部分，除了第 298 条规定的特定事项外，所有缔约国必须选择接受某一法庭或仲裁庭的管辖，这为相关争端的解决创制了“保底机制”，《南极条约》体系可以也参照《公约》的规定。即使不要求所有南极条约协商国必须接受某一法庭或仲裁庭的[36]管辖，也应针对南极现状，结合目前人类南极活动状况，制订覆盖面更广的强制争端解决程序，这样能在出现尖锐的且各方不能自行解决的南极争端之前，为其提供较为完整的解决机制。

其次，可参照《公约》中的海底管理局，适用人类共同遗产原则在南极建立一个“综合事务管理局”。《公约》第 136 条将“区域”内的矿产资源归为人类共同遗产，尽管人类共同遗产原则并不适用于南极海域，因为《公约》第 11 部分的“区域”制度旨在管理“区域”内矿产资源的开发，而对于南极资源，国际社会普遍持保护和养护的态度，但南极大陆与“区域”也存在相似之处：传统主权和属地管辖难以在其范围内适用，且它们均用于和平目的并出于人类共同利益而加以管理。两者的不同之处在于“区域”制度建立在人类共同遗产原则之上，而南极地区由南极条约体系这一独特的法律制度进行管理，该体系并未正式接受人类共同遗产原则。[37]但《南极条约》体系建立在冻结的主权之上，该方案归根究底仅是一个为避免尖锐矛盾的过渡性方案，实际的领土主权争端并没有解决，因此，在南极地区建立脱离传统主权和属地管辖，为全人类利益服务的领土和资源管理制度也不失为一种发展性的尝试。

笔者认为，为解决南极各类争端、管理南极事务，可在南极适用人类共同遗产原则。尽管领土主张国根据历史上的发现、先占、管理行为主张南极领土，但这并不能排除国际社会在南极地区享有的利益。《南极条约》在序言中强调南极不属于任何国家，确认了各国均在南极享有利益的事实，因此，可以认为南极是整个国际社会的共同遗产，人类共同遗产原则具有适用的前提。为此，可考虑在南极设立一个综合管理局，其宗旨是为全人类利益管理南极地区，如可由该管理局代表全

36 《联合国海洋法公约》第 136 条。

37 对南极适用何种理论，除人类共同遗产理论外，各国还提出了全球共有理论和世界公园理论；参见梁咏：《对南极地区的国际法展望与中国立场：人类共同遗产的视角》，载《法学评论》2011 年第 5 期，第 87 页。

人类就个主张国之间海域划界与主张问题进行讨论，并与当事国协商，还可以由其监管南极海域的矿物资源开采禁止规定的实施和监管船只活动等事项。这样可以一定程度上缓解前文提到的南极海域争端。但该制度可能面临的最大问题是机构权力来源的问题，领土主张国很难将其权力让渡给机构，且南极地区涉及无人主张的地域，这可能需要整个国际社会的同意。

五、结　语

《南极条约》自 1959 年以来维持的地区稳定态势正逐渐被挑战，尽管领土争端由于南极领土主权的“冻结”不会在短时间内爆发，但《公约》生效后引发的海域之争，其实质仍是南极领土主权争夺战的延续。

目前南极条约体系与《公约》在南极海域的重叠适用，对南极条约造成了一定程度的冲击，如引发了各类海域争端。而只要《南极条约》第四条中冻结条款保持生效，《公约》中创立的专属经济区制度和外大陆架制度就不会对南极海域制度产生根本性的影响。

彻底解决现存南极争端的方案在短时间内出现的可能性较低，各国可以借鉴《公约》的相关规定，通过签订或修订国际条约的方式，扩大强制争端解决程序的覆盖范围，建立更为完备的南极争端解决机制或设立综合事务管理局以缓解现有南极争端。总的来说，《公约》虽然给南极争端带来了新的问题和挑战，但同时也为南极争端的解决机制带来了启示。

UNCLOS' Impact on and Implications for Antarctic Maritime Disputes

LIU Weizhe*

Abstract: The maritime regime created by the United Nations Convention on the Law of the Sea (UNCLOS) contributes to multiple categories of Antarctic maritime disputes, which are rooted in the conflicts between UNCLOS and the Antarctic Treaty System. Though States at stake are claiming their territorial sea, exclusive economic zone (EEZ), and continental shelf in the Antarctic area, it is not adequate for this very fact to shake the stability of the Antarctic Treaty System, let alone fundamentally affecting the Antarctic maritime order. UNCLOS provisions on compulsory procedures and the international seabed area (the Area) have brought valuable enlightenment for improving existing Antarctic dispute settlement mechanisms.

Key Words: UNCLOS; Antarctic maritime disputes; Settlement mechanism

I. Introduction

Endowed with rich biological resources and oil and gas resources, Antarctica[1] has been the territory over which States are competing to claim their territorial sovereignty even before the signing of the Antarctic Treaty. It became a continent with special legal status subject to the Antarctic Treaty signed in 1959, which froze all territorial claims over the Antarctic region and maintained the relative stability

---

* LIU Weizhe, China Institute of Boundary and Ocean Studies, Wuhan University. E-mail: kellyliu2017@163.com. This paper won honorable mention of the COLR Dissertation Competition on "Retrospect and Prospect of the 25th Anniversary of the Entry into Force of the UNCLOS".

1 The Antarctic referred to in this paper means the area south of 60º South Latitude, covering the Antarctica land (including ice shelves), and also the sea area south of 60º South Latitude.

of the situation in Antarctica. The Antarctic Treaty Consultative Parties signed a series of treaties based on the Antarctic Treaty, resulting in a set of regional systems, known as the Antarctic Treaty System. The United Nations Convention on the Law of the Sea (UNCLOS), adopted in 1982, serves as the "Constitution" for the prevailing laws of the sea, applicable to all sea areas. However, it is not made clear in UNCLOS its relationship with the Antarctic Treaty System, and its content is obviously in conflict with the Antarctic Treaty System. The overlapping application of UNCLOS and the Antarctic Treaty System in the Antarctic sea area will inevitably affect the order established by the latter. Even though the status quo of the frozen territorial sovereignty over the Antarctic cannot be shaken, interest-involved States will still make use of UNCLOS to vie for Antarctic maritime rights and interests.

As a general rule, Antarctic disputes are mainly divided into two categories: maritime disputes and territorial disputes. The application of UNCLOS in the Antarctic sea will inevitably have a certain impact on maritime disputes. In the meantime, the complete dispute settlement mechanism of UNCLOS has also brought valuable enlightenment to the existing Antarctic dispute settlement mechanisms.

II. Categories of Antarctic Maritime Disputes

There are legal and *de facto* differences among States on the ownership of Antarctic territory and related maritime rights, as well as conflicts of legal interests, leading to maritime and territorial disputes in the Antarctic.

Article of the Antarctic Treaty has in fact frozen the territorial sovereignty claims over the Antarctic.[2] Art. 4(1) establishes the "unbiased clause" by

2 Art.4(1) of the Antarctic Treaty:"Nothing contained in the present Treaty shall be interpreted as:(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica."Art. 4(2) of the Antarctic Treaty:"No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

providing that no acts shall constitute a basis for renunciation or recognition of the territorial sovereignty or sovereign rights in Antarctica originally claimed; Art. 4(2) extends the application scope of the "unbiased clause" to the acts of States after the conclusion of the treaty. The ambiguous provisions on freezing territorial claims under Article 4 of the Antarctic Treaty alleviate and shelve the conflicts of interest among existing and potential claimants and non-claimants in the Antarctic Territory. The Antarctic Treaty has always been an expedient measure and a product of mutual compromise among the Contracting States to maintain long-term peace in the Antarctic. As a result, the disputes over territorial sovereignty has been temporarily covered up and put aside.[3] However, the conclusion of the Antarctic Treaty completely ignored the existence of potential maritime disputes, which set the stage for subsequent maritime disputes.

The principle of sovereignty is a pivotal principle of International Law, and the dispute over territorial sovereignty was the main type of dispute in Antarctica before the signing of UNCLOS. The dispute over Antarctic maritime rights appeared with the negotiation of UNCLOS. Some scholars have argued that there is no requirement in the International Law for coastal States to formally establish their territorial claims before claiming maritime rights, so Antarctic territorial claimants are free to assert their maritime rights.[4] Accordingly, even if the Antarctic territorial claim is frozen as a result of the entry into force of the Antarctic Treaty, it will not affect the States' claims to their maritime rights under UNCLOS in the Antarctic sea area. However, given the principle that "the land dominates the sea", maritime claims can be regarded as a reaffirmation of territorial claims. The States' relevant maritime claims in the Antarctic are actually in the hope to consolidate their territorial claims in the Antarctic.

UNCLOS's expansion in the maritime rights of coastal States has renewed the taste of the claimant States of Antarctic territory for resources and rights, and the battle for the Antarctic sea area has ensued.

A. The Territorial Sea and the Exclusive Economic Zone (EEZ)

---

3 WU Ningbo, *A Study on the Legal Issues of the Delimitation of the Antarctic Outer Continental Shelf,* Master's thesis of Fudan University, 2012, p. 17. (in Chinese)

4 Federica Mucci & Fiammetta Borgia, *The Legal Regime of the Antarctic*, The IMLI Manual on International Maritime Law, Volume I: The Law of the Sea, Oxford University Press, 2014, p. 499.

The opposition of the Antarctic maritime claims is manifested first and foremost in the ability of claimant States to expand their sovereign rights in the Antarctic sea area following UNCLOS. Article 6of the Antarctic Treaty also allows States to exercise their rights in the Antarctic high seas following International Law,[5] but the specific meaning is unclear due to the ambiguity of the terms "high seas" and "rights". Does this mean that the Antarctic sea area is not governed by the Antarctic Treaty but by the high seas' regime? The development of the Antarctic Treaty System has given a negative answer: it covers not only the conservation of biological resources in the Antarctic sea area, but also such matters as development and utilization of marine mineral resources and protection of the Antarctic marine environment.[6] There is no doubt that States must take into account the special Antarctic maritime regime under the Antarctic Treaty System when claiming rights under UNCLOS. In this regard, claims to the territorial sea and the EEZ under UNCLOS by claimant States based on their "Antarctic territory" are bound to encounter opposition from non-claimant States, leading to maritime disputes.

Prior to the adoption of UNCLOS and the Antarctic Treaty, the relevant maritime regime had been in fact initially defined in the 1958 Geneva Conventions. However, the Convention on the Territorial Sea and the Contiguous Zone, one of the four Geneva Conventions, does not provide for the breadth of the territorial sea, despite the generally-accepted breadth of the territorial sea of 3 nautical miles. The adoption of UNCLOS has allowed for an expansion of such breadth, whereby coastal States can claim a territorial sea of 12 nautical miles. Australia, for example, stated in 1990 to extend the breadth of its Antarctic territorial sea to 12 nautical miles. But this is yet another statement that lacks the effect of International Law, as Australia limits the legal effect of the 12-nautical-mileterritorial sea area only to its nationals.[7] This shows a tendency on the part of the claimant States to act cautiously and dare not conflict with the freezing provisions of the Antarctic Treaty in issues of sovereignty over the territorial sea.

---

5 Art. 4 of the Antarctic Treaty: "The provisions of the present Treaty shall apply to the area south of 60º South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under International Law with regard to the high seas within that area."

6 CHEN Li, *Study on the Legal Status of Antarctic Ocean*, Fudan Journal (Social Sciences Edition), Vol. 51: 5, p. 159 (2014). (in Chinese)

7 RUAN Zhenyu, *Antarctic Treaty System and International Law of the Sea: Conflict and Coordination,* Fudan Journal (Social Sciences Edition), Vol. 38: 1, p. 133 (2001). (in Chinese)

Unlike the territorial sea, there was no EEZ regime at the time of signing the Antarctic Treaty. States would enjoy the exclusive rights to explore and exploit the natural resources in the Antarctic sea area, provided that they legally claim an EEZ of 200 nautical miles based on their Antarctic territory. So far, four claimant States have declared the Antarctic EEZ. Since it is provided for in Article IV of the Antarctic Treaty that States may not create any sovereign rights in Antarctica, the claim to the Antarctic EEZ is also opposed by non-claimant States on the grounds that it is suspected of violating this Article. In addition to basing its EEZ claim on the Antarctic continent, Argentina also claims a 200-nautical-mile EEZ that extends into the Antarctic sea area from its Sandwich Islands north of 60º South Latitude.[8]

From the foregoing, there are disputes between the claimant States and the non-claimant States in the claims to the Antarctic territorial sea and the EEZ. Moreover, even if these claims are recognized as legal, there still exist disputes of overlapping claims to be delimited in each sea area.

B. The Outer Continental Shelf

Compared with the Convention on the Continental Shelf, UNCLOS not only reaffirms the standard of natural extension, but also introduces the distance criterion to determine the outer limits of the continental shelf, which essentially expands the scope of the continental shelf that a country can claim.[9] It is worth noting that the inherent sovereignty-based rights of coastal States over their continental shelf do not require any declaration. However, when they claim the outer limits of the continental shelf beyond 200 nautical miles, it is necessary to apply to delimitation to the Commission on the Limits of the Continental Shelf (hereinafter "CLCS") for approval and recommendation.[10] This provides an opportunity for the claimant States to reaffirm their territorial sovereignty over Antarctica through the institutions under UNCLOS.

At present, Australia, the United Kingdom, Norway and Argentina have all made formal submissions to CLCS on the delimitation of the continental shelf involving the Antarctic sea area. These submissions fall into the following two categories:

---

8 Both the United Kingdom and Argentina claim the islands, which Britain calls the South Sandwich Islands.

9 Public International Law (2nd Edition), Higher Education Press, 2018, p. 257. (in Chinese)

10 Art. 77(3), Art. 76(9) of the United Nations Convention on the Law of the Sea.

For the first category, the claimant States claimed a continental shelf beyond 200 nautical miles based on the Antarctic continent. Except for the United Kingdom, the other three States have made submissions to CLCS based on their "Antarctic territory". Among them, both Australia and Norway took the initiative to request CLCS not to deliberate the part of the continental shelf attached to the Antarctic territory.[11] Although Argentina did not request so,[12] CLCS also decided not to deliberate the application for the outer limits of the continental shelf attached to Antarctica as a result of the diplomatic notes addressed to the Secretary-General of the United Nations requesting doing so from several States.

In the second category, the claimant States presented to CLCS the submissions on the outer continental shelf across the Antarctic sea area based on the islands north of 60º South Latitude (hereinafter "sub-Antarctic islands"). Australia, Argentina and the United Kingdom all made such claims, among which Argentina and the United Kingdom both claimed a continental shelf that extends to the Antarctic sea area from the Georgia Islands and Sandwich Islands. According to the respective submissions made by the United Kingdom[13] and Argentina[14] in 2009, the outer edges of the outer continental shelves of the Georgia Islands and Sandwich Islands delineated by the two States almost coincided (as shown in Figure 1, the upper part of the figure is the claim of the United Kingdom, the lower part is the claim of Argentina, and the box shows the part that involved the Georgia Islands and Sandwich Islands). As the submissions of the two States involved an

---

11 See Commonwealth of Australia, E*xecutive Summary of the Australian Continental Shelf Submission*, UN webisite (Date TBC), https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_2004_c.pdf; For the executive summary of Norway's continental shelf submission to the United Nations Commission on the limits of the continental shelf on 4 May 2009, see Norway, continental shelf submission of Norway in respect of Bouvetøya and droning Maud Land executive summary, UN website (Date TBC), https://www.un.org/Depts/los/clcs_new/submissions_files/nor30_09/nor2009_executivesummary.pdf.

12 See the notes submitted by the United Kingdom, the United States, Russia, India, the Netherlands and Japan concerning the Argentina's submission on the 200-nautical-mile outer continental shelf to the Secretary-General of the United Nations, Communications received with regard to the submission made by Argentina to the Commission on the Limits of the Continental Shelf, UN website (Date of visit to be confirmed by author), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm.

13 United Kingdom of Great Britain and Northern Ireland, Submission in respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands, Executive Summary, UN website (May. 5, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/gbr45_09/gbr2009fgs_executive%20summary.pdf.

14 Argentina, Outer Limit of the Continental Shelf, Argentina submission (May. 5, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf.

unresolved territorial dispute, CLCS decided, following its rules of procedure, not to deliberate the application for the delimitation of the continental shelf of that place for the time being.Different from the case of the United Kingdom and Argentina, Australia claimed the continental shelf across the Antarctic sea area based on three sub-Antarctic islands without territorial sovereignty dispute.[15] In 2004, Australia applied delimitation of the outer continental shelf to CLCS,[16] which involved one continental shelf with outer limit starting from the "Antarctic territory", and two continental shelves with outer limits starting from the sub-Antarctic islands.[17] According to the recommendations made by CLCS, even though the outer limits of the continental shelf extended to the Antarctic sea area, the claim involving Antarctic outer limits based on the sub-Antarctic islands has basically been recognized by CLCS. However, despite the fact it has been approved by CLCS in the procedure, it is worth exploring what its legal effect is and whether it is contrary to the prohibition of any creation of any sovereign right in the Antarctic under the Antarctic Treaty.

It can be seen that although the territorial dispute in the Antarctic has been put on hold due to the establishment of the Antarctic Treaty System, claimant States are making every effort to expand their Antarctic maritime sovereign rights to seek future rights and interests in the Antarctic, as the System doesn't specify the application relationship with UNCLOS. The maritime claims made by Antarctic territorial claimant States based on their "Antarctic territory" have been opposed by non-claimant States. This is because claims to Antarctic territory have been frozen and, naturally, newly created derivative rights based on sovereignty cannot be recognized.[18] On the other hand, it is also urgent to explore and solve how to coordinate the outer continental shelf and EEZ involving the Antarctic sea area claimed by coastal States based on the sub-Antarctic islands with the Antarctic Treaty System.

The main way to settle Antarctic maritime disputes may be to fundamentally

---

15 The three islands are: Heard Island, MacDonald Islands and Macquarie Island.

16 See Commonwealth of Australia, E*xecutive Summary of the Australian Continental Shelf Submission*, On the UN website (Date TBC), https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_2004_c.pdf.

17 The two continental shelf claiming areas that involve Antarctic sea area are the Kerguelen Plateau and the Macquarie Ridge, respectively.

18 ZHU Ying,XUE Guifang, LI Jinrong: *Conflicts of Legal Systems Induced by the Delimitation of the Continental Shelf in the Antarctic Region*, Chinese Journal of Polar Research, Vol. 23: 4, p. 320 (2011). (in Chinese)

clarify the relationship between UNCLOS and the Antarctic Treaty System. But what about the existing Antarctic dispute settlement mechanism? Can it ease the existing disputes among States in the Antarctic to some extent? Given this, it is necessary to understand the existing dispute settlement mechanisms of the Antarctic Treaty System.

III. Existing Antarctic Dispute Settlement Mechanisms

Settling disputes by peaceful means is not only a provision of the Charter of the United Nations, but also a requirement of the basic principles of International Law. The requirements for the peaceful settlement of Antarctic disputes are also included in the Antarctic Treaty System. Documents relating to the settlement of Antarctic disputes under the Antarctic Treaty System mainly include the Antarctic Treaty, the Convention for The Conservation of Antarctic Marine Living Resources (hereinafter "CCAMLR"), the Protocol on Environmental Protection to the Antarctic Treaty (hereinafter "PEPAT") and its Annex VI.[19]

Article 11 of the Antarctic Treaty provides for two mechanisms for the settlement of disputes arising from the interpretation and application of the Treaty. The first is mutual consultation between the parties to the dispute, intending to settle disputes through negotiation, investigation and other peaceful means. If the first mechanism fails, the dispute shall, with the consent of the parties concerned, be referred to the International Court of Justice for settlement. But when the parties to the dispute fail to agree on a referral to the Court, they should continue to seek a settlement through the first mechanism.[20]

Article 25 of CCAMLR provides a dispute settlement mechanism similar to that provided for in Article 11of the Antarctic Treaty, but it deals with the disputes related to the "interpretation and application" of the former.[21] Disputes that cannot be settled by such peaceful means as negotiations shall, with the consent of the parties concerned, be referred to the International Court of Justice or arbitration. Likewise, if no agreement can be reached on referral to the Court or arbitration, the

19 GUO Hongyan, *The Settlement Mechanism of the Antarctic Treaty System on the Antarctic Dispute*, Journal of Ocean University of China (Social Sciences), Vol. 31: 3, p. 8 (2018). (in Chinese)

20 Art.11 of the Antarctic Treaty.

21 Art. 25(1) of the Convention for the Conservation of Antarctic Marine Living Resources.

parties concerned shall return to a peaceful settlement.[22]

PEPAT provides for two kinds of dispute settlement mechanisms: a general mechanism and a special mechanism. The former is similar to the provisions of Article 11of the Antarctic Treaty. However, unlike the Antarctic Treaty, PEPAT requires the parties to the dispute to first fulfill a procedural obligation, that is, to consult on the settlement of the dispute. The latter is exclusively for addressing disputes under Articles 7, 8 and 15 of PEPAT and the annexes to PEPAT, as well as disputes relating to Article 13 of PEPAT (in so far as it is related to the above-mentioned articles). States may choose to settle the above-mentioned disputes through the International Court of Justice or the Court of Arbitration at any time when they become contracting parties to PEPAT or at any time thereafter. If each party to the dispute has opted for the same settlement mechanism, such a mechanism shall prevail unless otherwise agreed by the parties.[23] If the parties fail to choose the same settlement mechanism or both parties accept the two mechanisms, the dispute may only be referred to the Court of Arbitration unless otherwise agreed by the parties. If no choice is made or the choice made has lapsed, that State is deemed to have accepted the jurisdiction of the Court of Arbitration.[24] It appears that arbitration can be a compulsory settlement mechanism for particular disputes. However, before these specific disputes are referred to the compulsory settlement mechanism, there is a period of 12 months for the parties to the dispute to resolve the dispute following the provisions of Article 18, and PEPAT specifically provides that it does not authorize the International Court of Justice or the Court of Arbitration to resolve disputes within the scope of Article 4 of the Antarctic Treaty, namely the Antarctic sovereignty disputes.[25]

Provisions of the Antarctic Treaty System on the dispute settlement have been sometimes evaluated as "relatively simple, and even overly simple".[26] There is still room for improvement in the Antarctic dispute settlement mechanism, as neither the Antarctic Treaty nor CCAMLR states how the dispute should be settled if the parties concerned fail to do so peacefully and fail to agree on a referral to the International Court of Justice or the Court of Arbitration. Precisely because

---

22 Art. 25(2) of the Convention for the Conservation of Antarctic Marine Living Resources.
23 Arts. 19(1)(4) of the Protocol to the Antarctic Treaty on Environmental Protection.
24 Arts. 19(3)(5) of the Protocol to the Antarctic Treaty on Environmental Protection.
25 Art. 20(2) of the Protocol to the Antarctic Treaty on Environmental Protection.
26 Arthur Watts, *International Law and the Antarctic Treaty System,* Cambridge University Press, Vol. 11, 1992,p. 90.

of the imperfection of the dispute settlement mechanism under the Antarctic Treaty System, some Antarctic Treaty System Consultative Parties prefer to seek the dispute settlement mechanism of the non-Antarctic Treaty System in case of a dispute. For example, in the case of Australia v. Japan over whaling, Australia sought the International Court of Justice to resolve its whaling dispute with Japan in the Antarctic sea area based on Japan's violation of the International Convention for the Regulation of Whaling.[27] The imperfection of the existing Antarctic dispute settlement mechanisms will lead to the reluctance of the Contracting States to settle disputes under the Antarctic Treaty System, which is detrimental to the development of the dispute settlement mechanism, and may also give rise to differences in applicable standards due to different legal documents cited in individual cases, thus resulting in the adverse consequences of fragmented judgment results inhomogeneous cases. At the same time, invoking international legal documents outside the Antarctic Treaty System to resolve disputes in the Antarctic may lead to application conflicts because of the special legal status of the Antarctic. Given the development of science and technology and the increasing frequency of human activities in Antarctica, the establishment of a more complete dispute settlement mechanism within the Antarctic Treaty System can not only provide a unified solution applicable to the Antarctic for disputes that may occur in the future, but also avoid causing more application conflicts.

To conclude, the current dispute settlement mechanisms under the Antarctic Treaty System is based on the principle of peaceful settlement, and the general settlement mechanism is consistent with the requirements of the Charter of the United Nations. Where a dispute cannot be settled by negotiation, investigation, etc., such dispute may be referred to the International Court of Justice or the Court of Arbitration with the consent of the parties to the dispute. Compulsory arbitration procedures are only involved for specific disputes, such as those related to the prohibition of mineral resources activities, environmental impact assessment and contingency plans.

IV. UNCLOS' Impact and Enlightenment on Antarctic Maritime Disputes

27 Whaling in the Antarctic (Australia *v.* Japan: New Zealand intervening), I.C.J. Reports 2014, p. 226

Article 6 of the Antarctic Treaty defines the scope of its application and specifies that it shall not prejudice the rights of any State to the high seas under International Law.[28] Following the method of treaty interpretation provided for in the Vienna Convention on the Law of Treaties, the term "high seas" herein shall mean "all parts of the sea that are not included in the territorial sea or the internal waters of a State" as provided for in the 1958 Geneva Convention on the High Seas. The "International Law" referred to in Article 6should include the international law of the sea. However, as to whether the "international law of the sea" refers to the one during the signing of the Antarctic Treaty or the one that has been evolving over time, this paper holds the opinion that the latter interpretation is more appropriate, since the rights of States to the high seas under the international law are constantly changing, and the adoption of a more flexible interpretation would enable the Antarctic Treaty to be more in tune with present-day realities and prolong its service life. UNCLOS is an indispensable part of the current international law of the sea, so the overlapping use of the Antarctic Treaty and UNCLOS in the Antarctic region is an inevitable trend. UNCLOS, while having an impact on Antarctic disputes, will also shed some light on its settlement mechanism.

A. Impact on the Territorial Sea and EEZ Disputes

The Antarctic Treaty only mentions the high seas and its international regulatory regime, without regulating the legal status of the sea area adjacent to the territory. Therefore, when the Antarctic Treaty and UNCLOS are applied simultaneously in the Antarctic region, there will be a dispute as to whether the corresponding maritime rights claimed by Antarctic territorial claimant States based on UNCLOS violate Article 4, Paragraph 2 of the Antarctic Treaty.

The territorial sea is regarded as the composition of the territory of a state under International Law.[29] As Article 4 of the Antarctic Treaty freezes States' sovereign claims over Antarctic territory, the territorial sea claim should naturally be frozen as well. The breadth of territorial sea stipulated by International Law was 3 nautical miles at the time of the entry into force of the Antarctic Treaty, but such breadth was changed from 3to a maximum of 12 nautical miles with the conclusion

28 Art.6 of the Antarctic Treaty.
29 Public International Law (2nd Edition), Higher Education Press, 2018, p. 249. (in Chinese)

of UNCLOS. Is it contrary to Article 4, Paragraph 2 of the Antarctic Treaty to extend the Antarctic territorial sea from 3 to 12 nautical miles? This paper holds the view that even though UNCLOS is a result of the development of the international law of the sea, the developed territorial sea regime cannot be applied to frozen Antarctic territorial claims (including territorial sea claims).Hence, if an Antarctic territorial claimant State claims a 12-nautical-mileterritorial sea area under UNCLOS, it would violate the prohibition of the Antarctic Treaty on expanding existing territorial sovereignty. Australia's restrictive territorial declaration is a manifestation of its dare not to blatantly violate freezing provisions.

With regard to EEZ, Australia has formally claimed the Antarctic EEZ, arguing that EEZ is a right attached to territorial sovereignty and therefore does not constitute an expansion of the original sovereignty claim. However, other claimant States do not agree with the legal basis of this claim. The EEZ regime is a regime pioneered by UNCLOS, and coastal States enjoy exclusive sovereign rights in the EEZ. Even if it is considered that the claim of EEZ does not belong to the expansion or the introduction of a new claim of sovereignty, the coastal States do rely on such a claim to create new sovereign rights in the Antarctic, thus contravening the Antarctic Treaty. Meanwhile, recognition of the rights of claimant States in the Antarctic EEZ may give rise to resource utilization and exploitation practices that contradict the provisions of the Antarctic Treaty System,[30] and these contradictions will remain to be further reconciled.

B. Impact on the Antarctic Continental Shelf Disputes

The provisions of UNCLOS in respect of territorial sea and EEZ have not given rise to substantive disputes, but only to antagonism between claimant States and non-claimant States in each sea area. Regarding continental shelf disputes, the provisions of UNCLOS on the continental shelf (especially the outer continental shelf) have had a great impact on the Antarctic Treaty System, or formed an irreconcilable contradiction between UNCLOS and the Antarctic System in the Antarctic sea area, owing to the attraction of Antarctic oil and gas resources and the intervention of CLCS on the limits of the Continental Shelf. Aside from providing

30 For example, Article VII of the Protocol on Environmental Protection to the Antarctic Treaty provides that "Any activity relating to mineral resources, other than scientific research, shall be prohibited."

that coastal States may claim the continental shelf of 200 nautical miles, UNCLOS also grants coastal States the right to claim an outer continental shelf beyond 200 nautical miles under certain circumstances. In the latter case, coastal States need to make submissions on the delimitation of the outer continental shelf to CLCS, and any submission deliberated and adopted by CLCS will be given a certain degree of legal binding force and become "final and legally binding". This procedure under UNCLOS provides a legal basis for States to claim the continental shelf in the Antarctic sea area. At present, all the seven Antarctic territorial claimant States have made submissions on the200-nautical-mileouter continental shelf involving Antarctica (among which Chile has submitted preliminary information). It appears that UNCLOS has greatly intensified the dispute over claims on the Antarctic continental shelf.

On the one hand, the international community has basically maintained a consistent attitude as to whether or not a continental shelf can be claimed based on the Antarctic continent, and UNCLOS will not change the status quo of the sea area under the Antarctic Treaty System. Although all the seven claimant States had made submissions on the delimitation of the continental shelf involving Antarctica, they would not ask CLCS to deliberate that part just because they had submitted an application to CLCS for an outer continental shelf based on the Antarctic continent. Instead, in their submissions, the States concerned drew the attention of CLCS to the special legal and political status of Antarctica and requested it not to deliberate the applications of the relevant parts to maintain the coherence of UNCLOS and the Antarctic Treaty. In the meantime, these continental shelf claims raised opposition from other non-territorial claimant States, which argued that there was no territorial sovereignty over Antarctica and therefore no so-called coastal States, and that the continental shelf maritime rights claimed by territorial claimant States could not be established.

On the other hand, the claims to an outer continental shelf spanning into the Antarctic sea area based on sub-Antarctic islands have posed a significant challenge to the Antarctic Treaty System. In 2008, CLCS largely agreed with Australia's claim on the outer limits of the continental shelf extending to the Antarctic sea area from its sub-Antarctic islands. It is worth mentioning that although Germany, Russia, the Netherlands, the United States, Japan and India have issued statements opposing Australia's application for the outer limits of the continental shelf based on the Antarctic continent, none of them raised any objection to the part of the

Antarctic continental shelf covered by the sub-Antarctic islands.[31] These States seem to recognize that sub-Antarctic States can claim the outer continental shelf based on UNCLOS even if the area concerned has entered the Antarctic sea area. Some scholars have also argued that Australia's move is compatible with UNCLOS and the Antarctic Treaty, that is, claims to the continental shelf involving the Antarctic based on sub-Antarctic islands is not prohibited by the freeze clause.[32] As far as this paper is concerned, this view overly relies on the legal effect of the recommendations of CLCS, while ignoring the provisions of the Antarctic Treaty prohibiting the creation of any sovereign rights in the Antarctic, as well as the current development of the Antarctic Treaty System.

First of all, the audit opinion given by CLCS is only of a recommended nature, and some scholars have argued that such a recommendation is not sufficient to bind States to delineate outer limits following the recommendations.[33] Some scholars have also argued that since CLCS is a body composed entirely of experts in geology, geophysics and hydrology, its recommendations are not legally binding on States.[34] Therefore, even if CLCS endorsed the outer limits of the continental shelf claimed by Australia in the Antarctic sea area, other States could still object to it.

Secondly, even if Australia were entitled under UNCLOS to claim the continental shelf across the Antarctic sea area based on its sub-Antarctic islands, given the prohibition of the Antarctic Treaty on the creation of any sovereign rights in the Antarctic, the continental shelf south of 60º South Latitude claimed by Australia is null and void because of violations of the Antarctic Treaty. There is no doubt that the recognition of Australia's sovereign rights over the continental shelf in the Antarctic sea area would be a recognition of Australia's sovereign rights of exclusive exploration, exploitation and scientific research to the exclusive mineral resources of the region, which runs counter to the purpose stipulated in the Antarctic Treaty that the Antarctic region should always be used exclusively for peaceful purposes for the benefit of all mankind. Despite Australia's commitment

---

31 See the notes submitted by Germany, Russia, the Netherlands, the United States, Japan and India concerning the submission made by Australia to the Secretary-General of the United Nations, https://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm.

32 WU Ningbo: *An Analysis on Australian Submission for Delimitation in Outer Limits of Continental Shelves Related to Antarctic Area*, Pacific Journal, Vol. 23: 7, pp. 9-16 (2015). (in Chinese)

33 Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Springer-Verlag Berlin Heidelberg, 2008, p. 84.

34 FAN Yunpeng, *A Study on the Legal Status of the Commission on the Limits of the Continental Shelf,* China Oceans Law Review, Vol. 3: 1, p. 156 (2007). (in Chinese)

that it will not exploit mineral resources on the continental shelf in the Antarctic sea area, its exercise of other sovereign rights and jurisdiction over the continental shelf will threaten the peace and security of Antarctica to some extent. From this point of view, Argentina's claim of the EEZ extending to the Antarctic sea area based on its sub-Antarctic island would also be null and void as a violation of the Antarctic Treaty.

Finally, the prohibition of mineral exploitation in the Antarctic sea area in the existing Antarctic Treaty System is incompatible with the continental shelf regime. In the early 1990s, the signing of PEPAT completely prohibited the exploitation and utilization of mineral resources in all Antarctic sea areas, which, as argued by some scholars, fundamentally prohibited the continental shelf rights enjoyed by various claimant States in the Antarctic sea area.[35] The fundamental purpose of the continental shelf regime is to enable coastal States to enjoy exclusive sovereign rights such as exploration and exploitation of mineral resources in the natural extension of their territory, which is not possible under the existing Antarctic Treaty System.

It can be said that the entry into force of UNCLOS has triggered a series of disputes in the Antarctic sea area. Due to the freezing of the territorial sovereignty of the Antarctic continent, the territorial sea and EEZ regime in UNCLOS will not have an impact on the Antarctic maritime regime under the Antarctic Treaty System. However, there is a risk that the Antarctic maritime regime under the Antarctic Treaty System is very likely to be impacted by the actions of States claiming the continental shelf extending to the Antarctic sea area based on their sub-Antarctic islands following UNCLOS. The fact that CLCS has deliberated and approved Australia's submission on the outer limits of continental shelf based on its sub-Antarctic islands may provide a legitimate basis for the relevant States to extend national sovereign rights to the Antarctic sea area, which is fundamentally in conflict with the Antarctic Treaty System. The solution to this problem should be traced back to the relationship between the Antarctic Treaty and UNCLOS.

Given the Antarctic Treaty does not clearly provide for the ownership of rights in the adjacent sea areas of the continent, the States can strengthen their "territorial sovereignty" through "breakthroughs" such as the continental shelf,

---

35 RUAN Zhenyu, *Antarctic Treaty System and International Law of the Sea: Conflict and Coordination*, Fudan Journal (Social Sciences Edition), Vol. 38: 1, p. 136 (2001). (in Chinese)

which may lead to new territorial sovereignty disputes. However, seeing that the frozen sovereignty of the Antarctic Treaty is the basis of the entire Antarctic Treaty System, the shaking of it may lead to the collapse of the whole system. Coupled with the fact that UNCLOS does not apply to the Antarctic continent, UNCLOS has not had a substantial impact on the peaceful status quo of territorial sovereignty in the Antarctic.

C. UNCLOS' Enlightenment for Improving Antarctic Dispute Settlement Mechanisms

To begin with, there is a need to establish a broader compulsory dispute settlement procedure for the settlement of the Antarctic dispute. The existing dispute settlement mechanism in the Antarctic Treaty System is mainly settled by peaceful means between States based on the principle of a peaceful settlement. If a dispute is to be referred to the International Court of Justice or the Court of Arbitration, it must be subject to the consent of the States concerned, and the compulsory arbitration procedure can be applied in the special circumstances under PEPAT. With the increasing frequency of human activities in Antarctica, various types of disputes will flare up, and it will be far from enough to rely solely on the compulsory arbitration proceedings related to the environment under PEPAT. Taking the jurisdiction of tourist vessels as an example, a considerable number of Antarctic tourist vessels are not registered under the nationality of the Antarctic Treaty Consultative Parties, and thus cannot be required to comply with the provisions of the Antarctic Treaty System. Given that the territorial claims of the claimant States have been frozen, their maritime claims cannot be used as a basis for exercising jurisdiction over these vessels. International disputes may arise in the event of environmental pollution or liability accidents caused by these vessels. When the parties to the dispute fail to resolve the disputes by peaceful means and fail to reach an agreement on a referral to the International Court of Justice or the Court of Arbitration, there is a high probability that these disputes will be in suspense, which is to the detriment of the development of human activities in Antarctica and international cooperation in the Antarctic region.

Part 15 of UNCLOS, in which all Contracting States must choose to accept the jurisdiction of a court of justice or court of arbitration except for the specific matters provided for in Article 298, creates a "minimum guarantee mechanism" for the settlement of relevant disputes, and the Antarctic Treaty System may also refer

to the provisions of UNCLOS. Even if it is not required that all Antarctic Treaty Consultative Parties should accept the[36] jurisdiction of a court of justice or court of arbitration, a broader compulsory dispute settlement procedure should be developed in the light of the status quo of Antarctica and the current state of human activities in the Antarctic, in order to provide a more complete settlement mechanism for a cute Antarctic disputes that cannot be resolved by the parties concerned.

Secondly, the principle of the common heritage of mankind could be applied to establish an "integrated affairs authority" in Antarctica, along the lines of the International Seabed Authority in UNCLOS. Article 136 of UNCLOS classifies the mineral resources in the Area as the common heritage of mankind. Although the principle of the common heritage of mankind does not apply to the Antarctic sea area, as the Area regime of Part 11 of UNCLOS aims to manage the exploitation of mineral resources in the Area, and the international community generally holds the attitude of protection and conservation of Antarctic resources, there are similarities between the Antarctic continent and the Area: traditional sovereignty and territorial jurisdiction are difficult to apply within their scope, and they are used for peaceful purposes and managed for the common interests of mankind. They differ in that the Area regime is based on the principle of the common heritage of mankind, while the Antarctic region is governed by a unique legal regime, the Antarctic Treaty System, which does not formally accept the principle of the common heritage of mankind.[37] Yet the Antarctic Treaty System, which is based on frozen sovereignty, is in the final analysis only a transitional solution to avoid sharp contradictions, leaving the actual territorial sovereignty dispute unresolved. In this context, it is also a developmental attempt to establish a territorial and resource management system in Antarctica that is divorced from traditional sovereignty and territorial jurisdiction and serves the interests of all mankind.

This paper holds the opinion that the principle of the common heritage of mankind can be applied in the Antarctic to resolve various disputes in the Antarctic and manage Antarctic affairs. Even though territorial claimant States claim Antarctic territory based on historical discovery, pre-occupation and management,

---

36 Art. 136 of the United Nations Convention on the Law of the Sea.

37 As to what theory is applicable to Antarctica, in addition to the theory of common heritage of mankind, States have also put forward the theory of global sharing and the theory of world parks. See LIANG Yong, *Prospect of International Law and China's Position on Antarctica: The Perspective of the Common Heritage of Mankind*, Law Review, Vol.22: 5, p. 87 (2011). (in Chinese)

this does not rule out the interests enjoyed by the international community in the Antarctic region. In its preamble, the Antarctic Treaty emphasizes that Antarctica is not owned by any State and confirms the fact that all States enjoy interests in Antarctica. Antarctica can therefore be considered the common heritage of the entire international community, and the principle of the common heritage of mankind has the premise of application. To this end, consideration can be given to the establishment of an integrated affairs authority in Antarctica, whose purpose is to manage the Antarctic region for the benefit of all humankind, for example, by conducting a discussion on behalf of all mankind on the delimitation and claims of maritime areas between the claimant States, and consultation with the States concerned, and also by regulating the enforcement of the prohibition on the exploitation of mineral resources in Antarctic sea area and the regulation of activities of vessels. This can alleviate the Antarctic maritime disputes mentioned above to some extent. However, the biggest problem facing the regime is the source of institutional power, which is difficult for territorial claimant States to cede to the institution, and the fact that the Antarctic region involves unclaimed territory, which may require the consent of the entire international community.

V. Conclusion

The regional stability maintained by the Antarctic Treaty since 1959 is gradually being challenged. Although territorial disputes will not break out in a short time due to the "freeze" of Antarctic territorial sovereignty, the maritime disputes triggered by the entry into force of UNCLOS are in essence a continuation of the battle for Antarctic territorial sovereignty.

The current overlapping application of the Antarctic Treaty System and UNCLOS in the Antarctic sea area has caused an impact on the Antarctic Treaty to a certain extent, such as causing various maritime disputes. As long as the freeze clause in Article 4of the Antarctic Treaty remains in force, the EEZ regime and the outer continental shelf regime created in UNCLOS will not have a fundamental impact on the Antarctic maritime regime.

Given the low likelihood of a thorough solution to the existing Antarctic disputes in a short period, States can draw on the relevant provisions of UNCLOS, expand the coverage of compulsory dispute settlement procedures by signing or amending international treaties, and establish a more complete Antarctic dispute settlement mechanism or set up an integrated affairs authority to alleviate

existing Antarctic disputes. To sum up, despite the new problems and challenges that UNCLOS has brought to the Antarctic dispute, it has also shed light on the Antarctic dispute settlement mechanisms.

Translator: CHEN Jueyu
Editor (English): HUANG Rui

船舶碰撞溢油污染损害赔偿责任认定的法律问题
——以“达飞佛罗里达”轮与“舟山”轮碰撞污染事故应急处置费用纠纷案的再审为例

张春昌　帅月新 *

内容摘要：2019 年 9 月，最高人民法院公布对“达飞佛罗里达”轮与“舟山”轮碰撞污染事故应急处置费用纠纷案的再审判决，引发业界高度关注和广泛讨论。本文结合国际公约、国际惯例和国内法律，对判决书中所涉及的非漏油船的责任承担、海难救助和污染应急之界定、政府部门对应急处置费用的民事索赔权利等法律焦点问题，进行详细剖析并作出相应评论意见和建议，以期为海事行政执法机关、海事司法审判机构等海商界处理类似事故和案件提供适当的参照。

关键词：船舶　碰撞　油污　司法判决　民事责任

2013 年 3 月 19 日，“达飞佛罗里达”轮在距长江口灯船东北约 124 海里处东海专属经济区与“舟山”轮发生碰撞，导致“达飞佛罗里达”轮船体结构严重损坏，共计 613.278 吨燃料油泄漏。事发后，交通运输部指定上海海事局负责该起事故的应急处置工作，上海海事局组织指挥上海打捞局、东海救助局等 11 家单位对涉案事故采取了救助、清防污作业，产生应急处置费用。经过长达五年多的诉讼，虽已有生效判决认定涉案两船应对本次事故各承担 50% 的碰撞过失责任，但对于应急处置费用的赔偿问题，在宁波海事法院一审、浙江省高级人民法院二审后，当事各方仍未能达成一致意见。2019 年 9 月，经最高法再审后，先后下达了四份再审判决书。[1] 这些判决书对社会公布后，立即引发业界高度关注，被认为至少解决了 10 余项长期未决的司法实践问题，有利于指导各地法院审判同类案件，提高审判

* 张春昌，环境科学与工程博士，上海海事大学商船学院副教授，电子邮箱：zhangchunchang@msa.gov.cn；帅月新，中国船舶油污损害理赔事务中心理赔审核部工程师，电子邮箱：shuaiyuexin@shmsa.gov.cn。

1 四份再审判决书系上海鑫安船务有限公司、交通运输部上海打捞局、中华人民共和国洋山港海事局、上海晟敏投资集团有限公司与普罗旺斯船东 2008-1 有限公司、法国达飞轮船有限公司、罗克韦尔航运有限公司船舶污染损害责任纠纷案，最高人民法院（2018）最高法民再 367 号、368 号、369 号、370 号民事判决书。

效率，促进司法统一。

一、船舶碰撞溢油污染责任主体及责任承担方式

宁波海事法院一审判决认为，[2] 上海打捞局的案涉行动为防污清污，有关防污清污费应当由漏油船赔偿，而不应由非漏油船赔偿，上海打捞局不服一审判决提起上诉。浙江省高级人民法院二审判决驳回上诉，维持原判。[3] 上海打捞局不服一、二审判决，向最高法申请再审。最高法再审认为：[4] 本案应当适用我国加入的相关国际公约，公约没有规定的事项适用国内法及其司法解释的规定，有关国际公约和国内法分别对污染者与第三人实行无过错责任原则、过错责任原则的基本内涵，暨污染者负全责，另有过错者相应负责，因此非漏油船“舟山”轮也应当按照其 50% 的碰撞过失比例承担污染损害赔偿责任。

在最高法对本案再审判决之前，船舶因碰撞事故导致溢油污染，两船在碰撞中互有过失，赔偿是一个争议的司法难题。[5] 主流观点有三：一是仅由漏油船承担；二是按过失比例承担按份责任；三是互有过失承担连带责任。[6] 问题的根源在于不同的责任承担方式会导致不同的结果。在以不打破事故责任方海事责任限制权利的前提下，如果仅由漏油船承担责任，则因为漏油船可以依法享受海事责任限制，导致受害人得不到足够的赔偿；如果只能先由漏油船在责任限制范围内全部赔偿，再由漏油船向非漏油船追偿，非漏油船在其责任限制范围赔偿，存在的风险是漏油船承担责任能力十分有限的情况下，受害人仍然得不到足够的赔偿；如果漏油船与非漏油船按过失比例承担责任或两者承担连带责任，则相比前面两种方式更有利于保护受害人的利益，但是，按照过失比例或连带责任之间仍有差别，相比之下，连带责任更加有利于保护受害人。

（一）“谁漏油，谁赔偿”不是一项法律原则

本案适用《2001 年国际燃油污染损害民事责任公约》（以下简称“《燃油公约》”），燃油公约适用于除《国际油污损害民事责任公约》（以下简称“CLC”）和《国际油污损害赔偿基金公约》（以下简称“FUND”）之外的船用燃油污染损害

2 宁波海事法院（2015）甬海法商初字第 442 号民事判决书。
3 浙江省高级人民法院（2017）浙民终第 581 号民事判决书。
4 最高人民法院（2018）最高法民再 368 号民事判决书。
5 较早引发司法界讨论的典型案例是 1999 年 3 月 24 日发生在珠江口的“闽燃供 2”油轮与“东海 209”轮碰撞导致“闽燃供 2”溢油污染事故。
6 朱强：《船舶污染侵权法上的严格责任研究》，中国方正出版社 2008 年版，第 153-161 页。

赔偿问题，该公约在设立之初因其适用的船舶多、事故频发、赔偿风险大等，在保险界、货主利益群体的强烈反对下，最终没有形成如同 CLC 或 FUND 公约一样的双层保障机制，只是明确了漏油船的责任、责任限制和强制保险等，而没有规定碰撞事故中非漏油船如何承担责任的问题，即使是责任限制与强制保险限额也不得不指向国内法或者国际公约。《燃油公约》采取了一种复杂的责任机制，将船舶所有人扩大化解释为除登记所有人外，还包括漏油船的光船承租人、船舶管理人和经营人等多人承担连带责任，但却仅由其中一方投保责任险。[7] 在国际海事界，打破长期建立的原则，将责任承担的方法改为美国《1990 年油污法》（以下简称“OPA 法令”）下共同承担责任的方式也是趋势所逼，[8] 随着大型船舶燃油污染事故的不断发生，CLC 下由漏油船单独承担赔偿责任的原则受到了《燃油公约》的挑战，这种单独承担赔偿责任的原则也是美国拒绝加入 CLC 的原因之一。可见，《燃油公约》是像一个半成品，曾想模仿 CLC 或 FUND 公约但未修成正果，解决公约未明确问题的方法只能寻求国内法的支撑。为此，最高法在对本案的判决中，通过解读《燃油公约》的相关条款，认为该公约不涉及第三人责任之旨意，也未排除其他有过错者可能承担责任之意，根据国内法对污染者与第三人实行过错责任原则的基本内涵应当适用《侵权责任法》关于第三方的责任的规定，[9] 认为非漏油船相应承担污染损害赔偿责任。

持不同观点的学者认为，船舶油污损害赔偿法律体系中，“谁漏油，谁赔偿”已成为一项基本原则被广泛采用。实际上，“谁漏油，谁赔偿”只是学术界的一种规律性总结，而不应当作为是一项法律原则，在 CLC、《燃油公约》等任何国际法，以及《海商法》《海洋环境保护法》等国内法中并无明文阐述。产生这一错觉的根源在于 CLC 中仅归责于船舶所有人的这一特殊制度安排，即：CLC 第 3 条第 1 款与第 4 款规定了污染受害人只能向船舶所有人提出索赔，而不能向光租人、船员、代理人、救助人和采取预防措施的人等提出索赔。CLC 的这一制度，对船舶所有人而言，除非符合免责情形，否则都要承担赔偿责任；对受害人则显得有些苛刻甚至不近合理，但是因为有了严格责任和强制保险两项制度的配合，以及有了货主承担第二层次赔偿作为补充，使得受害人有了足够的赔偿保障，这一安排又有一定的合理性。在民事法律体系中，它是在平衡船东、货主及其它各利益方的权利义务后而设计的一项独特的制度安排。

即使认可仅归责于船舶所有人这一制度安排，也不必然能够推导出 CLC 设

---

7 黄永申：《燃油污染公约是否完善了船舶油污责任制度？》，载上海国际海事信息研究中心网 2019 年 12 月 15 日，http://www.simic.net.cn/news_show.php?id=5378。

8 OPA defines a “responsible party”, in relation to a vessel, at 33 U.S.C. § 2701(32): In the case of a vessel, any person owning, operating, or demise chartering the vessel.

9 《侵权责任法》第 68 条：因第三人的过错污染环境造成损害的，被侵权人可以向污染者请求赔偿，也可以向第三人请求赔偿。污染者赔偿后，有权向第三人追偿。

立了“谁漏油，谁赔偿；不漏油，不赔偿”之原则。CLC 第 3 条第 4 款通过列举的方式规定了限制受害人向除船舶所有人之外的其他人索赔的名录，在该名录中并未提到事故有关的第三人。为此，刘寿杰等人认为，[10] 公约固守船舶所有人的归责问题，对于第三人的责任留待缔约国的国内法解决。然而，《燃油公约》第 3 条未完全照搬 CLC 第 3 条之规定，没有设立仅归责于船舶所有人的制度，更没有明确“谁漏油，谁赔偿”之原则。

（二）同一事故的双方责任共担

无论是 CLC、《燃油公约》还是《最高人民法院关于审理船舶油污损害赔偿纠纷案件若干问题的规定》（以下简称“油污损害司法解释”），对“事故”的定义都有“一系列事件因同一原因而发生的，视为同一事故”的解释。也就是说，船舶碰撞进而导致溢油，油污染是这一事故的结果，既然为同一事故，若碰撞双方对事故互有过失，则双方都系《海洋环境保护法》第 90 条规定的“造成海洋环境污染损害的责任者”，既然是责任者就应当承担责任，除非有法定的免责情形。《海洋环境保护法》第 89 条中关于“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”的规定不能作为碰撞事故中的任何一方以相对方为“完全第三者责任”为由而不承担责任。《燃油公约》第 3 条第 3 款 b 项关于“损害完全系由第三方故意造成损害的行为或不为造成的”的免责理由仅针对漏油船的船舶所有人，不能用作非漏油船的船舶所有人的免责理由。

有学者认为，美国 OPA 法令对于两船发生碰撞导致一船漏油的情况下，如果责任方主张由碰撞他船承担责任，则必须证明碰撞完全由于他船过错导致，并且与碰撞他船之间没有合同关系。溢油船舶一方作为责任人仍需负责清污，并且有权基于分摊或代位向他船索赔清污费用。美国油污法司法实践对于我国具有借鉴意义。[11] 但是在“Saudi Diriyah”轮碰撞溢油一案中，[12] 弗吉尼亚州东部地区法院的法官在解释 OPA 法令与普通法的关系时称：该法第 2718（a）条规定了“除外条款”，即：OPA 不应影响、推出或者解释为影响或修改州法律（包括普通法）中关于任何人的任何形式的责任或义务。为此，根据上述“除外条款”的规定，尽管碰撞双方可以依据 OPA 法令确定的责任限制，以过错比例分摊责任或代位求偿承担责任，但是，OPA 法令不得影响受害人根据州立法或普通法向碰撞事故的任

10 刘寿杰、余晓汉：《关于审理船舶油污损害赔偿纠纷案件若干问题的规定》的理解与适用，载《人民司法》2011 年第 17 期，第 37-40 页。

11 徐国平：《美国近三十年船舶油污损害赔偿法律适用及借鉴意义》，载《浙江海洋大学学报（人文科学版）》2019 年第 1 期，第 7-12 页。

12 U.S. National Shipping Company of Saudi Arabia *v.* Moran Mid-Atlantic Corporation, 924 F. Supp. 1436.

何一方提起污染损害索赔。[13] 一些州立法为了保护受害人的利益，规定了受害人可以提出无责任限制的索赔。

尽管我国与美国分属不同法系，但是在对待特别法与一般法、衡平法与普通法之间的关系时，有着相似作法。在我国适用《侵权责任法》来处理侵权责任纠纷，有利于司法统一。根据《侵权责任法》和《关于审理环境侵权责任纠纷案件适用法律若干问题的解释》，若不承担连带责任，则仍要按照《侵权责任法》第 68 条规定承担相对应的责任，并且没有责任先后的问题。最高法再审判决准确认定《燃油公约》仅规定漏油船方面的责任，非漏油船一方的污染损害赔偿责任承担问题应当根据国内法予以解决，并开创性提出漏油船承担全部赔偿责任、非漏油船在碰撞过失比例范围内承担赔偿责任的解决方案，巧妙地解决了可能的重复赔偿问题，更有利于油污受害人就所遭受的应急处置费用等损失得到尽可能充分的赔偿。

最高法再审判决对国家海洋环境利益与航运经营者商业利益之间的关系作出合理平衡，可以在一定程度上起到减少法律不确定性的作用，但是，我国不属于判例法国家，最高法判决的影响力有多大仍有待实践检验。为此，有必要从社会公平角度看待这一问题。污染损害首先是一种民事侵权，传统的侵权法要求侵权人恢复原状。，只是为了保护高风险的海运业发展，才出现了独特的海事责任限制制度，进而导致污染责任人寻求不同的归责方式来减轻自己所应承担的赔偿责任。为了确保污染受害人的权益得到充分的保障，CLC 或 FUND 公约框架已建立了多层次的赔偿保障，因为有独立且高额的责任限制以及货主摊款的油污基金，对受害人的保障能力强，适用 CLC 的油污损害赔偿责任可以采用仅归责于漏油船的船舶所有人的方式处理这一问题。但是，对于《燃油公约》以及尚未生效的《国际海运有毒有害物质污染损害责任和赔偿公约》（以下简称“HNS”）框架下的污染损害，坚持仅由漏油船承担责任则有失公平，不利于保障受害人的利益。

从维护国家权益角度，污染造成的生态环境损害和对国民利益的损害需要通过法律手段予以保护。当前国际对这一问题并未形成统一的作法，而航运又具有国际性，若船舶进出一国水域造成污染，被追究更为严格的责任，而在其它国家被放松要求，则会形成国际间的不平衡。为确保对违反防治船舶污染国际法和国内法的船舶给予足够的惩戒，同时防止沿海国、船旗国滥用权利，防止船舶因同一行为遭到多国制裁，《联合国海洋法公约》第 12 部分“海洋环境的保护和保全”中第 7 节“保障办法”中的第 223 条至第 233 条规定了国家行使公权利的范围、内容和限制要求。其中，第 229 条关于“民事诉讼的提起”中明确规定了“本公约的任何规定不影响因要求赔偿海洋环境污染造成的损失或损害而提起民事诉讼”。由此

13 David M. Bearden, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, CreateSpace Independent Publishing Platform, 2012, p. 13-14.

可见，即使是在《联合国海洋法公约》这一公约层次，在使用国家公权利的同时，仍将民事权利的保护放在优先位置。为此，对于船舶造成的污染损害，通常通过提起民事诉讼的方式保护国家利益，这种权利保护实质是赋予沿海国通过国内法的方式来规制。

二、污染应急行动的界定与处置费率的计算

在国际航运实践中，应对一起事故可能会单独或同时采取海难救助、污染应急、[14] 残骸清除等措施，这些措施可能在事故的不同发展阶段切入，会产生不同的法律关系。本案另一个焦点问题就是污染应急的范围，即如何合理界定污染应急和海难救助显得至关重要，这两种不同法律关系背后的赔偿主体、赔偿限额和费用标准不同，直接影响最终赔偿的多少。

本案中，宁波海事法院对一审判决认为，[15] 上海打捞局案涉参与事故应急行动的三船虽非专业清污船，但鉴于案涉行动在防止油污扩大方面起到重大作用，应当参照相应清污船费用标准核定有关费用，这就意味上海打捞局案涉行动并不构成海难救助。浙江省高级人民法院二审认为上海打捞局收到的任务协调书中虽然要求派遣力量前往救助，[16] 但也明确遇险性质为海洋环境，一审法院认定上海打捞局的案涉行动在性质上不构成海难救助并无不妥。最高法再审认为：[17] 认定某项海上应急行动究竟是海难救助还是防污清污需要结合作业的初始目的、船舶所面临的风险、实际作业内容等事实进行分析判断，明确了每艘船舶应急行动的法律属性。

（一）海难救助与污染应急的区分

海难救助的依据是《1989 年国际救助公约》（以下简称“《救助公约》”），赔偿方法是“无效果、无报酬”加上环境保护的特别补偿。业界广泛使用劳氏救助合同标准格式（以下简称“LOF 合同”）代替了《救助公约》的原则性规定，若救助涉及到环境保护问题，救助人可以在签订 LOF 合同时考虑引入 Special Compensation P&I Clause (以下简称“SCOPIC”)，以方便救助双方计算特别补偿，减少事后纠纷，加快救助报酬的核算和支付。救助费用包括了救助报酬和特别补偿，对于保险人和国际油污基金组织而言，他们更关心的是这两种费用最终

14 通常将 CLC 公约、燃油公约中的 preventive measures 直译为“预防措施”，以此作为“污染应急”的替代术语，最高法的判决书中的用语为“防污清污”。
15 同前注 2。
16 同前注 3。
17 同前注 4。

是由谁承担的问题。1997 年 2 月，FUND71 基金会议研究了国际保赔协会集团的提案和基金理事长的提案。[18] 国际保赔协会集团认为，《救助公约》第 14 条下的特别补偿应作为船舶油污损害的一种，即预防措施，当超出了船东的责任限制后，应由国际油污基金赔偿。支持这一观点的基础是商业保险人与保赔协会达成的协议（Funding Agreement），即《救助公约》第 13 条下的救助报酬由商业保险人承担，而第 14 条下的特别补偿由保赔协会承担。[19] 对于救助报酬及特别补偿等救助款项，按照《海商法》的规定不作为限制性债权，也就是说，这些费用不在船东设立的海事责任限制基金分摊，为此，对于救助人，将相关费用争取纳入救助费用意味着他可获得更多的赔偿。然而，本案适用《燃油公约》，该公约的海事责任限额指向了《海商法》，由于海商法框架下的一般海事责任限制适用于包括污染损害在内的财产损失。尽管本案中油污受害人要求船东及其保险人赔偿污染损害后的不足部分，仍可向中国船舶油污损害赔偿基金（以下简称 “国内油污基金”）提起补偿请求，但是，国内油污基金对一起事故的限额仅为 3000 万元人民币，且只能在本案诉讼环节结束后才能提出，存在着不确定性，这与 CLC 或 FUND 框架下的双层保障机制存在着较大不同。

界定海难救助与污染应急的方法是适用最初目的为主与双重目的分摊的方法。最初目的为主方法（primary purpose test）是 1971 年国际油污基金（FUND71）审理案件的一个原则，[20] 即只以最初的主要目的为赔偿适用的法律事实，而不赔偿次要目的或者附带的效果。FUND71 采取的最初目的为主的立场曾被质疑。[21] 后来，国际油污基金组织设立了双重目的分摊方法（dual purpose test）。目前，国际油污基金组织同时适用最初目的为主原则和双重目的分摊原则，其《国际油污基金索赔手册》（以下简称“索赔手册”）给出了以下确定方法：[22] “在某些情况下，救助作业可能含有预防措施的成分。如果这些作业的最初目的是为了防止污染损害，产生的费用原则上可根据 CLC 公约获得赔偿。但如果救助作业另有目的，比如救助船舶和（或）货物，公约对此产生的费用不予赔偿。如从事的活动以防止污染、救助船舶和（或）货物为双重目的，而作业的最初目的又不能确定，由此产生的费用将在污染预防措施和救助作业之间按比例划定。”油污损害司法解释第 11 条借鉴了国际油污基金组织的作法，规定了划分救助措施费用与预防措施费用的初始目的和双重目的标准。最高法的再审判决首先是分析了海难救助的构成要

18 See Note by the Director, 71FUND/EXC.52/9; Note by the International Group of Protection and Indemnity Clubs, 71FUND/EXC.52/9/1.

19 John Reeder, *Brice on Maritime Law of Salvage*, Sweet & Maxwell Press, 1993, p. 897-898.

20 IOPC Fund Annual Report 1988, p. 60.

21 John F. Donaldson, *Safer Ships, Cleaner Seas: Report of Lord Donaldson's Inquiry into the Prevention from Merchant Shipping*, The Stationery Office Books, 1994, p. 412-413.

22 IOPC Funds Claims Manual, 2016, paras. 3.1.15, p. 28.

件，认为部分应急措施可归属于救助法律关系，部分措施归属于污染应急，并通过解读《1976 年海事索赔责任限制公约》及国内法关于对“沉没、遇难、搁浅或者被弃船舶”的“起浮、清除、拆毁或使之无害”的费用作为非限制性海事赔偿请求的规定，认定“达飞佛罗里达”轮尚未构成上述任何情形，为此污染应急费用仍属于限制性债权，应当在船东设立的责任限制基金中受偿。

但是，上述界定方法仍存在以下两个方面的问题：一是计算方法不同的问题。如前所述，当存在着双重目的时，需要按照《救助公约》或者 LOF 合同给出的方法计算特别补偿，而特别补偿是指超出救助报酬的部分，救助报酬是根据救助是否成功来计算的，特别补偿的计算方法中要考虑全部救助费用，可能会有部分与防止污染并无任何关联性。同时，LOF 合同框架下的救助报酬是根据救助仲裁来确定的，救助仲裁结论是否可以作为 FUND 理赔的基础尚存疑问。为此，有观点认为，最好的解决方法是分别按照各自适用的公约进行核算。[23] 正是基于上述考虑，索赔手册明确规定：“评估与救助有关的预防措施费用请求时，不应以确定救助报酬所适用的标准为依据进行计算，但是，对这些预防措施的赔偿应仅限于产生的费用，并包括合理的营利部分”。[24] 这种规定实质是将污染应急费用与救助报酬科学分开。

二是主观意识难以判断的问题。无论是国际公约还是国内法，在适用最初目的为主与双重目的分摊方法时，强调的是作业开始时的目的，而目的是以人的主观意识为主的一种思想行为，相对于客观事实，从举证上讲，判断主观意识相对困难。实际操作中，可以通过签订 LOF 合同并主动引入 SCOPIC 来判断其初始目的有着环境保护的目的，也可以通过政府主管部门的行政强制指令来判断。另外，国际公约和国内法也没有明确判断主观意识的主体是谁，是施救方还是遇难船舶的所有人、货物所有人还是政府主管部门，因为对于同一个应急行动，不同的利益方，其视角不同，目的也会不同。

（二）污染应急处置费率的设计构想

SCOPIC 源于海难救助，海难救助的船舶多为可在恶劣海况下作业的大马力拖轮，而我国水上溢油应急力量的构成多源于从事日常港口作业的社会力量，并不是专业的海难救助机构。目前，我国救助打捞系统、三大石油公司已有部分船

23 IOPC Fund, Record Decisions of the 52nd Session of Executive Committee, 71FUND/EXC.52/11, paras. 4.4.

24 IOPC Funds Claims Manual, 2016, paras. 3.1.15, p. 27.

舶具备了更高等级海上应急处置功能，[25] 但多数船舶兼具日常作业和应急多重功能，一些船舶很难完全对应 SCOPIC 附录 A 表中的拖轮。因此，对于船舶污染应急处置费率的核定一直是困扰我国海事司法界的棘手难题。

本案判决中，最高法首先认为“深潜号”轮从事的是公共当局控制下的海难救助行为，[26] 尽管事故有关方并未纳入 SCOPIC，但是，法院原则上采纳了上海打捞局按照国际上较为普遍采用的 SCOPIC 费率标准计算该轮费用的主张。法院进一步认为，因为“深潜号”轮是工程船而非拖轮，为此按照拖轮的马力计费不合适，在考虑到该轮的特殊功能后，最终认可了一、二审法院认定的该轮使用费费率为 1 元 / 马力小时。

在污染应急处置费率方面，法院认为“联合正力”和“德泳”轮从事的是防污清污作业（即污染应急处置），因为该两轮从事的作业与“深潜号”轮从事的作业类似，而且 SCOPIC 费率也涵盖海难救助中的防污清污作业，故上述防污清污作业的费用也可参照 SCOPIC 费率确定。最高法的上述认定方法在当前尚没有统一认可的量化标准的情况下，也是一种解决问题的方法，但是，并不应成为未来最佳处理问题的方法，原因如下：

其一，污染应急处置与海难救助在法律属性上存在区别。海难救助的标的是他人财产，财产具有强的私益属性，而污染应急处置除了保护私人财产的属性外，还有保护公共财产、造福子孙后代的公益属性。为此，对于污染应急中的私益部分，参照海难救助的方法给予补偿容易被接受，对于占比较大的公益部分，应当索取比私益更低的补偿，以体现其公益性。若从事应急的主体是政府、社会公益组织，则以补偿成本为准，在实际的案例中，甚至可以放弃索赔；若从事应急的主体是企业或个人，应当从鼓励的角度，给予更高的补偿标准。

其二，污染应急处置与海难救助在风险上存在区别。由于海难救助以财产救助为标的物，若在救助过程中可能产生影响安全的情况，如恶劣天气情况下一般会停止救助。但是，相比而言，若污染物威胁到极其敏感的生态资源，即使是在恶劣的天气条件下，也可能会采取一些极端措施来应对，在设计污染应急处置费率标准时，有必要针对极端条件下的应急处置给予更高的费率标准。

其三，污染应急处置与海难救助补偿的法理基础不同。海难救助已成为一种合同法律关系，而合同法律关系是可以按照合同当事人的协商合意来处理相互之间的法律问题，其中包括确定费率标准。SCOPIC 就是通过合同方式引入并适用

---

25 我国救助打捞是国家应急保障体系的重要组成部分，也是国家应对海上重特大突发事件的中坚力量，在沿海建立了 3 个救助局、3 个打捞局和 4 个救助飞行队的完整的救捞网络；三大石油公司系指中国石油天然气股份有限公司、中国石油化工股份有限公司和中国海洋石油有限公司，其均建有成规模的服务海上石油钻井平台开采的专业保障船队。

26 同前注 4。

到救助报酬的计算当中。污染应急处置与海难救助不同，而污染侵权法律关系中的赔偿法理基础是恢复原状，赔偿基础是付出多少获得多少，理论上不应存在“不当得利”。但是，这种实际支出并不妨碍参与应急处置的单位、个人获得应有的合理利润。

其四，污染应急处置与海难救助的承担主体不同。海难救助作为船、货双方共同承担的支付责任，只包括救助报酬而不包括特别补偿。[27] 在对海洋环境构成损害威胁的船货实施救助时，救助人才能得到特别补偿，因为救助报酬计算时已考虑了保护环境效果的因素。这种从鼓励环境救助角度而采取行动产生的特别补偿仅由船东承担，与货主无关。在仅存在单一层次赔偿保障机制的法律体系中，污染应急处置的承担主体仅是船东（包括其保险人），在存在两个层次赔偿保障机制的法律体系中，则可由船东与货主共同承担。为此，在确定污染应急处置费率时，不仅仅要听取船东的意见，也应听取石油货主方面的意见，在国内，应当吸纳国内油污基金的意见。

考虑到海难救助与污染应急处置存在的上述区别，在设计我国污染应急处置费率标准时，应当综合考虑以下因素：一是国家整体应急能力，要鼓励社会单位参与水上污染应急处置；二是采取污染应急处置措施的主体，区分政府与社会主体；三是污染应急处置所面临的安全风险、作业的复杂与困难程度等；四是社会对环境保护的重视程度，纯环境损失获赔的比例较以往的占比越来越高；五是在当前航运业仍处于利润较薄、安全风险高的态势之下，还应适当考虑保护航运业的发展，以平衡船东、石油货主、应急处置方和污染受害方等多方利益。

三、政府海事机构在污染应急行动民事索赔中的主体地位

中华人民共和国洋山港海事局（以下简称“洋山港海事局”）与普罗旺斯船东 2008-1 有限公司、法国达飞轮船有限公司、罗克韦尔航运有限公司船舶污染损害责任纠纷案中，宁波海事法院对一审判决认为，[28] 船舶发生污染事故后，海事管理机构或者其指定的其他单位采取清除、打捞、拖航、引航、过驳以及其他必要措施，减轻污染损害，可以依法或者以合同向油污责任人提出索赔。洋山港海事局诉请的费用系多个单位的不同行动而产生，并不能因洋山港海事局的行政机关身

27 《2016 年约克 - 安特卫普规则》第 6 条中规定，根据《救助公约》第 14 条第 4 款或任何其他实质上类似的规定（例如 SCOPIC clause），由船舶所有人付给救助人的特别补偿，不得计入共同海损。SCOPIC clause 第 15 条也有类似规定，指出 SCOPIC 酬金不列入共同海损。

28 宁波海事法院（2015）甬海法商初字第 445 号民事判决书。

份而否定其诉讼主体资格。浙江省高级人民法院二审认为案涉污染事故突发后，[29]本负有防污清污义务的当事方未能及时采取有效措施避免或者减少污染损害的发生，洋山港海事局作为国家海事行政主管部门，依职权采取强制措施，组织相关第三方单位参与应急防污清污作业，有权要求事故责任方承担本案实际支出的合理防污清污费。最高法再审判决根据《燃油公约》关于“预防措施”和“污染损害”条款的文义及其上下文并参照该公约的目的及宗旨，[30]明确采取预防措施的人所发生的费用属于污染损害赔偿范围，采取预防措施的人也相应可以主张预防措施的费用，一、二审法院认定洋山港海事局具有索赔防污清污费的主体资格，符合燃油公约精神。洋山港海事局参与案涉事故应急处理，并实际支付或者承诺支付所委托专业技术单位调查、监测、检验、评估、协助防污清污作业等相关费用，可以对责任者提出赔偿要求。

鉴于政府部门的公权力性质，其参与清污行动具有强烈的公益属性，船舶油污事故的相关责任方据此认为政府部门在船舶油污损害民事责任纠纷中并不具有诉讼主体地位，这也是本案中另一个值得探讨的焦点问题。在国际公约层面，较早赋予政府这种干预权的是《1969 年国际干预公海油污事故公约》，该公约规范的是以环境保护为目的的干预权，而以安全为目的的干预权主要体现在《救助公约》和《1979 年国际海上搜寻救助公约》中。最近生效的一个国际公约为《2007 年内罗毕国际船舶残骸清除公约》，该公约兼具安全和环境保护目的。同时，国内相关法律也赋予了政府的行政强制权力。在突发事件状态下，行政机关采取的应急措施可归类于一种特殊的行政强制措施。

在突发事件应急处置中，政府干预主要采取两种方式。一种方式是政府部门动用自身的资源参与应急处置，即直接“从事”应急处置；另一种方式是政府负责指挥协调，即以“控制”者角色指挥应急处置活动。在《救助公约》中亦用“从事”和“控制”来区分政府参与海难救助的两种情形。[31]其中，关键的问题是政府干预措施及其费用的法律定位，即是按照行政来处理还是按民事来处理，不同的渠道决定着政府的付出是否可以得到足额赔偿或补偿问题，也决定着责任人的赔偿负担轻重问题，因为是否可纳入损害项目中，决定着责任方是否享受海事赔偿责任限制以及享受哪一类的海事赔偿责任限制的问题，其最终赔付的数额有时会差别很大，这是本案的另一个争论焦点。

我国在船舶污染应急处置领域中，采取的是先行鼓励船方自行清污或委托专业应急机构清污，只有在船方不能清除污染或不愿清除污染的情况下，政府才采取强制清污的措施。在船舶所有人自行清污的情况下，船舶所有人与参与清污的

29　浙江省高级人民法院（2017）浙民终第 582 号民事判决书。
30　最高人民法院（2018）最高法民再 369 号民事判决书。
31　《救助公约》第 5 条规定：本公约不影响国内法或国际公约有关由公共当局从事或控制的救助作业的任何规定。。

单位之间构成的是合同关系，此时政府的角色是监督清污行动是否科学、及时、有效。只有在船舶遇有海难时，在存在重大污染损害威胁情况下，政府才有权采取干预措施。政府的这种行为是为了保护环境这一公共资源不受损害，同时也为了保护某些特定污染受害人的利益。在实践中，多数法院将社会力量参与的清污行动作为一项民事行为，以无因管理、非合同救助或者侵权为理论依据，按照民事法律关系处理。理论界也形成了行政强制代履行说、无因管理说、公益民事诉讼说、污染侵权责任说等不同理论观点，但这几种学说都存在着一定法律缺陷。关于行政强制代履行说，虽然《行政强制法》为强制清污费的索赔提供了行政路径，代履行费用应当由油污责任方承担，但并未规定承担该费用的具体方式，政府部门如何申请法院强制执行在司法实践中尚存在一定的争议，而且行政程序繁琐漫长，油污责任方对政府部门在代履行过程中做出的行政行为均有权提出陈述申辩或者复议诉讼，将会浪费大量的行政资源及诉讼资源。关于无因管理说，在强制清污的情况下，尽管清污单位和油污责任方之间不存在清污合同，但是清污单位系受政府部门委托从事清污行为，其与政府部门之间存在委托合同关系，有义务根据该委托合同从事清污行为，这与无因管理中没有法定或者约定义务的规定并不符合。[32] 关于公益诉讼说，环境公益民事诉讼不要求原告与诉讼行为有民事法律上的利害关系，政府部门可以以环境公益民事诉讼原告的身份进行民事索赔，但公益诉讼后于私益诉讼受偿，[33] 在此情形下清污费用就变成排在后位受偿的费用，于清污单位而言，其处在不平等的地位而遭受利益损失，影响到他们今后参与政府部门指派工作的积极性。关于污染侵权说，溢油行为确实导致了海洋环境污染的损害事实，但并不必然会导致清污单位遭受损失。在强制清污中，清污单位对遭受污染的海洋环境既不享有所有权，也不享有用益物权或担保物权等财产性权益，溢油行为并未侵害清污单位的民事权益，强制清污费的产生与溢油行为并不存在直接的因果关系，因此清污单位就无权向油污责任方主张侵权之债。除此之外，民事债权的另一个支柱，即合同之债，因为参与污染应急的第三方与污染责任人之间无共同的意思表示，也就无法构成合同之债。

在船舶污染损害赔偿领域，由于国际公约设立得早，国内立法向国际公约趋同已成为习惯，传统的仅由侵权人承担污染损害责任的制度已被打破，已由传统的“污染者付费原则”过渡到“受益者付费原则”。1982 年的《海洋环境保护法》在 2000 年修订时，将原来的第 41 条“凡违反本法，造成或者可能造成海洋环境

32 《民法通则》第 121 条：没有法定的或者约定的义务，为避免他人利益受损失而进行管理的人，有权请求受益人偿还由此支出的必要费用。

33 《最高人民法院关于审理环境民事公益诉讼案件适用法律若干问题的解释》第 31 条：被告因污染环境、破坏生态在环境民事公益诉讼和其他民事诉讼中均承担责任，其财产不足以履行全部义务的，应当先履行其他民事诉讼生效裁判所确定的义务，但法律另有规定的除外。

污染损害的，本法第五条规定的有关主管部门可以责令限期治理，缴纳排污费，支付消除污染费用，赔偿国家损失；并可以给予警告或者罚款”修改为第 90 条第 2 款“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”。“代表国家对责任者提出损害赔偿要求”，已说明了从行政属性到民事属性的转变。该法的法律释义，再次说明了包括政府组织的污染清除措施费用在内的国家损失的属性为民事责任。[34]

政府产生的船舶污染应急处置费用按照民事侵权法律予以赔偿已有相应的国际公约、惯例和国内司法解释支撑。CLC 第 1 条分别给出了“人”与“预防措施”的定义，其中，人系指任何个人或合伙人或任何公共或私人机构，无论是否系法人，包括国家或其下属机构；预防措施系指在事故发生后，为防止或减轻污染损害而由任何人采取的任何合理措施。上述定义表明，采取预防措施（即污染应急处置措施）的政府或其指定的第三方有权依据公约，按照民事侵权法律关系，获得污染责任人的预防措施费用赔偿。在国际油污基金组织理赔的诸多案例中，政府主导的污染应急处置费用按照公约的预防措施费用给予赔偿的案例已十分常见。

2005 年的《第二次全国涉外商事海事审判工作会议纪要》第 145 条曾规定：国家海事行政主管部门或其它企事业单位为防止或减轻油污损害而支出的费用，包括清污费用，可直接向油污责任人提起诉讼。2006 年的最高人民法院民事审判第四庭、中国海事局印发的《关于规范海上交通事故调查与海事案件审理工作的指导意见》中明确：“船舶油污事故发生后，海事局组织有关单位和个人参加清污作业的费用，油污责任人应当承担赔偿责任。海事法院在审理清污费用赔偿案件中，应当对此予以充分考虑。”[35]

在“达飞佛罗里达”一案审结后，最高人民法院 2017 年底出台的《关于审理海洋自然资源与生态环境损害赔偿纠纷案件若干问题的规定》第 7 条明确了海洋自然资源与生态环境损失赔偿范围包括预防措施费用、恢复费用、恢复期间损失、调查评估费用四类。[36] 其中，预防措施费用系指为减轻或者防止海洋环境污染、生态恶化、自然资源减少所采取合理应急处置措施而发生的费用。尽管 2019 年最高法出台的《关于审理生态环境损害赔偿案件的若干规定（试行）》不适用于海洋生态损害索赔，但该司法解释第 19 条明确规定实际支出应急处置费用的机关（即组织应急处置的政府主管部门）提起诉讼主张该费用的，人民法院应予受理。

---

34 参见《中华人民共和国海洋环境保护法释义》，载中国人大网，http://www.npc.gov.cn/npc/c2174/200108/a92bbb66649649e9ab400c806e02a015.shtml。

35 《关于规范海上交通事故调查与海事案件审理工作的指导意见》第 3 条，法民四〔2006〕第 1 号，2006 年 1 月 19 日公布。

36 《关于审理海洋自然资源与生态环境损害赔偿纠纷案件若干问题的规定》第 7 条，法释〔2017〕23 号，2017 年 12 月 29 日公布。

因此，在公共利益受到污染侵害时，政府部门采取应急处置措施以防止、减轻污染人的侵权后果，为救济此种损害而产生的费用应当与其它类型的污染损害同等对待。反之，若将政府主导的船舶污染应急处置费用通过行政强制中的代履行方式通过行政手段获赔，则会存在着前述的执行争议、程序繁琐、行政和诉讼浪费资源等实际问题。政府及其有关部门在实施强制应急处置措施时，仍会以实施公权力的方式体现，与污染责任方相比，仍存在着不对等的关系。为此，有必要在将来立法时增加“合理性”要求来约束这一公权力的行使，同时增加行使不当承担相应的民事赔偿责任义务的规定。最高法在对洋山港海事局的再审判决中，一方面认可了海事机构的应急处置措施费用可通过民事方式获得赔偿，同时也就这些措施的合理性进行分析，坚持了只有合理的才给予赔偿的原则。

The Legal Issues of Compensation for Oil Pollution Damage Caused by Ship Collision – A Case Study of the Retrial on the Dispute Over the Cost of Preventive Measures in the Collision and Pollution Accident of *M.V CMA CGM Florida* and *M.V Chou Shan*

ZHANG Chunchang, SHUAI Yuexin*

Abstract: The Supreme People's Court announced the retrial decision on the dispute over the cost of preventive measures in the collision and pollution accident of *M.V CMA CGM Florida* and *M.V Chou Shan* in September 2019, which has called highly attention and widely discussion in society. Taking into account international conventions, international practice and relevant domestic laws, this paper provides a detailed analysis on the legal focal points of the Judgment, such as the liability of non-spilled vessel, the definition of salvage operations and pollution response, and the government's civil right to claim for the cost of emergency disposals. It also makes corresponding comments and suggestions which aim to provide appropriate guidance for maritime business community, such as maritime safety administrative agencies and maritime judicial trial bodies in dealing with similar incidents and cases.

Key Words: Ship; Collision; Oil pollution; Judicial decision; Civil liability.

M.V CMA CGM Florida collided with *M.V Chou Shan* in the exclusive economic zone of the East China Sea on 19 March 2013, about 124 nautical miles

* ZHANG Chunchang, PhD in Environmental Science and Engineer, Associate Professor, Merchant Marine College, Shanghai Maritime University. E-mail: zhangchunchang@msa.gov.cn; SHUAI Yuexin, China Ship Oil Pollution Damage Compensation Settlement Centre. E-mail: shuaiyuexin@shmsa.gov.cn.

northeast of the lighthouse at the Yangtze estuary, resulting in serious damage to the hull structure of *M.V CMA CGM Florida* and the amount of 613.278 tons fuel oil leaked into the ocean. After the incident, the Ministry of Transportation designated the Shanghai Maritime Safety Administration to be responsible for the emergency disposal of the accident, the Shanghai Maritime Safety Administration commanded the Shanghai Salvage Bureau, the East China Sea Rescue Bureau and other 11 units to engage in the rescue, clean-up and pollution prevention operations. Significant costs incurred as a result of the above ops. After more than five years of litigation, although the verdict has come into effect that the two ships involved in the accident should each bear 50% of the collision fault responsibility, but for the compensation of emergency disposal costs, the parties are still unable to reach an agreement after the first instance of Ningbo Maritime Court and the second instance of Zhejiang Province High People's Court. Four retrial judgments were released to the public after a retrial by the Supreme Court in September 2019,[1] which immediately raised great concerns in the society and were considered to resolve at least a serial of long-standing judicial practice issues, and to serve to guide the local courts in dealing with the similar cases, thereby improving trial efficiency and promoting judicial unity. The author attempts to analyze the following three focus questions.

I. Identification of Liability for Pollution Caused by Ship Collision and Oil Spilling and Ways of Assuming Responsibility

The first instance judgment of Ningbo Maritime Court held that[2] the case of Shanghai Salvage Bureau involved anti-pollution action, and the relevant anti-pollution fee should be compensated by the oil spill vessel, rather than by the non-spilled vessel. The Shanghai Salvage Bureau appealed against the first-instance judgment. The Zhejiang Provincial Higher People's Court rejected the appeal and upheld the original judgment.[3] The Shanghai Salvage Bureau refused to accept the first and second instance judgment and applied to the Supreme Court for a

1 Shanghai Shengmin Investment Group Co. Ltd. *v.* CMA CGM.S.A. & Rockwell Shipping Co. Ltd. (case of dispute over the liability for ship oil pollution damage), Supreme People's Court Civil Judgment (2018) No. 367, 368, 369, 370.

2 Ningbo Maritime Court (2015) Civil Judgment No. 442, First, Commercial Division, Ningbo.

3 Zhejiang Higher People's Court (2017) Civil Judgment No. 581, Final, Civil Division, HPC, Zhejiang.

retrial. The Supreme retired:[4] the case shall apply to the relevant international conventions which China has acceded, matters not covered by the conventions shall be governed by the provisions of domestic laws and its judicial interpretation. Relevant international conventions and domestic laws respectively apply the principle of no-fault liability and the basic connotation of the principle of fault liability to the polluter and the third party. That is the polluter should take full responsibility, and those who make other mistakes should take corresponding responsibility. Therefore, the non-spilled vessel "Zhoushan" should also bear the liability for pollution damage according to its 50% collision proportionate share of fault.

Whether the oil spill pollution caused by the ship's collision should be compensated by the oil spill ship or by the non-spill-related ship, if the two ships were mutually at fault in the collision. Alternatively, it could be jointly compensated by both ships, which is a judicial conundrum that has been contested for over two decades.[5] There are three prevailing views: the first view holds that responsibility lies solely with the oil spill vessel; the second view holds that both parties should bear a proportionate share of responsibility according to their fault; and the third view is that they should bear joint and several liabilities for each other's fault.[6] The root of the problem lies in the fact that different ways of assuming responsibility can lead to different outcomes. Provided that the right to limitation of maritime liability of the party responsible for the accident is not broken, if the oil spiller alone is liable, the victims will not be adequately compensated because the oil spillers is legally entitled to a limitation of maritime liability; if oil spiller can only pay full compensation to the extent of its limitation of liability in the first instance, and then the oil spiller can recover from the non-spill-related ship which can pay within its limitation of liability, there is a risk that the victims will still not receive adequate compensation if the non-spill-related ship's capacity to assume liability is very limited; if the oil spiller and non-spill-related ship are liable in proportion to their negligence or both are jointly and severally liable, the interests of the victims are better protected than in the above two ways, but there is still a difference between liability in proportion to negligence or joint and several liabilities. In

4 Supreme People's Court (2018) Civil Judgment No. 368, Retrial, Civil Division, SPC.

5 The typical case that triggered judicial discussion earlier was the collision between the tanker "Min Rangong 2" and "Dong Hai 209" at the mouth of the Pearl River on 24 March 1999, which resulted in the oil spill of "Min Rangong 2".

6 ZHU Qiang, *A Study of Strict Liability in Ship Pollution Tort Law*, China Fangzheng Press, 2008, p. 153-161. (in Chinese)

contrast, joint and several liabilities are more conducive to the protection for victims.

A. The "Who Spills, Who Pays" Is Not a Legal Principle

This case applies to the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (hereinafter "Bunker Convention"), which is applicable to the issue of compensation for damage caused by bunker oil pollution, except for that mentioned in the International Convention on Civil Liability for Oil Pollution Damage (hereinafter "CLC") and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (hereinafter "FUND"). At the initial stage of its establishment, due to the large number of applicable ships, frequent accidents and high risk of compensation, strong opposition from the insurance industry and interest groups of cargo owners, the Bunker Convention eventually failed to form a two-tier protection mechanism like the CLC/FUND, and only clarified the requirements on liability, limitation of liability and compulsory insurance of oil spill ships, but did not stipulate how non-spill-related ships in the collisions should be held responsible for oil pollution, even the limitation of liability and compulsory insurance limits had to be directed to domestic laws or international conventions. The Bunker Convention adopts a complex liability regime that extends the interpretation of the shipowner to include several persons such as the bareboat charterer, ship manager and operator of the oil spill vessel, as well as the registered owner, who are jointly and severally liable, but only one of whom is insured against liability.[7] In the international maritime community, the trend has also been to break with long-established principles and replace the approach to liability with one of shared responsibility under the United States Oil Pollution Act of 1990 (hereinafter "OPA Act").[8] In the aftermath of the Erika accident, the principle of separate liability for oil spill vessels under the CLC was challenged by the Bunker Convention, and the United States declined to accede to the CLC primarily because of this principle of separate liability was different from its domestic law. It can be seen that the Bunker Convention is like a

---

7 HUANG Yongshen, *Does the Bunker Oil Pollution Convention Improve the Ship's Oil Pollution Liability Regime?*, Shanghai International Maritime Information Research Center Network (Dec. 15, 2019), http://www.simic.net.cn/news_show.php?id=5378. (in Chinese)

8 OPA defines a "responsible party," in relation to a vessel, at 33 U.S.C. § 2701(32): In the case of a vessel, any person owning, operating, or demise chartering the vessel.

half-finished product that has been tried to imitate the CLC/FUND but has not yet been completed, and that the solutions to problems that are not explicitly addressed in the Bunker Convention can only be supported by domestic law. Therefore, in its judgment of this case, the Supreme Court, after interpreting the Bunker Convention positively, deduced in reverse that the Convention was silent on the question of how third parties could be held liable, nor did it preclude the possibility of liability for others with fault, and then applied the provisions of Tort Law of the People's Republic of China on the liability of third parties,[9] holding that the non-spill-related ship should be held liable for pollution damages.

Scholars holding different views believe that "who spills, who pays" has become a basic principle widely adopted in the legal system of compensation for oil pollution damage from ships. However, "who spills, who pays" is only a regular summary by scholars, and has never been a legal principle; it is not explicitly stated in any international laws such as the CLC and the Bunker Convention, or domestic laws such as the Maritime Law and the Marine Environment Protection Law. The source of this misconception lies in the special regime of the CLC, which only imputes liability to the shipowner, i.e., Article 3 (1) and (4) of the CLC Convention stipulate that pollution victims can only make claim against the shipowner and not against the bareboat charterer, crew, agents, salvors, any persons taking preventive measures, etc. This regime of the CLC imposes liability on the shipowner unless an exemption clause is met; for the victims, it seems a little harsh or even unreasonable, but which is justified by the fact that the combination of strict liability and compulsory insurance, supplemented by a second tier of compensation from the cargo owner, so that the victims have sufficient protection. Therefore, this institutional arrangement has a certain degree of reasonableness. It is a unique arrangement designed to balance the rights and obligations of shipowner, cargo owners and other relevant stakeholders in the civil legal system.

Even if the institutional arrangement that imputes liability only to the shipowner is endorsed, it is not necessary to deduce that the CLC establishes the principle of "who spills, who pays; no spill, no pay". Article 3 (4) of the CLC provides, by way of enumeration, for a list of persons against whom victims may not make claims, in which there is no mention of a third party in connection with

---

9 Art. 68 of the Tort Liability Law: "With respect to any damage arising from environmental pollution caused due to the fault of a third person, the infringee may claim compensation either from the polluter, or from the third person. After the polluter makes the compensation, the polluter shall have recourse against the third person".

the accident. Therefore, Liu Shoujie et al.[10] hold that the CLC adheres to the attribution of responsibility to the shipowner and the responsibility of third parties should be left to the domestic laws of the Contracting State. However, article 3 of the Bunker Convention does not fully reproduce the provisions of article 3 of the CLC and does not establish a system that is only attributable to the owner of the ship, not to specify the principle of "who spills, who pays", so this case cannot be dealt with under the approach of " who spills, who pays; no spill, no pay ".

B. Both Parties Shall Share the Liability for the Same Accident

Whether it is the CLC, the Bunker Convention or the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases of Disputes over Compensation for Vessel-induced Oil Pollution Damage (hereinafter "Interpretation of Oil Pollution Damage"), the definition of "Incident" is interpreted to mean "a series of occurrences having the same origin". That is to say, the oil spill caused by the collision of ships is the result of this accident. Since it is the same incident, if the two parties involved in the collision are at fault for the accident, both parties are "Whoever causes pollution damage to the marine environment" as stipulated in Article 90 of the Marine Environment Protection Law, and since they are responsible parties, they shall be liable for the compensation unless there is a statutory exemption. Article 89 of the Marine Environmental Protection Law stipulates that "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", which cannot be used as an excuse for either party in a collision to exclude liability on the ground that the other party is "solely third party liability". The exemption in Article 3(3)(b) of the Bunker Convention for "the damage was wholly caused by an act or omission done with the intent to cause damage by a third party " is only available to the owner of the ship and cannot be used as an exemption for the owner of a non-spill-related ship.

Some scholars believe that the OPA for the collision of two ships resulting in oil spill from one of them, if the responsible party claims liability on the other ship involved in the collision, it must prove that the collision was entirely due to the

---

10 LIU Shoujie & YU Xiaohan, *Interpretation and Application of the Provisions on Several Issues Concerning the Trial of Disputes over Oil Pollution Damage Compensation on Ships*, People's Justice, Vol. 55: 17, p. 37-40 (2011). (in Chinese)

fault of the other ship and that there was no contractual relationship between them. As the responsible party, the owner of the vessel from which the oil has escaped is still responsible for the clean-up and has the right to claim the cost from other vessel on the basis of apportionment or subrogation. The scholar further believes that the judicial practice of the U.S. is of significance to our country's judicial work. [11] However, in the oil spill collision case of Saudi Diriyah,[12] the judge of the Eastern District Court of Virginia, explaining the relationship between the OPA and the common law, stated that section 2718(a) of the Act provided for an "exclusion clause" that the OPA should not affect, introduce, or be interpreted as affecting or modifying any form of responsibility or obligation of any person under state law, including common law. To this end, in accordance with the above-mentioned "exclusion clause", although the parties to a collision may undertake liability in proportion to fault or subrogate liability under the limitation of liability established by the OPA, the OPA shall not affect the victim's claim for pollution damage against either party to the collision under state legislation or common law.[13] In an effort to protect the interests of victims, some state legislation provides for victims to file claims without limitation of liability.

Although China and the U.S. belong to different legal systems, there is a similar approach in dealing with the relationship between special law and general law, civil law and the common law. It is beneficial to the judicial unification to apply the Tort Liability Law to deal with the disputes. Therefore, according to the Tort Liability Law and the *Interpretation of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Disputes over Liability for Environmental Torts*, if they do not bear joint and several liabilities, they still have to bear corresponding liability in accordance with article 68 of the Tort Liability Law, and there are no priorities of responsibility. The Supreme Court's retrial decision pioneered the solution of full liability for oil spill vessels and proportional liability for non-spill-related vessels based on the proportion of collisional fault, and resolved the issue of possible duplication of compensation.

---

11 XU Guoping, *The Application and Implications of U.S. Ship Oil Pollution Damage Compensation Law for the Last 30 Years* , Journal of Zhejiang Ocean University (Humanities Edition), Vol. 36:1, p. 7-12 (2019). (in Chinese)

12 U.S. National Shipping Company of Saudi Arabia v. Moran Mid-Atlantic Corporation, 924 F. Supp. 1436.

13 David M. Bearden, *Comprehensive Environmental Response, Compensation, and Liability Act: A Summary of Superfund Cleanup Authorities and Related Provisions of the Act*, CreateSpace Independent Publishing Platform, 2012, p. 13-14.

The Supreme Court's retrial judgments reasonably balanced the national Marine environmental interests and the commercial interests of shipping operators, which can reduce legal uncertainty to a certain extent, but China is not a country of common law, and the influence of these judgments remains to be tested in practice. To this end, it is necessary to look at the issue from the perspective of social equity. Pollution damage is first a kind of civil tort, the traditional tort law requires the tortfeasor to restore the original state. Only in order to protect the development of high-risk maritime industry, a unique limitation system of maritime liability has emerged, which induces the polluter to seek different ways of attribution to lighten their liability. In order to ensure that the rights and interests of pollution victims are fully protected, the CLC/FUND framework has established multiple layers of compensation. Due to independent and high liability limitation and the oil pollution fund from the contributions of cargo owner, therefore the capacity to protect the victims is strong, and compensation for oil pollution damage to which the CLC applies may be dealt with in a manner that is attributable only to the owner of the oil spill vessel. However, it would be unfair to insist that only oil spill ship should bear the responsibility for pollution damage under the Bunker Convention and the International Convention on Civil Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (hereinafter "HNS") which is not yet in force, and which is not conducive to protecting the interests of the victims.

From the angle of safeguarding the rights and interests of the state, the environmental damage caused by pollution and the damage to the national interests needs to be protected by legal means. At present, there is no uniform international approach to this issue, and with shipping being international in nature, there is an international imbalance if ships are held more strictly liable for pollution caused by entering or leaving one country's waters, while requirements are relaxed in other countries. In order to ensure that adequate penalties are imposed on ships that violate international and domestic law on the prevention and control of pollution from ships, while preventing abuses by coastal and flag States and preventing ships from being subjected to multinational sanctions for the same acts, Articles 223 to 233 of Section 7 "Safeguards" of part 12 "Protection and Preservation of the Marine Environment" of the United Nations Convention on the Law of the Sea defines the scope, content and limitation requirements of the state's exercise of public rights. In particular, Article 229, "Institution of civil proceedings", clearly states that "Nothing in this Convention affects the institution of civil proceedings

in respect of any claim for loss or damage resulting from pollution of the marine environment". Thus, even at the level of the convention, the United Nations Convention on the Law of the Sea still gives priority to the protection of civil rights while exercising the state's public rights. For this reason, the pollution damage caused by ships is usually protected by the institution of civil proceedings, the protection of which essentially gives the coastal state the right to regulate by means of domestic law.

II. Definition of Pollution Response and Calculation of Tariffs

In this case, Ningbo Maritime Court of the first instance ruled that,[14] in the case of Shanghai Salvage Bureau the three ships which involved in the accident emergency action are non-professional clean-up boats, but given the action played a significant role in preventing further oil pollution, corresponding clean-up boat fee standards for approval shall be referred to the relevant costs, that means the Shanghai Salvage Bureau case involved action does not constitute of salvage operation. In the second instance, the Zhejiang Higher People's Court held that although the task coordination letter received by Shanghai Salvage Bureau required sending forces to rescue,[15] it also clarified that the nature of the distress was marine environment, and the court of first instance held that the actions involved in the case of Shanghai Salvage Bureau did not constitute maritime salvage in nature, and there was nothing wrong. The Supreme Court's retrial held that[16] to determine whether a certain maritime emergency operation is a salvage operation or an anti-pollution operation requires analysis and judgment based on the initial purpose of the operation, the risks faced by the ship, the actual operation content and other facts, thus clarifying the legal attributes of each ship's emergency operation.

Measures such as salvage operation, pollution response,[17] and wreck removal may be taken individually or simultaneously in a single incident, and these measures may be introduced at different stages of the accident. Different legal relationships may arise from the same incident. Another focus of this case is how

---

14 Supra note 2.
15 Supra note 3.
16 Supra note 4.
17 The term "preventive measures" in the CLC Convention and the Bunker Convention is usually directly translated as " 预防措施 " in Chinese as an alternative term for "pollution emergency", and the term used in the Supreme Court judgment is " 防污清污 " in Chinese.

to define salvage operation and pollution response. The controversy is rooted in the differences of the compensation subject, the compensation limitation and the cost standard behind the two different legal relationships, which directly affects the final amount of compensation.

A. The Distinction between Salvage Operation and Oollution Response

Salvage operation is based on the International Convention on Salvage, 1989 (hereinafter "Salvage Convention") and the method of compensation is "No cure, No Pay" plus special compensation for environmental protection. The standard Lloyd's Open Form (hereinafter "LOF contract ") is widely used by the industry to replace the principal provisions of the Salvage Convention, if the salvage involves environmental protection, the salvor may consider introducing a special compensation P&I Club Clause (hereinafter "SCOPIC") when signing the LOF contract, so as to facilitate the calculation of special compensation by both parties to the salvage, reduce subsequent disputes and speed up the calculation and payment of the salvage remuneration. The cost of salvage which includes salvage remuneration and special compensation, for insurers and the International Oil Pollution Funds, they are more concerned about the ultimate bearing of the above expenses. In February 1997, the FUND71 assembly meeting considered the proposals of the International Group of P&I Clubs and the director of the Funds.[18] In the view of the International Group of P&I Clubs, the special compensation under Article 14 of the Salvage Convention should be regarded as a form of oil pollution damage from ships, that is, a preventive measure, to be paid by the International Oil Pollution Funds when it exceeded the limitation of the shipowner's liability. This view is supported by a Funding Agreement between commercial insurers and insurance associations, whereby the commercial insurer bears the remuneration under Article 13 of the Salvage Convention and the special compensation under Article 14 is borne by the P&I Club.[19] Salvage payments such as salvage remuneration and special compensation shall not be regarded as claims subject to limitation according to the provisions of the Maritime Law, that is to say, such expenses shall not be apportioned among the maritime liability limitation fund

18 See Note by the Director, 71FUND/EXC.52/9; Note by the International Group of Protection and Indemnity Clubs, 71FUND/EXC.52/9/1.

19 John Reeder, *Brice on Maritime Law of Salvage*, Sweet & Maxwell Press, 1993, p. 897-898.

constituted by the shipowner, and for this reason, the salvor's efforts to include the relevant costs in the expenses of salvage means that he can receive more compensation. However, the Bunker Convention is applicable in this case and the limitation of maritime liability under the Bunker Convention points to the Maritime Law, while the general limitation of maritime liability under the Maritime Law framework applies to property damage, including pollution damage. Although the victims may still file a claim for the inadequate part of the pollution damage to the China Ship-source Oil Pollution Compensation Fund (hereinafter "COPC Fund"), however, the COPC Fund's limit for an accident is only RMB 30 million, and it can only be raised after the litigation of the case, which is subject to uncertainty and quite different from the two-level protection mechanism under the CLC/FUND framework.

The methodology for defining salvage operation and pollution response is the application of the primary purpose test and dual purpose test. The primary purpose test is a principle of the 1971 International Oil Pollution Compensation Fund (FUND71) use to settle cases,[20] which considers only the primary purpose of the action as the applicable legal fact and does not consider the secondary purpose or the incidental effect. The FUND71's stance on this issue had been questioned.[21] Subsequently, IOPC Funds established the dual purpose test. Currently, the IOPC Funds applies both the primary purpose test and the dual purpose test, and its IOPC Fund Claim Manual (hereinafter "Claim Manual") gives the following determination:[22] "Salvage operations may in some cases include an element of preventive measures. If the primary purpose of such operations is to prevent pollution damage, the costs incurred qualify in principle for compensation under the CLC. However, if salvage operations have another purpose, such as saving the ship and/or the cargo, the costs incurred are not accepted under the CLC. If the operations are undertaken for the purposes of both preventing pollution and saving the ship and/or the cargo, but it is not possible to establish with any certainty the primary purpose, the costs are apportioned between pollution prevention and salvage. Article 11 of the Interpretation of Oil Pollution Damage, which draws on the practice of the IOPC Funds, sets out the criteria of the primary test and dual purpose test for dividing the costs of salvage operation and preventive

20 IOPC Fund Annual Report 1988, p. 60.
21 John F. Donaldson, *Safer Ships, Cleaner Seas: Report of Lord Donaldson's Inquiry into the Prevention from Merchant Shipping*, The Stationery Office Books, 1994, p. 412-413.
22 IOPC Funds Claims Manual, 2016, paras. 3.1.15, p. 28.

measures. The retrial judgment of the Supreme Court first analyzed the constitutive requirements of salvage operation, and holds that part of the emergency measures can be classified as salvage and part of the measures as pollution emergency. And then, by reading the 1976 Convention on Limitation of Liability for Maritime Claims and the provisions of domestic laws on the costs of "floating, clearing off, demolishing or eliminating the harm of the vessel which is sunken, in distress, grounded or abandoned" as claims not subject to limitation, it was found that the *M.V CMA CGM Florida* has not constituted any of the above-mentioned circumstances, and that the costs of pollution response were still the claims subject to limitation which should be paid out of the limitation fund constituted by the shipowner.

However, there are still two problems with the aforementioned definition methodology: one is the difference of calculation methods. As noted earlier, when there is a dual purpose, the special compensation has to be calculated according to the method given in the Salvage Convention or the LOF contract, and the special compensation is the amount over the salvage compensation, which is calculated on the basis of the success of the salvage and especially the calculation takes into account the total cost of salvage, some of which may not have any relevance to pollution prevention. At the same time, the remuneration for salvage under the framework of the LOF is determined on the basis of an arbitration, and it is doubtful whether the conclusion of the arbitration on salvage can be used by the FUND for claim settlement. To that end, the view was expressed that the best solution would be to account separately under the respective applicable conventions.[23] It is in the light of the above considerations that the Claims Manual clearly states: "The assessment of claims for the costs of preventive measures associated with salvage is not made on the basis of the criteria applied for determining salvage awards, but the compensation is limited to costs, including a reasonable element of profit".[24] The essence of this provision is to scientifically separate the pollution response expenses from the salvage remuneration.

The second problem is the difficulty of judging subjective consciousness. Both international conventions and domestic laws, in applying the method of apportionment with the primary purpose test and dual purpose test, emphasis is placed on the purpose at the beginning of the operation, whereas the purpose is an ideological act based on the subjective consciousness of the person, as opposed to

---

23 IOPC Fund, Record Decisions of the 52nd Session of Executive Committee, 71FUND/EXC.52/11, paras. 4.4.

24 IOPC Funds Claims Manual, 2016, paras. 3. 1. 15, p. 27.

objective facts, while judging subjective consciousness is relatively difficult from the perspective of evidence. In practice, the initial purpose can be judged to have an environmental protection purpose by concluding a LOF contract and voluntarily introducing SCOPIC, or by an administrative enforcement order by a governmental authority. Moreover, neither international conventions nor national laws make a clear determination as to who is the subject of subjective consciousness, whether it is the salvor, the owner of the ship in distress, the owner of the cargo or the competent government authority, and different stakeholders have different perspectives and different purposes in relation to the same emergency operation.

B. Design Conception for Pollution Response Tariffs

SCOPIC originates from salvage operation, where most of the vessels are high-powered tugboats that can operate in bad sea conditions, while the composition of China's oil spill emergency response force mostly originates from the social forces engaged in daily port operations, and it's not exactly the professional marine salvage agency. At present, some vessels of China's rescue and salvage system and the three major oil companies already have higher level marine emergency response function,[25] but most of them have multiple functions of daily operation and emergency response, and it is difficult for some of them to fully correspond to the tugboats listed in SCOPIC Appendix A. Therefore, the approval of the pollution response tariffs has been a thorny problem plaguing China's maritime justice community.

In the judgment of this case, the Supreme Court firstly held that the M/V Shen Qian was engaged in salvage under the control of public authorities, [26]although the parties involved in the accident did not include SCOPIC, however, the court accepted in principle the claim of the Shanghai Salvage Company to calculate the cost of the ship on the basis of the SCOPIC tariff, which is more commonly used internationally. The court further held that since the *M/V Shen Qian* was an engineering vessel and not a tugboat, it was inappropriate to charge according to the

25 China's salvage and rescue bureaus are an important part of the national emergency support system, and also the backbone of the country's response to major emergencies at sea, a complete salvage and rescue network consisting of three rescue bureaus, three salvage bureaus and four rescue fleets, which has been set up along the coast. The three major oil companies refer to CNPC, Sinopec and CNOOC, all of them have built a large-scale professional support fleet for offshore oil drilling platforms.

26 Supra note 4.

horsepower of the tugboat, taking into account the special functions of the vessel, finally approved the in-use rate of 1 Yuan per horsepower-hour as determined by the court of first and second instances.

With regard to the tariffs of pollution response, the court held that the *M/V Shen Qian* and *De Yong* were engaged in pollution-prevention and clean-up operations (namely pollution response), because the operations performed by the two ships were similar to those performed by the M/V Shen Qian, the costs of such operations can also be determined by reference to the SCOPIC tariffs, which also cover the pollution response in the event of salvage operation. The Supreme Court's above-mentioned approach is a solution to the problem in the absence of uniformly recognized quantitative criteria, but it should not be the best way to deal with the problem in the future, for the following reasons:

Firstly, there is a difference in the legal attributes between pollution response and salvage operation. The subject of salvage is the property of others which has strong attribute of private interest, while pollution response not only protects private property, but also protects public property and benefits future generations which falls under the category of public good. For this reason, it is easy to accept the compensation for the private part in pollution response by reference to the approach of salvage operation, but it is questionable that compensation for the larger public benefit component should still be compensated in the same way. Since the activity is for the public good, it should be compensated at a lower rate than private interests in order to reflect its public good character. If the government agencies or social commonweal organizations engaged in emergency response, then the cost compensation shall prevail, and claims can even be waived in actual cases; if an enterprise or an individual engaged in emergency response, a higher standard of compensation should be offered from the angle of encouragement, and this criterion should be set at an appropriately high incentive rate on the basis of cost to encourage these companies and individuals to participate in the pollution response.

Secondly, there is a difference in risk between pollution response and salvage operation. Since salvage is subject to property rescue which will generally be halted in the event of a situation that could affect safety during the process of rescue, such as severe weather conditions, and the same is true for pollution response. However, in contrast, if a contaminant threatens extremely sensitive ecological resources, more urgent emergency measures are often taken to prevent the contaminant from affecting these sensitive resources, and for this reason, extreme measures may be taken even under severe weather conditions. To this end, it is necessary to

design different rates for pollution response, especially the higher rate standard for emergency disposal under extreme conditions.

Thirdly, the legal basis for pollution response is different from that for compensation for marine salvage. Salvage operation has become a contractual legal relationship that can be based on the negotiated consent of the parties to the contract to deal with each other's legal issues, including the setting of the tariffs. The SCOPIC is introduced contractually and applied to the calculation of compensation for salvage. As a preventive measure, the pollution response is a loss item in pollution torts, which is different from the salvage. The legal basis of compensation in pollution torts is to restore the status quo ante, which aims to compensate as much as the loss, and for which compensation for pollution response paid on pay-as-you-go basis, theoretically there should be no "unjust enrichment". In this sense, the rate of pollution response is based on the actual expenditure, however, such actual expenditure does not prevent the units and individuals involved in emergency disposal from obtaining reasonable profits.

Fourthly, the subject of liability of pollution response is different from that of salvage. Salvage, as a joint liability of the shipowner and the cargo owner, includes only the remuneration for salvage and not special compensation. [27] Special compensation is available only if it exceeds the remuneration for the rescue, because the environmental protection effect has been taken into account in the calculation of the compensation for salvage. For this reason, such special compensation arising from actions taken to encourage environmental salvage is borne solely by the shipowner and not by the cargo owner. In a legal system where there is only a single level of compensation mechanism, the shipowner (including his insurer) is the main party responsible for pollution emergency disposal. In a legal system with a two-tier compensation mechanism, the liability may be shared between the shipowner and the cargo owner. Therefore, the opinions of not only shipowners, but also cargo owners should be heard when determining the pollution emergency disposal rate, and the opinions of the COPC Fund should be incorporated.

Considering the above-mentioned differences between salvage operation

---

27 Art. 6 of the 2016 York-Antwerp Rules provides that under Art. 14(4) of the Salvage Convention or any other similar provisions in substance (such as SCOPIC) special compensation payable to a salvor by the shipowner shall not be allowed in general average. A similar provision is found in article 15 of SCOPIC clause, which states that SCOPIC honorariums are not included in general average.

and pollution response, the following factors should be taken into account in the design of China's pollution tariffs. Firstly, the overall national emergency response capacity and the need for institutional design to encourage social units to participate in water pollution emergency response; secondly, the subject of pollution emergency disposal measures should be taken to distinguish the government from the social units; thirdly, the risks faced by pollution response, including safety risks, complexity and difficulty of operation; fourthly, the degree to which the society attaches importance to environment protection, with the change of people's attitudes towards environment protection, the proportion of compensation for pure environmental loss is higher and higher than that in the past; fifthly, the position of the shipping industry in the socio-economic context, while the current shipping industry is still in a situation of low profitability and high safety risks, due consideration should also be given to protect the development of the shipping industry in order to balance the interests of shipowners, oil cargo owners, emergency parties and pollution victims.

III. The Principle Position of Governmental Maritime Agencies in Civil Claims for Pollution Response

In the ship pollution damage liability case of China Yangshan Port Maritime Bureau (hereinafter "Yangshan Port Maritime Bureau") and Provence Shipowner 2008-1 Ltd., CMA CGM SA, Rockwell Shipping Limited, Ningbo Maritime Court of the first instance ruled that,[28] after pollution accidents, the maritime administration institution or it's designated other units to take clear, salvage, towing, pilotage, craft and other necessary measures to mitigate the pollution damage, can lodge a claim against oil pollution responsibility according to law or by contract. The costs of the Yangshan Port Maritime Bureau are generated by the different actions of several units, and the qualification of the subject of the lawsuit cannot be denied because of the administrative organ status of the Yangshan Port Maritime Bureau. The second trial of Zhejiang Higher People's Court held that after the pollution accident,[29] the parties with anti-pollution clean-up obligation failed to take effective measures to prevent or reduce pollution damage, and Yangshan

28 Ningbo Maritime Court (2015) Civil Judgment No. 442, First, Commercial Division, Ningbo.

29 Zhejiang Higher People's Court (2017) Civil Judgment No. 582, Final, Civil Division, HPC, Zhejiang.

Port Maritime Bureau as the national maritime administrative departments, with its authority need to take coercive measures, organize third party units to participate in emergency anti-pollution clean-up operation, therefore they have the right to request the accident responsible party bear the actual expenditure of this anti-pollution clean-up operation. Supreme Court's retrial judgment according to the convention on the fuel oil on the "preventive measures" and "pollution damage" clause of the methods and its context and reference purpose and aim of the convention held that,[30] the costs of any definite take preventive measures falls within the scope of pollution damage compensation, who take preventive measures are also can claim the corresponding costs. The first and second instance court held that Yangshan Port Maritime Bureau can claim for the anti-pollution clean-up compensation according to its main body qualifications, which is in line with the spirit of the Bunker Convention. If Yangshan Port Maritime Bureau participates in the emergency operation of the accident involved in the case and actually paid or promised to pay the relevant expenses such as investigation, monitoring, inspection, evaluation and assistance in the anti-pollution clean-up operations of the professional technical unit entrusted by it, it may claim for compensation against the responsible party.

In view of the nature of public power of government departments, their participating in clean-up operation has a strong nonprofit nature. Therefore, the parties responsible for the ship oil pollution accident think that the government departments do not have the position of litigation subject in the civil liability dispute of ship oil pollution damage, which is another focus issue worth discussing in this case. At the level of international conventions, the right to intervene was earlier given to governments in the 1969 International Convention on Intervention in Cases of Oil Pollution Casualties on the High Seas, which regulates the right to intervene for the purpose of environmental protection, while the right to intervene for the purpose of safety is mainly embodied in the Salvage Convention and the *1979 International Convention on Maritime Search and Rescue*. One international convention that has recently entered into force is the *Nairobi International Convention on the Removal of Wrecks, 2007*, which combines safety and environment protection objectives. At the same time, the relevant domestic laws also endow the government with the power of administrative enforcement.

There are two main types of government intervention in emergency response.

30 Supreme People's Court (2018) Civil Judgment No. 369, Retrial, Civil Division, SPC.

One way is for government departments to use their own resources to participate in emergency response, that is, to "engage" directly in emergency response; the other way is for the government to take charge of coordination, that is, to direct emergency response in the role of "controller". In the Salvage Convention, "engaging" and "controlling" are also used to distinguish the two situations of government participation in salvage operation.[31] Among them, the key issue is the legal position of government intervention measures and its costs, that is, whether it is to be dealt with administratively or civilly. Different ways determine whether the government's efforts will be fully compensated or reimbursed, and also determine the extent of the liability for that responsible party, because whether it can be subsumed under the items of damage that determine whether and to what extent the liable party is entitled to limitation of liability for maritime claims, the amount eventually paid can sometimes vary considerably, which is another point of contention in this case.

In the field of emergency disposal of ship pollution in China, the first step is to encourage shipowners to clean up themselves or entrust professional emergency response agencies to clean up, and only when the shipowners are unable or unwilling to do so, the government will take mandatory decontamination measures. In the case of the shipowner's own decontamination, the contractual relationship is constituted between the shipowner and the unit involved in the operation, at which time the role of the government is to supervise whether the clean-up action is scientific, timely and effective. The government has the right to intervene only in the event of a shipwreck and when there is a threat of significant pollution damage. Such governmental action is intended to protect the environment as a public resource from damage, but also in order to protect the interests of certain specific pollution victims. In practice, most courts treat clean-up involving social forces as a civil action, which is based on the theories of management without cause, non-contractual salvage or tort, and in accordance with civil legal relationships. There are many theories in the theoretical community, such as the theory of administrative performance on behalf of the party concerned, the theory of management without cause, the theory of nonprofit civil litigation and the theory of pollution tort liability, however, there are some legal defects in these theories. In terms of the theory of administrative performance on behalf of

31 Art. 5 of the Salvage Convention: "This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities".

the party concerned, although the *Administrative Coercion Law of the People's Republic of China* provided the administrative path for mandatory clean-up costs claim, and generation performance of the expenses shall be borne by the oil pollution responsibility, but it does not specify the way to bear the costs. It is still controversial that how the government applies to court for enforcement in the judicial practice, and administrative procedures are complicated and time-consuming, oil pollution liability party has the right to make statements and defend itself or to bring a suit for reconsideration when the government departments are on behalf of the party concerned to perform the administrative act, which will waste administrative resources and the lawsuit resources. In terms of the theory of management without cause, when they are forced to clean up, although there is no contract between the clean-up unit and the party responsible for oil pollution, the cleaning unit is entrusted by the government department to carry out the cleaning, therefore there is an entrustment contract relationship between the cleaning unit and government departments, and it is obliged to carry out the cleaning according to the entrustment contract, which is inconsistent with the stipulation that there is no legal or agreed obligation in the theory of management without cause.[32] In terms of the theory of nonprofit civil litigation, the environmental civil litigation does not require the plaintiff to have the civil legal interests, the government can claim for compensation as the plaintiff in nonprofit civil litigation, but they will receive private interest litigation payments after the nonprofit litigation.[33] In this case, the clean-up costs become the lowest reimbursed payment, for cleaning unit, the losses suffered by interests in an unequal position, affect their enthusiasm for participating in government departments assigned work in the future. In terms of the theory of pollution tort liability, it was stated that oil spills did cause damage to the marine environment but did not necessarily result in losses to the cleansing units. In mandatory cleaning, to suffer from pollution of the Marine environment, cleaning units do not enjoy the ownership, usufructuary right, security interests or other property rights, oil spill behavior does not infringe on civil rights and interests of

32 Art. 121 of General Principles of the Civil Law: Without statutory or agreed obligations, the person who conducts management to avoid loss of the interests of others has the right to request the beneficiary to reimburse the necessary expenses incurred therefrom.

33 Art. 31 of Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations: The defendant who was held liable for environmental pollution and ecological destruction by environmental civil public interest litigation and other civil litigation, whose assets was not enough to perform all the obligations under the judgments, the defendant shall perform obligations under other civil litigation judgment except as otherwise provided by law.

the cleaning unit, between mandatory cleaning and oil spilling, there is no direct causality, so cleaning unit shall not be entitled to any infringement of the oil pollution responsibility. In addition, another pillar of a civil claim is a contractual obligation, which cannot be formed in such a case because there is no common expression of will between the third party involved in the pollution emergency and the person responsible for the pollution.

In the field of compensation for pollution damage from ships, due to the early establishment of international conventions, it has become customary for domestic legislation to converge with international conventions, and the traditional system of liability for pollution damage only borne by infringers has been broken down, there has been a transition from the traditional "polluter pays principle" to the "beneficiary pays principle". The Marine Environment Protection Law of 1982 was amended in 2000 to replace the original article 41, which read: " 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 prescribed in article 5 of this Law 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; they may also give the violator a warning or impose a fine" is amended to Article 90, paragraph 2, "For damages to marine ecosystems, marine fishery resources and marine protected areas which cause heavy losses to the State, the department invested with power by the provisions of this law to conduct marine environment supervision and administration shall, on behalf of the State, put forward compensation demand to those held responsible for the damages". "Putting forward compensation demand to those held responsible for the damages on behalf of the State" has illustrated the attribute shifted from administrative to civil. The legal interpretation of the law, which once again clarified from the legislator's perspective that the attribute of state losses, including the costs of clean-up organized by government agencies, is civil liability.[34]

At the same time, the costs of pollution response incurred by the government are compensated in accordance with civil tort law, which is supported by corresponding international conventions, practices and domestic judicial interpretations. Article 1 of the CLC defines "person" as any individual or partnership or any public or private body, whether corporate or not, including

34 The Interpretation for *Marine Environment Protection Law,* the NPC network (Aug. 1, 2001), http://www.npc.gov.cn/npc/c2174/200108/a92bbb66649649e9ab400c806e02a015.shtml. (in Chinese)

a State or any of its constituent subdivisions, and "preventive measures" any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage. The above definition indicates that the government taking preventive measures (namely pollution response measures) or a third party designated by it is entitled under the Convention to be paid for the costs of preventive measures from the person responsible for the pollution, in accordance with the tort legal relationship. In a number of cases settled by the IOPC Funds, it is quite usual for government-led pollution emergency response costs to be compensated in accordance with the Convention's preventive measures.

Article 145 of the *Proceedings of the Second National Conference on Foreign-related Commercial and Maritime Trials* in 2005 stipulates that the expenses incurred by the State Maritime Administrative Department or other enterprises and institutions for preventing or mitigating oil pollution damage, including the costs for clean-up, may be brought directly against the person responsible for the oil pollution. The *Guidance Regulating the Investigation of Marine Traffic Accidents and the Trial of Maritime Cases*, issued by the Fourth Chamber of the Supreme Court Civil Trial Division IV and the China Maritime Safety Administration in 2006, clearly states: "After the occurrence of a ship oil pollution accident, the person responsible for the oil pollution shall bear the compensation for the expenses incurred by the Maritime Administration in organizing the relevant units and individuals to participate in the decontamination operation".[35]

After the conclusion of the trial of the case of *CMA CGM Florida*, Article 7 of the provisions of the Supreme People's Court *on Several Issues concerning the Trial of Cases Involving Disputes over Compensation for Damage to Marine Natural Resources, Ecology and Environment*, issued at the end of 2017, made it clear that the scope of compensation for damage to marine natural resources and the ecological environment includes the costs of preventive measures, restoration costs, losses during restoration, and investigation and assessment costs.[36] Of which, costs of preventive measures refer to reasonable emergency measures taken to mitigate or prevent pollution of the marine environment, ecological deterioration and reduction of natural resources. Despite the fact that the 2019 several provisions

35 Art. 3 of the Guiding Opinions on Regulating the Investigation of Marine Traffic Accidents and the Trial of Maritime Cases, Civil Adjudication Tribunal No.4 of Supreme Court, No. 1(2006), issued on January 19, 2006.

36 Art. 7 of the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases Involving Disputes over Compensation for Damage to Marine Natural Resources, Ecology and Environment.

of the Supreme People's Court *on the Trial of Cases on Compensation for Damage to the Ecological Environment* (for Trial Implementation) do not apply to marine ecological damage claims, however, Article 19 of this interpretation clearly stipulates that the People's Court shall accept a lawsuit filed by an organ (namely the government agency which organized the emergency disposal) that has actually pay for emergency disposal costs and claim such expenses.

Therefore, emergency disposal measures taken by government agencies to prevent or mitigate damage to public interests caused or likely to be caused by an accident should be treated as a civil rights infringement, and for this reason the costs incurred should be treated in the same way as other types of pollution damage. Conversely, if the cost of government-led ship pollution emergency disposal is compensated by administrative means through the way of substitute performance, then there would be the aforementioned implementation disputes, complicated procedures, administrative and litigation resources waste and other practical problems. However, when the government and its related departments implement the compulsory emergency measures, they will still embody the public power, and there is still an unequal relationship with the party responsible for pollution. To this end, it will be necessary to include in future legislation a requirement of "reasonableness" to regulate the exercise of this public power, as well as an additional requirement of liability for improper exercise. The Supreme Court, in its decision on the reexamination of the Yangshan Port Maritime Bureau, while recognizing that the costs of emergency disposal measures of the maritime authority are compensated by civil means, also analyzed the reasonableness of those measures and adhere to the principle that compensation should be granted only if it is reasonable.

Translator: HUANG Rui
Editor (English): HUANG Yuxin

Rules of the International Tribunal for the Law of the Sea

Adopted on 28 October 1997
(amended on 15 March and 21 September 2001, on 17 March 2009, on 25 September 2018 and on 25 September 2020)

PREAMBLE

The Tribunal,

Acting pursuant to article 16 of the Statute of the International Tribunal for the Law of the Sea, Annex VI to the United Nations Convention on the Law of the Sea,

Adopts the following Rules of the Tribunal.

PART I USE OF TERMS

Article 1

For the purposes of these Rules:

(a) "Convention" means the United Nations Convention on the Law of the Sea of 10 December 1982, together with the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention;

(b) "Statute" means the Statute of the International Tribunal for the Law of the Sea, Annex VI to the Convention;

(c) "States Parties" has the meaning set out in article 1, paragraph 2, of the Convention and includes, for the purposes of Part XI of the Convention, States and entities which are members of the Authority on a provisional basis in accordance with section 1, paragraph 12, of the Annex to the Agreement relating to the implementation of Part XI;

(d) "international organization" has the meaning set out in Annex IX, article 1, to the Convention, unless otherwise specified;

(e) "Member" means an elected judge;

(f) "judge" means a Member as well as a judge *ad hoc;*

(g) "judge *ad hoc*" means a person chosen under article 17 of the Statute for the purposes of a particular case;

(h) "Authority" means the International Seabed Authority;

(i) "certified copy" means a copy of a document bearing an attestation by or on behalf of the custodian of the original or the party submitting it that it is a true and accurate copy thereof.

PART II ORGANIZATION

Section A. The Tribunal Subsection 1. The Members

Article 2

1. The term of office of Members elected at a triennial election shall begin to run from 1 October following the date of the election.

2. The term of office of a Member elected to replace a Member whose term of office has not expired shall run from the date of the election for the remainder of that term.

Article 3

The Members, in the exercise of their functions, are of equal status, irrespective of age, priority of election or length of service.

Article 4

1. The Members shall, except as provided in paragraphs 3 and 4, take precedence according to the date on which their respective terms of office began.

2. Members whose terms of office began on the same date shall take precedence in relation to one another according to seniority of age.

3. A Member who is re-elected to a new term of office which is continuous with his previous term shall retain his precedence.

4. The President and the Vice-President of the Tribunal, while holding these offices, shall take precedence over the other Members.

5. The Member who, in accordance with the foregoing paragraphs, takes precedence next after the President and the Vice-President of the Tribunal is in these Rules designated the "Senior Member". If that Member is unable to act, the Member who is next after him in precedence and able to act is considered as Senior Member.

Article 5

1. The solemn declaration to be made by every Member in accordance with article 11 of the Statute shall be as follows:

"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously".

2. This declaration shall be made at the first public sitting at which the Member is present. Such sitting shall be held as soon as practicable after his term of office begins and, if necessary, a special sitting shall be held for the purpose.

3. A Member who is re-elected shall make a new declaration only if his new term is not continuous with his previous one.

Article 6

1. In the case of the resignation of a Member, the letter of resignation shall be addressed to the President of the Tribunal. The place becomes vacant on the receipt of the letter.

2. In the case of the resignation of the President of the Tribunal, the letter of resignation shall be addressed to the Vice-President of the Tribunal or, failing him, the Senior Member. The place becomes vacant on the receipt of the letter.

Article 7

In any case in which the application of article 9 of the Statute is under consideration, the Member concerned shall be so informed by the President of the Tribunal or, if the circumstances so require, by the Vice-President of the Tribunal, in a written statement which shall include the grounds therefor and any relevant evidence. He shall subsequently, at a private meeting of the Tribunal specially convened for the purpose, be afforded an opportunity of making a statement, of furnishing any information or explanations he wishes to give and of supplying answers, orally or in writing, to any questions put to him. The Member concerned may be assisted or represented by counsel or any other person of his choice. At a further private meeting, at which the Member concerned shall not be present, the matter shall be discussed; each Member shall state his opinion, and if requested a vote shall be taken.

Subsection 2. Judges *ad hoc*

Article 8

1. Judges *ad hoc* shall participate in the case in which they sit on terms of complete equality with the other judges.

2. Judges *ad hoc* shall take precedence after the Members and in order of seniority of age.

3. In the case of the resignation of a judge *ad hoc*, the letter of resignation shall be addressed to the President of the Tribunal. The place becomes vacant on the receipt of the letter.

Article 9

1. The solemn declaration to be made by every judge *ad hoc* in accordance with articles 11 and 17, paragraph 6, of the Statute shall be as set out in article 5, paragraph 1, of these Rules.

2. This declaration shall be made at a public sitting in the case in which the judge *ad hoc* is participating.

3. Judges *ad hoc* shall make the declaration in relation to each case in which they are participating.

Subsection 3. President and Vice-President

Article 10

1. The term of office of the President and that of the Vice-President of the Tribunal shall begin to run from the date on which the term of office of the Members elected at a triennial election begins.

2. The elections of the President and the Vice-President of the Tribunal shall be held on that date or shortly thereafter. The former President, if still a Member, shall continue to exercise the functions of President of the Tribunal until the election to this position has taken place.

Article 11

1. If, on the date of the election to the presidency, the former President of the Tribunal is still a Member, he shall conduct the election. If he has ceased to be a Member, or is unable to act, the election shall be conducted by the Member exercising the functions of the presidency.

2. The election shall take place by secret ballot, after the presiding Member has declared the number of affirmative votes necessary for election; there shall be no nominations. The Member obtaining the votes of the majority of the Members

composing the Tribunal at the time of the election shall be declared elected and shall enter forthwith upon his functions.

3. The new President of the Tribunal shall conduct the election of the Vice-President of the Tribunal either at the same or at the following meeting. Paragraph 2 applies to this election.

Article 12

1. The President of the Tribunal shall preside at all meetings of the Tribunal. He shall direct the work and supervise the administration of the Tribunal.

2. He shall represent the Tribunal in its relations with States and other entities.

Article 13

1. In the event of a vacancy in the presidency or of the inability of the President of the Tribunal to exercise the functions of the presidency, these shall be exercised by the Vice- President of the Tribunal or, failing him, by the Senior Member.

2. When the President of the Tribunal is precluded by a provision of the Statute or of these Rules either from sitting or from presiding in a particular case, he shall continue to exercise the functions of the presidency for all purposes save in respect of that case.

3. The President of the Tribunal shall take the measures necessary in order to ensure the continuous exercise of the functions of the presidency at the seat of the Tribunal. In the event of his absence, he may, so far as is compatible with the Statute and these Rules, arrange for these functions to be exercised by the Vice-President of the Tribunal or, failing him, by the Senior Member.

4. If the President of the Tribunal decides to resign the presidency, he shall communicate his decision in writing to the Tribunal through the Vice-President of the Tribunal or, failing him, the Senior Member. If the Vice-President of the Tribunal decides to resign the vice-presidency, he shall communicate his decision in writing to the President of the Tribunal.

Article 14

If a vacancy in the presidency or the vice-presidency occurs before the date when the current term is due to expire, the Tribunal shall decide whether or not the vacancy shall be filled during the remainder of the term.

Subsection 4. Experts appointed under article 289 of the Convention

Article 15

1. A request by a party for the selection by the Tribunal of scientific or technical experts under article 289 of the Convention shall, as a general rule, be made not later than the closure of the written proceedings. The Tribunal may consider a later request made prior to the closure of the oral proceedings, if appropriate in the circumstances of the case.

2. When the Tribunal decides to select experts, at the request of a party or *proprio motu*, it shall select such experts upon the proposal of the President of the Tribunal, who shall consult the parties before making such a proposal.

3. Experts shall be independent and enjoy the highest reputation for fairness, competence and integrity. An expert in a field mentioned in Annex VIII, article 2, to the Convention shall be chosen preferably from the relevant list prepared in accordance with that annex.

4. This article applies *mutatis mutandis* to any chamber and its President.

5. Before entering upon their duties, such experts shall make the following solemn declaration at a public sitting:

"I solemnly declare that I will perform my duties as an expert honourably, impartially and conscientiously and that I will faithfully observe all the provisions of the Statute and of the Rules of the Tribunal".

Subsection 5. The composition of the Tribunal for particular cases

Article 16

1. No Member who is a national of a party in a case, a national of a State member of an international organization which is a party in a case or a national of a sponsoring State of an entity other than a State which is a party in a case, shall exercise the functions of the presidency in respect of the case.

2. The Member who is presiding in a case on the date on which the Tribunal meets in accordance with article 68 shall continue to preside in that case until completion of the current phase of the case, notwithstanding the election in the meantime of a new President or Vice-President of the Tribunal. If he should become unable to act, the presidency for the case shall be determined in accordance with article 13 and on the basis of the composition of the Tribunal on the date on which it met in accordance with article 68.

Article 17

Members who have been replaced following the expiration of their terms of office shall continue to sit in a case until the completion of any phase in respect of which the Tribunal has met in accordance with article 68.

Article 18

1. Whenever doubt arises on any point in article 8 of the Statute, the President of the Tribunal shall inform the other Members. The Member concerned shall be afforded an opportunity of furnishing any information or explanations.

2. If a party desires to bring to the attention of the Tribunal facts which it considers to be of possible relevance to the application of article 8 of the Statute, but which it believes may not be known to the Tribunal, that party shall communicate confidentially such facts to the President of the Tribunal in writing.

Article 19

1. If a party intends to choose a judge *ad hoc* in a case, it shall notify the Tribunal of its intention as soon as possible. It shall inform the Tribunal of the name, nationality and brief biographical details of the person chosen, preferably at the same time but in any event not later than two months before the time-limit fixed for the filing of the counter-memorial. The judge *ad hoc* may be of a nationality other than that of the party which chooses him.

2. If a party proposes to abstain from choosing a judge *ad hoc*, on condition of a like abstention by the other party, it shall so notify the Tribunal, which shall inform the other party. If the other party thereafter gives notice of its intention to choose, or chooses, a judge *ad hoc*, the time-limit for the party which had previously abstained from choosing a judge may be extended up to 30 days by the President of the Tribunal.

3. A copy of any notification relating to the choice of a judge *ad hoc* shall be communicated by the Registrar to the other party, which shall be requested to furnish, within a time-limit not exceeding 30 days to be fixed by the President of the Tribunal, such observations as it may wish to make. If within the said time-limit no objection is raised by the other party, and if none appears to the Tribunal itself, the parties shall be so informed. In the event of any objection or doubt, the matter shall be decided by the Tribunal, if necessary after hearing the parties.

4. A judge *ad hoc* who becomes unable to sit may be replaced.

5. If the Tribunal finds that the reasons for the participation of a judge *ad hoc*

no longer exist, that judge shall cease to sit on the bench.

Article 20

1. If the Tribunal finds that two or more parties are in the same interest and are therefore to be considered as one party only, and that there is no Member of the nationality of any one of these parties upon the bench, the Tribunal shall fix a time-limit within which they may jointly choose a judge *ad hoc*.

2. Should any party among those found by the Tribunal to be in the same interest allege the existence of a separate interest of its own or put forward any other objection, the matter shall be decided by the Tribunal, if necessary after hearing the parties.

Article 21

1. If a Member having the nationality of one of the parties is or becomes unable to sit in any phase of a case, that party is entitled to choose a judge *ad hoc* within a time-limit to be fixed by the Tribunal, or by the President of the Tribunal if the Tribunal is not sitting.

2. Parties in the same interest shall be deemed not to have a Member of one of their nationalities upon the bench if every Member having one of their nationalities is or becomes unable to sit in any phase of the case.

3. If a Member having the nationality of one of the parties becomes able to sit not later than the closure of the written proceedings in that phase of the case, that Member shall resume the seat on the bench in the case.

Article 22

1. An entity other than a State may choose a judge *ad hoc* only if:

(a) one of the other parties is a State Party and there is upon the bench a judge of its nationality or, where such party is an international organization, there is upon the bench a judge of the nationality of one of its member States or the State Party has itself chosen a judge *ad hoc*; or

(b) there is upon the bench a judge of the nationality of the sponsoring State of one of the other parties.

2. However, an international organization or a natural or juridical person or state enterprise is not entitled to choose a judge *ad hoc* if there is upon the bench a judge of the nationality of one of the member States of the international organization or a judge of the nationality of the sponsoring State of such natural or

juridical person or state enterprise.

3. Where an international organization is a party to a case and there is upon the bench a judge of the nationality of a member State of the organization, the other party may choose a judge *ad hoc*.

4. Where two or more judges on the bench are nationals of member States of the international organization concerned or of the sponsoring States of a party, the President may, after consulting the parties, request one or more of such judges to withdraw from the bench.

Section B. The Seabed Disputes Chamber Subsection 1. The members and judges *ad hoc*

Article 23

The members of the Seabed Disputes Chamber shall be selected following each triennial election to the Tribunal as soon as possible after the term of office of Members elected at such election begins. The term of office of members of the Chamber shall begin to run from the date of their selection. The term of office of members selected at the first selection shall expire on 30 September 1999; the terms of office of members selected at subsequent triennial selections shall expire on 30 September every three years thereafter.

Members of the Chamber who remain on the Tribunal after the expiry of their term of office shall continue to serve on the Chamber until the next selection.

Article 24

The President of the Chamber, while holding that office, takes precedence over the other members of the Chamber. The other members take precedence according to their precedence in the Tribunal in the case where the President and Vice-President of the Tribunal are not exercising the functions of those offices.

Article 25

Articles 8 and 9 apply *mutatis mutandis* to the judges *ad hoc* of the Chamber.

Subsection 2. The presidency

Article 26

1. The Chamber shall elect its President by secret ballot and by a majority vote

of its members.

2. The President shall preside at all meetings of the Chamber.

3. In the event of a vacancy in the presidency or of the inability of the President of the Chamber to exercise the functions of the presidency, these shall be exercised by the member of the Chamber who is senior in precedence and able to act.

4. In other respects, articles 10 to 14 apply *mutatis mutandis*.

Subsection 3. *Ad hoc* chambers of the Seabed Disputes Chamber

Article 27

1. Any request for the formation of an *ad hoc* chamber of the Seabed Disputes Chamber in accordance with article 188, paragraph 1 (b), of the Convention shall be made within three months from the date of the institution of proceedings.

2. If, within a time-limit fixed by the President of the Seabed Disputes Chamber, the parties do not agree on the composition of the chamber, the President shall establish time- limits for the parties to make the necessary appointments.

Section C. Special chambers

Article 28

1. The Chamber of Summary Procedure shall be composed of the President and Vice-President of the Tribunal, acting ex officio, and three other Members. In addition, two Members shall be selected to act as alternates.

2. The members and alternates of the Chamber shall be selected by the Tribunal upon the proposal of the President of the Tribunal.

3. The selection of members and alternates of the Chamber shall be made as soon as possible after 1 October in each year. The members of the Chamber and the alternates shall enter upon their functions on their selection and serve until 30 September of the following year. Members of the Chamber and alternates who remain on the Tribunal after that date shall continue to serve on the Chamber until the next selection.

4. If a member of the Chamber is unable, for whatever reason, to sit in a given case, that member shall be replaced for the purposes of that case by the senior in precedence of the two alternates.

5. If a member of the Chamber resigns or otherwise ceases to be a member,

the place of that member shall be taken by the senior in precedence of the two alternates, who shall thereupon become a full member of the Chamber and be replaced by the selection of another alternate.

6. The quorum for meetings of the Chamber is three members.

Article 29

1. Whenever the Tribunal decides to form a standing special chamber provided for in article 15, paragraph 1, of the Statute, it shall determine the particular category of disputes for which it is formed, the number of its members, the period for which they will serve, the date when they will enter upon their duties and the quorum for meetings.

2. The members of such chamber shall be selected by the Tribunal upon the proposal of the President of the Tribunal from among the Members, having regard to any special knowledge, expertise or previous experience which any of the Members may have in relation to the category of disputes the chamber deals with.

3. The Tribunal may decide to dissolve a standing special chamber. The chamber shall finish any cases pending before it.

Article 30

1. A request for the formation of a special chamber to deal with a particular dispute, as provided for in article 15, paragraph 2, of the Statute, shall be made within two months from the date of the institution of proceedings. Upon receipt of a request made by one party, the President of the Tribunal shall ascertain whether the other party assents.

2. When the parties have agreed, the President of the Tribunal shall ascertain their views regarding the composition of the chamber and shall report to the Tribunal accordingly.

3. The Tribunal shall determine, with the approval of the parties, the Members who are to constitute the chamber. The same procedure shall be followed in filling any vacancy. The Tribunal shall also determine the quorum for meetings of the chamber.

4. Members of a chamber formed under this article who have been replaced, in accordance with article 5 of the Statute, following the expiration of their terms of office, shall continue to sit in all phases of the case, whatever the stage it has then reached.

Article 31

1. If a chamber when formed includes the President of the Tribunal, the President shall preside over the chamber. If it does not include the President but includes the Vice-President, the Vice-President shall preside. In any other event, the chamber shall elect its own President by secret ballot and by a majority of votes of its members. The member who, under this paragraph, presides over the chamber at the time of its formation shall continue to preside so long as he remains a member of that chamber.

2. Subject to paragraph 3, the President of a chamber shall exercise, in relation to cases being dealt with by that chamber and from the time it begins dealing with the case, the functions of the President of the Tribunal in relation to cases before the Tribunal.

3. The President of the Tribunal shall take such steps as may be necessary to give effect to article 17, paragraph 4, of the Statute.

4. If the President of a chamber is prevented from sitting or acting as President of the chamber, the functions of the presidency of the chamber shall be assumed by the member of the chamber who is the senior in precedence and able to act.

Section D. The Registry

Article 32

1. The Tribunal shall elect its Registrar by secret ballot from among candidates nominated by Members. The Registrar shall be elected for a term of five years and may be re- elected.

2. The President of the Tribunal shall give notice of a vacancy or impending vacancy to Members, either forthwith upon the vacancy arising or, where the vacancy will arise on the expiration of the term of office of the Registrar, not less than three months prior thereto. The President of the Tribunal shall fix a date for the closure of the list of candidates so as to enable nominations and information concerning the candidates to be received in sufficient time.

3. Nominations shall be accompanied by the relevant information concerning the candidates, in particular information as to age, nationality, present occupation, academic and other qualifications, knowledge of languages and any previous experience in law, especially the law of the sea, diplomacy or the work of international organizations.

4. The candidate obtaining the votes of the majority of the Members

composing the Tribunal at the time of the election shall be declared elected.

Article 33

The Tribunal shall elect a Deputy Registrar; it may also elect an Assistant Registrar.

Article 32 applies to their election and terms of office.

Article 34

Before taking up their duties, the Registrar, the Deputy Registrar and the Assistant Registrar shall make the following solemn declaration at a meeting of the Tribunal:

"I solemnly declare that I will perform my duties as Registrar (Deputy Registrar or Assistant Registrar as the case may be) of the International Tribunal for the Law of the Sea in all loyalty, discretion and good conscience and that I will faithfully observe all the provisions of the Statute and of the Rules of the Tribunal".

Article 35

1. The staff of the Registry, other than the Registrar, the Deputy Registrar and the Assistant Registrar, shall be appointed by the Tribunal on proposals submitted by the Registrar. Appointments to such posts as the Tribunal shall determine may, however, be made by the Registrar with the approval of the President of the Tribunal.

2. The paramount consideration in the recruitment and employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

3. Before taking up their duties, the staff shall make the following solemn declaration before the President of the Tribunal, the Registrar being present:

"I solemnly declare that I will perform my duties as an official of the International Tribunal for the Law of the Sea in all loyalty, discretion and good conscience and that I will faithfully observe all the provisions of the Statute and of the Rules of the Tribunal".

Article 36

1. The Registrar, in the discharge of his functions, shall:

(a) be the regular channel of communications to and from the Tribunal and in particular shall effect all communications, notifications and transmission of documents required by the Convention, the Statute, these Rules or any other relevant international agreement and ensure that the date of dispatch and receipt thereof may be readily verified;

(b) keep, under the supervision of the President of the Tribunal, and in such form as may be laid down by the Tribunal, a List of cases, entered and numbered in the order in which the documents instituting proceedings or requesting an advisory opinion are received in the Registry;

(c) keep copies of declarations and notices of revocation or withdrawal thereof deposited with the Secretary-General of the United Nations under articles 287 and 298 of the Convention or Annex IX, article 7, to the Convention;

(d) keep copies of agreements conferring jurisdiction on the Tribunal;

(e) keep notifications received under article 110, paragraph 2;

(f) transmit to the parties certified copies of pleadings and annexes upon receipt thereof in the Registry;

(g) communicate to the Government of the State in which the Tribunal or a chamber is sitting, or is to sit, and any other Governments which may be concerned, the necessary information as to the persons from time to time entitled, under the Statute and the relevant agreements, to privileges, immunities or facilities;

(h) be present in person or represented by the Deputy Registrar, the Assistant Registrar or in their absence by a senior official of the Registry designated by him, at meetings of the Tribunal, and of the chambers, and be responsible for preparing records of such meetings;

(i) make arrangements for such provision or verification of translations and interpretations into the Tribunal's official languages as the Tribunal may require;

(j) sign all judgments, advisory opinions and orders of the Tribunal and the records referred to in subparagraph (h);

(k) be responsible for the reproduction, printing and publication of the Tribunal's judgments, advisory opinions and orders, the pleadings and statements and the minutes of public sittings in cases and of such other documents as the Tribunal may direct to be published;

(l) be responsible for all administrative work and in particular for the accounts and financial administration in accordance with the financial procedures of the Tribunal;

(m) deal with inquiries concerning the Tribunal and its work;

(n) assist in maintaining relations between the Tribunal and the Authority, the International Court of Justice and the other organs of the United Nations, its related agencies, the arbitral and special arbitral tribunals referred to in article 287 of the Convention and international bodies and conferences concerned with the codification and progressive development of international law, in particular the law of the sea;

(o) ensure that information concerning the Tribunal and its activities is accessible to Governments, the highest national courts of justice, professional and learned societies, legal faculties and schools of law and public information media;

(p) have custody of the seals and stamps of the Tribunal, of the archives of the Tribunal and of such other archives as may be entrusted to the Tribunal.

2. The Tribunal may at any time entrust additional functions to the Registrar.

3. In the discharge of his functions the Registrar shall be responsible to the Tribunal.

Article 37

1. The Deputy Registrar shall assist the Registrar, act as Registrar in the latter's absence and, in the event of the office becoming vacant, exercise the functions of Registrar until the office has been filled.

2. If the Registrar, the Deputy Registrar and the Assistant Registrar are unable to carry out the duties of Registrar, the President of the Tribunal shall appoint an official of the Registry to discharge those duties for such time as may be necessary. If the three offices are vacant at the same time, the President, after consulting the Members, shall appoint an official of the Registry to discharge the duties of Registrar pending an election to that office.

Article 38

1. The Registry consists of the Registrar, the Deputy Registrar, the Assistant Registrar and such other staff as required for the efficient discharge of its functions.

2. The Tribunal shall determine the organization of the Registry and shall for this purpose request the Registrar to make proposals.

3. Instructions for the Registry shall be drawn up by the Registrar and approved by the Tribunal.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar and approved by the Tribunal.

Article 39

1. The Registrar may resign from office with two months' notice tendered in writing to the President of the Tribunal. The Deputy Registrar and the Assistant Registrar may resign from office with one month's notice tendered in writing to the President of the Tribunal through the Registrar.

2. The Registrar may be removed from office only if, in the opinion of two thirds of the Members, he has either committed a serious breach of his duties or become permanently incapacitated from exercising his functions. Before a decision to remove him is taken under this paragraph, he shall be informed by the President of the Tribunal of the action contemplated, in a written statement which shall include the grounds therefor and any relevant evidence. When the action contemplated concerns permanent incapacity, relevant medical information shall be included. The Registrar shall subsequently, at a private meeting of the Tribunal, be afforded an opportunity of making a statement, of furnishing any information or explanations he wishes to give and of supplying answers, orally or in writing, to any questions put to him. He may be assisted or represented at such meeting by counsel or any other person of his choice.

3. The Deputy Registrar and the Assistant Registrar may be removed from office only on the same grounds and by the same procedure as specified in paragraph 2.

Section E. Internal functioning of the Tribunal

Article 40

The internal judicial practice of the Tribunal shall, subject to the Convention, the Statute and these Rules, be governed by any resolutions on the subject adopted by the Tribunal.

Article 41

1. The quorum specified by article 13, paragraph 1, of the Statute applies to all meetings of the Tribunal. The quorum specified in article 35, paragraph 7, of the Statute applies to all meetings of the Seabed Disputes Chamber. The quorum specified for a special chamber applies to all meetings of that chamber.

2. Members shall hold themselves permanently available to exercise their functions and shall attend all such meetings, unless they are absent on leave as provided for in paragraph 4 or prevented from attending by illness or for other

serious reasons duly explained to the President of the Tribunal, who shall inform the Tribunal.

3. Judges *ad hoc* are likewise bound to hold themselves at the disposal of the Tribunal and to attend all meetings held in the case in which they are participating unless they are prevented from attending by illness or for other serious reasons duly explained to the President of the Tribunal, who shall inform the Tribunal. They shall not be taken into account for the calculation of the quorum.

4. The Tribunal shall fix the dates and duration of the judicial vacations and the periods and conditions of leave to be accorded to individual Members, having regard in both cases to the state of the List of cases and to the requirements of its current work.

5. Subject to the same considerations, the Tribunal shall observe the public holidays customary at the place where the Tribunal is sitting.

6. In case of urgency the President of the Tribunal may convene the Tribunal at any time.

7. Upon consultations with the Members of the Tribunal, the President may decide, as an exceptional measure, for public health, security or other compelling reasons, to hold meetings entirely or in part by video link.

Article 42

1. The deliberations of the Tribunal shall take place in private and remain secret. The Tribunal may, however, at any time decide in respect of its deliberations on other than judicial matters to publish or allow publication of any part of them.

2. Only judges and any experts appointed in accordance with article 289 of the Convention take part in the Tribunal's judicial deliberations. The Registrar, or his Deputy, and other members of the staff of the Registry as may be required shall be present. No other person shall be present except by permission of the Tribunal.

3. The records of the Tribunal's judicial deliberations shall contain only the title or nature of the subjects or matters discussed and the results of any vote taken. They shall not contain any details of the discussions nor the views expressed, provided however that any judge is entitled to require that a statement made by him be inserted in the records.

Section F. Official languages

Article 43

The official languages of the Tribunal are English and French.

PART III PROCEDURE

Section A. General provisions

Article 44

1. The proceedings consist of two parts: written and oral.

2. The written proceedings shall consist of the communication to the Tribunal and to the parties of memorials, counter-memorials and, if the Tribunal so authorizes, replies and rejoinders, as well as all documents in support.

3. The oral proceedings shall consist of the hearing by the Tribunal of agents, counsel, advocates, witnesses and experts.

Article 45

In every case submitted to the Tribunal, the President shall ascertain the views of the parties with regard to questions of procedure. For this purpose, he may summon the agents of the parties to meet him as soon as possible after their appointment and whenever necessary thereafter, or use other appropriate means of communication.

Article 46

Time-limits for the completion of steps in the proceedings may be fixed by assigning a specified period but shall always indicate definite dates. Such time-limits shall be as short as the character of the case permits.

Article 47

The Tribunal may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Tribunal may, without effecting any formal joinder, direct common action in any of these respects.

Article 48

The parties may jointly propose particular modifications or additions to the Rules contained in this Part, which may be applied by the Tribunal or by a chamber if the Tribunal or the chamber considers them appropriate in the circumstances of

the case.

Article 49

The proceedings before the Tribunal shall be conducted without unnecessary delay or expense.

Article 50

The Tribunal may issue guidelines consistent with these Rules concerning any aspect of its proceedings, including the length, format and presentation of written and oral pleadings and the use of electronic means of communication.

Article 51

All communications to the Tribunal under these Rules shall be addressed to the Registrar unless otherwise stated. Any request made by a party shall likewise be addressed to the Registrar unless made in open court in the course of the oral proceedings.

Article 52

1. All communications to the parties shall be sent to their agents.

2. The communications to a party before it has appointed an agent and to an entity other than a party shall be sent as follows:

(a) in the case of a State, the Tribunal shall direct all communications to its Government;

(b) in the case of the International Seabed Authority or the Enterprise, any international organization and any other intergovernmental organization, the Tribunal shall direct all communications to the competent body or executive head of such organization at its headquarters location;

(c) in the case of state enterprises or natural or juridical persons referred to in article 153, paragraph 2 (b), of the Convention, the Tribunal shall direct all communications through the Government of the sponsoring or certifying State, as the case may be;

(d) in the case of a group of States, state enterprises or natural or juridical persons referred to in article 153, paragraph 2 (b), of the Convention, the Tribunal shall direct all communications to each member of the group according to subparagraphs (a) and (c) above;

(e) in the case of other natural or juridical persons, the Tribunal shall direct

all communications through the Government of the State in whose territory the communication has to be received.

3. The same provisions apply whenever steps are to be taken to procure evidence on the spot.

Article 53

1. The parties shall be represented by agents.

2. The parties may have the assistance of counsel or advocates before the Tribunal.

Section B. Proceedings before the Tribunal Subsection 1. Institution of proceedings

Article 54

1. When proceedings before the Tribunal are instituted by means of an application, the application shall indicate the party making it, the party against which the claim is brought and the subject of the dispute.

2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Tribunal is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.

3. The original of the application shall be signed by the agent of the party submitting it or by the diplomatic representative of that party in the country in which the Tribunal has its seat or by some other duly authorized person. If the application bears the signature of someone other than such diplomatic representative, the signature must be authenticated by the latter or by the competent governmental authority.

4. The Registrar shall forthwith transmit to the respondent a certified copy of the application.

5. When the applicant proposes to found the jurisdiction of the Tribunal upon a consent thereto yet to be given or manifested by the party against which the application is made, the application shall be transmitted to that party. It shall not however be entered in the List of cases, nor any action be taken in the proceedings, unless and until the party against which such application is made consents to the jurisdiction of the Tribunal for the purposes of the case.

Article 55

1. When proceedings are brought before the Tribunal by the notification of a special agreement, the notification may be effected by the parties jointly or by any one or more of them. If the notification is not a joint one, a certified copy of it shall forthwith be communicated by the Registrar to any other party.

2. In each case the notification shall be accompanied by an original or certified copy of the special agreement. The notification shall also, insofar as this is not already apparent from the agreement, indicate the precise subject of the dispute and identify the parties to it.

Article 56

1. Except in the circumstances contemplated by article 54, paragraph 5, all steps on behalf of the parties after proceedings have been instituted shall be taken by agents. Agents shall have an address for service at the seat of the Tribunal or in the capital of the country where the seat is located, to which all communications concerning the case are to be sent.

2. When proceedings are instituted by means of an application, the name of the agent for the applicant shall be stated. The respondent, upon receipt of the certified copy of the application, or as soon as possible thereafter, shall inform the Tribunal of the name of its agent.

3. When proceedings are brought by notification of a special agreement, the party or parties making the notification shall state the name of its agent or the names of their agents, as the case may be. Any other party to the special agreement, upon receiving from the Registrar a certified copy of such notification, or as soon as possible thereafter, shall inform the Tribunal of the name of its agent if it has not already done so.

Article 57

1. Whenever proceedings are instituted on the basis of an agreement other than the Convention, the application or the notification shall be accompanied by a certified copy of the agreement in question.

2. In a dispute to which an international organization is a party, the Tribunal may, at the request of any other party or *proprio motu*, request the international organization to provide, within a reasonable time, information as to which, as between the organization and its member States, has competence in respect of any specific question which has arisen. If the Tribunal considers it necessary, it may

suspend the proceedings until it receives such information.

Article 58

In the event of a dispute as to whether the Tribunal has jurisdiction, the matter shall be decided by the Tribunal.

Subsection 2. The written proceedings

Article 59

1. In the light of the views of the parties ascertained by the President of the Tribunal, the Tribunal shall make the necessary orders to determine, *inter alia*, the number and the order of filing of the pleadings and the time-limits within which they must be filed. The time-limits for each pleading shall not exceed six months.

2. The Tribunal may at the request of a party extend any time-limit or decide that any step taken after the expiration of the time-limit fixed therefor shall be considered as valid. It may not do so, however, unless it is satisfied that there is adequate justification for the request. In either case the other party shall be given an opportunity to state its views within a time-limit to be fixed by the Tribunal.

3. If the Tribunal is not sitting, its powers under this article may be exercised by the President of the Tribunal, but without prejudice to any subsequent decision of the Tribunal.

Article 60

1. The pleadings in a case begun by means of an application shall consist, in the following order, of: a memorial by the applicant and a counter-memorial by the respondent.

2. The Tribunal may authorize or direct that there shall be a reply by the applicant and a rejoinder by the respondent if the parties are so agreed or if the Tribunal decides, at the request of a party or *proprio motu*, that these pleadings are necessary. If the Tribunal is not sitting, its powers under this article may be exercised by the President of the Tribunal, but without prejudice to any subsequent decision of the Tribunal.

Article 61

1. In a case begun by the notification of a special agreement, the number and order of the pleadings shall be governed by the provisions of the agreement, unless

the Tribunal, after ascertaining the views of the parties, decides otherwise.

2. If the special agreement contains no such provision, and if the parties have not subsequently agreed on the number and order of pleadings, they shall each file a memorial and counter-memorial, within the same time-limits.

3. The Tribunal shall not authorize the presentation of replies and rejoinders unless it finds them to be necessary. If the Tribunal is not sitting, its powers under this article may be exercised by the President of the Tribunal, but without prejudice to any subsequent decision of the Tribunal.

Article 62

1. A memorial shall contain: a statement of the relevant facts, a statement of law and the submissions.

2. A counter-memorial shall contain: an admission or denial of the facts stated in the memorial; any additional facts, if necessary; observations concerning the statement of law in the memorial; a statement of law in answer thereto; and the submissions.

3. A reply and rejoinder shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them.

4. Every pleading shall set out the party's submissions at the relevant stage of the case, distinctly from the arguments presented, or shall confirm the submissions previously made.

Article 63

1. There shall be annexed to the original of every pleading certified copies of any relevant documents adduced in support of the contentions contained in the pleading. Parties need not annex or certify copies of documents which have been published and are readily available to the Tribunal and the other party.

2. If only parts of a document are relevant, only such extracts as are necessary for the purpose of the pleading in question or for identifying the document need be annexed. A copy of the whole document shall be filed in the Registry, unless it has been published and is readily available to the Tribunal and the other party.

3. A list of all documents annexed to a pleading shall be furnished at the time the pleading is filed.

Article 64

1. The parties shall submit any pleading or any part of a pleading in one or

both of the official languages.

2. A party may use a language other than one of the official languages for its pleadings. A translation into one of the official languages, certified as accurate by the party submitting it, shall be submitted together with the original of each pleading.

3. When a document annexed to a pleading is not in one of the official languages, it shall be accompanied by a translation into one of these languages certified as accurate by the party submitting it. The translation may be confined to part of an annex, or to extracts therefrom, but in this case it must be accompanied by an explanatory note indicating what passages are translated. The Tribunal may, however, require a more extensive or a complete translation to be furnished.

4. When a language other than one of the official languages is chosen by the parties and that language is an official language of the United Nations, the decision of the Tribunal shall, at the request of any party, be translated into that official language of the United Nations at no cost for the parties.

Article 65

1. The original of every pleading shall be signed by the agent and filed in the Registry. It shall be accompanied by a certified copy of the pleading, any document annexed thereto and any translations, for communication to the other party. It shall also be accompanied by the number of additional copies required by the Registry; further copies may be required should the need arise later.

2. All pleadings shall be dated. When a pleading has to be filed by a certain date, it is the date of receipt of the pleading in the Registry which will be regarded by the Tribunal as the material date.

3. If the Registrar arranges for the reproduction of a pleading at the request of a party, the text must be supplied in sufficient time to enable the pleading to be filed in the Registry before expiration of any time-limit which may apply to it. The reproduction is done under the responsibility of the party in question.

4. The correction of a slip or error in any document which has been filed may be made at any time with the consent of the other party or by leave of the President of the Tribunal. Any correction so effected shall be notified to the other party in the same manner as the pleading to which it relates.

Article 66

A certified copy of every pleading and any document annexed thereto

produced by one party shall be communicated by the Registrar to the other party upon receipt.

Article 67

1. Copies of the pleadings and documents annexed thereto shall, as soon as possible after their filing, be made available by the Tribunal to a State or other entity entitled to appear before the Tribunal and which has asked to be furnished with such copies. However, if the party submitting the memorial so requests, the Tribunal shall make the memorial available at the same time as the counter-memorial.

2. Copies of the pleadings and documents annexed thereto shall be made accessible to the public on the opening of the oral proceedings, or earlier if the Tribunal or the President if the Tribunal is not sitting so decides after ascertaining the views of the parties.

3. However, the Tribunal, or the President if the Tribunal is not sitting, may, at the request of a party, and after ascertaining the views of the other party, decide otherwise than as set out in this article.

Subsection 3. Initial deliberations

Article 68

After the closure of the written proceedings and prior to the opening of the oral proceedings, the Tribunal shall meet in private to enable judges to exchange views concerning the written pleadings and the conduct of the case.

Subsection 4. Oral proceedings

Article 69

1. Upon the closure of the written proceedings, the date for the opening of the oral proceedings shall be fixed by the Tribunal. Such date shall fall within a period of six months from the closure of the written proceedings unless the Tribunal is satisfied that there is adequate justification for deciding otherwise. The Tribunal may also decide, when necessary, that the opening or the continuance of the oral proceedings be postponed.

2. When fixing the date for the opening of the oral proceedings or postponing the opening or continuance of such proceedings, the Tribunal shall have regard to:

(a) the need to hold the hearing without unnecessary delay;

(b) the priority required by articles 90 and 112;

(c) any special circumstances, including the urgency of the case or other cases on the List of cases; and

(d) the views expressed by the parties.

3. When the Tribunal is not sitting, its powers under this article shall be exercised by the President.

Article 70

The Tribunal may, if it considers it desirable, decide pursuant to article 1, paragraph 3, of the Statute that all or part of the further proceedings in a case shall be held at a place other than the seat of the Tribunal. Before so deciding, it shall ascertain the views of the parties.

Article 71

1. After the closure of the written proceedings, no further documents may be submitted to the Tribunal by either party except with the consent of the other party or as provided in paragraph 2. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document within 15 days of receiving it.

2. In the event of objection, the Tribunal, after hearing the parties, may authorize production of the document if it considers production necessary.

3. The party desiring to produce a new document shall file the original or a certified copy thereof, together with the number of copies required by the Registry, which shall be responsible for communicating it to the other party and shall inform the Tribunal.

4. If a new document is produced under paragraph 1 or 2, the other party shall have an opportunity of commenting upon it and of submitting documents in support of its comments.

5. No reference may be made during the oral proceedings to the contents of any document which has not been produced as part of the written proceedings or in accordance with this article, unless the document is part of a publication readily available to the Tribunal and the other party.

6. The application of this article shall not in itself constitute a ground for delaying the opening or the course of the oral proceedings.

Article 72

Without prejudice to the provisions of these Rules concerning the production of documents, each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Tribunal to obtain. This communication shall contain a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications of the point or points to which their evidence will be directed. A certified copy of the communication shall also be furnished for transmission to the other party.

Article 73

1. The Tribunal shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

2. The Tribunal, after ascertaining the views of the parties, shall determine the order in which the parties will be heard, the method of handling the evidence and examining any witnesses and experts and the number of counsel and advocates to be heard on behalf of each party.

Article 74

1. The hearing shall, in accordance with article 26, paragraph 2, of the Statute, be public, unless the Tribunal decides otherwise or unless the parties request that the public be not admitted. Such a decision or request may concern either the whole or part of the hearing, and may be made at any time.

2. The Tribunal may decide, as an exceptional measure, for public health, security or other compelling reasons, to hold a hearing entirely or in part by video link.

Article 75

1. The oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings or merely repeat the facts and arguments these contain.

2. At the conclusion of the last statement made by a party at the hearing,

its agent, without recapitulation of the arguments, shall read that party's final submissions. A copy of the written text of these, signed by the agent, shall be communicated to the Tribunal and transmitted to the other party.

Article 76

1. The Tribunal may at any time prior to or during the hearing indicate any points or issues which it would like the parties specially to address, or on which it considers that there has been sufficient argument.

2. The Tribunal may, during the hearing, put questions to the agents, counsel and advocates, and may ask them for explanations.

3. Each judge has a similar right to put questions, but before exercising it he should make his intention known to the President of the Tribunal.

4. The agents, counsel and advocates may answer either immediately or within a time- limit fixed by the President of the Tribunal.

Article 77

1. The Tribunal may at any time call upon the parties to produce such evidence or to give such explanations as the Tribunal may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.

2. The Tribunal may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings.

Article 78

1. The parties may call any witnesses or experts appearing on the list communicated to the Tribunal pursuant to article 72. If at any time during the hearing a party wishes to call a witness or expert whose name was not included in that list, it shall make a request therefor to the Tribunal and inform the other party, and shall supply the information required by article 72. The witness or expert may be called either if the other party raises no objection or, in the event of objection, if the Tribunal so authorizes after hearing the other party.

2. The Tribunal may, at the request of a party or *proprio motu*, decide that a witness or expert be examined otherwise than before the Tribunal itself. The President of the Tribunal shall take the necessary steps to implement such a decision.

Article 79

Unless on account of special circumstances the Tribunal decides on a different form of words,

(a) every witness shall make the following solemn declaration before giving any evidence:

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth";

(b) every expert shall make the following solemn declaration before making any statement:

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth, and that my statement will be in accordance with my sincere belief".

Article 80

Witnesses and experts shall, under the control of the President of the Tribunal, be examined by the agents, counsel or advocates of the parties starting with the party calling the witness or expert. Questions may be put to them by the President of the Tribunal and by the judges. Before testifying, witnesses and experts other than those appointed under article 289 of the Convention shall remain out of court.

Article 81

The Tribunal may at any time decide, at the request of a party or *proprio motu*, to exercise its functions with regard to the obtaining of evidence at a place or locality to which the case relates, subject to such conditions as the Tribunal may decide upon after ascertaining the views of the parties. The necessary arrangements shall be made in accordance with article 52.

Article 82

1. If the Tribunal considers it necessary to arrange for an inquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the inquiry or expert opinion, stating the number and mode of appointment of the persons to hold the inquiry or of the experts and laying down the procedure to be followed. Where appropriate, the Tribunal shall require persons appointed to carry out an inquiry, or to give an expert opinion, to make a solemn declaration.

2. Every report or record of an inquiry and every expert opinion shall be

communicated to the parties, which shall be given the opportunity of commenting upon it.

Article 83

Witnesses and experts who appear at the instance of the Tribunal under article 77, paragraph 2, and persons appointed by the Tribunal under article 82, paragraph 1, to carry out an inquiry or to give an expert opinion, shall, where appropriate, be paid out of the funds of the Tribunal.

Article 84

1. The Tribunal may, at any time prior to the closure of the oral proceedings, at the request of a party or *proprio motu,* request an appropriate intergovernmental organization to furnish information relevant to a case before it. The Tribunal, after consulting the chief administrative officer of the organization concerned, shall decide whether such information shall be presented to it orally or in writing and fix the time-limits for its presentation.

2. When such an intergovernmental organization sees fit to furnish, on its own initiative, information relevant to a case before the Tribunal, it shall do so in the form of a memorial to be filed in the Registry before the closure of the written proceedings. The Tribunal may require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also authorize the parties to comment, either orally or in writing, on the information thus furnished.

3. Whenever the construction of the constituent instrument of such an intergovernmental organization or of an international convention adopted thereunder is in question in a case before the Tribunal, the Registrar shall, on the instructions of the Tribunal, or of the President if the Tribunal is not sitting, so notify the intergovernmental organization concerned and shall communicate to it copies of all the written proceedings. The Tribunal, or the President if the Tribunal is not sitting, may, as from the date on which the Registrar has communicated copies of the written proceedings and after consulting the chief administrative officer of the intergovernmental organization concerned, fix a time-limit within which the organization may submit to the Tribunal its observations in writing. These observations shall be communicated to the parties and may be discussed by them and by the representative of the said organization during the oral proceedings.

4. In the foregoing paragraphs, “intergovernmental organization” means an

intergovernmental organization other than any organization which is a party or intervenes in the case concerned.

Article 85

1. Unless the Tribunal decides otherwise, all speeches and statements made and evidence given at the hearing in one of the official languages of the Tribunal shall be interpreted into the other official language. If they are made or given in any other language, they shall be interpreted into the two official languages of the Tribunal.

2. Whenever a language other than an official language is used, the necessary arrangements for interpretation into one of the official languages shall be made by the party concerned. The Registrar shall make arrangements for the verification of the interpretation provided by a party at the expense of that party. In the case of witnesses or experts who appear at the instance of the Tribunal, arrangements for interpretation shall be made by the Registrar.

3. A party on behalf of which speeches or statements are to be made, or evidence is to be given, in a language which is not one of the official languages of the Tribunal shall so notify the Registrar in sufficient time for the necessary arrangements to be made, including verification.

4. Before entering upon their duties in the case, interpreters provided by a party shall make the following solemn declaration:

"I solemnly declare upon my honour and conscience that my interpretation will be faithful and complete".

Article 86

1. Minutes shall be made of each hearing. For this purpose, a verbatim record shall be made by the Registrar of every hearing, in the official language or languages of the Tribunal used during the hearing. When another language is used, the verbatim record shall be prepared in one of the official languages of the Tribunal.

2. In order to prepare such a verbatim record, the party on behalf of which speeches or statements are made in a language which is not one of the official languages shall supply to the Registry in advance a text thereof in one of the official languages.

3. The transcript of the verbatim record shall be preceded by the names of the judges present, and those of the agents, counsel and advocates of the parties.

4. Copies of the transcript shall be circulated to the judges sitting in the case and to the parties. The latter may, under the supervision of the Tribunal, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. The judges may likewise make corrections in the transcript of anything they have said.

5. Witnesses and experts shall be shown that part of the transcript which relates to the evidence given or the statements made by them, and may correct it in like manner as the parties.

6. One certified copy of the corrected transcript, signed by the President of the Tribunal and the Registrar, shall constitute the authentic minutes of the hearing. The minutes of public hearings shall be printed and published by the Tribunal.

Article 87

Any written reply by a party to a question put under article 76 or any evidence or explanation supplied by a party under article 77 received by the Tribunal after the closure of the oral proceedings shall be communicated to the other party, which shall be given the opportunity of commenting upon it. The oral proceedings may be reopened for that purpose, if necessary.

Article 88

1. When, subject to the control of the Tribunal, the agents, counsel and advocates have completed their presentation of the case, the President of the Tribunal shall declare the oral proceedings closed. The agents shall remain at the disposal of the Tribunal.

2. The Tribunal shall withdraw to consider the judgment.

Section C. Incidental proceedings Subsection 1. Provisional measures

Article 89

1. A party may submit a request for the prescription of provisional measures under article 290, paragraph 1, of the Convention at any time during the course of the proceedings in a dispute submitted to the Tribunal.

2. Pending the constitution of an arbitral tribunal to which a dispute is being submitted, a party may submit a request for the prescription of provisional measures under article 290, paragraph 5, of the Convention:

(a) at any time if the parties have so agreed;

(b) at any time after two weeks from the notification to the other party of a request for provisional measures if the parties have not agreed that such measures may be prescribed by another court or tribunal.

3. The request shall be in writing and specify the measures requested, the reasons therefor and the possible consequences, if it is not granted, for the preservation of the respective rights of the parties or for the prevention of serious harm to the marine environment.

4. A request for the prescription of provisional measures under article 290, paragraph 5, of the Convention shall also indicate the legal grounds upon which the arbitral tribunal which is to be constituted would have jurisdiction and the urgency of the situation. A certified copy of the notification or of any other document instituting the proceedings before the arbitral tribunal shall be annexed to the request.

5. When a request for provisional measures has been made, the Tribunal may prescribe measures different in whole or in part from those requested and indicate the parties which are to take or to comply with each measure.

Article 90

1. Subject to article 112, paragraph 1, a request for the prescription of provisional measures has priority over all other proceedings before the Tribunal.

2. The Tribunal, or the President if the Tribunal is not sitting, shall fix the earliest possible date for a hearing.

3. The Tribunal shall take into account any observations that may be presented to it by a party before the closure of the hearing.

4. Pending the meeting of the Tribunal, the President of the Tribunal may call upon the parties to act in such a way as will enable any order the Tribunal may make on the request for provisional measures to have its appropriate effects.

Article 91

1. If the President of the Tribunal ascertains that at the date fixed for the hearing referred to in article 90, paragraph 2, a sufficient number of Members will not be available to constitute a quorum, the Chamber of Summary Procedure shall be convened to carry out the functions of the Tribunal with respect to the prescription of provisional measures.

2. The Tribunal shall review or revise provisional measures prescribed by the Chamber of Summary Procedure at the written request of a party within 15 days of

the prescription of the measures. The Tribunal may also at any time decide *proprio motu* to review or revise the measures.

Article 92

The rejection of a request for the prescription of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.

Article 93

A party may request the modification or revocation of provisional measures. The request shall be submitted in writing and shall specify the change in, or disappearance of, the circumstances considered to be relevant. Before taking any decision on the request, the Tribunal shall afford the parties an opportunity of presenting their observations on the subject.

Article 94

Any provisional measures prescribed by the Tribunal or any modification or revocation thereof shall forthwith be notified to the parties and to such other States Parties as the Tribunal considers appropriate in each case.

Article 95

1. Each party shall inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed. In particular, each party shall submit an initial report upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures prescribed.

2. The Tribunal may request further information from the parties on any matter connected with the implementation of any provisional measures it has prescribed.

Subsection 2. Preliminary proceedings

Articl0e 96

1. When an application is made in respect of a dispute referred to in article 297 of the Convention, the Tribunal shall determine at the request of the respondent or may determine *proprio motu*, in accordance with article 294 of the Convention, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded.

2. The Registrar, when transmitting an application to the respondent under article 54, paragraph 4, shall notify the respondent of the time-limit fixed by the President of the Tribunal for requesting a determination under article 294 of the Convention.

3. The Tribunal may also decide, within two months from the date of an application, to exercise *proprio motu* its power under article 294, paragraph 1, of the Convention.

4. The request by the respondent for a determination under article 294 of the Convention shall be in writing and shall indicate the grounds for a determination by the Tribunal that:

(a) the application is made in respect of a dispute referred to in article 297 of the Convention; and

(b) the claim constitutes an abuse of legal process or is *prima facie* unfounded.

5. Upon receipt of such a request or *proprio motu*, the Tribunal, or the President if the Tribunal is not sitting, shall fix a time-limit not exceeding 60 days within which the parties may present their written observations and submissions. The proceedings on the merits shall be suspended.

6. Unless the Tribunal decides otherwise, the further proceedings shall be oral.

7. The written observations and submissions referred to in paragraph 5, and the statements and evidence presented at the hearings contemplated by paragraph 6, shall be confined to those matters which are relevant to the determination of whether the claim constitutes an abuse of legal process or is *prima facie* unfounded, and of whether the application is made in respect of a dispute referred to in article 297 of the Convention. The Tribunal may, however, request the parties to argue all questions of law and fact, and to adduce all evidence, bearing on the issue.

8. The Tribunal shall make its determination in the form of a judgment.

Subsection 3. Preliminary objections

Article 97

1. Any objection to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within 90 days from the institution of proceedings.

2. The preliminary objection shall set out the facts and the law on which the objection is based, as well as the submissions.

3. Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Tribunal, or the President if the Tribunal is not sitting, shall fix a time-limit not exceeding 60 days within which the other party may present its written observations and submissions. It shall fix a further time-limit not exceeding 60 days from the receipt of such observations and submissions within which the objecting party may present its written observations and submissions in reply. Copies of documents in support shall be annexed to such statements and evidence which it is proposed to produce shall be mentioned.

4. Unless the Tribunal decides otherwise, the further proceedings shall be oral.

5. The written observations and submissions referred to in paragraph 3, and the statements and evidence presented at the hearings contemplated by paragraph 4, shall be confined to those matters which are relevant to the objection. Whenever necessary, however, the Tribunal may request the parties to argue all questions of law and fact and to adduce all evidence bearing on the issue.

6. The Tribunal shall give its decision in the form of a judgment, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Tribunal rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.

7. The Tribunal shall give effect to any agreement between the parties that an objection submitted under paragraph 1 be heard and determined within the framework of the merits.

Subsection 4. Counter-claims

Article 98

1. A party may present a counter-claim provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Tribunal.

2. A counter-claim shall be made in the counter-memorial of the party presenting it and shall appear as part of the submissions of that party.

3. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the claim of the other party the Tribunal shall, after hearing the parties, decide whether or not the question thus presented shall be joined to the original proceedings.

Subsection 5. Intervention

Article 99

1. An application for permission to intervene under the terms of article 31 of the Statute shall be filed not later than 30 days after the counter-memorial becomes available under article 67, paragraph 1, of these Rules. In exceptional circumstances, an application submitted at a later stage may however be admitted.

2. The application shall be signed in the manner provided for in article 54, paragraph 3, and state the name and address of an agent. It shall specify the case to which it relates and shall set out:

(a) the interest of a legal nature which the State Party applying to intervene considers may be affected by the decision in that case;

(b) the precise object of the intervention.

3. Permission to intervene under the terms of article 31 of the Statute may be granted irrespective of the choice made by the applicant under article 287 of the Convention.

4. The application shall contain a list of the documents in support, copies of which documents shall be annexed.

Article 100

1. A State Party or an entity other than a State Party referred to in article 32, paragraphs 1 and 2, of the Statute which desires to avail itself of the right of intervention conferred upon it by article 32, paragraph 3, of the Statute shall file a declaration to that effect. The declaration shall be filed not later than 30 days after the counter-memorial becomes available under article 67, paragraph 1, of these Rules. In exceptional circumstances, a declaration submitted at a later stage may, however, be admitted.

2. The declaration shall be signed in the manner provided for in article 54, paragraph 3, and state the name and address of an agent. It shall specify the case to which it relates and shall:

(a) identify the particular provisions of the Convention or of the international agreement the interpretation or application of which the declaring party considers to be in question;

(b) set out the interpretation or application of those provisions for which it contends;

(c) list the documents in support, copies of which documents shall be annexed.

Article 101

1. Certified copies of the application for permission to intervene under article 31 of the Statute, or of the declaration of intervention under article 32 of the Statute, shall be communicated forthwith to the parties to the case, which shall be invited to furnish their written observations within a time-limit to be fixed by the Tribunal or by the President if the Tribunal is not sitting.

2. The Registrar shall also transmit copies to: (a) States Parties; (b) any other parties which have to be notified under article 32, paragraph 2, of the Statute; (c) the Secretary- General of the United Nations; (d) the Secretary-General of the Authority when the proceedings are before the Seabed Disputes Chamber.

Article 102

1. The Tribunal shall decide whether an application for permission to intervene under article 31 of the Statute should be granted or whether an intervention under article 32 of the Statute is admissible as a matter of priority unless in view of the circumstances of the case the Tribunal determines otherwise.

2. If, within the time-limit fixed under article 101, an objection is filed to an application for permission to intervene, or to the admissibility of a declaration of intervention, the Tribunal shall hear the State Party or entity other than a State Party seeking to intervene and the parties before deciding.

Article 103

1. If an application for permission to intervene under article 31 of the Statute is granted, the intervening State Party shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Tribunal. A further time-limit shall be fixed within which the parties may, if they so desire, furnish their written observations on that statement prior to the oral proceedings. If the Tribunal is not sitting, these time-limits shall be fixed by the President.

2. The time-limits fixed according to paragraph 1 shall, so far as possible, coincide with those already fixed for the pleadings in the case.

3. The intervening State Party shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.

4. The intervening State Party shall not be entitled to choose a judge *ad hoc* or to object to an agreement to discontinue the proceedings under article 105,

paragraph 1.

Article 104

1. If an intervention under article 32 of the Statute is admitted, the intervenor shall be supplied with copies of the pleadings and documents annexed and shall be entitled, within a time-limit to be fixed by the Tribunal, or the President if the Tribunal is not sitting, to submit its written observations on the subject-matter of the intervention.

2. These observations shall be communicated to the parties and to any other State Party or entity other than a State Party admitted to intervene. The intervenor shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.

3. The intervenor shall not be entitled to choose a judge *ad hoc* or to object to an agreement to discontinue the proceedings under article 105, paragraph 1.

Subsection 6. Discontinuance

Article 105

1. If at any time before the final judgment on the merits has been delivered the parties, either jointly or separately, notify the Tribunal in writing that they have agreed to discontinue the proceedings, the Tribunal shall make an order recording the discontinuance and directing the Registrar to remove the case from the List of cases.

2. If the parties have agreed to discontinue the proceedings in consequence of having reached a settlement of the dispute and if they so desire, the Tribunal shall record this fact in the order for the removal of the case from the List, or indicate in, or annex to, the order the terms of the settlement.

3. If the Tribunal is not sitting, any order under this article may be made by the President.

Article 106

1. If, in the course of proceedings instituted by means of an application, the applicant informs the Tribunal in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Tribunal shall make an order officially recording the discontinuance of the proceedings and

directing the removal of the case from the List of cases. A copy of this order shall be sent by the Registrar to the respondent.

2. If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Tribunal shall fix a time-limit within which the respondent may state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Tribunal shall make an order recording the discontinuance of the proceedings and directing the Registrar to remove the case from the List of cases. If objection is made, the proceedings shall continue.

3. If the Tribunal is not sitting, its powers under this article may be exercised by the President.

Section D. Proceedings before special chambers

Article 107

Proceedings before the special chambers mentioned in article 15 of the Statute shall, subject to the provisions of the Convention, the Statute and these Rules relating specifically to the special chambers, be governed by the Rules applicable in contentious cases before the Tribunal.

Article 108

1. When it is desired that a case should be dealt with by one of the chambers which has been formed in accordance with article 15, paragraph 1 or 3, of the Statute, a request to this effect shall either be made in the document instituting the proceedings or accompany it. Effect shall be given to the request if the parties are in agreement.

2. Upon receipt by the Registry of this request, the President of the Tribunal shall communicate it to the members of the chamber concerned.

3. Effect shall be given to a request that a case be brought before a chamber to be formed in accordance with article 15, paragraph 2, of the Statute as soon as the chamber has been formed in accordance with article 30 of these Rules.

4. The President of the Tribunal shall convene the chamber at the earliest date compatible with the requirements of the procedure.

Article 109

1. Written proceedings in a case before a chamber shall consist of a single pleading by each party. The time-limits concerning the filing of written pleadings shall be fixed by the chamber, or its President if the chamber is not sitting.

2. The chamber may authorize or direct the filing of further pleadings if the parties are so agreed, or if the chamber decides, *proprio motu* or at the request of one of the parties, that such pleadings are necessary.

3. Oral proceedings shall take place unless the parties agree to dispense with them and the chamber consents. Even when no oral proceedings take place, the chamber may call upon the parties to supply information or furnish explanations orally.

Section E. Prompt release of vessels and crews

Article 110

1. An application for the release of a vessel or its crew from detention may be made in accordance with article 292 of the Convention by or on behalf of the flag State of the vessel.

2. A State Party may at any time notify the Tribunal of:

(a) the State authorities competent to authorize persons to make applications on its behalf under article 292 of the Convention;

(b) the name and address of any person who is authorized to make an application on its behalf;

(c) the office designated to receive notice of an application for the release of a vessel or its crew and the most expeditious means for delivery of documents to that office;

(d) any clarification, modification or withdrawal of such notification.

3. An application on behalf of a flag State shall be accompanied by an authorization under paragraph 2, if such authorization has not been previously submitted to the Tribunal, as well as by documents stating that the person submitting the application is the person named in the authorization. It shall also contain a certification that a copy of the application and all supporting documentation has been delivered to the flag State.

Article 111

1. The application shall contain a succinct statement of the facts and legal grounds upon which the application is based.

2. The statement of facts shall:

(a) specify the time and place of detention of the vessel and the present location of the vessel and crew, if known;

(b) contain relevant information concerning the vessel and crew including, where appropriate, the name, flag and the port or place of registration of the vessel and its tonnage, cargo capacity and data relevant to the determination of its value, the name and address of the vessel owner and operator and particulars regarding its crew;

(c) specify the amount, nature and terms of the bond or other financial security that may have been imposed by the detaining State and the extent to which such requirements have been complied with;

(d) contain any further information the applicant considers relevant to the determination of the amount of a reasonable bond or other financial security and to any other issue in the proceedings.

3. Supporting documents shall be annexed to the application.

4. A certified copy of the application shall forthwith be transmitted by the Registrar to the detaining State, which may submit a statement in response with supporting documents annexed, to be filed as soon as possible but not later than 96 hours before the hearing referred to in article 112, paragraph 3.

5. The Tribunal may, at any time, require further information to be provided in a supplementary statement.

6. The further proceedings relating to the application shall be oral.

Article 112

1. The Tribunal shall give priority to applications for release of vessels or crews over all other proceedings before the Tribunal. However, if the Tribunal is seized of an application for release of a vessel or its crew and of a request for the prescription of provisional measures, it shall take the necessary measures to ensure that both the application and the request are dealt with without delay.

2. If the applicant has so requested in the application, the application shall be dealt with by the Chamber of Summary Procedure, provided that, within five days of the receipt of notice of the application, the detaining State notifies the Tribunal that it concurs with the request.

3. The Tribunal, or the President if the Tribunal is not sitting, shall fix the earliest possible date, within a period of 15 days commencing with the first working day following the date on which the application is received, for a hearing at which

each of the parties shall be accorded, unless otherwise decided, one day to present its evidence and arguments.

4. The decision of the Tribunal shall be in the form of a judgment. The judgment shall be adopted as soon as possible and shall be read at a public sitting of the Tribunal to be held not later than 14 days after the closure of the hearing. The parties shall be notified of the date of the sitting.

5. The Tribunal may decide, as an exceptional measure, for public health, security or other compelling reasons, that the judgment shall be read at a sitting of the Tribunal accessible to the parties and the public by video link.

Article 113

1. The Tribunal shall in its judgment determine in each case in accordance with article 292 of the Convention whether or not the allegation made by the applicant that the detaining State has not complied with a provision of the Convention for the prompt release of the vessel or the crew upon the posting of a reasonable bond or other financial security is well-founded.

2. If the Tribunal decides that the allegation is well-founded, it shall determine the amount, nature and form of the bond or financial security to be posted for the release of the vessel or the crew.

3. Unless the parties agree otherwise, the Tribunal shall determine whether the bond or other financial security shall be posted with the Registrar or with the detaining State.

Article 114

1. If the bond or other financial security has been posted with the Registrar, the detaining State shall be promptly notified thereof.

2. The Registrar shall endorse or transmit the bond or other financial security to the detaining State to the extent that it is required to satisfy the final judgment, award or decision of the competent authority of the detaining State.

3. The bond or other financial security shall be endorsed or transmitted, to the extent that it is not required to satisfy the final judgment, award or decision, to the party at whose request the bond or other financial security is issued.

Section F. Proceedings in contentious cases before the Seabed Disputes Chamber

Article 115

Proceedings in contentious cases before the Seabed Disputes Chamber and its *ad hoc* chambers shall, subject to the provisions of the Convention, the Statute and these Rules relating specifically to the Seabed Disputes Chamber and its *ad hoc* chambers, be governed by the Rules applicable in contentious cases before the Tribunal.

Article 116

Articles 117 to 121 apply to proceedings in all disputes before the Chamber with the exception of disputes exclusively between States Parties and between States Parties and the Authority.

Article 117

When proceedings before the Chamber are instituted by means of an application, the application shall indicate:

(a) the name of the applicant and, where the applicant is a natural or juridical person, the permanent residence or address or registered office address thereof;

(b) the name of the respondent and, where the respondent is a natural or juridical person, the permanent residence or address or registered office address thereof;

(c) the sponsoring State, in any case where the applicant is a natural or juridical person or a state enterprise;

(d) the sponsoring State of the respondent, in any case where the party against which the claim is brought is a natural or juridical person or state enterprise;

(f) an address for service at the seat of the Tribunal;

(g) the subject of the dispute and the legal grounds on which jurisdiction is said to be based; the precise nature of the claim, together with a statement of the facts and legal grounds on which the claim is based;

(h) the decision or measure sought by the applicant;

(i) the evidence on which the application is founded.

Article 118

1. The application shall be served on the respondent. The application shall also be served on the sponsoring State in any case where the applicant or respondent is a natural or juridical person or a state enterprise.

2. Within two months after service of the application, the respondent shall

lodge a defence, stating:

(a) the name of the respondent and, where the respondent is a natural or juridical person, the permanent residence or address or registered office address thereof;

(b) an address for service at the seat of the Tribunal;

(c) the matters in issue between the parties and the facts and legal grounds on which the defence is based;

(d) the decision or measure sought by the respondent;

(e) the evidence on which the defence is founded.

3. At the request of the respondent, the President of the Chamber may extend the time- limit referred to in paragraph 2, if satisfied that there is adequate justification for the request.

Article 119

1. Within two months after service of the application in accordance with article 118, paragraph 1, where the respondent is a State Party in a case brought by a natural or juridical person sponsored by another State Party in a dispute referred to in article 187, subparagraph (c), of the Convention, the respondent State may make an application in accordance with article 190, paragraph 2, of the Convention for the sponsoring State of the applicant to appear in the proceedings on behalf of the applicant.

2. Notice of an application under paragraph 1 shall be communicated to the applicant and its sponsoring State. If, within a time-limit fixed by the President of the Chamber, the sponsoring State does not indicate it will appear in the proceedings on behalf of the applicant, the respondent State may designate a juridical person of its nationality to represent it.

3. Within two months after service of the application in accordance with article 118, paragraph 1, on the sponsoring State of a party, such State may give written notice of its intention to submit written or oral statements in accordance with article 190, paragraph 1, of the Convention.

4. Upon receipt of such a notice, the President of the Chamber shall fix the time-limit within which the sponsoring State may submit its written statements. The sponsoring State shall be notified of such time-limit. It shall also be notified of the date of the hearing. The written statements shall be communicated to the parties and to any other sponsoring State of a party.

5. At the request of the respondent or a sponsoring State, the President of the

Chamber may extend a time-limit referred to in this article, if satisfied that there is adequate justification for the request.

Article 120

1. When proceedings are brought before the Chamber by the notification of a special agreement, the notification shall indicate:

(a) the parties to the case and any sponsoring States of the parties;

(b) the subject of the dispute and the precise nature of the claims of the parties, together with a statement of the facts and legal grounds on which the claims are based;

(c) the decisions or measures sought by the parties;

(d) the evidence on which the claims are founded.

2. The notification shall also provide information regarding participation and appearance in the proceedings by sponsoring States Parties in accordance with article 190 of the Convention.

Article 121

1. The Chamber may authorize or direct the filing of further pleadings if the parties are so agreed or the Chamber decides, *proprio motu* or at the request of a party, that these pleadings are necessary.

2. The President of the Chamber shall fix the time-limits within which these pleadings are to be filed.

Article 122

Proceedings by the Council on behalf of the Authority under article 185, paragraph 2, of the Convention shall be instituted by means of an application in accordance with article 162, paragraph 2 (u), of the Convention. The application shall be accompanied by a certified copy of the decision or resolution of the Council upon which it is based and the full records of all discussions within the Authority on the matter.

Article 123

1. When a commercial arbitral tribunal, pursuant to article 188, paragraph 2, of the Convention, refers to the Chamber a question of interpretation of Part XI of the Convention and the annexes relating thereto upon which its decision depends, the document submitting the question to the Chamber shall contain a precise statement

of the question and be accompanied by all relevant information and documents.

2. Upon receipt of the document, the President of the Chamber shall fix a time-limit not exceeding three months within which the parties to the proceedings before the arbitral tribunal and the States Parties may submit their written observations on the question. The parties to the proceedings and the States Parties shall be notified of the time-limit. The States Parties shall be informed of the contents of the submission.

3. The President of the Chamber shall fix a date for a hearing if, within one month from the expiration of the time-limit for submitting written observations, a party to the proceedings before the arbitral tribunal or a State Party gives written notice of its intention to submit oral observations.

4. The Chamber shall give its ruling in the form of a judgment.

Section G. Judgments, interpretation and revision Subsection 1. Judgments

Article 124

1. When the Tribunal has completed its deliberations and adopted its judgment, the parties shall be notified of the date on which it will be read.

2. The judgment shall be read at a public sitting of the Tribunal and shall become binding on the parties on the day of the reading.

3. The Tribunal may decide, as an exceptional measure, for public health, security or other compelling reasons, that the judgment shall be read at a sitting of the Tribunal accessible to the parties and the public by video link.

Article 125

1. The judgment, which shall state whether it is given by the Tribunal or by a chamber, shall contain:

(a) the date on which it is read;

(b) the names of the judges participating in it;

(c) the names of the parties;

(d) the names of the agents, counsel and advocates of the parties;

(e) the names of the experts, if any, appointed under article 289 of the Convention;

(f) a summary of the proceedings;

(g) the submissions of the parties;

(h) a statement of the facts;

(i) the reasons of law on which it is based;

(j) the operative provisions of the judgment;

(k) the decision, if any, in regard to costs;

(l) the number and names of the judges constituting the majority and those constituting the minority, on each operative provision;

(m) a statement as to the text of the judgment which is authoritative.

2. Any judge may attach a separate or dissenting opinion to the judgment; a judge may record concurrence or dissent without stating reasons in the form of a declaration. The same applies to orders.

3. One copy of the judgment, signed by the President and by the Registrar and sealed, shall be placed in the archives of the Tribunal and other copies shall be transmitted to each party. Copies shall be sent to: (a) States Parties; (b) the Secretary-General of the United Nations; (c) the Secretary-General of the Authority; (d) in a case submitted under an agreement other than the Convention, the parties to such agreement.

Subsection 2. Requests for the interpretation or revision of a judgment

Article 126

1. In the event of dispute as to the meaning or scope of a judgment, any party may make a request for its interpretation.

2. A request for the interpretation of a judgment may be made either by an application or by the notification of a special agreement to that effect between the parties; the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated.

3. If the request for interpretation is made by an application, the requesting party's contentions shall be set out therein, and the other party shall be entitled to file written observations thereon within a time-limit fixed by the Tribunal or by the President if the Tribunal is not sitting.

4. Whether the request is made by an application or by notification of a special agreement, the Tribunal may, if necessary, afford the parties the opportunity of furnishing further written or oral explanations.

Article 127

1. A request for revision of a judgment may be made only when it is based

upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Tribunal and also to the party requesting revision, always provided that such ignorance was not due to negligence. Such request must be made at the latest within six months of the discovery of the new fact and before the lapse of ten years from the date of the judgment.

2. The proceedings for revision shall be opened by a decision of the Tribunal in the form of a judgment expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

Article 128

1. A request for the revision of a judgment shall be made by an application containing the particulars necessary to show that the conditions specified in article 127, paragraph 1, are fulfilled. Any document in support of the application shall be annexed to it.

2. The other party shall be entitled to file written observations on the admissibility of the application within a time-limit fixed by the Tribunal or by the President if the Tribunal is not sitting. These observations shall be communicated to the party making the application.

3. The Tribunal, before giving its judgment on the admissibility of the application, may afford the parties a further opportunity of presenting their views thereon.

4. If the Tribunal decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly.

5. If the Tribunal finds that the application is admissible it shall fix time-limits for such further proceedings on the merits of the application as, after ascertaining the views of the parties, it considers necessary.

Article 129

1. If the judgment to be revised or to be interpreted was given by the Tribunal, the request for its revision or interpretation shall be dealt with by the Tribunal.

2. If the judgment was given by a chamber, the request for its revision or interpretation shall, if possible, be dealt with by that chamber. If that is not possible, the request shall be dealt with by a chamber composed in conformity with the

relevant provisions of the Statute and these Rules. If, according to the Statute and these Rules, the composition of the chamber requires the approval of the parties which cannot be obtained within time-limits fixed by the Tribunal, the request shall be dealt with by the Tribunal.

3. The decision on a request for interpretation or revision of a judgment shall be given in the form of a judgment.

Section H. Advisory proceedings

Article 130

1. In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

2. The Chamber shall consider whether the request for an advisory opinion relates to a legal question pending between two or more parties. When the Chamber so determines, article 17 of the Statute applies, as well as the provisions of these Rules concerning the application of that article.

Article 131

1. A request for an advisory opinion on a legal question arising within the scope of the activities of the Assembly or the Council of the Authority shall contain a precise statement of the question. It shall be accompanied by all documents likely to throw light upon the question.

2. The documents shall be transmitted to the Chamber at the same time as the request or as soon as possible thereafter in the number of copies required by the Registry.

Article 132

If the request for an advisory opinion states that the question necessitates an urgent answer the Chamber shall take all appropriate steps to accelerate the procedure.

Article 133

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all States Parties.

2. The Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request to such organizations.

3. States Parties and the organizations referred to in paragraph 2 shall be invited to present written statements on the question within a time-limit fixed by the Chamber or its President if the Chamber is not sitting. Such statements shall be communicated to States Parties and organizations which have made written statements. The Chamber, or its President if the Chamber is not sitting, may fix a further time-limit within which such States Parties and organizations may present written statements on the statements made.

4. The Chamber, or its President if the Chamber is not sitting, shall decide whether oral proceedings shall be held and, if so, fix the date for the opening of such proceedings. States Parties and the organizations referred to in paragraph 2 shall be invited to make oral statements at the proceedings.

Article 134

The written statements and documents annexed shall be made accessible to the public as soon as possible after they have been presented to the Chamber.

Article 135

1. When the Chamber has completed its deliberations and adopted its advisory opinion, the opinion shall be read at a public sitting of the Chamber.

1 *bis*. The Chamber may decide, as an exceptional measure, for public health, security or other compelling reasons, that the advisory opinion shall be read at a sitting of the Chamber accessible to the parties and the public by video link.

2. The advisory opinion shall contain:

(a) the date on which it is delivered;

(b) the names of the judges participating in it;

(c) the question or questions on which the advisory opinion of the Chamber is requested;

(d) a summary of the proceedings;

(e) a statement of the facts;

(f) the reasons of law on which it is based;

(g) the reply to the question or questions put to the Chamber;

(h) the number and names of the judges constituting the majority and those constituting the minority, on each question put to the Chamber;

(i) a statement as to the text of the opinion which is authoritative.

3. Any judge may attach a separate or dissenting opinion to the advisory opinion of the Chamber; a judge may record concurrence or dissent without stating reasons in the form of a declaration.

Article 136

The Registrar shall inform the Secretary-General of the Authority as to the date and the time fixed for the public sitting to be held for the reading of the opinion. He shall also inform the States Parties and the intergovernmental organizations immediately concerned.

Article 137

One copy of the advisory opinion, signed by the President and by the Registrar and sealed, shall be placed in the archives of the Tribunal, others shall be sent to the Secretary- General of the Authority and to the Secretary-General of the United Nations. Copies shall be sent to the States Parties and the intergovernmental organizations immediately concerned.

Article 138

1. The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.

2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

3. The Tribunal shall apply *mutatis mutandis* articles 130 to 137.

《中华海洋法学评论》稿约

《中华海洋法学评论》（*China Oceans Law Review*），国际刊号：ISSN 1813-7350，国内刊号：CN-35（Q）第 0017 号，电子刊号：ISSN 2518-6906，是中英双语全文对照的海洋法学期刊。前身为创刊于 2005 年的《中国海洋法学评论》，自 2019 年起由半年刊改为季刊。

本刊由厦门大学南海研究院、大连海事大学海法研究院、香港理工大学董浩云国际海事研究中心、澳门大学法学院和台湾师范大学政治学研究所联合办刊，是海洋法领域中英双语对照的优秀国际学术期刊。

本刊秉承“大中华、大海法”的办刊宗旨，力求刊发海内外与海洋法律、海洋政策相关的一切优秀研究成果，热忱欢迎广大专家、学者不吝赐稿，兹立稿约如下：

一、来稿题材和体裁不限，论文、评论、书评、译作、案例评析等均可，中文投稿每篇原则上不超过 1.2 万字，英文投稿每篇原则上不超过 2 万词（含脚注）。

二、鼓励英文著述，同一学术水准的来稿，英文著述将优先录用。来稿须为单语种原创写作，且未曾在任何纸质和电子媒介上发表。

三、文责自负。译作需附原文，以及原作者或出版者对于此翻译的书面授权许可。译者应保证该译本未侵犯原作者或出版者任何可能的权利，并在可能的损害产生时自行承担损害赔偿责任。编辑委员会或其任何成员不承担由此产生的任何责任。

四、本刊采用中国法学会法学期刊研究会《法学引注手册》的注释体例。

五、来稿请注明作者姓名、单位、职务、职称、研究方向、教育背景、通信地址、电子邮箱及联系电话等。来稿一律不退，请作者自留底稿。

六、本刊采用双向匿名审稿制度。来稿必复，编辑部将在收到来稿后两个月内安排匿名审稿。逾三个月未收到录用通知者，可自做他用。来稿一经刊用，即从优支付稿酬，并提供当期刊物两册。

七、欢迎对本刊文章进行转载、摘登和结集出版，但应尊重原作者依照《中华人民共和国著作权法》享有的权利，并在转载时注明“转自《中华海洋法学评论》20XX 年第 X 期”和原作者、译校者姓名，同时书面通知本刊编辑部。

八、为扩大本刊及作者的知识信息交流渠道，本刊已加入北大法宝、超星法源、读秀、HeinOnline、台湾华艺、万律、维普、中国知网等中外数据库，除非作者在来稿时特别声明，否则视为同意《中华海洋法学评论》拥有以非专有方式向第三方授予已刊作品电子出版权、信息网络传播权和数字化汇编、复制权，以及向《中国社会科学文摘》《高等学校文科学术文摘》和中国人民大学《复印报刊资料》等文摘类刊物推荐转载已刊作品的权利。

九、为了实现办公信息化，本刊要求作者必须以电子邮件方式投稿，不再接受纸质投稿。来稿（仅接受 Microsoft Word 文档）请发送至电子邮箱：colr@xmu.edu.cn。

十、凡向《中华海洋法学评论》编辑部投稿，即视为接受本稿约。

《中华海洋法学评论》编辑部

Submissions Instructions

The *China Oceans Law Review* [ISSN 1813-7350, CN-35 (Q) No. 0017, ISSN 2518-6906 (online)] is a Chinese-English bilingual academic journal focusing on ocean-related laws and policies. Launched in 2005, the *COLR* changed from a semi-annual to a quarterly publication in 2019.

The *COLR* is jointly sponsored by Xiamen University South China Sea Institute, Dalian Maritime University Institute of Maritime Law and Ocean Law, University of Macau Faculty of Law, The Hong Kong Polytechnic University CY Tung International Centre for Maritime Studies, and Taiwan Normal University Graduate Institute of Political Science. The Journal has been indexed by many well-known academic databases at home and aboard, such as HeinOnline, Westlaw China, Airiti, CNKI, Cqvip, Duxiu, and Lawinfochina.com. Papers from all academics and industry practitioners are faithfully respected and welcome. The *COLR* requests that contributors comply with the following standards:

1. No restrictions are placed on the style, idea or perspective of the piece. The same standards of review are applied to all submissions. Although there are no minimum or maximum page requirements for submissions, submissions that are 20,000 words or less, including text and footnotes, are strongly preferred.

2. All material submitted must be original and unpublished works.

3. Authors are responsible for the content of their contributions, unless otherwise declared; however, the Editorial Board has the discretion to edit the textual details. If the submission is a translation, the original article and a written authorization issued by the original author or publisher are also required.

4. Please use footnotes rather than endnotes. Footnotes should conform to the Man ual of Legal Citation (2019).

5. Potential contributors are expected to provide their personal information, including name, employer, title, position, research interest(s), education background, postal and email address, contact number etc. We regret that submissions cannot be returned; please notify the Editorial Board as soon as possible if you are withdrawing an article.

6. Submissions are subject to double-blind peer review within two months of submission. Two free copies of the Journal will be offered to each author of accepted article.

7. Authors are kindly requested to submit their papers electronically by emailing to colr@xmu.edu.cn. Submissions should be in Microsoft Word format.

8. The *COLR* is abstracted and indexed in HeinOnline, Westlaw China, Airiti, CNKI, Cqvip, Duxiu, and Lawinfochina.com.

9. Submission of the piece implies that the authors have read, understood and agreed to the above statements.

***COLR* Editorial Board**

《中华海洋法学评论》订购单

订购人	
邮寄地址	
电子邮件	
联系电话 / 传真	
订购期数	自____年第____期 至____年第____期
订购本数	每期_____本
合计金额（每本定价人民币 50 元，含邮费）	
备注	

订阅者可通过银行或邮局将订阅款汇至厦门大学，有关账户信息如下：

账户名称：厦门大学
银行账号：4100021709024904620
开户银行：工行厦门市分行厦大支行
转账时请留言“订阅《中华海洋法学评论》”。转账成功后请将订购期数、邮寄地址、联系人、汇款数额等信息发送至 colr@xmu.edu.cn。

诚邀赞助

《中华海洋法学评论》是海洋法领域中英双语对照的优秀国际学术期刊，每年出版 4 期，读者主要包括海内外高校、研究所、法院、律所等涉海企事业单位的科研人员和实务工作者。我刊致力于推动中国海洋法学的繁荣发展，衷心欢迎关心海洋法学发展的企事业单位提供赞助。有意者请垂询《中华海洋法学评论》编辑部（电话：0592-2181308）。

China Oceans Law Review Subscription Form

Name of Subscriber	
Name of Contact Person	
Address	
Tel/Fax No.	
E-mail	
Subscription Period	
Amount Payable (USD 50 per copy, including air postage)	
Remarks	

Subscribers may purchase a copy of COLR by e-mailing the Subscription Form to colr@xmu.edu.cn and transferring the submission fee to the following bank account:

Account Name: Xiamen University
A/C: 428658381176
Deposit Bank: Bank of China Xiamen Branch
Swift Code: BKCHCNBJ73A
Please write "subscription to *China Oceans Law Review*" on the remark column of the remittance slip.

Invitation to Sponsors

China Oceans Law Review [ISSN 1813-7350, CN-35 (Q) No. 0017, ISSN 2518-6906 (online)] is a Chinese-English bilingual academic journal focusing on ocean-related laws and policies. This Chinese-English bilingual journal is jointly sponsored by Xiamen University, Dalian Maritime University, The Hong Kong Polytechnic University, University of Macau and Taiwan Normal University. If you are interested in sponsoring this quarterly journal, please kindly contact COLR Editorial Board (Tel: +86-592-2181308).

中华海洋法学评论

（季刊）

2020 年第 3 期　总第 35 期
刊　　号：ISSN 1813-7350
　　CN-35(Q) 第 0017 号
出版时间：2020 年 9 月
主管单位：厦门大学
主办单位：厦门大学南海研究院
合作单位：大连海事大学海法研究院
　　香港理工大学董浩云国际海事研究中心
　　澳门大学法学院
　　台湾师范大学政治学研究所
出版单位：《中华海洋法学评论》编辑部
主　　编：施余兵
地　　址：福建省厦门市思明南路 422 号厦门大学南安楼 220 室 361005
电　　话：0592-2181308
电子信箱：colr@xmu.edu.cn
发行单位：《中华海洋法学评论》编辑部
印刷单位：厦门市明亮彩印有限公司 [闽（2020）印证字 354400015 号]
国内定价：人民币 50.00 元
国外定价：美　元 50.00 元

China Oceans Law Review

(Quarterly)

Volume 16 Number 3
ISSN 1813-7350
CN-35(Q) No. 0017
Publication: September 2020
Supervisor: Xiamen University
Sponsor:
Xiamen University South China Sea Institute
Co-sponsors:
Dalian Maritime University Institute of Maritime Law and Ocean Law
The Hong Kong Polytechnic University CY Tung International Centre for Maritime Studies
University of Macau Faculty of Law
Taiwan Normal University Graduate Institute of Political Science
Publisher: Editorial Board of *China Oceans Law Review*
Editor-in-Chief: SHI Yubing
Address:
Rm. 220, Nan'an Bld., Xiamen Univ., 422 South Siming Rd., Xiamen, Fujian 361005, China
Tel: 0592-2181308
E-mail: colr@xmu.edu.cn
Distributor: Editorial Board of *China Oceans Law Review*
Printer: Xiamen Mingliang Color Printing Co. LTD
[Min (2020) Yin Zheng Zi No. 354400015]
Price: (RMB) 50.00
(USD) 50.00